
Article

**The Child Protection Pretense:
States' Continued Consignment of
Newborn Babies to Unfit Parents**

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When adults with terrible child abuse histories or with chronic and serious substance abuse or mental illness problems have a new child, one might expect child protection agencies to take proactive steps to prevent the newborn babies these adults produce from suffering maltreatment. These biological parents pose a high risk of abusing and/or neglecting the baby,¹ and maltreatment during the developmentally crucial first year of life is likely to cause serious and permanent damage to the child.² Moreover, the state would have little difficulty identifying most such parents at the time of birth, because it maintains records of parents who have previously committed child abuse or neglect, hospitals report all births to a state agency, and hospitals are legally required to notify local child protection agencies whenever a baby tests positive for in utero exposure to illegal drugs.³ Yet the reality is that, despite federal legislation intended to induce a more proactive and preventive approach to child maltreatment,⁴ states rarely act to protect at-risk newborn babies before they incur abuse or neglect. Instead, states continue to confer legal parenthood on biological parents without regard for any history or condition that renders such persons presumptively unfit to parent and continue to allow such persons to take newborn babies home with no monitoring.⁵ This state practice is the root cause of intergenerational transmission of dysfunction in our society and a tragic injustice to the babies who could be protected.⁶

To avoid this injustice and social cost, child protection agencies need to identify, at the time of birth, biological parents with obvious high risk factors, such as previous termination of parental rights as to another child, having been convicted of

1. See *infra* Part II (discussing the risks faced by children of unfit parents).

2. See, e.g., FRED WULCZYN ET AL., BEYOND COMMON SENSE: CHILD WELFARE, CHILD WELL-BEING, AND THE EVIDENCE FOR POLICY REFORM 32 (2005).

3. See Keeping Children and Families Safe Act of 2003, 42 U.S.C. § 5106a(b)(2)(A)(ii) (2000 & Supp. 2004).

4. See *infra* Part III (discussing several federal statutes that have attempted to address child mistreatment but which have fallen short).

5. See *infra* Part I (discussing how current laws favor the biological relationship of a parent and child).

6. See CHING-TUNG & JOHN HOLTON, TOTAL ESTIMATED COST OF CHILD ABUSE AND NEGLECT IN THE UNITED STATES 4–5 (2007), http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf (estimating annual spending nationally of \$33.1 billion on direct costs and \$70.7 billion on indirect costs of child maltreatment).

criminal child abuse or neglect, having serious drug abuse or mental health problems, or being currently incarcerated. The agencies should assess such biological parents and their home situation before the parents take the baby home. States should aid parents who, the assessment suggests, can adequately parent with some assistance. With respect to parents who most likely can not adequately parent within the babies' first six months of life, even if services are provided, states should terminate the parents' legal relationship to the newborn child and create a parent-child relationship instead with qualified applicants for adoption. States should not wait until birth parents have maltreated and damaged the baby and should not place newborn babies in temporary care situations for prolonged periods while they attempt to reform deeply dysfunctional parents. That conclusion is radical but sound. As this Article demonstrates, newborns are simply different from older children, a basic fact that the child protection system and legal scholars have failed to fully recognize. Other scholars emphasize the rights of the parents, often to the detriment of the child; this Article serves as an important counterbalance.

Since the mid-90s, Congress has passed several laws designed to push states to take a more proactive, preventive approach to child maltreatment. Two in particular promised to ensure that local agencies would intervene to protect newborn babies from unfit parents and quickly secure healthy, permanent family placements for them. The Adoption and Safe Families Act of 1997 (ASFA)⁷ required that states authorize courts to terminate parental rights without waiting for child protective agencies to attempt to rehabilitate parents, in certain cases where parents have demonstrated unfitness through egregious conduct toward their other children.⁸ The Keeping Children and Families Safe Act of 2003 (KCAFSA)⁹ required states to direct birthing facilities to report to a local state child protective agency all births in which babies manifest in utero exposure to illegal drugs, thus bringing to the attention of child protection agencies newborn children at high risk of maltreatment because of parental drug abuse.¹⁰ KCAFSA also required states to

7. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified in scattered sections of 42 U.S.C.).

8. See 42 U.S.C. § 671(a)(15)(B), (D) (2000).

9. Keeping Children and Families Safe Act of 2003, Pub. L. No. 108-36, 117 Stat. 800 (codified as amended at 42 U.S.C. §§ 5102–5119 (2000 & Supp. 2004)).

10. See 42 U.S.C. § 5106a(b)(2)(A)(ii).

implement a plan to ensure the safety of such offspring of drug addicts.¹¹

However, resistance among social workers and judges to “disqualifying” biological parents from raising their offspring has rendered these legal developments largely ineffective. No matter how troubling biological parents’ histories are, the state still routinely sends newborn children home with them unsupervised.¹² When child protection agencies do take custody of children at birth, they typically put such children in provisional foster care while undertaking lengthy and usually futile parental rehabilitation efforts.¹³ Achieving the congressional aim of child-maltreatment prevention requires further federal or state legislation to fill gaps in current law that allow local child-protection agencies to continue traditional, reactive practices. This Article explains why these promising federal reform efforts have largely produced only a pretense of maltreatment prevention at the state and local level, and it identifies further legal reforms needed to make better parentage choices for children born to unfit biological parents.

Part I explains the state’s generally overlooked role and responsibility in family formation and custodial placement of children after birth. Part II draws on child-development literature to explain why it is vital that children receive consistent nurturance during the first year of life, that the state not disrupt any attachment infants form with a good caregiver, and that child-protection law and policy take account of the ways in which the situation of a newborn differs from that of older children. Part III describes the federal government’s substantial role in the realm of child protection, particularly the provisions of ASFA and KCAFSA that create the potential for a more proactive approach to preventing child maltreatment. Part IV details the ways in which state law and local practice are frustrating those legislative aims. Finally, Part V sets forth proposals for filling the gaps left by federal legislation, to ensure all children a healthy start in life, free of abuse, neglect, and family disruption. Part V also addresses likely objections to more aggressive child-protection measures—in particular, the conflict with supposed rights of parents and the disparate impact on poor and minority-race parents.

11. *Id.*

12. *See infra* Part IV.

13. *See infra* Parts II, IV (discussing how laws favor biological parents even when they are clearly unfit to parent when the child is born).

I. STATE CREATION OF PARENT-CHILD RELATIONSHIPS

A parent-child relationship is a legal relationship entailing rights, responsibilities, and liabilities. The legal relationship ensures an opportunity for a social relationship to arise, yet the legal relationship arises without mutual consent between the private parties. State maternity and paternity laws place adults and newborn children into legal relationships with each other, always without the consent of the children and sometimes without the consent of the adults.¹⁴ Such state action is presumptively inconsistent with western society's commitment to a limited state that leaves private parties free to choose their own social relationships and to decide whether to request state protection of the social relationship through legal recognition.¹⁵ It therefore requires strong justification and careful constraint.

An obvious justification for the state's creating legal family relationships for a newborn child is that newborns need to be in relationships with adult caregivers immediately yet cannot choose those adults themselves. The state appropriately steps in, as *parens patriae* protector of the welfare of these non-autonomous persons, to act in their behalf, choosing for them. In fact, this is the *only* plausible justification for the state to intrude so profoundly into a child's life—the only justification that adequately respects the equal moral status of children relative to adults.¹⁶ It is the same justification the state must invoke for creating a legal caretaking relationship between an incompetent adult and a competent adult—that is, for a “guardianship of the person” for a disabled adult.¹⁷ In neither context can it be a plausible justification that some persons' incapacity simply creates an opportunity for the state to take over their lives and to place them in the care of others in order to serve state aims or the desires of other persons. Vulnerability does not justify treating a person instrumentally. Thus, the law governing adult guardianship makes the desire of particular adults to serve as a guardian for an incompetent adult a necessary but not sufficient condition for appointment.¹⁸ It is also

14. See James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 859–81 (2003).

15. See JAMES G. DWYER, *THE RELATIONSHIP RIGHTS OF CHILDREN* 95–122 (2006).

16. See *id.* at 205.

17. See *id.* at 82–85.

18. *Id.*

necessary that the appointment of one particular person as guardian, rather than any other person who might wish to serve, be the best choice for the ward.¹⁹ The state, in this context, acts in a proxy capacity, choosing for the incompetent adult as he would if able, with judicially determined “best interests” controlling in the absence of an actual choice by the prospective ward prior to becoming incompetent.²⁰ Likewise, with the law governing adoption of children, the state, in a *parens patriae* role, investigates potential adoptive parents, qualifying some for adoption and disqualifying others, and places a child in a parent-child relationship with adopters only if that is in the child’s best interests—that is, if the child would, if able, choose to be in that relationship.²¹ In both of these other contexts in which the state creates legal relationships for non-autonomous persons, only those persons are viewed as having rights in the matter and only their interests are relevant.

We should similarly view the state, when it creates the first legal parent-child relationships for newborn children through parentage laws, as acting in a proxy role, choosing on behalf of the child and constrained to choose as the child would if able, which presumptively means based on the child’s best interests.²² Ideally, then, legal rules for parentage would place children in parent-child relationships that are, all things considered, the best ones available for them. The state would place a child with those adults, from among all those who wish to serve as parents for that child, whose serving as parents would best promote the child’s welfare.

Against such a “best available parent” standard, existing parentage laws are at best a very rough approximation of the ideal. The state currently assigns children to adults for upbringing purposes almost exclusively on the basis of biological parentage. In every state, with rare exception, the law makes the birth mother a child’s legal mother.²³ And in every state, with rare exception, the law makes men legal fathers almost exclusively on the basis of rules that directly or indirectly pre-

19. *Id.* There are generally statutory priorities for some categories of persons over others in selection of a guardian, but these are based on assumptions about who is likely to be the best caregiver, and statutes direct courts to depart from the priority order when necessary to serve the ward’s welfare. *Id.*

20. *Id.*

21. See Dwyer, *supra* note 14, at 882–83.

22. See DWYER, *supra* note 15, at 205.

23. Dwyer, *supra* note 14, at 859–65.

dicating parentage on biological paternity.²⁴ This legal regime approximates the ideal described above to some degree because, all else being equal, it is considered to be best for children to be raised by their biological parents. This is in part because we culturally value the biological connection within parent-child relationships and in part because biological families are still regarded as “natural,” which is of some significance to older children.²⁵ However, many parental characteristics other than a biological connection are relevant to a child’s well being, yet the law makes those other aspects irrelevant.²⁶ Some biological parents are so lacking in the capacities or commitment required for parenting that their serving as a child’s parents would, on the whole, be worse for the child than if some other available adults took on that role. That this is so is evidenced by laws authorizing courts to terminate the parental rights of biological parents even after they have formed a social family relationship with a child and even when the biological parents want to remain legal parents.²⁷ Because rules for establishing a child’s first legal family currently do not reflect this fact,²⁸ children born to such biological parents typically must first suffer serious maltreatment and disruption of an established family life before the state places them with adequate caregivers.²⁹

Some departure from the ideal of state proxy relationship decision making for newborn children is unavoidable. Our knowledge of what makes for a good upbringing for children is limited. Further, though we do have substantial confidence in our belief that certain forms of upbringing are very bad, the state, arguably for good reason, usually does not have sufficient information about first-time parents to identify in advance everyone who is likely to create a very bad upbringing.³⁰ In addi-

24. *Id.* at 865–81. Certain statutory presumptions of paternity—for example, that based on a man’s being married to the birth mother or a man’s “holding out” a child as his offspring—historically were based largely on an assumption that such status or behavior signaled that the man was most likely the biological father. *Id.* at 865–68.

25. See Elizabeth Bartholet, *Guiding Principles for Picking Parents*, 27 HARV. WOMEN’S L.J. 323, 334–35 (2004).

26. See Dwyer, *supra* note 14, at 859–81.

27. See *id.* at 952–66.

28. See *infra* Part III (discussing how parentage laws favor biological parents to the detriment of the child).

29. See generally Dwyer, *supra* note 14, at 952–66 (describing the high threshold under state law for terminating parent-child relationships).

30. See *infra* Part IV.A (discussing the lack of information available to state agencies about new parents).

tion, some departure from the ideal because such decisions are difficult to administer; state agencies cannot be expected (or perhaps trusted) to make fine judgments among potential parents or to make individualized decisions with respect to a substantial percentage of newborn children.³¹ Thus, we must expect and accept some bluntness in the legal rules by means of which the state makes proxy family-relationship choices for newborn children, and most children cannot reasonably complain later in life that they would have been somewhat better off, all things considered, if the state had chosen different parents for them.

However, it is *not* tolerable for the state to make *no* individualized parentage decisions for *any* children on the basis of potential parents' relative capacities and commitment. Sometimes the state is aware that expectant birth parents are so utterly lacking in the capacity for and/or commitment to caring for a child—so likely to cause children to experience things known to be very bad for children—that it is inexcusable for the state to place children in a legal relationship with those adults and to send children home from the hospital to live in their custody. This situation is just as inexcusable as it is to send a child who has already been seriously abused home with a parent who is very likely to abuse her again. Nevertheless, the state does this today, routinely.³² There is no basis in the parentage laws of any state for excluding some adults from parentage of a child on the grounds that they are not minimally qualified to serve as parents or are at very high risk of committing serious child maltreatment.³³ Even maliciously killing a child today does not legally disqualify one from being named the legal parent of another offspring tomorrow.³⁴ Being found guilty of such an atrocity does not even require one to make some showing to the state that one is not likely to maliciously kill that next child as well, in order to be named legal parent of the new baby. By way of comparison, it is inconceivable that any adult would similarly choose a spouse without giving any consideration to that person's history in intimate relationships and, in particular, any

31. See *infra* Part IV (discussing the complexity in determining whether someone will be fit to be a parent at the time the child is born).

32. See Dwyer, *supra* note 14, at 959–66 (describing the high threshold under state law for terminating parent-child relationships based on abuse and neglect).

33. *Id.* at 859–81.

34. See Adoption and Safe Families Act of 1997 § 103(a)(3), 42 U.S.C. § 675(5)(E) (2000).

history of partner abuse that person might have.³⁵ Likewise, it is inconceivable that the state would approve any applicant for adoption of a child who has a history of severe child maltreatment. The fact that parentage law today completely disregards such disqualifying history or characteristics is difficult to explain on any grounds other than an exaggerated notion of the importance of being raised by one's biological parents and/or a morally untenable notion of parental ownership of biological offspring.³⁶

II. WHY IT IS CRUCIAL TO GET IT RIGHT AT BIRTH

This Part explains what is concretely at stake for newborn babies and why there is a particular urgency to securing good, permanent families for newborns whose birth parents are unfit.

A. NEWBORNS' DEVELOPMENTAL NEEDS

Abundant research demonstrates that the state's creation of a legal parent-child relationship has an enormous impact on a child's brain development, basic psychological health and emotional make up, capacity for self-regulation, and physical health and growth. Parents largely determine an infant's experience of the world, and that experience has a tremendous effect on every aspect of the child's development. Of crucial importance to each child's healthy development are early satisfaction of physical needs, freedom from trauma, and—less commonly known—“a secure attachment to a sensitive, responsive, and reliable caregiver.”³⁷ Infancy is “a period of extreme vulnerability in which specific child welfare experiences have the potential to have devastating, long-term consequences.”³⁸

Thus, the state's creation of parent-child relationships effectively determines the basic life prospects of persons and the likelihood of their experiencing happiness and fulfillment. Ar-

35. Cf. International Marriage Broker Regulation Act of 2005, Pub. L. No. 109-162, § 833(d)(2)(B), 119 Stat. 3066, 3072 (2006) (codified as amended at 8 U.S.C. § 1375a(d)(2)(B) (2006)) (requiring international marriage brokers to conduct criminal background checks on their male clients).

36. See ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 7 (1999) (referring to the legal system's inordinate valorizing of biological parent-child relationships as “blood bias”).

37. Douglas F. Goldsmith et al., *Separation and Reunification: Using Attachment Theory and Research to Inform Decisions Affecting the Placements of Children in Foster Care*, *JUV. & FAM. CT. J.*, Spring 2004, at 1, 2 (2004).

38. WULCZYN ET AL., *supra* note 2, at 32.

guably there is nothing else the state routinely does to private individuals that has a greater impact on their well-being and that plays a more determinative role in whether their lives go well or poorly. This action by the state has the potential to damage them severely, and it in fact does so in a large number of cases, many of which are quite predictable. As discussed below, empirical studies show that some birth parents—in particular, those who have previously abused or neglected a child, those who are serious and chronic substance abusers, and those who have a serious mental illness—are likely to create a quite negative experience of the world for a baby, including trauma and severe deprivation.³⁹ That the state now does such a profound thing to persons in such a blunt and indiscriminate fashion, without taking this known danger into account, is remarkable. Tragically, most child maltreatment today befalls the youngest children.⁴⁰

Evidence for the fundamental importance of a child's first year comes from the neurobiological literature on brain development and from the social scientific literature on attachment.⁴¹ The neurobiological literature reveals that, during infancy of a normal child, most brain development is complete and the basis for cognitive and perceptual processes is in place.⁴² Healthy development of various parts of the brain depends on avoiding or receiving certain experiential inputs.⁴³

39. See *infra* notes 73–77, 88–97 and accompanying text.

40. See Safe Babies Act of 2007, H.R. 1082, 110th Cong. § 2 (2007) (“The Congress finds as follows: (1) Children three years of age and younger have the highest rates of victimization. Infants and toddlers are twice as likely as all other children to become victims of child maltreatment. . . . (4) Children under the age of four account for 81 percent of child fatalities, and children under the age of one account for 45 percent of such fatalities.”).

41. For a concise summary, see generally Julie Cohen & Victoria Youcha, *Zero to Three: Critical Issues for the Juvenile and Family Court*, JUV. & FAM. CT. J., Spring 2004, at 15.

42. See Charles A. Nelson, *The Neurobiological Bases of Early Intervention*, in HANDBOOK OF EARLY CHILDHOOD INTERVENTION 204, 210 (Jack P. Shonkoff & Samuel J. Meisels eds., 2d ed. 2000) (“[S]ynapse elimination in the human brain appears to occur late in gestation and early in the postnatal period, during a period when the nervous system is highly sensitive to environmental influences.”); *id.* at 215 (“[T]he most dramatic development—that of structures, sulci, gyri, and so forth—occurs during the first few years of life.”); see also Sheryl Dicker & Elysa Gordon, *Building Bridges for Babies in Foster Care: The Babies Can’t Wait Initiative*, JUV. & FAM. CT. J., Spring 2004, at 29, 30 (arguing that “more brain growth and learning occurs during infancy than any other time of life”).

43. See, e.g., Laurie Miller Brotman et al., *Children, Stress, and Context: Integrating Basic, Clinical, and Experimental Prevention Research*, 74 CHILD

Deleterious to neurological development are not only physical maltreatment—that is, physical trauma and malnutrition,⁴⁴—but also social deprivation and stress during infancy.⁴⁵ Studies of children who spent time after birth in institutional care—where they were safe and had basic physical needs satisfied but received little caregiver attention—find that “these children suffered from metabolic deficits in the areas of the brain believed to be involved in higher cognition, emotion, and emotion regulation.”⁴⁶ Studies of children with attachment disorders caused by parental neglect also show an adverse impact on brain development.⁴⁷ Impairment of brain development caused by social deprivation in turn hinders intellectual, linguistic, emotional, and social development.⁴⁸

Social science literature amply documents the crucial developmental importance of a secure attachment, which is a child’s psychological identification with and emotional connection to a caregiver. A secure attachment to a caregiver is the basis of a child’s understanding of and feeling about the world and about

DEV. 1053, 1053–57 (2003) (discussing the effects of stress on the brain and other physiological development); Nelson, *supra* note 42, at 215 (“[E]nvironment plays a critical role in regulating and determining both prenatal and early postnatal brain development.”); *id.* at 218 (“There are now numerous illustrations from a variety of species that demonstrate the influence of positive or negative early life experiences on both the function and the structure of the brain.”).

44. See WULCZYN ET AL., *supra* note 2, at 27 (noting the effects of neglect and trauma on brain development); Nelson, *supra* note 42, at 215 (“[P]oor nutrition during the first several years of postnatal life has been shown to affect a wide range of both behavioral and neurological functions as a result of its adverse impact on myelination, which in turn has been shown to affect conduction velocity.”).

45. See, e.g., MARGARET G. SMITH & ROWENA FONG, THE CHILDREN OF NEGLECT: WHEN NO ONE CARES 60 (2004); Brotman et al., *supra* note 43, at 1053–54 (noting the effect of maternal deprivation on brain development); Charles A. Nelson III et al., *The Effects of Early Deprivation on Brain-Behavioral Development: The Bucharest Early Intervention Project*, in ADOLESCENT PSYCHOPATHOLOGY AND THE DEVELOPING BRAIN: INTEGRATING BRAIN AND PREVENTION SCIENCE 197, 209 (Daniel Romer & Elaine Walker eds., 2007) (“[I]nstitutionalization is associated with profoundly negative effects on child and brain development.”); Nelson, *supra* note 42, at 218, 221.

46. Charles H. Zeanah et al., *Designing Research to Study the Effects of Institutionalization on Brain and Behavioral Development: The Bucharest Early Intervention Project*, 15 DEV. & PSYCHOPATHOLOGY 885, 888 (2003).

47. See SMITH & FONG, *supra* note 45, at 68.

48. See, e.g., WULCZYN ET AL., *supra* note 2, at 27 (noting that the impairment of brain development as a result of abuse or neglect makes children “persistently vulnerable to mental health problems and other developmental difficulties”).

himself and therefore plays an “essential formative role[] in later social and emotional functioning. Infant-parent attachments promote a sense of security, the beginnings of self-confidence, and the development of trust in other human beings.”⁴⁹ A secure attachment initially entails a desire to stay close to a strong, protective, and nurturing figure, and ultimately, “its effective operation brings with it a strong feeling of security and contentment.”⁵⁰ That security enables a child eventually to explore the world without great anxiety and therefore to master tasks and develop a sense of competence and self-worth.⁵¹ It also “creates a positive expectation from the child’s view that relationships can be fulfilling, helpful, and provide sufficient protection in a world that may at times be overwhelming,”⁵² an expectation that will later make possible positive peer and family relationships and healthy intimacy.⁵³ As a result, securely attached children become “more independent, socially competent, inquisitive, and cooperative and empathic with peers; have higher self-esteem; and demonstrate more persistence and flexibility on problem-solving tasks.”⁵⁴ They possess a “greater capacity for self-regulation, effective social interactions, positive self-representations, self-reliance, and adaptive coping skills.”⁵⁵ Conversely, if a child fails to attach to any caregiver or forms only an insecure attachment, many negative consequences for many aspects of development are likely, as discussed below.

Whether a child forms an attachment at all and whether any attachment formed is secure depends on the child’s interactions with caregivers during the attachment phase of infancy, between seven months and two years of age.⁵⁶ In this period especially, babies need “sensitive and responsive care from fa-

49. Joan B. Kelly & Michael E. Lamb, *Using Child Development Research to Make Appropriate Custody and Access Decisions for Young Children*, 38 FAM. & CONCILIATION CTS. REV. 297, 298 (2000).

50. John Bowlby, *Postscript to ATTACHMENT ACROSS THE LIFE CYCLE* (Colin Murray Parkes et al. eds., 1991).

51. See Goldsmith et al., *supra* note 37, at 3.

52. *Id.*

53. See Cohen & Youcha, *supra* note 41, at 17.

54. Kelly & Lamb, *supra* note 49, at 303.

55. Goldsmith et al., *supra* note 37, at 2.

56. See Kelly & Lamb, *supra* note 49, at 299–301 (describing the attachment phase).

miliar adults in the course of feeding, holding, talking, playing, soothing, and general proximity.”⁵⁷

In short, babies need regular, positive interactions with capable and permanent caregivers in a variety of contexts in order to form the psycho-emotional foundation they will need successfully to traverse later developmental stages and attendant challenges.⁵⁸

Accordingly, it is not sufficient for a child’s healthy development that a parent simply not physically endanger the child. Even if a parent is consistently present and not dangerous, a child might fail to form a secure attachment as a result of poor parenting, including “disturbed family interactions, parental rejection, inattentive or disorganized parenting, [and] neglect.”⁵⁹ Children can therefore fail to form a secure attachment as a result of a parent’s being present but frequently changing environments, present but operating randomly rather than following a regular schedule, present but largely distracted, present but incapacitated for significant periods, or present but uncaring.⁶⁰ Any of these might result from a parent’s substance abuse, mental illness, or dysfunctional relationship with another adult; “[p]reoccupation with personal stressors diminishes the parent’s ability to respond in this way.”⁶¹ Parents addicted

57. *Id.* at 298.

58. Goldsmith et al., *supra* note 37, at 3; *see also id.* at 11 (“[Parents need] insightfulness regarding the impact of their own emotional states on the child’s behavior.”); Kelly & Lamb, *supra* note 49, at 300 (“In the absence of such opportunities for regular interaction across a broad range of contexts, infant-parent relationships fail to develop and may instead weaken.”).

