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2009

The Child Protection Pretense

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The Child Protection Pretense:
States’ Continued Consignment of Babies to Unfit Parents

James G. Dwyer∗

Introduction

When adults with terrible child abuse histories conceive a new child, or when adults who have chronic and serious substance abuse or mental illness problems conceive a child, one might expect child protection agencies to take some 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, and maltreatment during the developmentally crucial first year of life is likely to cause serious and permanent damage to the child.1 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 can notify local child protection agencies whenever a baby tests positive for in utero exposure to illegal drugs or alcohol. Yet the reality is that, despite federal legislation intended to induce a more proactive and preventive approach to child maltreatment,2 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.3 It is no exaggeration to say that this state practice is the root cause of inter-generational transmission of dysfunction in our society and a tragic injustice to the babies who could be protected.4

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 having previously had parental rights terminated as to another child, having a criminal conviction for child abuse or neglect, having serious drug abuse or mental health problems, or being currently a prison inmate. They should conduct an assessment of such biological parents and their home situation before the parents take a baby home with them. With respect to those parents who, the assessment suggests, can be adequate parents now with some assistance, states should provide such assistance. However, for reasons set forth in this Article, with parents who most likely could not become adequate within the babies’ first six months of life even if services were provided, states should move immediately at birth to terminate their legal relationship to the baby and to create a parent-child relationship with qualified applicants for adoption. States should not wait until

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1 See infra Part II.
2 See infra Part III.
3 See infra Part I.
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 fairly radical, relative to current practices and attitudes, and much of this article is devoted to demonstrating why it is sound. A central aspect of that demonstration is documenting how newborns are simply different from older children, a basic fact that the child protection system and legal scholars have failed fully to recognize.

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 held out promise of ensuring intervention to protect newborn babies from unfit parents and quickly to secure good, permanent family placements for them. The Adoption and Safe Families Act of 1997 (hereafter “ASFA”) included a requirement that states authorize courts to terminate parental rights without waiting for child protective agencies to attempt rehabilitative efforts with the parents, in certain cases where parents have demonstrated unfitness through egregious conduct toward other children. The Keeping Children and Families Safe Act of 2003 (hereafter “KCAFSA”) included a requirement that states direct birthing facilities to report to their 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 for one particular, and the most common, reason – namely, parental drug abuse. KCAFSA also required states to implement a plan to ensure the safety of such offspring of drug addicts.

However, against a background of strong institutional resistance to “disqualifying” anyone from raising their biological offspring – among social workers and judges, in particular – those developments have been largely ineffective. No matter how horrible biological parents’ histories are, the state still routinely sends newborn children home with them, without supervision. When child protection agencies do take custody of children at birth, they still routinely put such children in a provisional foster care placement while they undertake lengthy and usually futile parental rehabilitation efforts, a practice inconsistent with babies’ vital need for attachment to and bonding with a nurturing and permanent caregiver. Effectuating the congressional aim of child maltreatment prevention will require further legislation at the federal or state level 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 the further legal reforms needed to effectuate the aim of making better parentage choices for children born to unfit biological parents.

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9 See infra Part IV.
10 See infra Parts II and IV.
Part I of this Article 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 child maltreatment. Part IV details the ways in which state law and practice are frustrating those legislative aims. Lastly, Part V sets forth proposals for filling the gaps left by federal legislation in order better to accomplish the overriding purpose of ensuring all children a healthy start in life, free of abuse, neglect, and family disruption.

I. State Creation of Parent-Child Relationships

The state creates legal parent-child relationships. That is a truism. Legal parent-child relationships generally determine social parent-child relationships and therefore children’s family experience. A child’s family experience largely determines his or her fate in life. The state’s selection of legal parents thus largely determines whether a person’s life goes well or poorly. In this Part, I explain why newborn babies have a moral right against the state’s forcing them to be in relationships with grossly unfit parents and how current parentage and child maltreatment laws nevertheless do just that.

A parent-child relationship is in several ways like a state-arranged marriage. It is a legal relationship entailing rights, responsibilities, and liabilities; the legal relationship ensures an opportunity for a social relationship to arise; and the legal relationship arises without mutual consent between the private parties. In this last respect in particular, a parent-child relationship is an extraordinary thing; it is a state-imposed family relationship that does not arise from the mutual consent of the private parties in it and, in fact, can arise without the consent of either. 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.11 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 for themselves whether to request state protection of the social relationship through legal recognition. It therefore requires strong justification and careful constraint.