59. Kelly & Lamb, *supra* note 49, at 302.

60. *See* SMITH & FONG, *supra* note 45, at 40; Laurel K. Leslie et al., *Addressing the Developmental and Mental Health Needs of Young Children in Foster Care*, 26 J. DEVELOPMENTAL & BEHAV. PEDIATRICS 140, 141 (2005) (“Numerous studies . . . suggest that the development of social, emotional, and behavioral problems in children is due to deficient family management skills characterized by harsh and inconsistent discipline, low levels of supervision and involvement in the child’s life, and lack of appropriate prosocial reinforcement.”); LUCY HUDSON ET AL., ZERO TO THREE, HEALING THE YOUNGEST CHILDREN: MODEL COURT-COMMUNITY PARTNERSHIPS 2, 14 (2007), http://www.abanet.org/child/practice&policybrief_march07.pdf.

61. Goldsmith et al., *supra* note 37, at 3; *see also id.* at 4 (noting that repeated changes in caregivers, as might occur when parents come in and out of a child’s life, can produce Reactive Attachment Disorder); Kelly & Lamb, *supra* note 49, at 302 (discussing impact of parental discord); *id.* at 305 (discussing locational stability and its importance for infants and “predictable comings and goings of both parents, regular feeding and sleeping schedules, consistent and appropriate care, and affection and acceptance; John M. Leventhal et al., *Maltreatment of Children Born to Women Who Used Cocaine During Pregnan-*

to drugs are likely to be mired in a myriad of dysfunctional conditions that prevent them from parenting adequately and that create an environment for children antithetical to their healthy development.⁶² And of course, children likely will fail to form even an insecure attachment with parents if parents are absent for long periods,⁶³ as when parents abandon or neglect a child or go to prison,⁶⁴ or if a child's interactions with parents are often painful rather than nurturing, as when parents physically abuse a child.⁶⁵ All these negative experiences can pre-

cy: *A Population-based Study*, 100 PEDIATRICS e7, 1 (1997), <http://pediatrics.aappublications.org/cgi/reprint/100/2/e7.pdf> ("Studies show that mothers who use cocaine have difficulties interacting with their infants, in particular, demonstrating more intrusive and hostile behaviors toward their infants."); *Substance Abuse and Child Maltreatment*, CHILD WELFARE INFO. GATEWAY, Dec. 2003, at 2, http://www.childwelfare.gov/pubs/factsheets/subabuse_childmal.pdf [hereinafter CWIG, *Substance Abuse*] (noting that substance-abusing parents have a diminished capacity to function as parents because of drug-related activities and are often also afflicted with mental illness, high levels of stress, and dysfunction in their larger family).

62. See SHEIGLA MURPHY & MARSHA ROSENBAUM, PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPES AND STIGMA 8 (1999) (horrible childhood environment); *id.* at 9 (low self-esteem); *id.* at 12 (dysfunctional social environment); *id.* at 13 (poverty, STDs, violence); *id.* at 15 (AIDS, criminal activity); *id.* at 17–18 (maltreatment as children); *id.* at 18 (lack of education and employment, partner abuse); *id.* at 19 (horrible neighborhoods, lack of control over life); *id.* at 20–21 (80% on welfare, one-third homeless, one-third living in housing projects or motels, more than one-half convicted of crimes); *id.* at 21 (lost custody of prior children or left prior children in care of other adults); *id.* at 21 (lack of relationship with their own parents); *id.* at 26 (own parents also substance abusers); *id.* at 29 (70% abused as children, surrounded by violence, fatalistic); *id.* at 33 ("Many lived in a virtual reign of terror in neighborhoods with high rates of crime and violence. [The neighborhoods were] veritable combat zones. Between gang warfare, police raids, random shootings, and drug dealing, fear became a way of life."); *id.* at 45 (other parent typically also a drug addict); *id.* at 46–48 (prostitution); *id.* at 49 (lack of personal agency); *id.* at 51 (submission to violence by male partner, 70% battered by male partner); *id.* at 58–59 (fear that telling father about the baby will trigger violence); *id.* at 68 (pregnancy and beatings by partner, pregnancy interfering with prostitution, thereby reducing income); *id.* at 70 (one-third abused during pregnancy by male partner).

63. Kelly & Lamb, *supra* note 49, at 300 ("[I]t is important to minimize the length of time that infants are separated from their attachment figures; extended separations unduly stress developing attachment relationships.")

64. CHRISTOPHER J. MUMOLA, U.S. DEPT OF JUSTICE, INCARCERATED PARENTS AND THEIR CHILDREN 5 (2000) (showing that over 90% of mothers in prison see their children less than once a week, with around half never seeing their children during their incarceration).

65. WULCZYN ET AL., *supra* note 2, at 32 ("Much empirical work has documented that maltreated and foster infants are more likely to exhibit . . . attachment disorders."); Cohen & Youcha, *supra* note 41, at 18 ("[C]hildren who have experienced physical abuse . . . are more likely to be insecurely attached

vent children from forming trust in a caregiver and, more generally, in the world they inhabit, and they can also prevent children from developing self-esteem, a sense of competence, or a view of themselves as persons who are worthy of care.⁶⁶

In addition, children are harmed by disruption of an established attachment relationship.⁶⁷ It is very difficult to reestablish an attachment once it is disrupted and also very difficult for a child later to form an attachment to a new caregiver.⁶⁸ Thus, children's development is adversely affected by removal from a parent after an attachment with the parent has formed, even though the removal might be necessary for the child's safety or because the parent goes to prison.⁶⁹ Importantly, children are also adversely affected by being removed from foster parents if they have begun to attach to the foster parents, whether the removal is for the purpose of placing the child with a "rehabilitated" birth parent or for the purpose of changing foster care placements (as traditionally was done when foster parents appeared to be getting "too close" to the child).⁷⁰ Stress in general can adversely affect a child's development,⁷¹ and dis-

to their parents.").

66. See Goldsmith et al., *supra* note 37, at 7.

67. See WULCZYN ET AL., *supra* note 2, at 29 ("[T]ransitions in living environments have an independent relationship to major indicators of adolescent deviance (e.g., delinquency and school dropout)."); Kelly & Lamb, *supra* note 49, at 303 ("[T]here is a substantial literature documenting the adverse effects of disrupted parent-child relationships on children's development and adjustment.").

68. Kelly & Lamb, *supra* note 49, at 300–01.

69. See Goldsmith et al., *supra* note 37, at 6, 8–9 (noting that the trauma of separation from parents after attachment can cause the child to associate the parents with trauma, making reunification difficult).

70. WULCZYN ET AL., *supra* note 2, at 148 (arguing that multiple foster care placements lead to behavioral problems); Cohen & Youcha, *supra* note 41, at 16 ("When a baby faces a change in placement, fragile new relationships with foster parents are severed, reinforcing feelings of abandonment and distrust."); Leslie et al., *supra* note 60, at 141 (noting that placement changes exacerbate attachment problems); ZERO TO THREE, RESTRUCTURING THE FEDERAL CHILD WELFARE SYSTEM: ASSURING THE SAFETY, PERMANENCE AND WELL-BEING OF INFANTS AND TODDLERS IN THE CHILD WELFARE SYSTEM 5 (2007), <http://www.zerotothree.org/site/DocServer/childwelfare.pdf?docID=2521> [hereinafter ZERO TO THREE] ("Multiple foster care placements present a host of traumas for very young children. When a baby faces a change in placement, fragile new relationships with foster parents are severed reinforcing feelings of abandonment and distrust. Babies grieve when their relationships are disrupted and this sadness adversely effects their development.").

71. See Brotman et al., *supra* note 43, at 1054; Louise S. Ethier et al., *Risk Factors Associated with the Chronicity of High Potential for Child Abuse and Neglect*, 19 J. FAM. VIOLENCE 13, 22 (2004); Nelson, *supra* note 42, at 216; Ka-

ruption of any attachment relationship and living situation is highly stressful for a child.⁷²

In turn, attachment disorders cause lifelong difficulties. Numerous studies of maternal deprivation have concluded that failure of attachment caused by inadequate nurturance in infancy results in “a variety of serious medical problems, physical and brain growth deficiencies, cognitive problems, speech and language delays, sensory integration difficulties and stereotypes, and . . . social and behavioral abnormalities.”⁷³ Attachment failure retards socio-emotional development and produces emotional withdrawal, indiscriminate socializing, lack of impulse control, failure to internalize moral norms, and psychiatric disorders such as depression, anxiety, hyperactivity, and disruptive behavior.⁷⁴ Some children subject to early depriva-

therine C. Pears & Deborah M. Capaldi, *Intergenerational Transmission of Abuse: A Two-Generational Prospective Study of an At-Risk Sample*, 25 CHILD ABUSE & NEGLECT 1439, 1442 (2001) (discussing Post-Traumatic Stress Disorder in abuse victims).

72. Goldsmith et al., *supra* note 37, at 1 (warning of the severe risks to, and long-term effects on a child associated with separation from the caregiver); Kelly & Lamb, *supra* note 49, at 304 (“[T]he loss or attenuation of significant relationships in childhood can cause anxiety and a profound sense of loss, particularly in the first 2 years, when children have limited cognitive and communicative resources to help cope with loss.”).

73. Zeanah et al., *supra* note 46, at 886 (citations omitted); *see also* SMITH & FONG, *supra* note 45, at 66–67; Nelson, *supra* note 42, at 216 (“[I]solation rearing also results in a host of behavioral impairments, including hyperactivity, abnormal responses to novelty and stressors, and cognitive deficits in adulthood.”).

74. *See* JUSTIN W. PATCHIN, THE FAMILY CONTEXT OF CHILDHOOD DELINQUENCY 5 (2006) (“[L]ack of emotional ties between parents or between parent and child contribute to involvement in maladaptive behavior.”); *id.* at 6 (“[A]ttachment to one’s parents can result in decreased delinquency through a process known as ‘virtual supervision.’” (citation omitted)); *id.* at 14 (“[C]hildren attached to both parents are less likely to be delinquent than youth attached to only one parent.”); *id.* at 28 (citing research concluding that “youth who are strongly attached to their parents are less likely to engage in delinquent behavior”); *id.* (“[I]nattentive parents who do not take time to positively socialize their children may actually cause them to act out on impulses or negative feelings, thereby leading them toward a ‘persistent’ criminal career.” (emphasis removed)); *id.* at 29–30 (“[P]arents control their children’s behavior and buffer them from delinquency by forming strong social and emotional ties that bind children to their parents, and, by extension, to conventional order.”); *id.* at 30 (“If the child is alienated from the parent, he will not learn or will have no feeling for moral rules, he will not develop an adequate conscience or superego.” (citation omitted)); *id.* at 31 (“[Y]outh who are psychologically attached will fear the emotional damage caused by the disobedience.”); *id.* at 32 (“[D]elinquent peers will become salient only if the attachment to the parents is weak.”); *id.* at 43 (“Parents play a crucial role in that self-control is developed (almost exclusively in the family) in the first few

tion recover some lost ground in some areas of development if transitioned early to a highly nurturing environment, but much damage is irreparable and less recovery in all aspects of development is possible the longer a child goes without permanence in a good home.⁷⁵ Merely providing services to neglectful parents or special educational programs for a child is very unlikely to remedy the effects of a nonnurturing environment in infancy.⁷⁶

A much larger body of social science research demonstrates a clear link between proven child maltreatment (which correlates highly with attachment disorders) and numerous adverse effects and outcomes for maltreated children. It shows a strong correlation between maltreatment and cognitive impairment, delayed language development, poor school performance, poor physical health and development, mental health problems, lack of self-control and behavioral disorders, failure to internalize

years and remains relatively stable across the life course.”); SMITH & FONG, *supra* note 45, at 66–67; Nelson et al., *supra* note 45, at 205–09; HUDSON ET AL., *supra* note 60, at 14; ZERO TO THREE, INFANT AND EARLY CHILDHOOD MENTAL HEALTH: PROMOTING HEALTHY SOCIAL AND EMOTIONAL DEVELOPMENT 5 (2004), <http://www.zerotothree.org/site/DocServer/IMHState.pdf?docID=1723>.

75. WULCZYN ET AL., *supra* note 2, at 32 (“[S]ome types of insult to the brain, such as neglect and trauma, are more difficult to overcome and may result in lasting cognitive and social-emotional impairments.”); Cohen & Youcha, *supra* note 41, at 18 (citing a statement by the American Psychiatric Association that “there is no scientific evidence to support the effectiveness of some specific therapies used to treat [Reactive Attachment] Disorder” (citation omitted)); Cindy S. Lederman et al., *When the Bough Breaks the Cradle Will Fall: Promoting the Health and Well Being of Infants and Toddlers in Juvenile Court*, 52 JUV. & FAM. CT. J. 33, 34 (2001) (“For young children who have the misfortune of entering the juvenile court system in their first few years of life, preventive interventions are often too late.”); Nelson, *supra* note 42, at 220 (“[A]t least some regions of the brain, at least under some conditions [can recover from early deprivation].”); *id.* at 221 (noting that for children subjected to socio-emotional deprivation in infancy, “the adverse impact of these experiences on the brain may create a situation whereby intervention must be provided early and intensively to be successful”); Zeanah et al., *supra* note 46, at 903 (discussing studies of children adopted from institutions showing that “lack of early social interaction had profound effects upon the social and emotional development of the child” and that those socio-emotional effects are not greatly ameliorated even by later adoption).

76. See, e.g., W. John Curtis & Charles A. Nelson, *Toward Building a Better Brain: Neurobehavioral Outcomes, Mechanisms, and Processes of Environmental Enrichment*, in RESILIENCE AND VULNERABILITY: ADAPTATION IN THE CONTEXT OF CHILDHOOD ADVERSITIES 463, 464 (Sunia S. Luthar ed., 2003) (“[O]ver the past four decades, scores of enriched preschool intervention programs have been implemented . . . [T]he hoped-for and expected enduring effects on IQ have largely not been obtained.”).

moral norms, peer socialization problems, violence and other forms of delinquency, running away from home, youth suicide, substance abuse, prostitution, teen pregnancy, unemployment, criminality in adulthood, partner violence as an adult, and maltreatment of the next generation of children.⁷⁷ Many of these adverse outcomes are more pronounced the younger a child is when incurring the maltreatment.⁷⁸ Significantly, some researchers have concluded that psychological maltreatment is more detrimental in the long run than is physical maltreatment.⁷⁹

Turning to predictive parental characteristics, child maltreatment strongly correlates with parental substance abuse, mental illness, and prior maltreatment of another child: birth parents with substance abuse problems are (a) at a pronounced higher risk of child maltreatment, (b) extremely unlikely to overcome an addiction prior to the time when their baby needs to form a secure attachment to a consistent, nurturing caregiver, regardless of what assistance they receive, (c) very likely to

77. See PATCHIN, *supra* note 74, at 7, 39–45; SMITH & FONG, *supra* note 45, at 43, 63–65, 72–73; WULCZYN ET AL., *supra* note 2, at 32–36, 82, 105–06, 146–49; Cohen & Youcha, *supra* note 41, at 16, 18; Susan M. Cunningham, *The Joint Contribution of Experiencing and Witnessing Violence During Childhood on Child Abuse in the Parental Role*, 18 VIOLENCE & VICTIMS 619, 619–20, 632 (2003); Ethier et al., *supra* note 71, at 14, 21–22; Jaana Haapasalo & Terhi Aaltonen, *Mothers' Abusive Childhood Predicts Child Abuse*, 8 CHILD ABUSE REV. 231, 242–44 (1999); Diane V. Malbin, *Fetal Alcohol Spectrum Disorder (FASD) and the Role of Family Court Judges in Improving Outcomes for Children and Families*, 55 JUV. & FAM. CT. J., Spring 2004, at 53, 53–54; Steven J. Ondersma, *Introduction to the First of Two Special Sections on Substance Abuse and Child Maltreatment*, 12 CHILD MALTREATMENT 3, 4 (2007); Pears & Capaldi, *supra* note 71, at 1441–42; Cathy Spatz Widom, *Understanding Child Maltreatment and Juvenile Delinquency: The Research*, in UNDERSTANDING CHILD MALTREATMENT AND JUVENILE DELINQUENCY: FROM RESEARCH TO EFFECTIVE PROGRAM, PRACTICE, AND SYSTEMIC SOLUTIONS 1, 1–8 (2003); Aubyn C. Stahmer, et al., *Developmental and Behavioral Needs and Service Use for Young Children in Child Welfare*, 116 PEDIATRICS 891, 897 (2005); CWIG, *Substance Abuse*, *supra* note 61, at 2; OFFICE OF PLANNING, RESEARCH, & EVALUATION, U.S. DEPT' HEALTH & HUMAN SERVICES, NATIONAL SURVEY OF CHILD AND ADOLESCENT WELL-BEING (NSCAW): CPS SAMPLE COMPONENT WAVE 1 DATA ANALYSIS REPORT §§ 11.1, 11.5 (2005), http://www.acf.hhs.gov/programs/opre/abuse_neglect/nscaw/reports/cps_sample/cps_toc.html [hereinafter NSCAW].

78. See PATCHIN, *supra* note 74, at 18–22 (citing evidence that the earlier children manifest antisocial behavior, the more likely they are to have a “prolonged career” of antisocial and criminal behavior); Cunningham, *supra* note 77, at 634; Stahmer et al., *supra* note 77, at 894.

79. See Lois A. Weithorn, *Protecting Children from Exposure to Domestic Violence: The Use and Abuse of Child Maltreatment Statutes*, 53 HASTINGS L. J. 1, 74–76 (2001).

have child protective services (CPS) remove their children from their custody at some point anyway, and (d) extremely unlikely to reunify successfully following removal.⁸⁰ The prospects are

80. See PATCHIN, *supra* note 74, at 9 (noting the propensity of substance abusers' children to become substance abusers themselves); *id.* at 9–10 (“[H]istories of criminal involvement and alcoholism of the mother was found to be more prevalent in delinquent youth. . . . Growing up with parents who are openly involved in deviant activities can also have detrimental effects for youth as they develop their own identity.”); *id.* at 11 (stating that for parents involved in criminal activity “parenting is compromised due to their own illicit activities” and “inebriated parents cannot effectively supervise their children and may punish inconsistently or harshly”); SMITH & FONG, *supra* note 45, at 35, 37, 45, 211–16; Amy D’Andrade & Jill Duerr Berrick, *When Policy Meets Practice: The Untested Effects of Permanency Reforms in Child Welfare*, 33 J. SOC. & SOC. WELFARE 31, 37 (2006) (“[E]stimates of the proportion of children placed in foster care at least in part due to substance abuse issues of the parents range from 50%–80%.”); Jill Duerr Berrick et al., *Reasonable Efforts? Implementation of the Reunification Bypass Provision of ASFA*, CHILD WELFARE (forthcoming 2008) (“Evidence from a number of studies suggests . . . that substance abuse has become the predominant problem among many parents involved in child welfare” (citation omitted)); Leventhal et al., *supra* note 61, at 4 (“[B]y 2 years of age, children born to mothers who used cocaine during pregnancy were 6.5 times more likely to be maltreated and 5.0 times more likely to be placed outside the home compared with a sociodemographically similar comparison group.”); *id.* (“[A]pproximately 25% of the children in the cocaine-exposed group spent some time during the first 2 years of their life being cared for outside their homes.”); Malbin, *supra* note 77, at 55–56 (listing behavioral and judgment-making problems associated with Fetal Alcohol Spectrum Disorder, which results from mothers exposing their babies to alcohol in utero); Ondersma, *supra* note 77, at 3–5 (noting several studies showing highly elevated rates of child maltreatment among parents with alcohol or substance-abuse problems); Kathryn Page, *Fetal Alcohol Spectrum—The Hidden Epidemic in Our Courts*, 52 JUV. & FAM. CT. J. 21, 29 (2001); Dana K. Smith et al., *Child Maltreatment and Foster Care: Unpacking the Effects of Prenatal and Postnatal Parental Substance Use*, 12 CHILD MALTREATMENT 150, 151, 155, 157 (2007); Nancy K. Young et al., *Parental Substance Use Disorders and Child Maltreatment: Overlap, Gaps, and Opportunities*, 12 CHILD MALTREATMENT 137, 140–42 (2007) (reviewing the literature showing that a high percentage of parents with child maltreatment reports have substance abuse problems even though child protection workers fail to detect substance abuse problems 61% of the time); *id.* at 142–43 (showing the percentage of parents receiving drug treatment who lose custody of their children and the percentage who ultimately have parental rights terminated); *id.* at 147 (“The recovery process often takes longer than is allowed under the ASFA legislation.”); STEVE CHRISTIAN, NAT’L CONFERENCE OF STATE LEGISLATURES, SUBSTANCE-EXPOSED NEWBORNS: NEW FEDERAL LAW RAISES SOME OLD ISSUES 4 (2004), <http://www.ncsl.org/print/cyf/newborns.pdf> (“[M]aternal alcohol and drug use is clearly associated with numerous risk factors. These include chaotic and dangerous lifestyles, involvement in abusive relationships, and mental-health problems that affect parenting.”); *id.* (“Perinatal substance exposure, combined with postnatal risk factors such as unpredictable and inconsistent parenting, increases the risk of poor long-term outcomes, including behavioral problems and cognitive deficits.”); JOHN D. FLUKE & DANA M. HOLLINSHEAD,

similarly bleak for birth parents suffering from serious mental illnesses.⁸¹ While states generally do a poor job of collecting information on maltreatment recidivism rates, studies suggest that these rates are quite high, so there is good reason to fear that parents who have seriously abused or neglected one or more children before will abuse or neglect another child they conceive if given the opportunity.⁸²

Studies of children of incarcerated parents also document the lifelong damage done to these children by their parents' ab-

NAT'L RES. CTR. ON CHILD MALTREATMENT, CHILD MALTREATMENT RECURRENCE: A LEADERSHIP INITIATIVE OF THE NATIONAL RESOURCE CENTER ON CHILD MALTREATMENT 8, 22 (2003), <http://www.nrcps.org/PDF/MaltreatmentRecurrence.pdf> (noting studies showing the elevated risk of maltreatment recurrence when children are returned to parents who have had substance abuse problems); NSCAW, *supra* note 77, § 11.3.3, tbl.A-9; JOSEPH P. RYAN, ILL. DEP'T OF CHILDREN & FAMILY SERVS., ILLINOIS ALCOHOL AND OTHER DRUG ABUSE (AODA) WAIVER DEMONSTRATION: FINAL EVALUATION REPORT 3-3 (2006), <http://cfcwww.social.uiuc.edu/pubs/pdf.files/AODA.01.06.pdf> (reporting the results of intensive demonstration project that raised rates of reunification with substance abusing parents only from 11.6% to 15.5% and stating that "historically, substance abusing families achieve very low rates of reunification"); BARBARA E. SMITH ET AL., AM. BAR ASS'N, PARENTAL SUBSTANCE ABUSE, CHILD PROTECTION AND ASFA: IMPLICATIONS FOR POLICY MAKERS AND PRACTITIONERS 6 (2005), http://www.abanet.org/child/final_report_dec22.pdf (showing that among substance-abusing parents in the child protective systems in Illinois and California, 40% fail even to attempt treatment and 40% enter treatment but relapse); *id.* at 7 (stating that mothers are less likely to overcome addiction than fathers).

81. See WULCZYN ET AL., *supra* note 2, at 132 (noting the association between maltreatment and parents' mental-health difficulties); D'Andrade & Berrick, *supra* note 80, at 36 ("[E]motional problems of the parent . . . are associated with failure to reunify."); Haapasalo & Aaltonen, *supra* note 77, at 234; Terry Lyons, *When Reasonable Efforts Hurt Victims of Abuse: Five Years of the Adoption and Safe Families Act of 1997*, 26 SETON HALL LEGIS. J. 391, 397-404 (2002) (discussing the mental health problems of victims of partner violence and the overlap between families with partner violence and families with child abuse); FLUKE & HOLLINSHEAD, *supra* note 80, at 8 (citing a study showing higher rate of maltreatment for parents with mental-health problems following return of child to parent custody); NSCAW, *supra* note 77, § 11.3.3 ("[A]dult mental illness is a substantial contributor to the problems in parenting that child welfare services attempts to address."); *id.* at tbl.A-10.

82. Most child maltreatment fatalities occur among infants and most are at the hands of parents who were previously subject to investigation for child maltreatment. See CHILD PROTECTIVE SERVS. PROGRAM, VA. DEP'T OF SOC. SERVS., ANNUAL CHILD MALTREATMENT FATALITY REPORT 11 (2004), http://www.dss.virginia.gov/files/about/reports/children/child_protective_services/2004/neglect.pdf; NSCAW, *supra* note 77, § 11.1 (finding that over half of the families reported to CPS agencies for child abuse or neglect have had prior maltreatment reports as well); *id.* § 11.6 (noting "extraordinary level of prior child welfare involvement among the families and children in this study"); *id.* at tbls.A-6, A-7.

sence and criminal disposition.⁸³ Congress has recognized the serious detriment children incur from growing up while a parent is in prison, and it has recognized that criminality in parents is typically coupled with a host of other dysfunctional behaviors and characteristics:

Parental arrest and confinement lead to stress, trauma, stigmatization, and separation problems for children. These problems are coupled with existing problems that include poverty, violence, parental substance abuse, high-crime environments, intrafamilial abuse, child abuse and neglect, multiple care givers, and/or prior separations. As a result, these children often exhibit a broad variety of behavioral, emotional, health, and educational problems that are often compounded by the pain of separation.⁸⁴

Teen parents in juvenile detention have these same problems in addition to being immature.⁸⁵ Thus, for the state to create and continue a legal parent-child relationship between a newborn child and a birth parent who is in a prison or juvenile correction facility at the time of birth or who is highly likely to become incarcerated at a later point, because of a substantial history of violence or illegal substance abuse, is to set up the child for lifelong suffering and dysfunction.

In sum, scientific research shows that two things can seriously adversely affect an infant's physiological and psycho-emotional development—initial placement in the custody of parents who are incapable of providing consistent nurturing and, alternatively, disruption of a healthy initial attachment with good caregivers. The best child welfare policy is therefore one that aims to get parentage right at the outset and then supports whatever choice of initial parentage is made. Accordingly, certain current practices discussed below are quite detrimental to children. The state routinely confers legal parenthood and custody on birth parents even when the state is aware that the birth parents have serious maltreatment histories with other children, have intractable substance abuse or mental health problems, and/or are incarcerated. And when the state does take custody of children, temporary foster care is

83. See, e.g., PATCHIN, *supra* note 74, at 16 (“[C]hildren of prisoners are extremely vulnerable to engage in delinquent behavior possibly due to the combination of disruption (being absent) and exposure to deviant parental beliefs.”).

84. 42 U.S.C. § 629i(a)(1)(D) (Supp. 2004).

85. See LESLIE ACOCA & KELLY DEDEL, NO PLACE TO HIDE: UNDERSTANDING AND MEETING THE NEEDS OF GIRLS IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM 10 (1998) (“The vast majority of girls in the juvenile justice system are experiencing one or more serious physical- and/or mental-health disorders.”).

still the norm for placements after removal of all children, including infants, and the number of placement transitions for children in the foster care system is shockingly high—nationally, six placements per child on average.⁸⁶

B. WHY NEWBORNS ARE DIFFERENT

More generally, child-protection law fails to differentiate among children by age, instead taking a “one rule fits all ages” approach.⁸⁷ Correspondingly, many legal scholars writing about the child-protection system write as if all children are affected in the same ways by it, regardless of age.⁸⁸ Yet several things clearly differentiate newborn children from older children who come to CPS attention. First, as discussed above, the first year of life is the most important developmentally. Second, children are readily adoptable immediately after birth, but their chances for adoption diminish steadily from that point on, especially if they incur maltreatment or spend a substantial period of time in foster care.⁸⁹ Third, newborn children have no established relationship with birth parents to maintain.

86. See Clare Huntington, *Rights Myopia in Child Welfare*, 53 UCLA L. REV. 637, 660 (2006); SMITH ET AL., *supra* note 80, at 155 (reporting the results of a 2004 government study of multiple foster care placements); RYAN, *supra* note 80, at 3-3 (showing that out of 1936 children removed from custody of substance-abusing parents in Cook County, only one was in a pre-adoptive foster care placement).

87. See WULCZYN ET AL., *supra* note 2, at 9 (“[T]he child welfare system has a long history of one-size-fits-all solutions that ignore what is known about well-being and human development.”); *id.* at 122 (“[T]he federal framework for child welfare services . . . is almost completely silent on ways to account for age or development.”); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 667–72 (1999) (noting that AFSA treats different children with different needs identically).

88. *Cf.* Dicker & Gordon, *supra* note 42, at 30 (“[T]he needs of infants . . . are often invisible to the court and child welfare system.”); Lederman et al., *supra* note 75, at 33 (noting that infants historically have been largely ignored).

89. See BARTHOLET, *supra* note 36, at 181 (“The potential pool of adoptive parents is enormous—it dwarfs the pool of waiting children. About 1.2 million women are infertile and 7.1 percent of married couples, or 2.1 million.”); *id.* at 241 (“[W]e have a system that holds children too long in their homes of origin and in out-of-home care until they have suffered the kind of damage that makes it hard for them to adjust and to bond in a new family”); U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN, GAO-02-585, at 29 (2002) [hereinafter GAO] (reporting difficulties states experience in finding adoptive parents for children with behavioral problems); *id.* at 38 (noting that states are increasingly finding it diffi-

This last fact, in particular, is typically overlooked by those who advocate for family “reunification” efforts in all cases. For example, Dorothy Roberts, a prominent critic of the child-protective system, writes:

Think for a moment what it means to rip children from their parents and their siblings to be placed in the care of strangers. Removing children from their homes is perhaps the most severe government intrusion into the lives of citizens. It is also one of the most terrifying experiences a child can have.⁹⁰

What Roberts describes is simply not applicable to children taken into state custody at birth or within the first few months of life. Those children are not attached to their birth parents and experience no terror in the absence of their birth parents.⁹¹ It is not until after some months of life that children begin to differentiate among persons in the environment and associate particular persons with particular experiences, such as satisfaction of their physical and emotional needs or, conversely,

cult to find adoptive homes for older children in foster care); WULCZYN ET AL., *supra* note 2, at 112 (noting that the likelihood of adoption decreases as age increases); Libby S. Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. ON LEGIS. 1, 11 (2001) (noting that as children get older it becomes more difficult to find them permanent homes); Brian H. Bix, *Perfectionist Policies in Family Law*, 2007 U. ILL. L. REV. 1055, 1061 & n.37 (citing statistics and noting that “given the current supply and demand for children for adoption, there is every reason to believe that a baby given up immediately after birth would have no trouble finding a loving home”); Gordon, *supra* note 87, at 667–68; Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1745 (2000) (“By the time the foster children are eligible for adoption—the time it will take to exhaust reunification efforts and the time it will take the courts to order termination—children will almost certainly be older than two years, and often considerably older. These simply are not the children that these couples want to adopt.”); Child Welfare Information Gateway, *Concurrent Planning: What the Evidence Shows*, April 2005, at 5, http://www.childwelfare.gov/systemwide/laws_policies/statutes/concurrent.pdf [hereinafter CWIG, *Concurrent Planning*].

90. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 173.

91. See Kelly & Lamb, *supra* note 49, at 299 (stating that during the first two months of life infants accept care from any caregiver and show no preference among them whereas between two and seven months infants “begin to recognize certain caregivers and prefer interaction with them” but still “do not protest when separated from their parents”); Viola Macchi Cassi et al., *A Behavioural and ERP Investigation of 3-Month-Olds’ Face Preferences*, 44 NEUROPSYCHOLOGIA 2113, 2114 (2006) (“[W]hat is classically interpreted as a specific inborn preferential response to faces is in fact the result of a more general preference for any class of top-heavy visual stimuli displaying more patterning in the upper portion.”); *id.* at 2115 (citing studies showing increasing selectivity, between six and twelve months).

trauma.⁹² And it is not until the period when attachment solidifies, between seven and twenty-four months of age, that children experience stress from being separated from a particular caregiver.⁹³

In light of newborns' preattachment reality, it is a misnomer to characterize efforts at rehabilitating unfit birth parents of newborns as "reunification," and it is incorrect to characterize taking a newborn into CPS custody as disruption of a family relationship. A newborn has not been in a relationship with the birth parents that could be disrupted, and so cannot logically be reunited with them. The question from a CPS perspective in the case of a newborn is whether the state will try to *create* a minimally adequate relationship in the first instance between a child and birth parents whom the child has never known, and either place the newborn in birth parents' custody or hold the newborn in foster care while CPS tries to make such custody possible, or will instead immediately create a permanent relationship for the child with some other adults who are already well prepared to be nurturing caregivers.

If the state chooses the former path, establishing and maintaining for a substantial period a legal relationship with unfit birth parents, it actually sets up the children for the terrifying experience Roberts describes, given the high probability of maltreatment in the birth parents' custody and the substantial possibility of ultimate adoption by someone other than the foster parents (resulting in severance of any relationship the baby has with the foster parents) in cases where birth parents are incapable of taking custody at the child's birth. What observers of and participants in the child-protection system need to acknowledge is that the prevailing practice of placing children in foster care and attempting to rehabilitate their parents is simply ineffective in a large percentage of cases. Sensible policy and proper respect for newborns' needs and moral rights should lead agencies to try to identify the newborns whose parents have the poorest prognosis and to take the latter path with those babies—that is, immediate placement with adoptive parents. CPS agencies generally do not have sufficient funding to provide substantial services to all the parents they now attempt to rehabilitate, so the resources are spread thinly over all

92. Kelly & Lamb, *supra* note 49, at 299.

93. *Id.*

rather than concentrated on parents who have a reasonable chance of becoming capable of adequate care giving.⁹⁴

The most common response to acknowledgement of the limited resources for reforming dysfunctional parents is to argue that the only policy change needed is to devote massively more public resources to the child-protective system and to services for unfit parents, and that terminating parental rights is unfair so long as the state does not provide parents with effective services. There are two problems with this response. First, even the best, most resource-intensive parent-rehabilitation programs, with all the facilities and services and encouragement experts typically recommend, have very little success with dysfunctional parents.⁹⁵ For example, a five-year demonstration

94. See HUDSON ET AL., *supra* note 60, at 21 (noting a lack of funding for needed mental-health services); GAO, *supra* note 89, at 42 (noting a lack of substance abuse treatment); NSCAW, *supra* note 77, § 11.6 (“There is no doubt that most of the children and families who come to the attention of child welfare agencies receive very little direct service from the agency.”); Richard P. Barth et al., *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL’Y & L. 371, 395 (2005) (“Financing for family reunification services is very limited and inflexible. Even when there are resources to pay for assisting parents, the parent training technologies for family reunification are massively underdeveloped.”); Gordon, *supra* note 87, at 662–66.

95. See CAPTA: *Successes and Failures at Preventing Child Abuse and Neglect: Hearing Before the Subcomm. on Select Education of the Comm. on Education and the Workforce*, 107th Cong. 70 (2002) [hereinafter CAPTA] (statement of Richard Gelles) (“[A]s yet, there is no empirical evidence to support the effectiveness of child welfare services in general or the newer, more innovative intensive family preservation services.” (emphasis removed)); SMITH & FONG, *supra* note 45, at 185 (“[T]here remain, at the present time, no intervention techniques that have been proven to be consistently successful with families who neglect their children”); WULCZYN ET AL., *supra* note 2, at 8 (“[R]esearch has so far struggled to find effective services for maltreatment, placement prevention, and family reunification.” (citation omitted)); *id.* at 170 (“[V]ery few interventions that address maltreatment and placement have met the standard scientific criteria of effectiveness.”); Ethier et al., *supra* note 71, at 22 (reporting the results of study of parents in rehabilitation programs, showing that “after 4 years of intervention and services received, 62% of the mothers still display a high level of abuse and neglect problems”); FLUKE & HOLLINSHEAD, *supra* note 80, at 12 (citing a study that found “duration, intensity and breadth of family preservation services had little overall impact on the recurrence of child maltreatment” (emphasis removed)); Nat’l Conf. of State Legis., *States Using Evidence-Based Methods to Prevent Child Abuse*, PUB. HEALTH NEWS, May 3, 2004, at 1, 2 available at <http://www.ncsl.org/print/health/preventabuse.pdf> [hereinafter NCSL] (discussing studies showing that many programs that “look good cosmetically” in fact have not been proven effective). Successful parent rehabilitation is especially unlikely when children are removed from parent custody in infancy; only around one third of newborns taken into state custody ultimately “reunify” with birth par-

project in Cook County, Illinois that provided 1500 randomly selected parents with a comprehensive needs assessment, entry into treatment programs within twenty-four hours of assessment, and a "Recovery Coach" to coordinate their services, monitor their progress, advocate on their behalf, and give them encouragement succeeded in securing the recommended services very quickly for the vast majority of parents in the program, but raised the rate at which social workers thought it "safe" to return a child to parent custody only from 11.6% to 15.5%.⁹⁶ Most parents whose children need to be taken into state custody have dysfunctions so deep, stemming from damage they themselves incurred as children, that they are not going to overcome them even in a couple of years,⁹⁷ and newborns cannot wait more than six months or so for a permanent and nurturing caregiver.

Second, even if a massively greater investment in parental rehabilitation would lead to a timely transformation of enough unfit parents to make waiting for their birth parents a good bet for at-risk newborns, until that investment is made the children now being born to unfit parents should have their needs addressed based on what is actually available, not what would be available in a perfect world. If the current foster care system is a failure, as some maintain, then we should be quite uncomfortable about placing children in it, especially newborn babies, while we make unpromising efforts to effect dramatic changes in deeply dysfunctional birth parents. If birth parents are so unfit at the time of birth that their having custody of a baby would be detrimental to the baby even with CPS oversight, then the best bet for the baby is most likely to be immediate termination of birth parents' rights and placement of the baby for adoption.

Importantly, even where there is a good chance of eventual birth-parent custody, it makes much less sense for a newborn than for an older child to wait for that to occur. It is a mistake simplistically to assume that placement with the legal parents, following a court determination that that would be safe, is always or even usually the best outcome for children who enter

ents. See ZERO TO THREE, *supra* note 70, at 1.

96. See RYAN, *supra* note 80, at 1-1 to 1-11, 3-3.

97. Observers of child protection agency practices note that most parents reported for child maltreatment have little motivation or capacity to become rehabilitated. See, e.g., CAPTA, *supra* note 95, at 69-70 (statement of Richard Gelles); Bartholet, *supra* note 25, at 339; NSCAW, *supra* note 77, at tbl.A-11.

the foster care system. In most cases in which “reunification” does occur today, the placement with birth parents occurs only after a year or more of rehabilitative efforts, and roughly half occur only after two or more years.⁹⁸ A year is simply too long for a newborn to wait for a biological parent to become capable of custody, and transferring custody to a birth parent after a year is likely to entail a detrimental disruption of an attachment to the initial caregiver if the child was placed with foster parents. Moreover, reunification does not mean that a child will then have even a decent upbringing; a substantial percentage of children whom the state transfers from foster care to birth-parent custody end up in the child protective system again, after another maltreatment report,⁹⁹ meaning that the child has multiple damaging disruptions during the crucial first years of life. Further, many of those who do remain in the parents’ home thereafter will have only a marginal existence, suffering maltreatment that goes undetected or receiving parental care that is just above the local CPS agency’s threshold for intervention.

Placing babies born to criminals in a holding pattern while birth parents serve jail terms is also very detrimental to the children, because of the impact on attachment and on a child’s sense of identity. Even after release, incarcerated parents are generally not able for some time to establish a home for and take care of a child,¹⁰⁰ so the child’s wait for permanency is likely to extend well beyond the expected release date, which is itself likely to be years down the developmental road if the parents have committed felonies.¹⁰¹ In addition, most incarcerated mothers suffer from a host of personal problems—in particular,

98. See Barth et al., *supra* note 94, at 394 (“Reunifications often result after quite a long time, well beyond what the law has now set as the time for the first permanency review (i.e., twelve months). Prior investigations have shown that about half of reunifications that occur do so in the first six to eighteen months, but that the remaining half will require an additional two or more years to do so.”); Cohen & Youcha, *supra* note 41, at 15 (noting that half of babies who enter foster care before three months of age spend thirty-one months or more in foster care); Dicker & Gordon, *supra* note 42, at 31 (noting that babies who enter foster care at less than three months of age are the most likely to “spend twice as long in care as older children”).

99. See Ethier et al., *supra* note 71, at 22; NCSL, *supra* note 95, at 1–2.

100. See Laurie P. Cohen, *A Law’s Fallout: Women in Prison Fight for Custody*, WALL ST. J., Feb. 27, 2006, at A1.

101. See Sally Day, *Mothers in Prison: How the Adoption and Safe Families Act of 1997 Threatens Parental Rights*, 20 WIS. WOMEN’S L. J. 217, 225 (2005) (“The average state prison inmate-mother serves a term of forty-nine months. Mothers in the federal system serve an average of eighty-three months.”).

drug addiction, alcoholism, mental illness, and lack of education—that will continue to plague them after release, and accordingly they are quite likely to return to prison after being “reunited” with the babies to whom they gave birth while in prison.¹⁰²

The alternative of placement of newborns for adoption, on the other hand, is a safe bet. There is no evidence that being raised by adoptive parents per se, rather than by biological parents, produces adverse outcomes for children.¹⁰³ In fact, children raised from birth by adoptive parents on average have better welfare outcomes than children raised by biological parents in general,¹⁰⁴ which is likely explained by the fact that adoptive parents, as evidenced by their successful completion of an intrusive and somewhat arduous qualification process, on average have a stronger motivation to be parents and have greater competencies and resources than the general population. This reality gives us some sense of the relative importance of the biological connection for children; it is significant, but positive nurturance is much more important. Tellingly, studies of adopted persons who go in search of their biological parents (which is certainly not something all adopted persons do) never suggest that, upon meeting and getting to know their biological parents, any adopted persons say that they wish they had been raised by their biological parents rather than by their adoptive parents.¹⁰⁵ It is subjectively important for many of them to

102. *Id.* at 224 (“Women’s convictions tend to come in the context of dismal personal histories.”); *id.* at 225 (detailing “socio-economic and health challenges” faced by mothers in prison); MUMOLA, *supra* note 64, at 7 (showing that two-thirds of mothers in state prison had a prior conviction and that nearly one-half had two or more prior convictions); *id.* at 8 (showing that 86% of mothers in state prisons had a history of illegal drug use); *id.* at 9 (showing that 22.5% of mothers in state prison are mentally ill).

103. See Bartholet, *supra* note 25, at 331 (“Sociobiologists who promote the biological favoritism theory have produced little empirical support for its validity in the realm of human parenting.”).

104. See GAO, *supra* note 89, at 14 (“Limited evidence suggests that few adopted children returned to the child welfare system.”); ELIZABETH BARTHOLET, *FAMILY BONDS* 164–86 (1993) (discussing empirical literature).

105. See James Gladstone & Anne Westhues, *Adoption Reunions: A New Side to Intergenerational Family Relationships*, 47 *FAM. REL.* 177, 179 (1998); Karen March, *The Dilemma of Adoption Reunion: Establishing Open Communication Between Adoptees and Their Birth Mothers*, 46 *FAM. REL.* 99, 103–04 (1997); Paul Sachdev, *Adoption Reunion and After: A Study of the Search Process and Experience of Adoptees*, 71 *CHILD WELFARE* 53, 64–65 (1992); Mark Simpson et al., *Adoptees in Search of Their Past: Policy Induced Strain on Adoptive Families and Birth Parents*, 30 *FAM. REL.* 427, 432 (1981). Adoptee searchers are overwhelmingly female and interested only in knowing their

make that connection with their biological past, but having a good, secure, loving upbringing is vastly more important.

In short, for a substantial percentage of newborn children whose parents have previously manifested unfitness or who are currently incapacitated by reason of serious and chronic substance abuse, severe mental illness, or incarceration, there is very little chance of their having a decent life with their birth parents, and the only sensible surrogate decision in their behalf by the state would be to move for TPR and adoption immediately after birth. The best-interests equation is much different for newborns than it is for older children, and the law can and should reflect this difference. It should push CPS agencies to view protective intervention and TPR differently for newborns than for older children. As Part III explains, recent legislative reforms at the federal level aimed to induce more proactive child protective intervention, with a particular focus on preventing maltreatment of additional children within the same family after a parent has been found to have abused or neglected one child.

III. FEDERAL LAWS PUSHING STATES TO BE PROACTIVE

Since the 70s, the federal government has played a significant and expanding role in state child protection efforts, through funding legislation that conditions grants to states on their enacting certain types of laws to govern child maltreatment cases. States have generally conformed their laws to the federal funding conditions. Since the mid-90s, the thrust of federal legislation has been to push states to intervene before high-risk parents abuse or neglect a child, with particular concern for at-risk newborns.

Congress began to construct the current framework of federal funding conditions with the 1974 Child Abuse Prevention and Treatment Act,¹⁰⁶ which required states to institute a system of mandatory child maltreatment reporting by people in certain positions, such as teachers and doctors. Then in 1980, Congress reacted to complaints that children were remaining in foster care too long because local CPS agencies were not giving parents enough help in overcoming problems that led to removal. It passed the Adoption Assistance and Child Welfare Act of

birth mother, not their biological father. Sachdev, *supra*, at 57–58.

106. Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. §§ 5101–5106 (2000)).

1980 (“AACWA”),¹⁰⁷ which required states to make “reasonable efforts” to avoid the need for removing children from parental custody following a maltreatment report and, when removal is necessary, to secure the reunification of parent and child.¹⁰⁸ Thus, the initial federal focus was on reacting to child abuse or neglect after it had occurred, rather than on preventing maltreatment in the first instance by intervening on the basis of maltreatment risk.¹⁰⁹

In the mid-90s, however, Congress fielded widespread complaints that states were doing too little to prevent child abuse and neglect, were allowing unfit parents too much time to become rehabilitated, were unwisely endeavoring to rehabilitate parents who were extremely unlikely to become fit to have custody within a reasonable time, were lax in moving children in foster care to permanent placements when reunification with parents was not possible, and were subjecting children to multiple foster care placements.¹¹⁰ Congress recognized that these practices were damaging children and wasting public funds.¹¹¹

107. Pub. L. No. 96-272, 94 Stat. 500 (1980) (codified in scattered sections of 42 U.S.C. (2000)).

108. See *id.* § 101; Adler, *supra* note 89, at 3 (noting that AACWA was an “effort to address the problem of foster care drift” but still “emphasized family preservation”).

109. See, e.g., 148 CONG. REC. H1502 (daily ed. Apr. 23, 2002) (statement of Rep. Holt in support of the Adoption and Safe Families Act); WULCZYN ET AL., *supra* note 2, at 12 (“A common thread in the criticism of child welfare services is their residual or reactive nature.”).

110. See BARTHOLET, *supra* note 36, at 24 (“[W]e try to avoid removing children from their families at all costs and to return children who are removed as quickly as possible.”); *id.* at 235 (“[Family preservation activists] condemn the state for being too reluctant to respond to serious child maltreatment with coercive measures, to remove children from harm’s way, and to terminate parental rights so that children can be moved on to safe, nurturing families.”); Adler, *supra* note 89, at 3 (noting that foster care caseloads “overwhelmed family preservation resources” and that Congress reacted to “[e]gregious incidents of child abuse, occurring as state agencies made futile attempts to preserve troubled families”); Barth et al., *supra* note 94, at 372–74 (citing foster care drift, efforts “to reunify children with even the most difficult families,” and research showing that even infants were experiencing multiple foster care placements); Berrick et al., *supra* note 80; Gordon, *supra* note 87, at 646–48 (noting that ASFA was passed in response to concerns that local CPS agencies were undertaking excessive efforts to rehabilitate parents and were trying to return children to parents in whose care children could never be safe).

111. See, e.g., 143 CONG. REC. S12668 (daily ed. Nov. 13, 1997) (statement of Sen. Jeffords) (“[I]f a parent has been found to have murdered another child in the family, or has subjected a child to chronic abuse, it is unreasonable—and irrational—to insist that the state return that child to the family.”); 143

Speaking in support of ASFA, legislators blamed states for exaggerating the AACWA reasonable efforts requirement. Senator DeWine stated:

We need [this bill] because of an unintended consequence of a bill that was passed by this Congress in 1980. . . . [The AACWA], tragically, has often been seriously misinterpreted by those responsible for administering our foster care system. Too often, reasonable efforts, as outlined in the statute, have come to mean unreasonable efforts. It has come to mean efforts to reunite families which are families in name only. I am speaking now of dangerous, abusive adults who represent a threat to the health and safety and even the lives of these children. . . . Clearly, the Congress of the United States in 1980 did not intend that children should be forced back into the custody of adults who are known to be dangerous and known to be abusive.¹¹²

Congress reacted with legislation aimed at shortening children's time in foster care, avoiding wasted efforts with irredeemable parents, achieving permanency for children of such parents more quickly, and, crucially, encouraging states to take a more proactive, preventive approach to child abuse and neglect.¹¹³

To minimize time in foster care for already-maltreated children, ASFA requires a "permanency hearing" within twelve months of a child's placement and, under the "15-22 rule," a petition for termination of parental rights (TPR) if a child has been in foster care for fifteen of the most recent twenty-two months.¹¹⁴ Relatedly, ASFA requires states to authorize TPR

CONG. REC. S12,198 (daily ed. Nov. 8, 1997) (statement of Sen. Helms) ("Foster care children should not be returned to unfit, abusive parents. . . . Because the current Federal law requires States to make reasonable efforts to reunite children with their biological parents, children have tragically been returned to their abusive and sometimes murderous parents."); 143 CONG. REC. H2012 (daily ed. Apr. 30, 1997) (statement of Rep. Pryce) ("[T]he most important change we can make is to elevate the rights of children because too often a foster child's best interests are abandoned while courts and welfare agencies drag their feet. To correct this injustice, H.R. 867 [ASFA] places the safety and well-being of children above efforts by the State to reunite them with biological parents who have abused or neglected them.")

112. 143 CONG. REC. 12,668 (daily ed. Nov. 13, 1997); *see also* H.R. REP. 105-77 (1997), *reprinted in* 1997 U.S.C.C.A.N. 2739 (noting that CAPTA's reasonable efforts requirement, applied in a manner too protective of parents' rights, had operated as an undesirable obstacle to adoptions that would be beneficial to children).