An obvious justification for the state’s creating legal family relationships for a newborn child, and thereby granting some adults a state-protected opportunity to develop a social relationship with the child, is that newborns need immediately to be in relationships with adult caregivers 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’s intruding so profoundly into a child’s

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life, the only justification that adequately respects the equal moral status of the child.\textsuperscript{12} In particular, a contention that children enter life owned by the adults who conceived them, or as objects of those adults’ possessory rights, and that the state is simply enforcing property rights when it creates legal parent-child relationships, is irreconcilable with a view of children as persons with moral status equal to that of adults, a view that is now well established.\textsuperscript{13}

Significantly, this \textit{parens patriae} justification is the same one 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. 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. It would be a gross abuse of state power for the state to make decisions about fundamental aspects of an incompetent person’s life so as to serve anyone’s interests other than those of the incompetent person herself. The law governing adult guardianship clearly reflects this; the desire of particular adults to serve as a guardian for an incompetent adult are a necessary but not sufficient condition for appointment, because it is also a necessary condition 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.\textsuperscript{14} The state is viewed in this context as acting 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.\textsuperscript{15}

In other words, in creating a legal relationship between an incompetent adult and a caregiver, a relationship of ward and guardian, the law requires a mutuality of choice, just as it does in relationships between competent adults, in order for anyone to have a right to be in a relationship, with the state as proxy supplying the reciprocating choice in behalf of the person unable to make an actual choice. In forming relationships with other adults (e.g., in marrying), competent adults are entitled to choose, from among those who wish to be in a relationship with them, solely on the basis of what is best for themselves, and the law confers an equivalent right on incompetent adults in creating legal relationships for them (e.g., a guardian-ward relationship), basing the decision solely on what is best for the incompetent adult. Likewise with the law governing adoption of children; the state, in a \textit{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.\textsuperscript{16}

\textsuperscript{12} See JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN (2006), chs. 4-7.
\textsuperscript{13} Id. at 171-88.
\textsuperscript{14} See id. at 82-85. 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.
\textsuperscript{15} Id.
\textsuperscript{16} See Dwyer, supra note 11, at 882-83.
The state should similarly be viewed, when creating the first legal parent-child relationships for newborn children through parentage laws, as acting in a proxy capacity, choosing in behalf of the child and constrained to choose as the child would if able, which presumptively means on the basis of the child’s best interests. There is no other plausible justification for the state using its power to intrude so profoundly into a person’s private life, presuming to dictate who a child’s family will be. 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, all things considered. The state would then have the same aim we adults typically have when choosing another adult with whom to form a family – that is, to choose the person, among those who want to be in a family relationship with us, who is in some sense best for us, with whom we expect to have a better life than we would with any other available potential partner.

Against such a ‘best available parent’ standard, existing parentage laws might be viewed as 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. And in every state, with rare exception, the law makes men legal fathers on the basis of rules that directly or indirectly predicate parentage on biological paternity. This legal regime approximates the ideal described above to some degree because, all else being equal, it is best for children to be raised by their biological parents. Children in our society have a significant interest in being part of a social family in which members are biologically related. This is in part simply because culturally we happen to place some importance on the biological connection, so most people value having it in parent-child relationships. It is also in part because biological families are still regarded as “normal,” which is of some significance to older children.

This regime of parentage laws is only a rough approximation, however, because there are many aspects of parenthood other than a biological connection that are relevant to a child’s well being, yet the law makes those other aspects irrelevant. In a significant percentage of cases, biological parents’ deficiencies in other aspects outweigh the benefit of biological connection, such that it would actually be better for the newborn children if the state made someone other than their biological parents their legal parents and, correspondingly, the adults who take custody of them after birth and raise them. 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 would some other available adults’ taking on that role. That fact is a basic assumption underlying

17 See Dwyer, supra note 12, at ch. 7.
18 Dwyer, supra note 11, at 859-65.
19 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.
existing 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. Legal rules for establishing a child’s first legal family, however, currently do not reflect this fact, with the result that 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.