113. GAO, *supra* note 89, at 1-2; D'Andrade & Berrick, *supra* note 80, at 31-32.

114. 42 U.S.C. § 675(5) (2000). This feature of ASFA appears to have had a discernible impact on the operation of local child protection agencies and to have increased dramatically the number of adoptions in the United States. *See* Barth et al., *supra* note 94, at 386.

without any efforts to rehabilitate abusive parents (also known as “reunification bypass” or “fast-track TPR”) in cases where a “parent has subjected the child to aggravated circumstances,” which would at a minimum include more heinous forms of maltreatment. This would allow for a severely abused or neglected child’s adoption with much less time spent in foster care. In addition, ASFA clarifies that AACWA’s “reasonable efforts” requirement does not preclude states from “concurrent planning”—that is, placing a child in a preadoptive foster home and completing steps toward adoption while also working toward reunification with birth parents, so that if the parents do not succeed in rehabilitation, an adoption can happen more expeditiously and without disrupting the child’s life.¹¹⁵

What was conceptually revolutionary about ASFA, though, was its emphasis on preventing maltreatment by reacting to a parent’s history of maltreatment with other children. ASFA’s “no reasonable efforts” provision requires states to authorize TPR without rehabilitate efforts even in some cases as to a child who has not yet been abused or neglected, cases in which the parents’ past conduct toward another child suggests the child is at very high risk of maltreatment. Specifically, ASFA required states to authorize local CPS agencies to forego reasonable efforts and move immediately for a permanent placement other than with the biological parent if a biological parent has previously had rights terminated as to another offspring, has previously culpably killed or attempted to kill another offspring, or has previously committed felony assault resulting in seriously bodily injury against another offspring.¹¹⁶ In fact, ASFA directs states to legally *mandate* that CPS workers petition for TPR without rehabilitative efforts as to any child whose parent has been convicted of killing, attempting to kill, or committing felony assault against another offspring, unless CPS chooses to place the child with a relative or documents a compelling reason for determining that such a petition would not be in the child’s best interests.¹¹⁷ Further, Congressional supporters of ASFA were emphatic that the Act’s list of cases in

115. U.S.C. § 671(a)(15) (2000) (“[R]easonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts [to preserve and reunify families].”).

116. *Id.* § 671(a)(15)(D). Murder of the child’s other parent is also a basis for reunification bypass. *Id.* § 101(a)(15)(D)(ii).

117. *Id.* § 675(5)(E) (2000); *see also id.* § 5106a(b)(2)(A)(xvi).

which reasonable efforts were not required was not exclusive, and that states were free to add others.¹¹⁸

Though there is some evidence of a particular congressional concern with the damage done to the youngest children,¹¹⁹ the congressional record does not reflect a specific ASFA aim of promoting adoption of children over parental objection immediately after birth. Yet CPS agencies *could* use this authorization to petition for involuntary TPR without reasonable efforts as a basis for submitting such a petition immediately after a child's birth and for placing a newborn in an adoptive home, if the child's biological parent has a history of the specified sort.

A second highly significant federal law aimed at more proactive intervention, one that does clearly reflect a concern with newborns, is the Keeping Children and Families Safe Act of 2003 (KCAFSA). KCAFSA requires states to ensure (1) that medical professionals who detect drug exposure in newborns report this to the local child protective agency, and (2) that local CPS agencies react to such reports with "procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports" and "a plan of safe care" for the baby.¹²⁰ This was a bold step for Congress, given the widespread resistance, from the medical community and from advocates for reproductive freedom, to legal rules attaching any negative consequences to women's behavior during pregnancy.¹²¹ Supporters of KCAFSA decried the fact that substance

118. See, e.g., 143 CONG. REC. S12668 (daily ed. Nov. 13, 1997) (statement of Sen. DeWine) ("This bill . . . also includes a list of certain very specific cases in which reasonable efforts are not required. . . . Mr. President, let me point out now very carefully so there is no risk of misinterpretation on this floor, this list that I have just read is not meant to be an exclusive list. The authors of this legislation do not—do not—intend these specified items to constitute an exclusive definition of which cases do not require reasonable efforts to be made. Rather, these are examples—these are just examples—of the kind of adult behavior that makes it unnecessary, that makes it unwise, makes it simply wrong for the Government to make continued efforts to send children back to their care. This is not meant to be an exclusive list. We make this clear in the text of the bill.").

119. 143 CONG. REC. H2013 (daily ed. Apr. 30, 1997) (statement of Rep. Pryce) (noting the crucial developmental importance of a child's first years of life).

120. 42 U.S.C. § 5106a(b)(2)(A)(ii) to (iv) (Supp. 2004).

121. See, e.g., Nat'l Abandoned Infants Assistance Res. Center, *Substance Exposed Infants: Noteworthy Policies & Practices*, Sept. 2006, at 2, available at http://aia.berkeley.edu/media/pdf/sen_issue_brief.pdf [hereinafter NAIARC] (citing opposition by American Academy of Pediatrics to universal testing of newborns for drug exposure); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104

abusing mothers routinely take their children home without any safeguards in place, noting that a high percentage of such children end up abused or neglected, and they expressed the belief that this legislation would spare a great number of children from having to suffer permanent damage before receiving proper attention from local child welfare agencies.¹²² Supporters also criticized the traditional CPS approach of being reactive, and saw the Act as a significant step toward being more proactive.¹²³

In sum, federal legislative reforms since the mid-90s have created the potential for more proactive intervention to prevent at-risk children from ever being abused or neglected, and in particular for stepping in at the time of birth based on parental history or current dysfunction. In some such cases, CPS might need only to conduct an assessment of the birth parents' situation and offer assistance, such as home visits by a nurse or social worker.¹²⁴ In other cases, temporary placement of the baby in foster care might be appropriate, if the birth parents suffer from a temporary incapacity that they can overcome quickly

HARV. L. REV. 1419, 1419 (1991); Ellen M. Weber, *Child Welfare Interventions for Drug-Dependent Pregnant Women: Limitations of a Non-Public Health Response*, 75 UKMC L. REV. 789, 789–95 (2007).

122. See, e.g., 148 CONG. REC. H1511 (daily ed. Apr. 30, 2002) (statement of Rep. Greenwood) (“Today, children are born all over this country to mothers who have substance abuse problems. Their mothers are alcoholic or their mothers are drug addicts. These babies are born in hospitals, they are frequently underweight, they are frequently frail. . . . [T]hey are sent home from hospitals every day in this country and it is only a matter of time in so many instances until they return back to the hospital abused, bruised, beaten, and sometimes deceased. That is because we have not developed a system in this country to identify these children and intervene in their lives. The amendments that we put in this bill for the first time require the States to set up programs so that when these children are born to these addicted families that there is intervention. . . . In those cases where the mother is refusing or unable or unwilling to get help to protect her child, to mother properly, to parent properly, or where the home situation is just too chaotic and too violent for the child to be safe, then there can be intervention and the child can be placed in foster care. Over and over again, the newspapers of our country are replete with these cases of terribly, terribly abused, battered, sexually abused and sometimes beaten-to-death children who could have been saved if only we had intervened when we knew there was a problem, when we could see that this child was born to a dysfunctional family where substance abuse is the issue. Now we will be able to do that.”).

123. See, e.g., 148 CONG. REC. H1513 (daily ed. Apr. 23, 2002) (statement of Rep. Holt); 148 CONG. REC. H1509 (daily ed. Apr. 23, 2002) (statement of Rep. Miller).

124. See Cohen & Youcha, *supra* note 41, at 18 (discussing such programs and when they are likely to be effective); NCSL, *supra* note 95, at 1.

with assistance. As explained in Part II, however, in a significant percentage of cases the state action most consistent with the welfare of the newborn children will not be to send the child home and hope for the best, with or without services, nor to place the child in foster care while parent-rehabilitation efforts are undertaken, but instead to move immediately to create an alternative permanent family for the baby, via TPR and adoption. ASFA and KCAFSA took some steps toward making this possible, but for reasons described in Part IV, the reality today is that it almost never happens.

IV. WHY THE POTENTIAL IS UNREALIZED

It is somewhat difficult to know for certain to what extent states are effectuating the preventive aims of the federal laws Part III described. The federal oversight agency, the Children's Bureau at the Department of Health and Human Services, gathers little information on state practices in implementing ASFA and KCASFA,¹²⁵ and most states do not collect this information from their local CPS agencies.¹²⁶ Evidence from non-HHS sources is limited but suggests that local agencies still almost never seek TPR until after they spend considerable time trying to rehabilitate parents, so long as parents are present and resist termination. For example, a GAO survey of four states found that only 102 of 14,489 children entering foster

125. See GAO, *supra* note 89, at 23; Barth, et al., *supra* note 94, at 379 ("Because rigorously designed and large-scale evaluations of ASFA do not exist, uncertainty about the impact of ASFA continues to be great. . . . The Adoption and Foster Care Analysis and Reporting System (AFCARS) [HHS's instrument for collecting data on state practices] . . . has few variables per case, and has not been structured to follow cohorts of children over time. Thus it has very limited utility for understanding the way that child welfare services might have changed."); *id.* at 392 ("[T]here is no federal oversight of the development or application of exemption [i.e., "no reasonable efforts"] provisions."); D'Andrade & Berrick, *supra* note 80, at 37 ("[T]here are no reporting requirements associated with this aspect [reunification bypass] of the law. States do not have to report or monitor when reunification exception is employed, or which of the available conditions are used to deny reunification services to parents.") The implementing regulations are 45 C.F.R. §§ 1355.10 to 1355.57 (2007).

126. See D'Andrade & Berrick, *supra* note 80, at 37 ("[M]ost states were not able to provide data on the use of reunification exceptions." (citation omitted)); *id.* at 41 ("California does not require that counties track how and when reunification exception conditions are applied, or which are used."). I requested such information from the Virginia Department of Social Services and was told that the Department does not ask localities to report on the statutory bases for TPR petitions nor on whether rehabilitation efforts were made prior to petitioning for TPR.

care were “fast-tracked” for adoption,¹²⁷ and that only one percent of children adopted from foster care are under age one.¹²⁸ That tiny fraction of cases in which adoption occurs soon after birth might well comprise solely cases in which birth parents acquiesce to TPR. This Part explains why states still almost never place children born to unfit parents in adoptive homes until after the children have been permanently damaged by maltreatment and/or prolonged foster care.

A. HIGH-RISK PARENTS DO NOT COME TO THE STATE’S ATTENTION

Although ASFA created bases for TPR and adoption immediately after birth for some children whose birth parents have previously demonstrated unfitness, it did nothing to ensure that such children come to CPS attention at the time of birth. If CPS is unaware that a parent who has previously horribly abused or killed a child has procreated again, it can do nothing to protect the newborn child from also becoming a victim. Such parents typically are able to procreate again, because they receive little or no jail time.¹²⁹ Likewise, if adults with chronic

127. GAO, *supra* note 89, at 24; *see also id.* at 3 (concluding that states use the “fast track” authorization infrequently); U.S. GEN. ACCOUNTING OFFICE, FOSTER CARE: STATES’ EARLY EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT, GAO/HEHS-00-1, 9 (1999) (noting that only two states supplied data on TPR without reasonable efforts, and of those two, one reported four instances and the other reported zero); Barth, et al., *supra* note 94, at 390 (“Information from over two hundred cases that have experienced TPRs in the NSCAW study shows that only five percent of these decisions were made earlier than twelve months in to the case. Around three-fourths followed an attempt at reunification services that parents did not participate in.” (citation omitted)); Berrick, et al., *supra* note 80, (discussing a California study showing courts authorized reunification bypass in fewer than 10% of cases in which statutes authorized it). Conversations I have had with local CPS directors and CPS attorneys in Virginia are consistent with the impression these studies create; agencies continue doing business the way they long have, automatically placing children they remove, of whatever age, in foster care and, unless the parents simply refuse to cooperate, giving the parents a year or more to improve.

128. GAO, *supra* note 89, at 22.

129. *See* ELLEN GRAY, UNEQUAL JUSTICE: THE PROSECUTION OF CHILD SEXUAL ABUSE 10–11 (2003); Jennifer M. Collins, *Lady Madonna, Children at Your Feet: The Criminal Justice System’s Romanticization of the Parent-Child Relationship*, 93 IOWA L. REV. 131, 133 (2007); John Hopkins, *Inmate’s Release: 3-Year Term Ends Today for Killer of Stepdaughter*, VA. PILOT, July 20, 2007, at A1 (discussing the short sentence for a man who pled guilty to molesting and killing a two-year old girl—four years after going unprosecuted for the death of his own one-month old daughter—and noting that the mother of the one-month old had been “charged with murder, convicted of felony child abuse,

and severe substance abuse or mental health problems procreate, CPS can do nothing to protect the child they produce if no one perceives the problem and notifies CPS. Yet neither federal nor state law ensures that *any* newborn children at high risk of maltreatment come to the attention of local CPS agencies *before* being abused or neglected.

State reporting laws generally do not include as a factual trigger for a report to CPS the presence of an ASFA “no reasonable efforts” ground for TPR—for example, that birth parents have previously tortured or abandoned another child, and ASFA did not direct states to do so. Reporting laws generally require some people and permit others to report only suspicions that a child *has been* abused or neglected or that a parent has engaged in conduct that puts the child in immediate danger.¹³⁰ Indeed, birthing facility staff will typically have no reason to be aware of a birth parents’ child maltreatment history. Even if by happenstance they are aware of such history, they have no legal grounds for notifying CPS of the birth. Reporting laws generally also do not require reporting to CPS of births to parents who are mentally ill or who are in prison.

In any state, therefore, a parent who yesterday was convicted of felony assault against one child, or had parental rights terminated as to another child because of horrible abuse or neglect of the other child and a failure to respond to a program of rehabilitative services, can give birth today and walk out of the hospital with the new baby without any supervision and without the local CPS agency—who just argued in court that the parents were unfit to have custody of a child—even being aware of the new child. Regardless of parental history, hospit-

and put on probation”).

130. See, e.g., N.Y. SOC. SERV. LAW § 413 (McKinney 2003 & Supp. 2008); 23 PA. CONS. STAT. ANN. § 6311 (2001 & Supp. 2008); VA. CODE ANN. § 63.2-1509(A) (2007 & Supp. 2008). On occasion, hospitals invoke such imminent-danger provisions as justification for notifying CPS when a birth parent is manifestly incapable of caring for a child, perhaps because she is mentally ill. See, e.g., *Sylvia v. Hampton Dep’t of Soc. Servs.*, No. 1557-06-1, 2007 WL 817444, at *2 (Va. App. Mar. 20, 2007) (upholding the juvenile court’s finding that a newborn was “abused and neglected by virtue of appellant’s behavior in the hospital” and ordering that the child be taken into CPS custody on that basis). But such rules have conventionally been interpreted to refer to situations of concrete immediate peril to a child, such as a parent poised to do violence to a child or a home environment in which dangerous items such as drug needles or guns are lying about. See, e.g., N.D. CENT. CODE § 27-20-02 (2006) (including within the definition of “deprived child” a child who is “present in an environment subjecting the child to exposure to a controlled substance . . . or drug paraphernalia”); Weithorn, *supra* note 79, at 68.

als send newborn children home with birth parents, and local CPS agencies are generally unaware of the child's existence until they get a call informing them that the newborn, after going to live with the birth parents, has suffered harm from abuse or neglect, at which point CPS workers might lament: "I knew we'd be seeing those parents again."¹³¹

The one situation in which CPS now must be called in at the time of a child's birth is detection of in utero drug exposure, following KCAFSA. This might appear an effective way of triggering CPS proactive intervention for a high percentage of at-risk children, given the high correlation between maternal drug abuse and both newborns' developmental fragility and postpartum parental abuse or neglect of children. However, KCAFSA had major gaps and states are exploiting them. First, KCAFSA covers only exposure to illegal drugs, not exposure to high amounts of alcohol,¹³² even though children born to alcoholic mothers also have special needs and are at heightened risk of maltreatment.¹³³ Second, birthing facilities are not required to test for exposure to illegal drugs; KCAFSA did not mandate testing, and state laws generally do not require it.¹³⁴

131. Cf. CAPTA, *supra* note 95, at 64–65 (statement of Richard Gelles) ("Between 1,500 and 2,000 children are killed by their caretakers each year—and half of these children are slain after they or their families have come to the attention of authorities.").

132. See 42 U.S.C. § 5106a(b)(2)(A)(ii) (2000).

133. See Malbin, *supra* note 77, at 53–54 ("Parents of children with FASD often themselves have undiagnosed brain damage (i.e., FASD) that compromises their ability to successfully complete court-mandated programs."); *id.* at 54 (noting that most children with fetal alcohol spectrum disorder develop behavioral problems including attention deficit disorder, hyperactivity, reactive attachment disorder, learning disorder, oppositional defiant disorder, serious emotional disturbance, and/or antisocial personality disorder).

134. See NAIARC, *supra* note 121, at 2. Minnesota mandates that a toxicology test be given to a pregnant woman if she has obstetrical complications that indicate the possible use of a controlled substance, and of a newborn if there is evidence of prenatal exposure to a controlled substance. MINN. STAT. § 626.5562 (2006). Virginia requires that providers of prenatal care "establish and implement a medical history protocol for screening pregnant women for substance abuse . . ." VA. CODE ANN. § 54.1-2403.1(A) (2005). However, detection of substance abuse by means of such a protocol does not trigger a requirement that the baby be tested for exposure nor a requirement that medical professionals notify the local CPS agency of the mother's substance abuse. In fact, the law proscribes release of the information to anyone other than the woman herself, her representative, or her other health care providers. VA. CODE ANN. § 54.1-2403.1(B), (C) (2005). And it dictates that the information is to be used to counsel and treat the woman and shall be inadmissible in criminal proceedings. VA. CODE ANN. § 54.1-2403.1(D) (2005). Other states' statutes might authorize hospitals to test for drug exposure but not require that they

Whether physicians or nurses test newborns for drug exposure typically depends on hospital policy or individual predilection, and evidence suggests it is not done consistently for drugs and is rarely done for alcohol.¹³⁵ Given physicians' reluctance to report misconduct by their patients to state authorities, some who would have tested before KCASFA might now choose not to, to avoid being in a position of being legally required to report to CPS. Many might believe, rightly or wrongly, that they need parental consent to perform tests on the baby if adverse legal consequences could follow,¹³⁶ and substance abusing parents would likely refuse consent. KCASFA thus might well have had the unintended, ironic effect of reducing detection of maternal drug abuse. In the U.S. as a whole, thousands of newborns are taken into state custody each year because of maternal drug addiction,¹³⁷ but experts believe this represents only a small fraction of the total number of children whose mothers are substance abusers—the vast majority do not come to CPS attention.¹³⁸

In addition to situations where parents with maltreatment histories or substance abuse problems give birth in hospitals and then take the child home without CPS awareness, there are situations in which birth parents do *not* take a newborn child home with them yet CPS still does not become aware of the child's birth, because the baby is handed off to a relative. This might happen informally, by virtue of a birth parent exiting the hospital with a child and immediately leaving the child with a grandparent or other relative. Somewhat more formally, it routinely occurs when birth parents are in prison. A significant number of women who are sentenced to jail are pregnant when they enter prison, or somehow become pregnant after entering prison, and so give birth while they are prisoners.¹³⁹ Many states do not require prison officials to inform the local

do so. See, e.g., KAN. STAT. ANN. § 214.160(2), (3) (2006); WIS. STAT. § 146.0255(2) (2006).

135. See NAIARC, *supra* note 121, at 2–3, 5.

136. See *id.* at 4 (discussing informed consent); see also WIS. STAT. § 146.0255(2) (2006) (“[N]o physician may test an expectant mother without first receiving her informed consent to the testing.”).

137. See Dicker & Gordon, *supra* note 42, at 31.

138. Steven J. Ondersma et al., *Child Protective Services' Response to Prenatal Drug Exposure: Results From a Nationwide Survey*, 25 CHILD ABUSE & NEGLECT 657, 661–63 (2001).

139. See Mariely Downey, *Losing More than Time: Incarcerated Mothers and the Adoption and Safe Families Act of 1997*, 9 BUFF. WOMEN'S L.J. 41, 41 (2001) (“Five percent of the women entering prison are pregnant.”).

CPS of births to inmates. In Virginia, for example, state statutes direct that any child born in the facility or to an inmate “shall be delivered to his father or other member of his family,” and only if no relative steps forward are prison officials to involve CPS.¹⁴⁰ Placement with a “father or other member of the family” usually means placement with non-parent relatives, because for most children born to imprisoned mothers the biological father is not available.¹⁴¹

Placement with nonparent relatives can be fine for a child; the relatives might be good caregivers and might ultimately adopt the child. But in most instances, the relatives will not adopt the child, and so the child will for some time following birth not be in the custody of adults who will be the child’s permanent parent figures. Relatives typically intend to care for the child just until the birth parent gets out of jail.¹⁴² If the parent will be out a few months after the birth and immediately take custody, the disruption in care might not have adverse consequences, because the child will not yet have attached to the nonparents. But if it will be much later than that, which is likely if the parent was convicted of a felony (other than child abuse),¹⁴³ the child will likely either attach to the nonparent caregivers, in which case a transfer of custody to the released mother will disrupt the attachment, or the child will not attach to any caregiver. As explained in Part II, either would eventually be detrimental to the child’s development,

In addition, as discussed further below, many relatives of prison inmates are not good caregivers, and their having custody can be quite detrimental to a child. Criminals tend to come from pervasively dysfunctional families and communities, and most of them were themselves abused or neglected as children, by the very persons who are most likely, now as grandparents, to step forward to take custody of the child.¹⁴⁴ A state’s direc-

140. VA. CODE ANN. § 37.2-714 (2005 & Supp. 2008). *See also* MASS. GEN. LAWS ch. 119 § 23A (2002).

141. *See* Downey, *supra* note 139, at 45 (“Seventy to ninety percent of incarcerated mothers are the sole caregivers for their children.”); MUMOLA, *supra* note 64, at 3 (stating that only 28% of mothers in state prison received childcare assistance from the fathers).

142. *See* Gordon, *supra* note 87, at 659.

143. *See* Downey, *supra* note 139, at 47.

144. *See, e.g.*, MUMOLA, *supra* note 64, at 3 (stating that for 53% of mothers in state prison, their children are in the care of a grandparent); Laurie Miller Brotman et al., *Preventive Intervention for Urban, Low-Income Preschoolers at Familial Risk for Conduct Problems: A Randomized Pilot Study*, 32 J. CLINICAL CHILD & ADOLESCENT PSYCHOL. 246, 246–47 (2003) (noting “environmen-

tion to place children of inmates in the custody of prisoners' relatives, without notification of CPS so that social workers can determine whether such a placement is good for a child, is therefore likely to be greatly detrimental to many such children.

B. CPS AND COURTS LACK AUTHORITY TO INTERVENE PRIOR TO MALTREATMENT

Even if a child born to high-risk parents comes to CPS attention, there is no clear federal mandate that states take action to prevent maltreatment of that child. In all states, the law does require local CPS agencies to conduct an assessment or investigation of a child's situation when it receives a report of parental conduct that would meet the state's definition of abuse, neglect, or endangerment, and does permit CPS workers to take custody of a child where the report is substantiated and the child would otherwise suffer harm.¹⁴⁵ In most states, however, nothing in the circumstances of a newborn child prior to placement in the birth parents' home could meet those definitions, absent a very generous and nontraditional interpretation of statutory language. Standards for intervention historically were drafted with only a reactive focus, an assumption that the state should get involved with respect to a given child only after a parent has maltreated that child, has overtly threatened to harm the child, or has put that child in a dangerous situation, and historically the prevailing understanding of child maltreatment was limited to conduct toward a child after birth.¹⁴⁶

tal" and community risk factors and stating that it is well documented that antisocial behavior is familial); Cohen, *supra* note 100, at A12 (describing families of women in prison as including other members incarcerated and/or with substance abuse problems); SMITH ET AL., *supra* note 80, at 157.

145. See, e.g., CONN. GEN. STAT. § 46b-129 (2007 & Supp. 2008); NEV. REV. STAT. § 432B.260(1-4) (2007); VA. CODE ANN. § 63.2-1503, 1505 (2007 & Supp. 2008).

146. See, e.g., *Reyes v. Sup. Ct. of San Bernardino County*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (reasoning that criminal child abuse statute applied only to living children "susceptible to care or custody"); *In re Fletcher*, 533 N.Y.S.2d 241, 243-44 (N.Y. Fam. Ct. 1988) (holding that state legislature did not intend civil child maltreatment statute to cover conduct affecting a child before birth). *But see* MINN. STAT. § 260C.178(b) (2006) (authorizing placement of a child in foster care when "the court determines there is reason to believe . . . that the child's health or welfare would be immediately endangered In determining whether the child's health or welfare would be immediately endangered, the court shall consider whether the child would reside with a perpetrator of domestic child abuse"); MINN. STAT. § 260C.007(2)(iii) (2006) (defining "[c]hild in need of protection or services" to include a child who "resides

Thus, a newborn in the hospital cannot have been maltreated or even yet put at risk of maltreatment; that can only happen after birth parents take the baby home. And CPS typically will not know how high-risk parents are treating a baby at home unless and until they receive a report of abuse or neglect.