Some departure from the ideal of state proxy relationship decision making for newborn children – that is, some number of parentage decisions that are not best for children – is unavoidable, given the imperfection of our knowledge of what makes for a good upbringing for children and given limitations on access to information about birth parents. To some extent we are simply unable to rank as better or worse different forms of upbringing, because there is some inherent indeterminacy to the notion of a good upbringing. And while 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. In addition, some further departure from the ideal is justifiable on grounds of administrability; 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. 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, 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. 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. Even maliciously killing a child today does not legally disqualify one from being named the legal parent of another child tomorrow. Being found guilty of such an atrocity does not even require one to make some showing to the state that one is not likely maliciously to kill that next child as well, in order to be named legal parent of the new baby. 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 to

\[21\] Dwyer, supra note 11, at 859-81.
any history of partner abuse that person might have. And it is inconceivable that the state would approve for adoption of a child any applicant 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 what Elizabeth Bartholet terms a “blood bias” – an exaggerated notion of the importance of being raised by one’s biological parents and a morally untenable notion of parental ownership of biological offspring.

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 and present evidence that they are now or soon could be minimally adequate parents, before the state would confer legal parenthood of a 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 is standard practice for adoptive parents) that it is politically unrealistic to propose it. However, an alternative approach that would have largely the same practical effect would be to create a mechanism for terminating parental rights immediately after birth as to biological parents who have previously demonstrated clear unfitness to serve as legal and social parents and who have not taken effective steps to overcome past problems. 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 legal developments have created the opportunity for states to move toward such an approach to family formation for newborns in the highest-risk situations. Before analyzing those developments and the reasons why they have had little impact on practice, I explain in Part II what is concretely at stake for newborn babies, why there is a particular urgency to securing good, permanent families for them soon after birth.

II. Why It is Crucial to Get It Right at Birth

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 and emotional make up and health, 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 – what is less commonly known – “a secure attachment to a sensitive, responsive, and reliable caregiver.”

Infancy is “a period of extreme vulnerability in which specific child welfare experiences have the potential to have devastating, long-term consequences.”

The state’s creation of parent-child relationships thus effectively determines the basic life prospects of persons and the likelihood of their experiencing happiness and fulfillment. Arguably 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, more than any other action the state takes toward children, has the potential to damage them severely, and it in fact does so now 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. 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.

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. The neurobiological literature reveals that in the normal child, by the end of the first year of life most brain development is complete and the basis for cognitive and perceptual processes is in place. Healthy development of various parts of the brain depends on avoiding or receiving certain experiential inputs. Deleterious to neurological development are not only physical

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26 See infra, notes 44-48, 60-68 and accompanying text.
27 See H.R. 1082: Safe Babies Act of 2007, § 2 (“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.”).
29 See Charles A. Nelson, The Neurobiological Bases of Early Intervention, in HANDBOOK OF EARLY INTERVENTION, 204-27 at 210 (Shonkoff and Meisels, eds., DATE) ("[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"), at 215 ("[T]he most dramatic development – that of structures, suici, gyri, and so forth – occurs during the first few years of life"); Sheryl Dicker and Elysa Gordon, Building Bridges for Babies in Foster Care: The Babies Can’t Wait Initiative, 55(2) JUV. & FAM. CT J., 29, 30 (2004) (citing report of the National Research Council and the Institute of Medicine concluding that "more brain growth and learning occurs during infancy than any other time of life").
30 See, e.g., Nelson, supra note 29, at 215 ("[E]nvironment plays a critical role in regulating and determining both prenatal and early postnatal brain development"); at 218 ("There are now
maltreatment — that is, physical trauma and malnutrition, but also social deprivation and stress during infancy. 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.” Studies of children with attachment disorders caused by parental neglect also find an adverse impact on brain development. Impairment of brain development caused by social deprivation in turn hinders intellectual, linguistic, emotional, and social development.

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. It is the basis of a child’s understanding of and feeling about the world and about himself.

The development of attachments to parents and other important caregivers constitutes one of the most critical achievements of the 1st year of life. These enduring ties play essential formative roles 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.

A secure attachment initially entails “an urge to keep proximity or accessibility to someone seen as stronger or wiser, and who if responsive is deeply loved,” and ultimately “its effective operation brings with it a strong feeling of security and 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.”); Brotman et al., *Children, Stress, and Context: Integrating Basic, Clinical, and Experimental Prevention Research*, 74 (4) CHILD DEV. 1053 (2003) (discussing effects of stress on brain and other physiological development).