Despite its aim of promoting more proactive intervention, ASFA did nothing to change that conventional, reactive approach to investigation and initial CPS protective action. ASFA did not require states to amend their definitions of abuse, neglect, dependency, or other standard of maltreatment, for purposes of CPS authority to investigate and intervene, so that they include maltreatment of other children by the same parent. Though state law might authorize TPR with respect to a newborn child who is still at the hospital, pursuant to ASFA's no reasonable efforts component, there will generally be no legal basis for CPS even to conduct an investigation of the parent's situation, let alone take protective custody, before the parent takes the newborn home and abuses or neglects the baby. Thus, should a hospital employee happen to notify a CPS social worker that a parent who previously committed felony sexual assault or some other egregious conduct against another child just became a parent again, the social worker would have to say "thanks for letting us know, but we have no authority even to come down and talk to the birth parent." That information would likely not itself meet the state's definition of abuse or neglect for purposes of assessment, investigation, or removal, so the social worker would be unable to take any action to learn more or to protect the child.

Again KCASFA ostensibly creates an exception to the general rule, one limited to newborns who happen to be tested for drug exposure and who test positive. It requires that local CPS agencies have "procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports" and "a plan of safe care" for any baby reported to have a positive toxicology screening.¹⁴⁷ In practice, however, there is widespread evasion of this federal directive. States have generally complied with KCAFSA to the extent of requiring medical professionals to report drug exposure, requiring local CPS agencies to respond to any such report by conducting an initial assessment or investigation, authorizing CPS to file a petition in juvenile court for a removal order or other protective order,

with or would reside with a perpetrator of domestic child abuse").

147. 42 U.S.C. §§ 5106a(b)(2)(A)(ii) to (iv) (Supp. 2006).

and authorizing courts to order a removal of the child and placement in foster care.¹⁴⁸ However, most states' statutes do not *require* CPS to file a petition of any sort with a court when they verify the drug exposure of a baby; they merely *permit* CPS to do so.¹⁴⁹ As discussed further below, there is a strong cultural bias among CPS workers against intervention on the basis of pre-natal harm, so giving them the authority but not a mandate to bring a baby's situation before a judge for review is likely insufficient to ensure safety for such babies. Moreover, the law in most states also does not require courts to react to a CPS petition if filed; the law similarly just permits judges to issue an order in response if they so choose,¹⁵⁰ and many judges are also predisposed not to take any coercive action against a woman based on her conduct during pregnancy. In short, there are three institutions that all must act if the newborn child of a drug addict is to receive protection—a medical facility, a local CPS agency, and a court, and each of them is legally free not to act if sympathy for the birth mother makes them averse to acting.

In addition, at least one state, Virginia, has created an enormous loophole in what limited directive there is with respect to implementation of the investigation and “plan of safety” mandate, an exception to the KCAFSA-mandated provisions that in fact *precludes* local CPS agencies from acting in many cases even if they are alarmed by the baby's situation and want to act. Virginia's Department of Social Services, with some supportive signaling from the General Assembly,¹⁵¹ has issued

148. See, e.g., HAW. REV. STAT. § 587-89 (2006); LA. CHILD. CODE ANN. art. 603(16.1) (Supp. 2008); ME. REV. STAT. ANN. tit. 22, §§ 4004-B, 4011-B (Supp. 2007); 23 PA. CONS. STAT. ANN. § 6386 (Supp. 2008); VA. CODE ANN. §§ 63.2-1503(I), 63.2-1505(B)(1), 63.2-1509, 16.1-241.3 (2003 & Supp. 2007); 22 VA. ADMIN. CODE 40-705-40(A)(4)(d) (West 2006) (“[Local agencies must] immediately determine whether to petition a juvenile and domestic relations district court for any necessary services or court orders needed to ensure the safety and health of the infant.”).

149. See, e.g., MD. CODE ANN. FAM. LAW § 5-710(b) (LexisNexis 2007) (“[T]he local department *may*: (i) file a petition alleging that the child is in need of assistance under Title 3, Subtitle 8 of the Courts Article . . .” (emphasis added)); MINN. STAT. § 260C.148 (2006); VA. CODE ANN. § 63.2-1505(B)(1) (2007) (“[I]f the report or complaint was based upon [positive toxicology in a newborn] the local department may file a petition . . .”).

150. See, e.g., ALASKA STAT. § 47.10.020 (2007); IND. CODE § 31-33-8-8 (2007); ME. REV. STAT. ANN. tit. 19-A, § 4007 (2007); MASS. GEN. LAWS ch. 119 § 24 (2007); MINN. STAT. § 260C.148 (2006); VA. CODE ANN. § 16.1-241.3 (2003).

151. VA. CODE ANN. § 63.2-1505(B)(2) (West 2008) (creating an exception to the general requirement that local CPS agencies report to the state Depart-

regulations instructing local CPS agencies to “invalidate” newborn toxicology reports if “(i) the mother of the infant sought substance abuse counseling or treatment during her pregnancy prior to the infant’s birth and (ii) there is no evidence of child abuse and/or neglect by the mother after the infant’s birth.”¹⁵² Thus, CPS must invalidate a report of a drug-exposed baby and walk away from the situation if the mother received any counseling or treatment during pregnancy *or* even if she did *not* receive *any* counseling or treatment, so long as she attempted to receive one or the other and so long as the baby has not yet been maltreated when CPS interviews the mother. DSS regulations define counseling and treatment in a quite broad way, such that it “includes, but is not limited to, education about the impact of alcohol, controlled substances and other drugs on the fetus and on the maternal relationship; education about relapse prevention to recognize personal and environmental cues which may trigger a return to the use of alcohol or other drugs.”¹⁵³ Such education might be quite minimal and might make little impression on a drug addict. Indeed, the positive toxicology test at birth will almost always mean that whatever counseling or treatment a birth mother did receive was ineffective. This major exception to the state rule purportedly implementing KCAFSA makes irrelevant whether any counseling or treatment was effective in getting the mother to stop her substance abuse. Yet her inability to stop at such a time when she should be most highly motivated to stop—that is, when she knows she is poisoning her unborn child—suggests that she will be unable to get her addiction under control anytime soon after the child is born, and this in turn suggests that the baby is at high risk

ment of Social Services all cases that they investigate, for cases in which the basis for investigation is a positive newborn toxicology report and in which “the mother sought substance abuse counseling or treatment prior to the child’s birth”).

152. 22 VA. ADMIN. CODE § 40-705-40(A)(4)(e) (2006). This loophole is limited to some degree by this further direction:

If the mother sought counseling or treatment but did not receive such services, then the local department must determine whether the mother made a substantive effort to receive substance abuse treatment before the child’s birth. If the mother made a substantive effort to receive treatment or counseling prior to the child’s birth, but did not receive such services due to no fault of her own, then the local department should invalidate the complaint or report.

Id. See also MD. CODE ANN. FAM. LAW § 5-710(b) (2007) (authorizing CPS, upon receiving a positive toxicology report, either to initialize judicial proceedings or to offer the mother admission into a drug treatment program).

153. 22 VA. ADMIN. CODE § 40-705-40(A)(4)(f) (2006).

of abuse or neglect.¹⁵⁴ But Virginia makes such risk irrelevant.

Further, for a child protection agency to do anything more than offer services to a parent, in most states there would have to be a “founded” report of abuse or neglect,¹⁵⁵ and in most states drug exposure in utero does not satisfy the statutory definition of abuse or neglect, because child protection laws only apply to children after birth.¹⁵⁶ Pennsylvania law, for example, authorizes only provision of services to the child in response to in utero drug exposure.¹⁵⁷ Courts in some states might have authority to issue temporary, emergency orders based solely on the commencement of an investigation of a drug-exposed baby’s situation,¹⁵⁸ but continued state involvement requires a CPS allegation of abuse or neglect, which CPS cannot make without a founded report of conduct that falls within the state’s definition of abuse or neglect.¹⁵⁹ A handful of states do treat in utero exposure to controlled substances as abuse or neglect and authorize CPS protective action on that basis,¹⁶⁰ but they have

154. Cf. MURPHY & ROSENBAUM, *supra* note 62, at 9 (reporting that removal of a child causes most crack-cocaine-addicted mothers to abuse more heavily).

155. See, e.g., VA. CODE ANN. § 63.2-1508 (2007); 22 VA. ADMIN. CODE § 40-705-40(A)(4)(i) (2006).

156. See, e.g., CAL. PENAL CODE § 11165.13 (West 2007) (“[A] positive toxicology screen at the time of the delivery of an infant is not in and of itself a sufficient basis for reporting child abuse or neglect. However, any indication of maternal substance abuse shall lead to an assessment of the needs of the mother and child . . .”).

157. See 23 PA. CONS. STAT. ANN. § 6386 (Supp. 2008).

158. See VA. CODE ANN. § 16.1-241.3 (2003).

159. See *id.* §§ 16.1-252, 16.1-253(F) (discussing preliminary removal order and adjudication following a CPS allegation of abuse or neglect).

160. See, e.g., 750 ILL. COMP. STAT. 405/2-18(2) (2008) (treating as prima facie evidence of neglect fetal alcohol syndrome and “a medical diagnosis at birth of withdrawal symptoms from narcotics or barbiturates”), 750 ILL. COMP. STAT. 50/1 (creating a rebuttable presumption that the birth mother is unfit “where there is a confirmed test result that at birth the child’s blood, urine, or meconium contained any amount of a controlled substance . . . and the biological mother of this child is the biological mother of at least one other child who was adjudicated a neglected minor . . .”); MINN. STAT. § 626.556(f) (2006 & Supp. 2007) (“Neglect” means . . . prenatal exposure to a controlled substance, as defined in section 253B.02, subdivision 2, used by the mother for a nonmedical purpose, as evidenced by withdrawal symptoms in the child at birth, results of a toxicology test performed on the mother at delivery or the child at birth, or medical effects or developmental delays during the child’s first year of life that medically indicate prenatal exposure to a controlled substance . . .”); TEX. FAM. CODE ANN. § 161.001(1)(R) (Vernon 2002) (authorizing TPR as to a parent who has “been the cause of the child being born addicted to alcohol or a controlled substance,” if TPR would be in the child’s best interest).

come under heavy criticism for doing so, based in part on a child-centered concern that making pre-natal conduct a basis for intervention will discourage pregnant drug users from securing pre-natal care,¹⁶¹ but also based on adult-centered concerns about privacy and discriminatory application.¹⁶²

C. CPS AGENCIES RESIST TPR WITHOUT REHABILITATIVE EFFORTS

Even if newborns at high risk do come to CPS attention, even if CPS does investigate and take custody of such a child, and even if social workers believe they have the authority to petition for immediate TPR, CPS is highly unlikely to seek TPR and adoption with respect to the newborn, even in the worst cases of maltreatment history or parental dysfunction. This is so principally for two reasons: sympathy for parents and a preference for placement with relatives.

1. Social Worker Identification with Parents

In nearly every case, social workers who remove children from parental custody place the child in foster care and commence a program of rehabilitative efforts with the parents, so long as CPS can locate the parents and the parents do not flatly refuse to make any effort to change. No matter how horrible birth parents' child maltreatment history is, and with little regard for the age of the child and the extent of the child's relationship with the birth parent, social workers almost never seek immediate TPR and adoption.¹⁶³ Why is this the case?

First, the law generally does not compel social workers to proceed directly to TPR and adoption in many or any cases. Statutory language authorizing CPS agencies to seek TPR conventionally has been permissive, not mandatory, so the decision to petition has been entirely discretionary on the part of CPS.¹⁶⁴ ASFA contained a provision requiring states to make petitioning for TPR without reasonable efforts mandatory for

161. See NAIARC, *supra* note 120, at 6–7.

162. Nancy Feigenbaum, *New Statute Discriminatory: Critics Say Drug-Test Policy May Be Unfair*, DAILY PRESS (Newport News, Va.), April 26, 1998, at A9.

163. Berrick et al. found some tendency among CPS agencies in California to traverse the "reunification bypass" more often with younger children, but still at an extremely low rate, in only a small fraction of cases in which the law would allow reunification bypass. Berrick, et al., *supra* note 80.

164. See, e.g., DEL. CODE ANN. tit. 13, § 1103(a) (2006); TENN. CODE ANN. § 36-1-113(g) (2005).

CPS agencies in certain cases—that is, those in which the parent previously committed a violent felony against another child.¹⁶⁵ But that is narrower even than the category of reunification bypass situations explicitly authorized by ASFA, leaving out cases in which parents had prior TPRs or aggravated circumstances.¹⁶⁶

Such a mandate would be superfluous if all CPS agencies were inclined to pursue TPR without first undertaking a plan of parent rehabilitation whenever doing so would be best for a child, but they generally are not. It is contrary to historical practice, the practice dominant when most social workers of today were trained, and the practice encouraged by the “reasonable efforts” command of AACWA.¹⁶⁷ It is also contrary to the social work mentality; social workers are not trained to determine when efforts to rehabilitate parents would be futile, and they are not trained to determine when adoption would be better for a child than attempting to make it possible for the child safely to live with birth parents.¹⁶⁸ They are trained to

165. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, § 103(a)(3), 111 Stat. 2115, 2118 (1997) (codified at 42 U.S.C. § 675(5)(E) (2000)).

166. HHS does not appear to be enforcing even this narrow mandate. Virginia, for example, currently has no statutory, regulatory, or policy document instructing CPS agencies that they must petition for TPR without first attempting rehabilitative efforts in any cases. West Virginia, on the other hand, does include TPR as to another child in the list of triggers for a mandatory petition, as well as prior violent felonies against a child. See W. VA. CODE § 49-6-5b(a)(3) (2007).

167. See CAPTA, *supra* note 95, at 67 (statement of Richard Gelles) (“Case workers claim that the law requires them to make ‘every possible effort’ to keep families together.”); Gordon, *supra* note 87, at 677–78 (“State agencies already have a proven record of undermining the Child Welfare Act because of their unyielding, one sided belief in reunification.”).

168. See CAPTA, *supra* note 95, at 32 (statement of Rep. Greenwood) (“I want to again rely a little bit on my experiences. . . . More times than not, I felt like I erred on the side of putting these people back together again, and the kids didn’t turn out so well in the long run.”); *id.* at 33 (statement of Richard Gelles) (“Caseworkers need to understand that some families can be changed, some families can’t. . . . And some decisions are going to have to be made under the timelines of ASFA, that you are just not going to have enough time to change the family, given the child’s developmental interests. CAPTA in its 30-year iteration has not done a particularly good job at spurring research and development around these decision-making issues.”); *id.* at 68 (“[F]ront-line child welfare workers still enter homes severely lacking in training, insight, and the proper skills to assess risk and family needs. . . . Schools of Social Work in the United States bear much of the responsibility for the dearth of professionally trained front-line child welfare workers. . . . [because they] remain focused on turning out clinicians trained for either private clinical practice or administration. . . . [and do not] commit themselves to institut-

help people overcome problems, and so TPR represents failure for them. An observer of ASFA's passage predicted social worker resistance to its aims:

State agencies already have a proven record of undermining the Child Welfare Act because of their unyielding, one-sided belief in reunification [I]n 1997 Congress learned that states still sometimes sent children back into households that no amount of family preservation could help. Because funding for family preservation is so often paltry, this record can only reflect commitment to family reunification regardless of circumstance. Numerous studies confirm that social workers and judges often strain mightily to avoid severing a child's bonds to her parents, even when doing so would ultimately benefit a child. To be sure, these attitudes have been changing, and ASFA will shift priorities further. But given the status quo inclination of bureaucracies and the bias of social workers as a professional group, such change can only come slowly. In fact, in the absence of new support for services, ASFA's effort to promote permanency through adoption may only steel professionals' resolve to resist rules apparently unconcerned about parental needs.¹⁶⁹

This prediction of social worker resistance to ASFA is borne out by a recent survey of CPS staff in California. Attempting to discover why CPS workers in that state rarely employ the state's extensive reunification bypass law, Berrick et al. found that many social workers expressed "ambivalence about its use due to philosophical perspectives on the social work profession."¹⁷⁰ A representative comment by a social worker was: "It doesn't fit with the social work ethic. We are social workers. We do this work because we think people can change."¹⁷¹ In my own conversations with numerous CPS agency directors and social workers in Virginia, I heard the same perspective voiced. One local agency official told me emphatically that her agency would never petition for TPR without reasonable efforts, because "we don't give up on parents," and "you never know when someone might change."

ing a professional child welfare track and appropriate curriculum."); Gordon, *supra* note 87, at 677–78.

169. Gordon, *supra* note 87, at 678–79 (citations omitted).

170. Berrick et al., *supra* note 80.

171. *Id.*; see also CAPTA, *supra* note 95, at 69–70 (statement of Richard Gelles) ("At the core of child welfare work is the belief that most, if not all, parents want to be good and caring parents and caretakers. . . . If change does not occur, it is attributed to a lack of soft or hard resources, not to the parents' lack of willingness or ability to change. . . . In reality, change in general, and change in the particular case of caregivers that maltreat their children, is much more difficult to bring about. . . . All individuals are not equally ready to change.").

Part and parcel of this perspective is an adult-centered orientation among many—though certainly not all—CPS social workers. In conversation, it becomes clear that they view their “clients” as the dysfunctional parents, not the maltreated children. CPS workers typically have little contact with children after the initial investigation, even if the children are placed in foster care, but are likely to have frequent contacts with parents.¹⁷² They might simply collect information about the child from foster parents, school officials, and service providers, such as a therapist for a child, rather than by meeting with or observing the child. In discussing policy reforms with local and state-level CPS officials in Virginia, I most often heard objections couched in terms of parents’ rights rather than in terms of child welfare.¹⁷³ When I give presentations to CPS social workers and directors and I raise this concern, there are always a couple who approach me afterwards and, in hushed tones, say something to the effect of “it is so true; CPS is all about helping parents and giving them every last chance, not about doing what is best for the children.”

Even if CPS workers were more focused on making the best permanency choice for children, rather than myopically focused on fixing birth parents, CPS workers would still be unlikely to petition for TPR immediately after a child’s birth. In part this is because their understanding of child development, and of the permanent and severe damage that attachment failure and maltreatment in infancy can cause, is generally quite limited.¹⁷⁴ In addition, and perhaps in part because of this limited knowledge (and in part because of their focus on parents’ supposed rights), social workers have viewed their aim for newborns and other children as just ensuring safety, not ensuring an adequate environment for a child’s healthy develop-

172. For example, while regulations governing CPS’s assessments and investigations in Virginia require an initial in-person observation of the allegedly abused or neglected child, 22 VA. ADMIN. CODE § 40-705-80(A)(1), (B)(1) (2008), there are no state statutes or regulations governing on-going case management following placement of a child in foster care that require further contact with the child.

173. See, e.g., Roberts, *supra* note 90, at 178 (“Wrongfully removing children from the custody of their parents violates parents’ due process right to liberty.”).

174. See CAPTA, *supra* note 95, at 66–67 (statement of Richard Gelles) (“[C]hild welfare workers often receive only the most minimal pre-service training before they are assigned a caseload. . . . In-service training is also minimal.”); Goldsmith et al., *supra* note 37, at 2.

ment.¹⁷⁵ State regulations and policy manuals governing CPS also encourage a limited focus on physical safety in the custody of biological parents rather than on what setting is best for a child.¹⁷⁶ There is a large disjuncture, therefore, between the ideal of proxy decision making described in Part I of this Article, and the approach state actors today take to making decisions about family placement for newborn children. That ideal was meant to replicate or approximate the way autonomous adults make decisions for themselves in choosing family members, and when adults choose partners they certainly consider much more than whether a potential partner would threaten their physical safety.

Moreover, there are practical reasons why CPS agencies are reluctant to forego rehabilitation efforts and seek TPR immediately upon removal of a child. Parents might be more likely to litigate and appeal a TPR decision when CPS elects to forego rehabilitation, and if they do so they are likely to find a receptive audience in many judges, who are also adult-centered and comfortable with the conventional approach of giving dysfunctional biological parents every last chance to change.¹⁷⁷ Because of the time and expense that litigation at trial and appellate levels entail, many social workers and attorneys conclude that it is more efficient to make the rehabilitative effort and then petition.¹⁷⁸ But so long as the goal remains reunification, children are likely to linger in temporary foster care. In many agencies, there are also cumbersome administrative procedures

175. See CHRISTIAN, *supra* note 80, at 4 (“At present, many child welfare agencies view foster care primarily as a means of protecting children’s physical safety and only secondarily as a means of ensuring the healthy social and emotional development of very young children who are removed from home for reasons of abuse and neglect The limited perception of foster care may be changing because early brain research continues to affect policy”).

176. See, e.g., 22 VA. ADMIN. CODE § 40-705-10 (2008) (defining both “family assessment” and “investigation” as “collection of information necessary to determine: 1. The immediate safety needs of the child; 2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect; 3. Risk of future harm to the child; and 4. Alternative plans for the child’s safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services.”).

177. See CAPTA, *supra* note 95, at 67 (statement of Richard Gelles) (“Case workers claim that the law requires them to make ‘every possible effort’ to keep families together. They also claim that judges ignore caseworkers’ recommendations.”); GAO, *supra* note 89, at 3–4 (“[S]tate officials describe[] . . . reluctance on the part of some judges to allow the state to bypass reunification efforts.”).

178. GAO, *supra* note 89, at 25–26; Berrick et al., *supra* note 80.

for approving bypass recommendations, which further deter social workers from seeking them.¹⁷⁹ And even if an immediate TPR would save them time and resources in the long-run, overburdened social workers are likely to take the “foster care and rehabilitation” route because it is familiar to them and it entails less effort in the short-term.¹⁸⁰

2. Babies Lost in Relative Care

Even if children are removed at or soon after birth from the custody of birth parents who are manifestly unfit, they might quickly fall off the CPS radar screen if a court places them with relatives of the birth parents. Placement with relatives is generally an alternative to state assumption of custody and not a state-supervised foster care arrangement.¹⁸¹ In some states, a child must be in CPS custody in order for CPS to petition for TPR, so placement with relatives results in extended impermanence.¹⁸² In fact, placing a child with relatives allows CPS to avoid the mandatory TPR-filing requirement of ASFA for cases in which parents were previously convicted of violent felonies against another child.¹⁸³ Following placement with relatives, courts may order that the child continue to receive services and may require periodic review of the custodial arrangement, but courts are not required to do so, so placement with relatives generally results in little or no state oversight of a child’s situation.¹⁸⁴ CPS agencies have great discretion as to what placement they request a court to order and, as discussed further below, most operate with a strong bias toward relative placement.

179. Berrick et al., *supra* note 80.

180. See Gordon, *supra* note 87, at 679–81 (“While the decision to leave a child in foster care requires five or ten minutes of court time, the effort to terminate parental rights is exponentially more intensive. Lawyers and social workers simply looking to stay afloat may be forced to let children continue drifting through foster care.”).

181. See, e.g., VA. CODE ANN. § 16.1-278.2(A)(5) (2003).

182. See, e.g., KAN. STAT. ANN. § 38-2365(h) (Supp. 2007); S.C. CODE ANN. § 20-7-768 (Supp. 2007); S.D. CODIFIED LAWS § 26-8A-26 (2004 & Supp. 2008); UTAH CODE ANN. § 78A-6-314 (Supp. 2008).

183. See 42 U.S.C. § 675(5)(E) (2000); *cf.* CONN. GEN. STAT. § 17a-111a(b) (2007) (state law containing such an exemption); FLA. STAT. § 39.8055(2)(a) (Supp. 2008) (same); ME. REV. STAT. ANN. tit. 22, § 4052(2-A) (Supp. 2007) (same); MD. CODE ANN., FAM. LAW, § 5-525.1(b)(3) (2006) (same); MINN. STAT. § 260C.301 subdiv. 3(b) (2006) (same); N.Y. SOC. SERV. LAW § 384-b(3)(l)(i) (McKinney 2007) (same).

184. See CHRISTIAN, *supra* note 80, at 4 (“[U]nlicensed kinship care . . . receives less support and is subject to less monitoring than licensed foster care.”).

As noted above, placement with relatives can be a good thing for a newborn child. If the relatives are good caregivers and will be the child's long-term caregivers, the child can form a secure and healthy attachment and bond with them, and the relatives can in theory also facilitate whatever amount of contact with the birth parents is good for the child, perhaps more easily than could foster parents or adoptive parents outside the extended biological family.¹⁸⁵ And CPS is supposed to verify that relatives are minimally fit and willing caregivers before placing a child with them.¹⁸⁶

However, some relatives pass through CPS screening yet turn out to be very poor caregivers, either because characteristics that make them unable or disinclined to provide good care are not apparent at the time of placement or because social workers simply do an inadequate job of screening.¹⁸⁷ Moreover, some relatives, whatever their merits as caregivers for a child, have troubling inter-personal dynamics with the parents.¹⁸⁸ Studies find that children whom CPS places with kin rather than non-kin foster parents on average have poorer outcomes.¹⁸⁹ This is likely in part because they tend to receive fewer services than do children in non-relative foster care despite having similar needs,¹⁹⁰ but it is no doubt also in part because the dysfunction manifested by the parents runs through much

185. See Gordon, *supra* note 87, at 658 (“[C]hildren in kinship care can fare better than children in foster care along numerous axes.”).

186. See, e.g., VA. CODE ANN. §§ 16.1-252(F)(1), 16.1-281(C1) (2003 & Supp. 2008).

187. See, e.g., Hopkins, *supra* note 129, at A1 (describing the death of two-year old child, whom CPS removed from mother's custody because of an unexplained arm fracture and placed in care of her husband, the child's step-father, who was a convicted drug dealer and whose own daughter had been killed four years earlier).

188. See Lyons, *supra* note 81, at 403–04 (explaining that abusive partners frequently isolate victims from extended family, so that only members of the abuser's family are available to take custody of a child who is removed, which might reinforce the abuser's control over the victim).

189. See D'Andrade & Berrick, *supra* note 80, at 36 (“Placement with kin, and limited or no parental visiting, are associated with non-reunification and multiple placements are associated with re-entry [to care].” (citations omitted)).

190. See Laurel K. Leslie et al., *Developmental Delay in Young Children in Child Welfare By Initial Placement Type*, 23 INFANT MENTAL HEALTH J. 496, 500 (2002) (“[C]hildren in kinship care receive fewer services despite similar levels of need.”); *id.* at 512 (suggesting that the reason children in kinship care receive fewer services has to do with “family functioning, insurance status, decreased case supervision, or other system barriers”).

of the extended family and much of the birth parents' community. As Elizabeth Bartholet explains:

[W]e should be willing to face up to the fact that child maltreatment is only rarely aberrational. It ordinarily grows out of a family and community context. Keeping the child in that same context will often serve the child no better than keeping him or her with the maltreating parent.¹⁹¹

In fact, in many cases, relatives simply give the child over to the birth parents, without CPS authorization or awareness, so that kin care effectively amounts to return to parents, even though the parental conditions that originally necessitated removal still exist.¹⁹²

With older children, there is more reason to risk possible adverse outcomes from placement with relatives. Once a child has developed relationships with birth parents, extended family members, and others in the birth parents' community, the child has an interest in continuity of interpersonal connections and environment that counts in favor of placement with relatives.¹⁹³ With newborn children, however, that interest in continuity is absent; there is only an interest in later developing family ties to biological parents and relatives. In addition, because older children are less likely than newborns to be adopted,¹⁹⁴ placement with relatives might give older children a better chance than they would have in non-relative foster care, should their birth parents never regain custody, of completing childhood in an environment where they feel like they are part of a "real" family. That reason for relative placement also does not apply to newborns.

The law governing choice of foster parents and adoptive parents in most U.S. states today does give CPS workers the flexibility to approach placement of newborns differently from placement of older children. However, many CPS officials and case workers are confused as to what the law directs. Most appear to believe that they must always give priority to relatives, but that is false. Federal funding law directs states to require

191. BARTHOLET, *supra* note 36, at 93; *see also* SMITH & FONG, *supra* note 45, at 49–52, 233–34 (describing problems in communities where a high percentage of neglectful parents live).

192. *See, e.g.*, *Mullins v. Oregon*, 57 F.3d 789, 797 (9th Cir. 1995) (“[G]randparents sometimes may be unsuitable adoptive parents precisely because of their blood relationship, especially in cases of abuse such as this in which there may be a well founded fear that the grandparents will be unable to protect the children from future parental contact and abuse.”).

193. *See* Gordon, *supra* note 87, at 658–59.

194. *See id.* at 668.

that CPS workers consider relatives as substitute caregivers for children whose parents are unable to have custody. It declares, somewhat obtusely:

In order for a State to be eligible for payments under this part, it shall have a plan approved by the Secretary which . . . provides that the State shall consider giving preference to an adult relative over a non-related caregiver when determining a placement for a child . . .¹⁹⁵

The dictate to *consider* relatives grew in part out of a perception that children have an interest in growing up in a family in which they have a biological connection to other members.¹⁹⁶ But it also grew out of a desire to minimize state expenditures on children removed from birth parents' custody, given that unlicensed relative caregivers used to be ineligible for foster care subsidies,¹⁹⁷ and out of a sense that children "belong to" particular communities—the same attitude that has motivated some of the opposition to trans-racial adoption.¹⁹⁸ These latter considerations might also have motivated local CPS agencies and social workers to favor relatives when placing children removed from parental custody; they could save money and respect the supposed rights of communities to hold onto "their" children.

Consistent with the federal dictate, however, the law in most states does not in fact require that CPS ever give priority to relatives at any stage of a child protective intervention. Rather, it only requires that case workers investigate whether there are relatives who are willing and able to take custody and then choose the placement that is best for the child, after considering both relatives and non-relatives.¹⁹⁹ Courts in several

195. 42 U.S.C. § 671(a)(19) (2000).

196. See Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237, 250 (2004).

197. See Sonya Gipson Rankin, *Why They Won't Take the Money: Black Grandparents and the Success of Informal Kinship Care*, 10 ELDER L.J. 153, 166 (2002).

198. See Adler, *supra* note 89, at 18–19; Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1169–70, 1179–82 (1991); Roberts, *supra* note 90, at 180 (noting the National Association of Black Social Workers' opposition to transracial adoption on the grounds that it constitutes "a form of 'genocide'").

199. See, e.g., COLO. REV. STAT. § 19-3-605 (2008) (court shall consider petition by relatives but not grant it unless it is in best interests of child); MONT. CODE ANN. § 41-3-438(4)(a) (2007) (same); VA. CODE ANN. § 16.1-278.2(A)(5) (2003) (authorizing placement with a relative after initial removal but not requiring consideration of placement with a relative); *id.* § 16.1-283(A) (directing that, following a TPR order, "the court shall give a consideration to granting custody to relatives of the child, including grandparents").

states have rendered decisions on the basis of such an interpretation that the law requires only consideration of relatives, not preference for them.²⁰⁰ In many other states, statutes create presumptions of varying strength in favor of placement with relatives, but allow for rebuttal of the presumption by a showing that a non-relative placement would be better for the child all things considered.²⁰¹ The problem is that many social workers interpret the requirement of considering or giving a presumption to relatives as a mandate to place a child with a relative unless none are willing and minimally qualified, and they operate under a “keep the child with the family” ideology that draws no distinction among children based on age, that overlooks the several ways in which a newborn child’s situation differs from that of an older child.

D. GROUNDS FOR TPR WITHOUT REHABILITATION EFFORTS ARE TOO NARROW

Beyond the attitudinal and practical obstacles to CPS petitioning for TPR as to newborns with unfit birth parents, there are also clear legal obstacles. State statutory provisions authorizing TPR are confined to specific circumstances, not allowing for TPR whenever that would simply be best for the child.²⁰² As discussed in Part III, state law historically has required egregious conduct by the parent toward the child currently at issue and extensive efforts by CPS to locate and rehabilitate the parent, before a court could order TPR. ASFA forced states to alter their laws to allow for TPR without rehabilitative efforts in some circumstances based on conduct toward another child, but

200. See, e.g., *Div. of Family Servs. v. T.W. & K.A.*, No. 01-05-02TN, 2002 WL 1929548, at *14 (Del. Fam. Ct. Jan. 25, 2002); *In re Adoption of Irene*, 767 N.E.2d 91, 96 (Mass. Ct. App. 2002); *In re C.D.G.*, 108 S.W.3d 669, 677 (Mo. Ct. App. 2002); *In re Adoption of A.K.S.R.*, 71 S.W. 3d 715, 719 (Tenn. Ct. App. 2001); *Logan v. Fairfax County Dept. of Human Dev.*, 409 S.E.2d 460, 465 (Va. Ct. App. 1991).

201. See, e.g., MO. REV. STAT. § 210.565 (Supp. 2007); MONT. CODE ANN. § 41-3-438(4) (2007); WASH. REV. CODE § 13.34.130 (Supp. 2008).

202. The U.S. Supreme Court once suggested in dicta that states would violate constitutional rights of biological parents were they to terminate parental rights based solely on a best interests determination, but it has never held this. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) (“We have little doubt that the Due Process Clause would be offended ‘[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children’s best interest.’” (quoting *Smith v. Org. of Foster Families*, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring))).

the specific circumstances are limited to prior TPRs and violent felonies.²⁰³ ASFA also required authorization of TPR without reasonable efforts where a parent commits “aggravated circumstances” against the child at issue, but Congress’s suggested definition of aggravated circumstances included, in addition to abandonment, only horrible mistreatment of the present child. That definition would not facilitate preventive intervention, rather than just reactive intervention.

Importantly, ASFA did not explicitly preclude inclusion of other bases for TPR without reasonable efforts, and, as noted in Part III, some states have interpreted AACWA and current federal statutes as allowing them to have additional reunification bypass triggers in their TPR statutes. However, as also noted in Part III, many states have interpreted the background requirement of reasonable efforts to reunify that AACWA imposed as precluding what ASFA does not explicitly authorize. Accordingly, most states have very limited and narrow grounds for TPR without rehabilitative efforts and therefore for seeking a good, permanent home immediately after birth for a child born to manifestly unfit parents.²⁰⁴ Congress was somewhat clearer with ASFA that states were free to add more circumstances than those which ASFA mentioned under the heading of “aggravated circumstances” toward the child in question,²⁰⁵ yet most states have limited aggravated circumstances to just those which the federal law lists, which focus on egregious post-birth conduct by parents toward the child now at issue.²⁰⁶ One

203. See 42 U.S.C. § 671(a)(15)(D)(ii)–(iii) (2000).

204. See Child Welfare Information Gateway, *Reasonable Efforts to Preserve or Reunify Families and Achieve Permanency for Children: Summary of State Laws*, at 3–4 (2006), http://www.childwelfare.gov/systemwide/laws_policies/statutes/reunifyall.pdf.

205. 42 U.S.C. § 671(a)(15)(D)(i) (2000) (requiring that efforts to enable the child to return home need not be made if “the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse”).

206. See, e.g., GA. CODE ANN. § 15-11-58(a)(4)(A) (2008) (making it possible to disregard the requirement to make reasonable steps to reunify a family when aggravating circumstances exist, including abandonment, torture, chronic abuse, and sexual abuse); IDAHO CODE ANN. § 16-1619(6)(d) (Supp. 2008) (codifying an exception to the general rule to make reasonable efforts to reunify a family when aggravating circumstances exist, including abandonment, torture, chronic abuse, sexual abuse, committed murder, and attempted voluntary manslaughter of another child); ME. REV. STAT. ANN. tit. 22 § 4002(1-B)(A) (Supp. 2008) (making exception for aggravating circumstances, including rape, sexual abuse, kidnapping, abandonment, torture, and chronic

necessary remedy is therefore clarification by Congress as to which reading of AACWA and the current governing federal statute is correct—that is, whether state are free to add grounds for TPR without rehabilitative efforts beyond what ASFA required.

One very important set of circumstance ASFA does not directly address are those involving parental dysfunction that has not previously resulted in a TPR or criminal conviction. While there is widespread recognition that hardcore drug addicts, severely mentally ill people, and profoundly mentally disabled persons are generally unable to hold jobs that would support a family, to manage a household or finances, or otherwise to exercise control over their own lives, current child protection law in most states does not reflect the reality that such people are also generally incapable of caring adequately for a baby and are extremely unlikely to become capable of doing so within six months of being offered rehabilitation services. Moreover, in the case of maternal drug or alcohol abuse, a child who has been damaged neurologically by in utero exposure to drugs or alcohol might need not merely an adequate parent or even an average parent for his or her healthy development, but actually an exceptionally good parent or two, to provide the extra care the baby needs to remediate that early damage. If a set of exceptional potential parents is available to adopt a drug-exposed newborn, that is most likely to be a much better choice for the baby than being suspended in foster or kin care while CPS makes unpromising efforts to make drug-addicted, mentally ill, or mentally disabled birth parents minimally adequate.

ASFA also leaves out from the “no reasonable efforts” grounds incarceration. Several states’ statutes nevertheless treat incarceration per se as an aggravated circumstance or as an independent basis for TPR, in recognition of the fact that being separated from a child by incarceration straightforwardly precludes a birth parent from caring for the child.²⁰⁷ In addi-

abuse); MISS. CODE ANN. § 43-21-603(7)(c)(i) (Supp. 2007) (codifying exceptions, including abandonment, torture, chronic abuse, and sexual abuse).

207. See DEL. CODE ANN. tit. 13, § 1103(a)(5)a.3. (2006); IDAHO CODE ANN. § 16-2005(1)(e) (Supp. 2008); KY. REV. STAT. ANN. § 600.020(2)(b) (LexisNexis Supp. 2007); N.D. CENT. CODE § 27-20-02 (Supp. 2007) (including within “aggravated circumstances” cases in which a child is under age nine and the parent “[h]as been incarcerated under a sentence for which the latest release date is: ... after the child is twice the child’s current age, measured in days”); R.I. GEN. LAWS § 15-7-7(a)(2)(i) (2003); S.D. CODIFIED LAWS § 26-8A-21.1 (Supp. 2008) (reunification efforts need not be undertaken when a parent “[i]s incarcerated and is unavailable to care for the child during a significant period of

tion, most states make abandonment, which Congress included in its list of suggested “aggravated circumstances,” a statutory basis for TPR without reunification efforts, and in a couple of states courts have treated as abandonment a parent’s engaging in conduct he knew could cause him to be imprisoned and therefore separated from his child.²⁰⁸ But otherwise a parent’s unavailability owing to imprisonment is not a basis for seeking alternative parents for a newborn. In fact, at least two states treat incarceration as an *excuse* for not taking care of a child!²⁰⁹

In addition, limiting the “maltreatment of another child” basis for reunification bypass to violent felony convictions and prior TPRs leaves out situations where a birth parent has abused or neglected other children and has been unable to recover custody of them despite rehabilitative efforts CPS has already made, but as to whom there has not yet been a criminal prosecution or TPR. The parent, who is not presently fit to have custody of any children, now is faced with the challenge of becoming capable of caring not only for the older children but also for a newborn baby. The prognosis for that parent becoming a consistent, nurturing caregiver for the newborn child in time for the child successfully to develop a healthy bond and secure attachment is likely to be extremely poor.²¹⁰ A family court judge in upstate New York went so far as to order two such parents not to conceive another child, as a condition for return of the four children they then had in foster care. She explained:

It is painfully obvious that a parent who has already lost to foster care all 4 of her children born over a 6 year period, with the last one having been taken from her even before she could leave the hospital, should not get pregnant again soon, if ever. . . . All babies deserve more than to be born to parents who have proven they cannot possibly raise or parent a child. This neglected existence is an immense burden to place on a child and on society²¹¹

the child’s minority, considering the child’s age and the child’s need for care by an adult”); TENN. CODE ANN. § 36-1-113(g)(6) (Supp. 2007) (allowing termination of parental rights if the parent is incarcerated for a period of ten years or longer); TEX. FAM. CODE ANN. § 161.001(1)(Q) (Supp. 2008); Nat’l Conference of State Legislatures, Analysis of State Legislation Enacted In Response to the Adoption and Safe Families Act, P.L. 105-89, Aggravated Circumstances (1999), <http://www.ncsl.org/programs/cyf/aggravat.htm> [hereinafter NCSL (2007)].

208. Dwyer, *supra* note 14, at 958.

209. COLO. REV. STAT. § 19-3-604(2)(k)(IV) (2008); NEB. REV. STAT. § 43-292.02(2) (2004).

210. See FLUKE & HOLLINSHEAD, *supra* note 80, at 8 (noting a study showing higher rate of maltreatment recurrence as family size increases).

211. *In re Bobbijeane P.*, No. 03626-03, 2004 WL 834480, at *4 (N.Y. Fam.

Child welfare experts have stated in more restrained tones that “when parents of a child entering care have already lost multiple children to the system and have made no subsequent change to their lifestyle, providing another 12 months of services seems unlikely to effect change in the parent, while unduly burdening the child with extended stays in foster care.”²¹² Several states already have TPR provisions that look more broadly at a parent’s child maltreatment history, rather than only prior terminations or felony convictions, but most do not.²¹³

E. COURTS REFUSE TPR ABSENT EXTENSIVE REHABILITATIVE EFFORTS

Lastly, even if a CPS agency believes it has the authority to petition for TPR immediately or soon after a child’s birth, there is a good chance the judiciary will rebuff the agency’s attempt to be proactive, and this will deter social workers from trying. While courts currently grant most petitions for TPR, the rate of approval for TPR petitions is much lower in cases in which parents have not walked away from the scene and have not been given substantial time and services, even though the latter set of cases typically involves the most clearly unfit parents, as to whom social workers believe there is little chance of success.²¹⁴

There are several possible explanations for this. First, judges might interpret the statutory authorization for TPR without rehabilitative efforts more narrowly than CPS attorneys do. Second, as with statutory rules governing CPS disposi-

Ct. Mar. 31, 2004).

212. D’Andrade & Berrick, *supra* note 80, at 33–34; *see also* SMITH & FONG, *supra* note 45, at 41 (citing studies showing higher rates of maltreatment in larger families).

213. *See* KAN. STAT. ANN. § 38-1585(a)(3) (Supp. 2007) (presuming that a parent is unfit if “on two or more prior occasions a child in the physical custody of the parent has been adjudicated a child in need of care”); MINN. STAT. § 260C.301(1)(b) (Supp. 2007) (“It is presumed that a parent is palpably unfit to be a party to the parent and child relationship upon a showing that . . . the parent’s custodial rights to another child have been involuntarily transferred to a relative . . .”); S.D. CODIFIED LAWS § 26-8A-21.1 (Supp. 2008) (directing that reunification efforts need not be undertaken when a parent has “a documented history of abuse and neglect associated with chronic alcohol or drug abuse”); NCSL (2007), *supra* note 207.

214. *See, e.g.*, GAO, *supra* note 89, at 3–4 (citing “reluctance on the part of some judges to allow the state to bypass reunification efforts”); *id.* at 26 (finding that in Minnesota, in 25% of all cases in which children in foster care were not being fast-tracked, CPS had requested a fast track for the children but courts had refused).

tional petitions, statutory rules governing court TPR orders in most states are permissive rather than mandatory—that is, they say that a court *may* order TPR if it finds certain things, but do not require a court to order TPR in any case.²¹⁵ Thus, any judge disinclined to sever a biological parent's legal connection to an offspring before the parent has been given every last chance to change, out of solicitude for the interests and supposed entitlement of the parent, or out of an exaggerated estimation of a child's interest in being with biological parents, can simply refuse to order TPR regardless of what factual findings there are.

A GAO survey of ASFA implementation revealed just such parent-protective judicial attitudes.²¹⁶ It also found evidence that such attitudes operate especially strongly in the case of babies whom CPS takes into custody at birth based on maltreatment of other children. Because the parents have not yet hurt the new baby, judges believe they “should be given an opportunity to demonstrate their ability to care for this child.”²¹⁷ More generally, many judges simply are “not supportive of ASFA's goals.”²¹⁸ Judges' reluctance might stem in part from adhering to a traditional view that biological parents own their offspring and from identifying more strongly with parents who appear before them than with the babies in question, who typically do not appear before them.²¹⁹ It likely stems in part also from judges' limited knowledge of child development and, in

215. See, e.g., ALA. CODE § 26-18-7(a) (Supp. 2007); ALASKA CODE § 47.10.088(h) (Supp. 2007); COLO. REV. STAT. § 19-3-604 (2008); GA. CODE ANN. § 15-11-94(b) (2008); 705 ILL. COMP. STAT. 405/2-21(5) (2007); IOWA CODE § 232.116(1) (Supp. 2008); ME. REV. STAT. ANN. tit. 22, § 4055(1) (Supp. 2007); NEB. REV. STAT. § 43-292 (2004); N.C. GEN. STAT. ANN. § 7B-1111 (2007); OKLA. STAT. tit. 10, § 7006-1.1(A) (2007); OR. REV. STAT. §§ 419B.502, 419B.504 (2007); TEX. FAM. STAT. CODE ANN. § 161.001 (Supp. 2008); VA. CODE ANN. § 16.1-283 (Supp. 2008).

216. GAO, *supra* note 89, at 24.

217. *Id.* at 25.

218. *Id.* at 36.

219. See, e.g., Lederman et al., *supra* note 88, at 35 (“Despite the extreme risk to children in the child welfare system, they seldom appear in court and do not have a voice because they cannot articulate their needs and desires in words.”). Judges at the appellate level are especially unlikely to have much experience or training in child protection matters or to come face-to-face with the child in question. See John E. B. Myers, *The Legal System and Child Protection*, in THE APSAC HANDBOOK ON CHILD MALTREATMENT 305, 307–20 (2d ed., 2002).

particular, of the crucial developmental importance of the first year of life.²²⁰

In sum, proactive and preventive intervention to spare newborn child from permanently and seriously damaging early experiences remains exceedingly rare under current law and practices. Despite Congress's best intentions, the nation's child protective systems remain reactive and parent-focused. Proclamations of a new emphasis on prevention were at best a gross over-statement, and arguably a complete ruse. The final Part of this Article identifies the further legal reforms that are needed to realize the professed aim of sparing children born into high-risk situations from ever suffering abuse or neglect.

V. REMEDIES

One approach to better effectuating children's moral right against the state's forcing them into relationships with grossly unfit parents might be to require adults in specified, high-risk categories to make a showing of their fitness *before* they can *become* the legal parent of a biological offspring, just as applicants for adoption must do. For example, persons who previously had their parental rights terminated as to one child, because they severely abused or neglected that child, or who are addicted to debilitating drugs, might be required to appear before a juvenile court judge immediately before or after a baby's birth and present evidence that they are now or soon could be minimally adequate parents, before the state would confer legal parenthood of the newborn child upon them. This approach would be limited to high-risk biological parents, would not exclude anyone categorically from legal parenthood, and would entail applying criteria of parenting preparedness similar to those which states now routinely apply to applicants for adoption.

Nevertheless, such a pre-parentage qualification process for birth parents is so unfamiliar in our culture (even though it

220. See GAO, *supra* note 89, at 36 (noting that most states "reported that not enough training was available for judges"); Lederman et al., *supra* note 88, at 33, 35-36 (observing that infants entering the foster care system "historically, have been largely ignored. . . . Juvenile courts do not conduct assessments and evaluations of babies and toddlers Like most adults, judges and juvenile court personnel are not aware that early trauma and other developmental risk factors to which babies and toddlers in the child welfare system are disproportionately exposed can result in long term harm. [J]udges must recognize the developmental, social, and emotional harm that can result from an unhealthy attachment . . . [and] must begin to make infant mental health a priority.").

is standard practice for adoptive parents) that it is politically unrealistic to propose it. An alternative approach to avoiding state consignment of newborn babies to lives with unfit parent, an approach that is more politically realistic because it works within the existing conceptual and legal framework, would be to create a mechanism for terminating parental rights immediately after birth as to irremediably unfit biological parents. That mechanism would operate in tandem with procedures for ensuring that newborn children born to such parents are placed immediately after birth in a potential adoptive home. As described in Part III, recent federal legislative reforms created the opportunity for states to move toward such an approach to family formation for newborns in the highest-risk situations. Part IV explained how and why states have thwarted Congressional reform goals.

To complete the reforms Congress intended for ASFA and KSAFSA to effect, further legislation is necessary to a) expand the category of persons deemed presumptively unfit to raise children, b) identify at birth the biological offspring of such persons, and c) push CPS agencies and courts to take the necessary actions to prevent maltreatment of those children. The last of these will require, in the case of birth parents who cannot quickly be made adequate caregivers, creating expeditiously an alternative family for the children. These proposals would, in combination, effect a substantial transformation of child welfare practice.

A. MORE EXPANSIVE GROUNDS FOR TPR WITHOUT REASONABLE EFFORTS

In thinking about expanding the “no reasonable efforts” TPR grounds, one should bear in mind that, prior to ordering TPR, courts must always find, by clear and convincing evidence, *both* that parents have engaged in certain behavior or have certain problems *and* that TPR would be in the child’s best interests.²²¹ The best-interests assessment looks beyond the parental conduct or characteristic that is the “fault” predicate for TPR, to see whether other factors suggest it is best for the child to gamble on parental rehabilitation despite the parent’s history or problems. Courts take into account the nature, severity, and persistence of whatever parental conduct poses a danger to a child; whether CPS has made efforts in the past to

221. See Dwyer, *supra* note 14, at 955–56.

rehabilitate the parents; how responsive parents have been to such efforts; the availability of an alternative permanent placement; whether the other biological parent (rather than adoptive parents) would have custody of the child following termination; and many other things. Thus, whenever it appears best for a child, in light of all relevant considerations and available evidence, to develop or maintain a relationship with a legal parent, the best interest prong of the TPR rule ensures that this will happen. Adding further parental actions or circumstances that, along with the best interests of the child, *can* trigger TPR without rehabilitation efforts (but will not in every case do so) would not change this.

To address the clearest and most common circumstances in which newborns might have a much better life by being placed immediately in families with adults other than their birth parents, Congress should require states also to authorize TPR without reasonable efforts when birth parents have severe substance abuse or mental capacity problems, are incarcerated, or have substantial maltreatment histories that have not yet resulted in a TPR or criminal conviction. A significant number of states today already make substance abuse or mental illness or disability a basis for TPR, without a requirement that CPS attempt rehabilitative efforts, at least if the child before the court has been abused or neglected already and the parent was previously offered rehabilitative services but failed to respond adequately. For example, Iowa law authorizes immediate TPR when a “parent has a severe, chronic substance abuse problem” and “the parent’s prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child’s age and need for a permanent home.”²²² Congress should consider requiring all states to have such a provision.

In Virginia, I proposed legislation to address incarceration and multiple children in state custody, circumstances some other states already address in their TPR rules, as noted above. One provision would have added as a basis for TPR without reasonable efforts that 1) the child is under age one, 2) the father or mother is in prison and is expected to remain there for at least a year, and 3) TPR would be in the newborn child’s best

222. IOWA CODE § 232.116(1)(l) (Supp. 2008); *see also* NCSL (2007), *supra* note 207 (listing other states that include substance abuse or mental illness within “aggravated circumstances”).

interests.²²³ The best interests analysis could take into account, among other things, whether the child is in the custody of the other parent, rather than in foster care or with relatives who will not adopt. The one year period will seem too short to many, because one year is not very long for an adult, but in that one year—a child’s first year, the child could be damaged permanently by the inability to form a secure attachment with a nurturing and permanent caregiver. Another provision of the bill would have added as a basis for TPR without rehabilitative efforts that 1) the child is under age one, 2) the parent has two or more other children already in CPS custody, and 3) TPR would be in the newborn child’s best interests.²²⁴ Because of the third element, TPR would not be ordered automatically as to all birth parents with two children already in foster care; a court would still have to find that TPR is in the newborn child’s best interests, taking into account how the parents are progressing with rehabilitation and other relevant factors. It would simply create a possibility that does not now exist of moving immediately after birth to free the child legally for a permanent family relationship with fit parents, rather than consigning the baby to an indefinite period of foster care and “reunification” trials. Moreover, TPR as to the newborn would not mean CPS abandons the parents; it would continue to work with the parents on reunification with the older children unless and until there is a TPR as to those children as well.

Objections I received to expanding bases for TPR without rehabilitative efforts, objections likely to be echoed by legal scholars, include those typically leveled against CPS interventions generally—namely, that they trample the natural rights of biological parents and that they have a disparate impact on poor and minority-race parents and communities.²²⁵ As ex-

223. See S.B. 929, 2007 Gen. Assem., Reg. Sess. (Va. 2007).

224. See *id.*

225. See, e.g., CAPTA, *supra* note 95, at 77–84 (statement of Patrick Fagan) (alleging violation of parental rights by overaggressive child welfare interventions); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J.L. & SOC. POL’Y 303, 313–18 (2006) (arguing the ASFA disproportionately affects the black community); Dorothy E. Roberts, *The Community Dimension of State Child Protection*, 34 HOFSTRA L. REV. 23, 29–35 (2005) (lamenting the effects on poor and minority race communities of concentrated child protection intervention in those communities); Guggenheim, *supra* note 89, at 1743–44 (decrying “dismissal of the value of the rights of biological parents” and “coercive adoptions of other people’s children”); Day, *supra* note 101, at 223–27 (recognizing that a higher percentage of minority children have a parent in prison and thus are

plained in Part I, the proposition that some adults are morally entitled to be in a family relationship with certain children independently of that being good for the children is untenable, just as untenable as would be a claim by one adult that he is morally entitled to enter into a marriage with another adult regardless of any decision on her part that she wants that for herself. Conversely, as also explained in Part I, children have a moral right not to be forced into a family relationship that is clearly bad for them, a right that legislators and judges should acknowledge and respect. In any event, the expanded “no reasonable efforts” grounds for TPR proposed here would effect little change in birth parents’ relationships with newborn children, because they would operate in cases where parents are highly likely to lose custody of their children anyway and ultimately to lose parental rights. Arguably unfit birth parents would in many cases be better off, would suffer less, if the state effected a TPR immediately after birth, rather than pushing the birth parents for a year or more to do something they are incapable of doing, repeatedly denying their requests for custody, explicitly or implicitly condemning them for not transforming themselves, with the TPR threat hanging always over their heads. In any event, the principal effect of my proposal would be on the children, and the effect would be to act before they suffer maltreatment or attachment failure rather than after and to hasten permanence for them, which newborns need to have as quickly as possible after birth.

Complaints about child protective systems having a disparate impact are also unpersuasive. First, one cannot conclude simplistically from the fact of disparity across groups that many interventions and removals in the case of children from poor and/or minority families are unwarranted. To the extent they cite any evidentiary support for such complaints, CPS critics typically point to studies showing, if anything, *not* that CPS is routinely investigating and removing children of poor and minority-race families for no good reason, but rather that CPS is under-investigating and too infrequently removing children of more affluent and white families.²²⁶ If current interventions

more likely to enter foster care); NSCAW, *supra* note 77, § 11.3.3. Opponents of ASFA expressed this concern about a disparate impact. See, e.g., Barth, et al., *supra* note 94, at 377 (expressing opposition to ASFA because of its disparate impact).

226. See, e.g., Dorothy E. Roberts, *Under-Intervention Versus Over-Intervention*, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 371, 372 (2005) (citing a study showing “doctors were twice as likely to miss abuse in the case of white

are generally appropriate, then there is no basis for alleging harm to poor or minority populations. Indeed, from a child-centered rather than adult-centered perspective, there is a relative *advantaging* of persons in low-income families or of minority race, insofar as *children* of poor parents or of minority race are disproportionately receiving state assistance in avoiding maltreatment and death. If children from more affluent families and/or of white race are unduly under-represented in the child protective system—that is, if CPS agencies are failing to protect many wealthy white children who are subject to maltreatment, then the *adverse* disparate impact is to those wealthy white children, and the remedy should be more CPS involvement with wealthier, white families, not withdrawing needed protection from children in poor or minority race families.

Second, available empirical evidence shows that CPS workers are generally not reacting to poverty per se or to families' race or culture, but rather are reacting to real threats to children's well being. The most extensive survey to date of children entering foster care concluded:

Overall, the findings show that the children who are placed into out-of-home care have significantly more family risks, greater exposure to violence, and more serious levels of maltreatment than children who receive services at home. These findings go a long way to vanquish the arguments of those who would argue that children are placed into child welfare services for reasons of poverty alone or following a decision-making process that is largely random or that is fundamentally determined by the race of the child.²²⁷

Numerous studies, including some aimed at measuring child maltreatment independent of CPS involvement, show maltreatment is in fact much higher in poor families, most likely because there is a high correlation between low income and

children than of non-white children” and a study suggesting doctors failed to notify CPS of suspicious injuries to white children). Children reported to CPS as maltreated who remain at home have needs similar to those who are removed, yet receive fewer services to address those needs. See Stahmer et al., *supra* note 77, at 898 (“[Y]oung children remaining at home, are much less likely to receive services even in the presence of need.”); *id.* at 891–92 (“[Y]oung children who are active in CW [child welfare] but remain with their biological parent(s) also have significant developmental and behavioral issues.”); Laurel K. Leslie et al., *The Physical, Developmental, and Mental Health Needs of Young Children in Child Welfare by Initial Placement Type*, 26 DEVELOPMENTAL & BEHAV. PEDIATRICS 177, 180–82 (2005). This supports a conclusion that if CPS leaves more maltreated white children at home because of racial bias, the bias harms the underserved white children.

227. NSCAW, *supra* note 77, at 11–14.

certain parental characteristics and circumstances that make abuse or neglect more likely—namely, depression, stress, poor health, antisocial behavior, single parenting, having a large number of children, social isolation, lower cognitive functioning, and living in neighborhoods with high rates of drug use and crime.²²⁸ Many studies of children in foster care document that they do in fact have great needs arising from deficiencies in their care at home.²²⁹ Moreover, studies of attitudes toward CPS intervention have found no difference between social workers and members of lower-income and minority-race communities in their views of what parental conduct warrants CPS involvement.²³⁰ The notoriously high caseloads for CPS social workers generally lead them to focus only on the worst cases,²³¹ so it is facially implausible to suggest that they are routinely removing children from parental custody without cause.

Critics of child protective interventions typically point out that most children who are removed have experienced only neglect, not abuse, and suggest that this means many removals are inappropriate, but empirical research also shows that neglect is

228. See SMITH & FONG, *supra* note 45, at 4–5; *id.* at 48 (“Poverty is a pervasive and persistent correlate of families who neglect their children.”); *id.* at 49 (stating that other conditions highly correlated with poverty are root causes of neglect, such as unsafe housing, lack of education, employment problems, criminal activity, and drug use); *id.* at 219 (reporting higher rate of substance abuse among black parents than among white parents); *id.* at 221 (noting social isolation of substance abusing parents); *id.* at 229 (“It is clear—children who grow up in poverty are at higher risk for neglect than those who do not.”) (citing numerous studies); *id.* at 231–38; Ethier et al., *supra* note 71, at 13–15, 21–22; Haapasalo & Aaltonen, *supra* note 77, at 234; Barbara Needell & Richard P. Barth, *Infants Entering Foster Care Compared to Other Infants Using Birth Status Indicators*, 22 CHILD ABUSE & NEGLECT 1179, 1179–80 (1998); Pears & Capaldi, *supra* note 71, at 1442, 1454; Andrea J. Sedlak & Diane D. Broadhurst, U.S. Dep’t of Health & Human Servs., *Executive Summary of the Third National Incidence Study of Child Abuse and Neglect* 10 (1996), available at <http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm>; see also ALEX KOTLOWITZ, *THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA* (1991).

229. See Leslie et al., *supra* note 226, at 180–82.

230. See SMITH & FONG, *supra* note 45, at 22–26. My conversations with CPS officials in poor urban areas of Virginia with a large black population, many of whom are themselves African-American, suggest that they are very protective of black parents and sensitive to black communities’ perceptions of their activities.

231. See, e.g., CAPTA, *supra* note 95, at 10 (statement of Rep. James C. Greenwood) (testifying from personal experience as a child welfare caseworker that cases on the margins were overlooked because there were so many severe cases).

at least as dangerous and detrimental as is abuse.²³² This point also overlooks the fact, documented in Part II above, that an infant's life prospects are substantially harmed not only by physical maltreatment that results in injuries, impairments, malnutrition, or exposure to disease and the elements, but also by social and emotional deprivation and attachment disruption. The near-exclusive focus on physical safety among CPS employees, judges, and legal scholars is clearly unjustifiable in the case of newborn children.

Advocates for poor and minority communities (among whom I include myself) might still justifiably complain about the lack of state commitment to eliminating the poverty and community dysfunction into which many minority race children are born. However, until the economic justice these advocates seek becomes a reality, CPS agencies should not be faulted for having a strong presence in poor, minority communities. In fact, to the extent that the state causes fewer children to grow up in such dysfunctional environments, it arguably makes elimination of the poverty and dysfunction more realizable. Elizabeth Bartholet aptly observes: "Keeping them [maltreated children] in their families and their kinship and racial groups when they won't get decent care in those situations may alleviate guilt, but it isn't actually going to do anything to promote racial and social justice. . . . It is simply going to victimize a new generation."²³³

Underlying the disparate impact criticism is an understandable basic sense of unfairness, that certain groups of adults have the misfortune of losing custody of offspring piled on top of many other misfortunes in their lives. Such sympathy, though, however admirable, cannot justifiably lead to sacrific-

232. See, e.g., SMITH & FONG, *supra* note 45, at 1-4, 7 ("[N]eglect in early stages of life may lead to severe, chronic and irreversible damage....[N]eglect experienced in childhood has a more negative impact on early adolescent outcomes than physical abuse. . . . [N]eglect has an effect that is at least as devastating as abuse."); *id.* at 252-53; SUSAN ORR, CHILD PROTECTION AT THE CROSSROADS: CHILD ABUSE, CHILD PROTECTION, AND RECOMMENDATIONS FOR REFORM, POLICY STUDY NO. 262, 1-2 (1999) (noting that overintervention complaints point out that most CPS cases involve neglect rather than abuse, but responding that "it is precisely neglect cases that eventually turn deadly"); WULCZYN ET AL., *supra* note 2, at 76 ("[T]he youngest children are the most likely to have a most serious type of neglect (i.e., failure to provide or failure to supervise)"); D'Andrade & Berrick, *supra* note 80, at 35 ("Child deaths are more often associated with neglect than any other type of maltreatment").

233. BARTHOLET, *supra* note 36, at 6.

ing the welfare of today's newborn children and consigning them to the same lives of misfortune.

For the state to force newborn babies into family relationships with grossly unfit parents because taking away "their" children would add insult to the injury of poverty and inadequate public assistance treats the children as mere instruments for the gratification of others and is a condemnable abuse of state power.²³⁴

Other objections to more expansive TPR grounds might be couched in more child-centered terms. Some might emphasize the trauma to children of being separated from and losing a relationship with a parent, even if the parent is "less than ideal," and the uncertainty that TPR will lead to a better situation for a child. As explained in Part II, this argument has little purchase in connection with newborns, because newborns have no social relationship with birth parents and are readily adoptable. Adoptions do sometimes unravel, but that is largely limited to cases in which children were adopted at an older age after already being damaged by maltreatment and/or multiple foster care placements.²³⁵ Some adoptive parents do turn out to be abusive or neglectful, but the rate of maltreatment among adoptive parents is extremely low, much lower than the rate of maltreatment among birth parents, and far less than the rate

234. A comparison of parentage laws with marriage laws is instructive in thinking about this fairness issue also. Marriage law—in particular, the requirement of mutual consent—also results in a disparate, adverse impact on people who are poor or of minority race. People who are poor are, all else being equal, less attractive as mates to most other people, in part because of their relative lack of resources for supporting a household, family, and lifestyle and in part because certain dysfunctions are correlated with poverty, such as drug use, lack of self-control, criminality, lack of education, and mental health problems. See SMITH & FONG, *supra* note 45, at 233–35. Race in turn correlates highly with wealth in the U.S.; persons who are black or Hispanic are much more likely to be poor than are white people. See *id.* at 233. Accordingly, the aspect of marriage law that requires consent by both parties has a disparate impact; marriage rates are lower for poor people and for people of certain minority races, and many poor and minority communities appear to suffer from the paucity of stable nuclear families.

Yet no one ever suggests as a policy solution to this disparate impact that the state should force some people to marry poor people who otherwise cannot find a mate. We do not in the context of adult-adult relationships consider it proper to use some people's lives to compensate others for their misfortunes or to bolster fractured communities, by forcing some to forego opportunities for a better family life with other people whom they would choose. It is no more proper to do so in the context of adult-child relationships.

235. See DAVID M. BRODZINSKY ET AL., CHILDREN'S ADJUSTMENT TO ADOPTION: DEVELOPMENTAL AND CLINICAL ISSUES 46 (1998).

of repeat maltreatment by birth parents after a child is removed and then returned, and again is mostly confined to situations in which children are adopted at an older age.²³⁶ Delaying an inevitable TPR as to birth parents thus has the consequence of not only making adoption less likely, but of also making it more likely that any adoption that does occur will fail or entail maltreatment.

An additional objection that might be couched in child-centered terms is that some parents eventually overcome their addictions, psychological problems, criminality, and other causes of absence or maltreatment, so the state should not be so hasty in pulling the plug on them. What is relevant from a child welfare perspective, however, is not whether there is *any* chance that a birth parent can *ever* overcome his or her problems, but rather *how likely* it is that the birth parent can overcome his or her problems in time to avoid the substantial and lasting damage to the newborn child that is likely to arise either from maltreatment and failure of attachment or from the delays and disruptions that foster care typically entails. With the types of circumstances and conditions identified above as potential additional bases for TPR without rehabilitation efforts, the prospects for quickly overcoming parental problems are extremely poor. Many critics of ASFA's 15-22 rule in fact base their criticism on the reality that treatment for substance abuse is typically very lengthy, and unlikely to succeed within the twelve months that ASFA allows for rehabilitation efforts,²³⁷ and that imprisoned parents cannot be expected to become good caregivers right after release from prison.²³⁸ With older children, that fact might counsel in favor of relaxing the 15 to 22 provision (though that rule already contains a "best-

236. See RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES 69-71 (1988) (citing studies of child abuse and neglect showing adoptive parents are alleged perpetrators in 1% of reports though representing approximately 3% of the general population and stating that abuse rates are likely to be higher in older child placements but still below those of the general population); Richard P. Barth, *The Value of Special Needs Adoptions*, in ADOPTION POLICY AND SPECIAL NEEDS CHILDREN 173-74 (Rosemary J. Avery ed., 1997).

237. See Barth et al., *supra* note 94, at 377; Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?*, 39 HARV. J. ON LEGIS. 375, 388-89 (2002).

238. See Cohen, *supra* note 100, at A12 (quoting a social worker who counsels women in prison as saying "[i]t is unreasonable to expect these women to resume parenting and make good choices").

interests exception” that states now use more often than not).²³⁹ Conversely, with newborns, it counsels in favor of immediate TPR and adoption.

Others argue that a lengthy foster care period, while CPS agencies undertake rehabilitative efforts, does not harm children, because most adopted children are adopted by their foster parents.²⁴⁰ The belief is that delayed TPR just means a somewhat longer wait for legal formalization of the child’s relationship with foster parents, during which time life is no different for the child and his or her families than it will be post-TPR and post-adoption. However, the fact that most children adopted from the child protective system are adopted by foster parents does not mean that children remain in the home that was their initial post-removal placement. It simply means that adoptive parents typically serve as foster parents first. The foster parents who adopt might be the second, third, or sixth set of foster parents with whom the child lived.²⁴¹

In addition, even when a child’s first placement is with caretakers who will adopt, life is not the same emotionally and psychologically for a child’s new family before and after the court decisions creating legal protection for their relationship. Adoptive parents report high levels of anxiety while waiting for the legal process to run its course, and foster parents report a certain level of detachment from children, to protect both themselves and the children emotionally, in case the state ultimately removes the child from the foster home and places him or her with the birth parents. The adoption process itself usually takes a year or more,²⁴² so if the state does not commence that

239. See GAO, *supra* note 89, at 27 (noting that in the limited number of states that reported on the use of the 15 of 22 provision, “the number of children exempted from the provision greatly exceeded the number of children to whom it was applied”).

240. See CASEY FAMILY SERS., RECOMMENDATIONS TO INCREASE AND SPEED PERMANENCY THROUGH ADOPTION 7 (2003) (finding in Connecticut that 63% of children adopted are adopted by the caregivers with whom they lived at the time of TPR).

241. See GAO, *supra* note 89, at 14–15 (stating that, in 2000, the median length of foster care for children ultimately adopted was thirty-nine months, while, in that same year, the average time spent living with the adoptive parents prior to adoption was eighteen months); *id.* at 18 (showing that, in 2000, 67 percent of adopted children had two or more foster care placements before the adoption and roughly forty percent had three or more); Barth, et al., *supra* note 94, at 374 (discussing research showing infants typically experience multiple foster care placements).

242. See, e.g., CASEY FAMILY SERS., *supra* note 240, at 6 (discussing a study of adoption in Connecticut from 2002 to 2003 showing “a median of 13

process until after a TPR is final, including any appeals, an infant and adopting parent might wait several years for permanency.²⁴³ Risk of foster parent fatigue is especially likely with babies who have suffered in utero exposure to drugs or alcohol, because of the developmental challenges such babies face even in the most nurturing post-natal environment.²⁴⁴

One way partially to address these concerns is to establish a regular practice of “concurrent planning”²⁴⁵ with respect to newborns taken into state custody, under which CPS identifies and prepares an adoptive home immediately upon assuming custody of a child, while also undertaking rehabilitative efforts with birth parents. Concurrent planning shortens the time between foster care placement and adoption finalization, if adoption is the ultimate outcome, because CPS can complete many steps of the adoption process during the time it attempts parental rehabilitation, rather than beginning the process only after rehabilitation efforts end and the TPR process is completed.²⁴⁶ In addition, it avoids multiple placements for a child if undertaken immediately after a child is first taken into state custody; the first foster care placement is with the people who will adopt if birth parents’ rights are ultimately terminated.²⁴⁷ At the same time, it allows CPS to give birth parents another chance to become fit.²⁴⁸

At present, however, concurrent planning rarely occurs.²⁴⁹ In part this is because CPS case workers do not understand it,

months for an adoption petition to be filed after they were freed”).

243. See CHRISTIAN, *supra* note 80, at 4 (“Infants also tend to stay in foster care significantly longer than children age 1 and older . . . Foster placement itself poses risks to infants’ healthy development and formation of healthy attachment relationships.”).

244. See *id.* (“Because drug-exposed infants often have more health needs than non-drug-exposed infants, foster caregivers of such children tend to ‘burn out’ more quickly and return the children in their care to CPS.”).

245. For descriptions of concurrent planning, see D’Andrade & Berrick, *supra* note 80, at 42–46; CWIG: *Concurrent Planning*, *supra* note 89, at 6–11.

246. See CWIG: *Concurrent Planning*, *supra* note 89, at 9–10 (discussing the effectiveness of concurrent planning in San Mateo County, California in decreasing the time between foster care placement and adoption).

247. See *id.* at 8–9 (outlining the key elements of Colorado’s concurrent planning program that result in “timely permanency”).

248. See *id.* at 4 (showing the concurrent planning provides birth parents with opportunities to remain engaged in the child’s life).

249. See *id.* at 3 (“A Federal summary and analysis of State reviews found that ‘concurrent planning efforts are not being implemented on a consistent basis when appropriate’ in a majority of States . . . In some States with formal concurrent planning policies, little or no evidence of concurrent planning

do not have time to do it, expect strong resistance from judges and parents' attorneys, or are opposed to the practice because it seems—to them and/or to the parents—to compromise their commitment to working with the parents on rehabilitation.²⁵⁰ It is also in part because there is a substantial shortage of potential adoptive parents willing to participate.²⁵¹ Many applicants for adoption decline to participate in a concurrent planning situation because there is still a lengthy period of uncertainty and attendant anxiety. Additionally, concurrent planning typically requires them to be substantially involved in the process of rehabilitating the birth parents—at a minimum, cooperating with a visitation schedule, and, in some jurisdictions, having to serve as mentors to birth parents.²⁵²

In any event, even when social workers are inclined and able to engage in concurrent planning, TPR might be preferable, especially with newborns. If the ultimate outcome in a given concurrent planning case is placement in the custody of birth parents, the baby's attachment to the foster-adopt parents, which is likely to resemble the normal case of child attachment to parents, is severed. This severing is detrimental to the child and might not be outweighed by the benefit of being raised by a biological parent. The birth parent or parents are likely to be marginal caregivers even after being deemed legally minimally capable of assuming custody, and, in a substantial percentage of cases, birth parents will lose custody again, resulting in fur-

practices was found in case reviews." (citation omitted)).

250. See D'Andrade & Berrick, *supra* note 80, at 46–47 (relating the confusion that social workers in California face over the meaning of “reasonable efforts” in concurrent planning); CWIG: *Concurrent Planning*, *supra* note 89, at 2 (noting opposition by courts and attorneys); *id.* at 3 (“In a number of States, concurrent goals were written in the case files, but case reviews showed that efforts toward the goals were sequential rather than concurrent. A number of reports indicated that staff’s understanding of concurrent planning was unclear . . .”).

251. See CWIG: *Concurrent Planning*, *supra* note 89, at 8 (“Not surprisingly, the literature commonly points to the recruitment . . . of foster/adoptive families as one of the most challenging aspects of concurrent planning.”).

252. D'Andrade & Berrick, *supra* note 80, at 42–43 (“[C]oncurrent planning places a significant burden upon foster-adopt caregivers. The practice requires foster-adopt caregivers to commit to a permanent relationship with a child before it is known whether the child will be available for adoption, and to support the parents in reunification efforts at the same time. The emotionally taxing nature of foster-adopting may result in agencies having some difficulty recruiting these special caregivers.” (internal citation omitted)); Laura Frame et al., *Essential Elements of Implementing a System of Concurrent Planning*, 11 CHILD & FAM. SOC. WORK 357, 364–65 (2006); CWIG: *Concurrent Planning*, *supra* note 89, at 8.

ther disruption and trauma for the child.²⁵³ A judge in New York State laments: “Judges have seen repeatedly the re-entry of children into foster care based on the relapse by the biological parents and the positive toxicology of subsequently born siblings. Whenever a child born with a positive toxicology is returned to the parents, the judge prays that the child is safe”²⁵⁴

In short, among situations in which the state must assume custody of a newborn child because of parental unfitness, there might be few times in which the best decision, from a purely child-focused standpoint, is to keep open the possibility of birth parents’ one day assuming custody. Even when there is a good chance that birth parents can be made minimally adequate parents within a year or two, the best choice for the newborn is likely to be immediate TPR and adoption.

Comparison with adult relationship decisions might be illuminating here as well. Few adults, upon encountering for the first time another adult who has some characteristic that makes them very attractive as a partner, but who also happens to suffer from drug addiction, mental illness, or imprisonment, would promise to marry that other adult if and when he or she ever manages to overcome his or her problem, and forego other relationship opportunities in the meantime, even if there were a good chance the other person could get the problem under control within a year or two. The vast majority of adults would pursue and invest themselves emotionally in other available relationships, rather than hold out for such an unpromising one. Yet there is much less cost for an adult who waits a year or two for a potential partner than there is for a newborn baby who is forced to wait a year or two to find a permanent family.

253. See OFFICE OF THE ASSISTANT SEC’Y FOR PLANNING & EVALUATION, U.S. DEP’T OF HEALTH & HUMAN SERVS., REREPORTING AND RECURRENCE OF CHILD MALTREATMENT: FINDINGS FROM NCANDS 14 (2005) (showing that average rate of subsequent maltreatment report for children overall once reported as maltreated was 0.51 reports per child); Dicker & Gordon, *supra* note 42, at 31 (“[I]nfants move through the child welfare system differently than older children—they remain in care longer and re-enter care after discharge in alarming numbers [N]early one-third of all infants discharged from foster care return to the child welfare system, a strong indication that the problems leading to initial placement have remained unresolved.”); B. A. Ellaway et al., *Are Abused Babies Protected from Further Abuse?*, 89 ARCHIVES DISEASE CHILDHOOD 845–46 (2004).

254. Sharon S. Townsend, *Babies Can’t Wait: A Judicial Response*, JUV. & FAM. CT. J., Spring 2004, at 43.

This subpart focuses on ultimate outcomes for babies born to unfit parents and on identifying additional circumstances when the law should facilitate immediate creation of legal family relationships between babies and caregivers other than the birth parents. For that to occur, though, much more is needed than just amending TPR rules. As explained in Part III, states also need to back up new reunification bypass provisions with rules to ensure that such babies come to CPS attention and that CPS and courts react expeditiously. The remaining subparts below suggest how they might do so.

B. IDENTIFY AT BIRTH CHILDREN AT HIGH RISK OF MALTREATMENT

At present, states constructively “know” when a child is born whose birth parents have serious child maltreatment histories, have a criminal history that suggests they might endanger the child’s welfare, are currently in a jail, or have at some point been involuntarily committed to a psychiatric facility. These are all things as to which the state keeps careful records. The problem from the standpoint of enabling CPS to assess the danger to the child of being in the birth parents’ custody and perhaps acting to protect the child from harm is that the two relevant pieces of information—that is, the child’s birth and the parent’s history—are not in the possession of the same state agency, and specifically not in the possession of a child welfare agency.

All states require birthing facilities to report all births to a state agency, such as a department of health or vital records, including in the report not just the child’s name but also identifying information for the birth parents, if known, such as social security numbers or driver-license numbers.²⁵⁵ In addition, state CPS offices maintain a registry of prior adjudications of child abuse and neglect, and all terminations of parental rights, with identifying information for the abusive or neglectful parents.²⁵⁶ However, the two databases are not put together. There

255. See, e.g., ALA. CODE § 22-9A-7 (2008) (requiring a birth certificate to be filed with the Office of Vital Statistics); N.C. GEN. STAT. § 130A-101 (2007) (mandating the filing of a birth certificate regardless of the gestation period); 35 PA. CONS. STAT. ANN. § 450.401 (2008) (requiring a birth certificate to be filed with the local registrar).

256. See, e.g., DEL. CODE ANN. tit. 16, § 905 (2003) (stating that the Division of Family Services of the Department of Services for Children, Youth, and Their Families shall maintain a “Child Protection Registry”); MO. REV. STAT. § 210.109 (2007) (establishing a state-wide child protection system); MASS.

are also state and national databases listing all persons previously convicted of serious crimes, and sex offenders and other ex-convicts have to notify local law enforcement officials when they move to town, in some places being prohibited from living anywhere near where other people's children go to school or day care.²⁵⁷ But the law does nothing to ensure that any local agency is aware if such persons procreate and have custody of children in their very homes, even if their past offenses were against children in their custody. And as noted in Part IV, in some states CPS does not learn of births to people who are in prison unless no relative is willing to take possession of the newborn. Likewise, birth records and records of past commitment to mental institution are never cross-checked. Moreover, KCAFSA's exclusion of alcohol exposure from its reporting requirement and omission of a testing requirement leaves undetected untold number of babies at risk because of parental substance abuse.

One approach to addressing this situation, in order to enable CPS to take preventive action with respect to many more children who clearly are at heightened risk (which is not to say their birth parents are *certain* to abuse or neglect them, but rather just that there is sufficient cause for CPS's assessing the children's home situation), would be to require hospitals and other birthing facilities to report identifying information, regarding any persons who come to the facility as expectant parents, to the state agency overseeing child protection work in the state, just as schools and day care centers do with respect to anyone who applies for any sort of job. The state agency would have a computer program to check that information against state and/or national child maltreatment registries and against a criminal record database, and it would communicate any

GEN. LAWS ch. 119, § 51D (2002) (creating "multi-disciplinary service teams" to "review and monitor . . . service plan[s]"); 22 VA. ADMIN. CODE § 40-705-130 (2008) (requiring CPS agencies to report founded dispositions to a central registry). The federal government is currently working on creating a national database to deal with parents who move from one state to another. 42 U.S.C.A. § 16990 (Supp. 2008) (requiring the U.S. Secretary of Health and Human Services to "create a national registry of substantiated cases of child abuse and neglect").

257. See 42 U.S.C.A. § 16916 (Supp. 2008) (mandating that certain convicted sex offenders update their whereabouts every three months). For a fifty-state survey of sex offender registration laws, see generally Thomson West: Sex Offender Registration (2007), <http://www.westlaw.com> (search for "sex offender registration" in the Fifty State Surveys database).

matches to the appropriate local CPS agency.²⁵⁸ Likewise, prisons could be required to notify a state agency or the local CPS office of any births to inmates. All of this information transmission and cross-checking could occur electronically, with minimal human labor. In addition, states could mandate newborn toxicology testing and include pre-natal alcohol exposure in their testing and reporting provisions.²⁵⁹

I drafted a bill to amend Virginia's reporting and CPS response laws along these lines. In promoting the draft bill, I encountered a consistent, hostile reaction to its channeling of birth information to CPS. No one argued that CPS should never be aware of at-risk newborn children or that, should CPS happen to become aware of an at-risk newborn, it should take no action. Rather the voiced concern was with the impact of the process by which CPS becomes aware, that it would infringe adults' privacy rights and aggrandize the power of the state to have all births reported to the state CPS office. This was the first and strongest reaction even among individuals who identify as child protection workers.

Such privacy concerns arise in many child welfare contexts, and of course also in many contexts of crime prevention and criminal law enforcement. A similar parent-protective privacy objection was advanced, for example, in opposition to child support enforcement legislation in the 90s that entailed routine reporting of personal financial and employment information to state agencies.²⁶⁰ Yet ultimately that legislation passed, and today if any of us opens a new bank account or takes a new job, our bank or employer must report it to a government agency that will check our identifying information against a database of child support delinquents.²⁶¹ Arguably, the fact of a child's

258. One state, Michigan, now does this to a limited extent; its "new birth match" program entails an automated check of birth parents against a database of prior TPR. See Julie Bykowitz & Gadi Dechter, *Lawmakers Seek Closer Monitoring After Abuse*, BALTIMORE SUN, Jan. 11, 2008, at A1 (discussing legislative effort to enact similar program in Maryland).

259. Some states now mandate testing of pregnant women for certain diseases. See, e.g., KY. REV. STAT. ANN. § 214.160 (LexisNexis 2007) (requiring physicians to test pregnant women for syphilis and hepatitis B).

260. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.).

261. See Office of Child Support Enforcement, U.S. Dept. of Health and Human Services, Employer Services—Private Sector Employers—New Hire Reporting, Mar. 7, 2006, <http://www.acf.hhs.gov/programs/cse/newhire/employer/private/newhire.htm>.

entry into the world is information that should be viewed as less private than someone's opening a new savings account, and it is in fact information already reported to a state agency, as just noted. My proposal is simply that the same information be sent to a second state agency. This could be done by having a state's department of health or vital records transmit the information it receives from hospitals on to the state child protection office. An expedient CPS response to child endangerment, however, might require that hospitals report directly to the state child protection office and that they do so at the time of a birth mother's admission to the hospital rather than after the birth, so that in high-risk cases a social worker could meet with birth parents at the birthing facility before they take a child home. Moreover, the purpose for which the state would use the information—to find out, before birth parents take a child home, whether they have killed or maimed or sexually abused another child (which is also information that the state already collects)—is arguably much more compelling than child support enforcement, which in a large percentage of cases benefits only the state welfare office and not children.²⁶²

These privacy and big government objections were also among those made against that aspect of KCAFSA which requires medical professionals to report birth mothers' drug use to CPS. Yet that is also information more personal than the fact of having given birth to another human being, and the state uses that information for the very same purpose that I propose—that is, to trigger a CPS assessment of a child's situation. If most of us are comfortable with the state's identifying birth mothers who have taken drugs while pregnant, why would we be uncomfortable with the state's identifying birth mothers or fathers who previously threw their babies in dumpsters after birth?

Furthermore, this proposed cross-checking of state databases is far less invasive than current state-mandated, routine, extensive background checking of people who want to adopt a child who is not a biological offspring, and it has greater justification than the mandatory background checking of people who just want to work in a job or take up a hobby that involves limited contact with children. To become a parent by adoption entails accepting intrusive and detailed investigation of one's personal life and state oversight of one's caretaking for some

262. See Solangel Maldonado, *Deadbeat or Deadbroke: Redefining Child Support for Poor Fathers*, 39 U.C. DAVIS L. REV. 991, 1014–15 (2006).

period after receiving custody of a child.²⁶³ If someone applies to work as a janitor in a high school or offers to coach a children's basketball team, he or she will be subjected to a background check for past child maltreatment and criminal convictions. And if something turns up, that person is likely to be barred from the position, without an opportunity to show that he or she has overcome past problems. There is a concern in those cases with adults harming children who are not "theirs," and that concern seems to obviate any privacy-based objections. But the danger is likely greater that past child abusers will abuse the children in their homes than that they will harm other people's children in public places. On child welfare grounds, the starkly different attitude toward the sort of checking on birth parents that I propose is unwarranted, and it is further confirmation of the parent-protective orientation of state employees who call themselves child protection workers and officials.

An additional objection voiced in response to the notion of screening some parents at birth, made by academics and policy makers at a conference I hosted, was based on a discomfort with making "predictive judgments" about people—that is, basing legal action on a prediction that certain people would harm a child if allowed custody. TPR after a parent has abused or neglected the child in question is different, it was said, because not based on a prediction. This objection is simply nonsensical. Every preventive measure the state or any private party makes in any aspect of life is based on prediction of future costs or harms. Incarceration of criminals is in part justified on prevention grounds, and therefore on a supposition that someone who has committed a crime is likely to do it again. And a decision to terminate parental rights as to a child after parents have abused or neglect that child and have failed to become rehabilitated after a year or more of services is in fact also based on a prediction—namely, a prediction that maltreatment would recur. TPRs are not meant to be punishment for past maltreatment, but rather a preventive measure for the future welfare of the child—hence the requirement that TPR be in the child's best interests. That a parent has already abused or neglected a child might strengthen a prediction of future, further maltreatment of that child, but in some cases the prediction is strong enough before the child suffers any maltreatment and it

263. See Dwyer, *supra* note 14, at 881–904.

would be irrational for the state, acting as proxy for the child, to wait for the maltreatment to occur.

A more politically palatable approach would be legislation directing courts who adjudicate parents as having severely abused or neglected a child or who convict parents for committing felonies against children to include as part of their final disposition an order requiring such parents to notify the CPS agency in the locality where they live if and when they produce another child. This approach would resemble current state law requirements that convicted sex offenders report their presence to local police. The advantage of this approach would be that no parents would experience the privacy loss that cross-checking is said to entail unless they have previously harmed a child. The shortcomings of this approach are the difficulty of monitoring compliance and the fact that it would do nothing to protect children born to parents who pose a great risk to them but who have not previously been adjudicated or convicted for harming another child.

C. COMPEL CPS AND COURTS TO ACT EXPEDITIOUSLY

At a minimum, CPS agencies must have authority, when they become aware of the birth of children at high risk of maltreatment or parental absence, to investigate the birth parents' condition and circumstances and to offer assistance to the parents if they appear to need it. Because existing state statutory provisions governing investigation and removal generally do not refer to parental maltreatment of other children, parental alcohol abuse or mental illness, or parental incarceration, they require amendment to authorize CPS scrutiny based on all of these circumstances in addition to reports of maltreatment, endangerment, or in utero drug exposure of the current child.

Further, to deal with CPS resistance to pre-maltreatment action, state statutes should be amended so that if the CPS investigation reveals that a newborn child would be at substantial risk of maltreatment in parental custody, CPS *must* petition for custody of the child, to trigger a court review of the baby's situation. In turn, state law should provide that if evidence presented in court confirms CPS's conclusion, judges *must* order CPS custody. Current statutory language in many states is insufficiently clear as to whether CPS is even *permitted* to act before a child is harmed or endangered by affirmative, post-birth parental conduct. Certainly explicit restrictions on child-protective efforts should be reexamined and, absent

clear child-welfare-based justification, eliminated. There are legitimate concerns about pregnant women avoiding medical facilities for fear of being reported, and an obvious intent behind an exception for women who seek help with an addiction would be to motivate pregnant women to secure treatment. It seems unlikely, however, that many substance-abusing pregnant women are sufficiently familiar with such restrictions on CPS action in the administrative code that it affects their behavior. And an obvious alternative way of addressing the concern about pregnant women not seeking care their babies need is to treat their failing to do so as neglect that itself can be a basis for removal. The ordinary response to a concern that deterring people from doing one bad thing will lead them to do some other bad thing is to attach negative consequences to doing the other bad thing as well, if feasible. We do not ordinarily respond by permitting them to do both bad things. Importantly, the aim and effect of such rules should be solely protection of babies' well being, not moral condemnation and punishment of mothers; if it is best for a baby to be raised by his or her mother, then that is what should happen, regardless of what the mother has done in the past.

A further necessary reform is to require that CPS, when it assumes custody of a newborn child, seek a pre-adoptive foster care placement. Thus, if a court does ultimately order a TPR as to birth parents, the child would remain with the same caregivers from birth onward. Following any removal, CPS would assess the likelihood of parents' being capable of assuming custody within six months of the birth, using well-established instruments for conducting such assessments.²⁶⁴ The maximum time allowed birth parents to become capable of caring for a child should be much shorter in the case of a newborn.²⁶⁵ If the prognosis for birth parent custody within six months is poor, CPS should immediately petition for TPR unless it has strong reason to believe some other disposition would better serve the child's interests. Even when immediate TPR is not the disposition and instead CPS endeavors to rehabilitate the birth parents, CPS should immediately begin the agency process for approval of an adoption—that is, engage in concurrent planning,

264. See D'Andrade & Berrick, *supra* note 80, at 43–46 (describing use of “prognosis indicators” in context of concurrent planning).

265. Cf. CAL. WELF. & INST. CODE § 361.5(a)(2) (West 2008) (limiting court-ordered services to six months for children who were under three years of age at the initial time of removal).

unless it is clear that the condition currently making custody with birth parents unsafe is likely to end soon.²⁶⁶ Every effort should be made to avoid multiple foster care placements for infants.

Moreover, there should be a presumption *against* placement of a removed newborn child with relatives. Such a presumption makes sense in virtue of the tendency of dysfunction to run throughout families and in light of the fact that newborns have no existing ties to biological relatives to preserve. There are also the dangers that relatives will feign interest in adopting in order to keep a child near the birth parents and that, even if they do adopt, they might give birth parents more access to the child than is beneficial for the child, because of sympathy for or fear of the parents. Introducing a child to unfit birth parents later in life might be a good thing for the child, but on the whole a newborn is likely to fare best if removed entirely from the environment that produced the dysfunctional parents.

Lastly, a separate dispositional provision applicable only to newborn children could *require* the court having jurisdiction of any children removed at birth because of substantial maltreatment risk to render *whatever* disposition is in a child's best interests, including immediate TPR if the prognosis for parental rehabilitation is very poor, taking especially into account newborns' pressing need for permanency. Amending existing TPR statutes, governing all children, to change permissive language to mandatory would also be desirable, requiring rather than merely permitting courts to order termination if they find that the statutory standards for TPR are met, including that TPR would be in the child's best interests.²⁶⁷ An additional or alternative means of pushing judges to order TPR without rehabilitative efforts when that is best for a child would be to establish a statutory presumption in favor of TPR when the parental-conduct predicate for a fast-track TPR is satisfied, shifting the burden to the parents to show TPR would not be in the child's best interests.²⁶⁸

266. *Cf.* MINN. STAT. § 260C.301 subdiv. 3(a) (2006) (commanding the county attorney to petition for TPR in certain circumstances and to undertake concurrent planning).

267. *Cf.* MICH. COMP. LAWS § 712A.19b(5) (2008) (mandating that courts order TPR upon making certain factual findings, absent a demonstration that TPR would be contrary to the child's best interests). I recently proposed such an amendment in Virginia. *See* Va. Senate Bill 928 (2007).

268. *Cf.* 750 ILL. COMP. STAT. 50/1(D)(k) (1999 & Supp. 2008) (stating that

In discussing such proposals for getting newborns at risk through all the necessary steps toward permanency, the principal objection I have encountered focuses on use of mandatory language—that is, statutory language stating that CPS *shall* investigate, remove, and petition in certain circumstances and that courts *shall* order removal and termination in certain circumstances. For some, the concern was with limiting agency and court discretion. This concern is baseless, however, because the substantive standards in child protection rules—in particular, the “best interests” standard—are broadly worded, calling for somewhat subjective determinations by CPS and the courts, and so leave agencies and courts with ample discretion for deciding what outcome is best for a child in a given case.²⁶⁹ Changing permissive language to mandatory might simply signal to social workers and courts a legislative determination that they should act decisively to protect young children from lifelong harm, and that sympathy for parents is no reason for failing to do so. It might also give guardians *ad litem* for children a statutory basis for demanding expeditious agency or court action if and when social workers or judges do make certain factual findings. ASFA’s requirement that states mandate, rather than merely permit, petitions for TPR in some of the “no reasonable efforts” cases and under the 15 to 22 provision suggests a recognition at the federal level that local CPS agencies sometimes need to be commanded to take certain steps toward permanency, because without a mandate they will not act. A few states’ statutes already mandate agency filing of TPR petitions even in some circumstances not dictated by ASFA,²⁷⁰ and a few use mandatory language in statutory provisions governing court decision making as to TPR.²⁷¹

positive toxicology screening creates a rebuttable presumption that birth mother is unfit to parent the child); *id.* at 50/1(D)(i) (1999 & Supp. 2008) (providing that murder or attempted murder of one child creates presumption that the parent is “depraved”); KAN. STAT. ANN. § 38-1585 (repealed 2006) (showing the numerous triggers for presumption of parental unfitness); ME. REV. STAT. ANN. tit. 22, § 4055(1-A)(C) (2004) (stating that chronic substance abuse creates a presumption that the parent is unable to protect the child from harm).

269. *Cf.* GAO, *supra* note 89, at 27 (noting the high rate at which states invoke an exception to the 15 of 22 provision).

270. *See, e.g.*, N.J. STAT. ANN. § 30:4C-15.1(a) (West 2008) (mandating the initiation of a petition to terminate if certain standards are met).

271. *See, e.g.*, MICH. COMP. LAWS § 712A.19b(5) (2002) (forcing the court to terminate parental rights in certain circumstances); R.I. GEN. LAWS § 15-7-7(a) (2003) (mandating termination of parental rights if certain conditions are

Additional training of social workers and judges regarding the crucial importance of permanency for newborns, with instruction as to attachment, bonding, and brain development, might also go some way toward changing their inclinations in a child-centered direction. Alternatively, CPS agencies might need to employ persons who are not social workers but who are instead trained to conduct investigations, to make prognoses of parental rehabilitation, and to make best-interest decisions for newborns, and to give those employees authority to decide which disposition the agency will seek. Agencies might limit social workers' function to overseeing parental rehabilitation efforts *after* prognosis specialists and courts have decided that that will be the goal. Enhancement of the GAL role in child protection cases might also be desirable. Ensuring appointment of a GAL in all cases in which a newborn at risk is identified and training at least some GALs in the special needs of newborns and the proposed special legal provisions for newborns could help to expedite permanency for these children. Authorizing foster parents, prospective adoptive parents, and GALs to petition for TPR might be a further desirable remedy for CPS's reluctance to petition.²⁷²

An additional concern with my proposal was budgetary. The cross-checking of databases is nearly costless once the proper computer program is created, but having a CPS case worker investigate all the parents identified as having a serious maltreatment history or a debilitating condition would be far from costless. The usual response to such a concern is to say that an ounce of prevention is worth a pound of cure—that is, that preventing child maltreatment today will save the state an enormous amount of money down the road, with fewer citizens damaged by childhood maltreatment. Surely that is true, but the realist rejoinder is that legislators are not moved by the thought of savings to be realized decades down the road in very diffuse ways. In this context, though, there is reason to believe prevention will generate significant cost savings very quickly and within CPS agencies' own budgets. Newborns at high risk are, under current practices, likely to be abused during the first year or two of their lives and at that point come into the CPS

fulfilled); VT. STAT. ANN. tit. 15A, § 3-504 (2002) (providing the grounds for termination of the parent and child relationship).

272. Cf. IOWA CODE § 232.111(1) (2006) (authorizing a child's GAL or custodian to petition for TPR); ME. REV. STAT. ANN. tit. 22, § 4052(1) (2004 & Supp. 2007) (authorizing "the custodian of the child or . . . the department" to file a TPR petition).

system. CPS then must not only conduct an investigation and line up alternative caregivers, but must also pay large sums for foster care, services for parents, and remediation for the children. And the child is likely to return to the system multiple times in the following several years. Any given CPS agency might therefore see reduced costs within a very short period of time. Legislatures enacting these reforms could allow agencies some time to phase in new categories of parents to be investigated, so that there is not a shock to the system at the outset.

In the most basic sense, then, what is needed are state laws to build on and back up the TPR rules mandated by ASFA. ASFA's authorization of terminations based on parents' having demonstrated their unfitness through conduct toward other children will remain ineffective in preventing maltreatment so long as later-born children of unfit parents are not, *before they are harmed*, identified, brought into the child protection agency process, and brought before a court for a determination of what is best for them in light of their birth parents' unfitness. And ASFA's "no reasonable efforts" rule will leave a large portion of at-risk newborns unprotected unless it is widened to include more cases in which parents have abused or neglected other children and cases in which parents are incapacitated by substance abuse, mental illness, or incarceration.

CONCLUSION

This Article emphasizes terminating parental rights to prevent maltreatment of newborn children because it focuses on the worst cases, those in which parental rights are likely to be terminated anyway, and it proposes that states work harder to identify these cases at birth and terminate sooner rather than later. The urgency arises from the fundamental developmental needs of newborn babies. This approach for the worst cases actually comports with greater investment in societal programs that try to enable biological parents to retain parenting rights. Earlier TPRs in the worst cases would free up state resources to be devoted to the more hopeful cases. It would be foolish and dangerous, however, to believe that all birth parents can be made adequate parents by offering them assistance and services. Many simply face too many obstacles to becoming fit parents, and the reality is that the state is not very good at

reforming deeply dysfunctional people.²⁷³ Moreover, babies cannot wait for a greater societal commitment to helping adults overcome problems that make them unfit to parent. In addition, most treatment programs for abused and neglected children show very limited effectiveness in overcoming early damage, so we also cannot expect the state to fix the mistakes it makes in assigning children to parents in the first instance.

Consequently, the state's approach to minimizing child maltreatment should be altered in the following ways: First, ensure that CPS is aware of newborns at high risk of maltreatment. Second, have CPS parent-prognosis specialists assess, at the time those children are born, whether the birth parents' history and current condition make it unlikely that they can quickly become adequate parents. Third, for those birth parents who cannot, immediately terminate parental rights and place the babies for adoption, with a rebuttable presumption against placement with relatives of the birth parents. Fourth, concentrate rehabilitation resources on those birth parents who are likely to be able to take custody within a few months after birth and who are likely to succeed in the long run as parents, shifting CPS expenditures from low-probability parents to higher-probability parents.

This approach would bring the state much closer to the model of ideal proxy decision making described in Part I. This alternative approach would substantially benefit children and the public. Damaged children represent a moral tragedy and an enormous social cost. The choice we face as a society, therefore, is between clinging to an untenable and extremely expensive notion that manifestly unfit biological parents are entitled to one or more opportunities to become fit before a newborn child can have a good permanent home and, alternatively, respecting the moral right of children to enter into family relationships that they would choose if they were able.

273. See ORR, *supra* note 232, at 7 (“[P]revention programs like ‘Healthy Families’ already have a track record that is not very promising.” (footnote omitted)); SMITH & FONG, *supra* note 45, at 182 (“[S]tandard child welfare services have been shown to be ineffective in reducing neglecting behavior in families.” (internal emphasis omitted)); WULCZYN ET AL., *supra* note 2, at 129–32 (noting methodological problems with studies suggesting effectiveness of early intervention programs); *id.* at 134 (noting little effect for high-risk families from parent education programs); *id.* at 138 (“The extant evidence suggests that prevention programs have very modest if any beneficial impacts on parenting knowledge, attitudes, and behaviors.”).