See Nelson, supra note 29, at 215 (“Poor 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”); Wulczyn et al., supra note 25, at 27 (noting effects of neglect and trauma on brain development).


Zeanah et al., *Designing research to study the effects of institutionalization on brain and behavioral development: The Bucharest Early Intervention Project, 15 Dev. & PSYCHOPATHOL. 885, 888 (2003).

See SMITH AND FONG, supra note 32, at 68.

See also Wulczyn et al., supra note 25, at 27 (noting that impairment of brain development as a result of abuse or neglect makes children “persistently vulnerable to mental health problems and other developmental difficulties.”).

contentment.”

That security enables a child eventually to explore the world without great anxiety and so to master tasks and develop a sense of competence and self-worth. 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,” an expectation that will later make possible positive peer and family relationships and healthy intimacy. As a result, “securely attached children later are 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.” They “exhibit a greater capacity for self-regulation, effective social interactions, positive self-representations, self-reliance, and adaptive coping skills.” 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 is contingent on the child’s interactions with caregivers during the “attachment phase” of infancy, between seven months and two years of age. In this period especially, babies need “sensitive and responsive care from familiar adults in the course of feeding, holding, talking, playing, soothing, and general proximity.” Thus, much is required of a caregiver:

In order for an infant to develop a secure attachment, the caregiver must possess the capacity to accurately read the infant’s signals, correctly interpret the need underlying the child’s behavior, and respond quickly to effectively address the need. . . . As the infant explores the environment, the caregiver must provide the necessary structure, guidance, and supervision to ensure the child’s safety. In addition, the caregiver must have the capacity to provide a level of stimulation that is neither overwhelming nor stifling to the infant’s developmental level. Finally, the caregiver needs to be attentive to the infant’s internal world, by being emotionally available to assist the infant when frustration is encountered or to rejoice in the infant’s achievements encountered through the sheer joy of exploration.

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 to traverse successfully later developmental stages and attendant challenges.

38 See Goldsmith, Oppenheim, and Wanlass, supra note 24, at 3.
39 Id.; Cohen and Youcha, supra note 28, at 17.
40 Kelly and Lamb, supra note 36, at 303.
41 See Goldsmith, Oppenheim, and Wanlass, supra note 24, at 2.
42 Kelly and Lamb, supra note 36, at 298. See also id. at 299.
43 Goldsmith, Oppenheim, and Wanlass, supra note 24, at 3. See also id. at 11 (parents need “insightfulness regarding the impact of their own emotional states on the child’s behavior”); Kelly and Lamb, supra note 36, 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.”).
Accordingly, it is not sufficient for a child’s healthy development for a parent simply to share a household with a child and not physically endanger the child. A child whose parent is consistently present might nevertheless fail to form a secure attachment, as a result of “poor styles of parenting . . . such as disturbed family interactions, parental rejection, inattentive or disorganized parenting, neglect, and abuse.”

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. Any of these might result from a parent’s substance abuse, mental illness, or dysfunctional relationship with another adult; “Preoccupation with personal stressors diminishes the parent’s ability to respond in this way. A parent who is consumed by drug addiction or a serious psychopathology will have difficulty providing the level of reliable support needed to help the infant develop trust.”

Parents addicted 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. In addition, children likely will fail to

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44 Kelly and Lamb, supra note 36, at 302.
45 See HUDSON ET AL., HEALING THE YOUNGEST CHILDREN: MODEL COURT-COMMUNITY PARTNERSHIPS 2, 14 (ABA and Zero to Three, 2007); 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 (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.”); SMITH AND FONG, supra note 32, at 40.
46 Goldsmith, Oppenheim, and Wanlass, supra note 24, 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 and Lamb, supra note 36, at 302 (discussing impact of parental discord), 305 (discussing the importance for infants of locational stability and “predictable comings and goings of both parents, regular feeding and sleeping schedules, consistent and appropriate care, and affection and acceptance”); CHILD WELFARE INFORMATION GATEWAY (CWIG), SUBSTANCE ABUSE AND CHILD MALTREATMENT 2 (December 2003) (noting that substance-abusing parents have diminished capacity to function as parents because of impairment when using, expenditure of family resources on drugs and alcohol, time spent seeking drugs, and time spent using drugs and alcohol, and noting that substance-abusing parents are often also afflicted with mental illness, high levels of stress, and dysfunction in their larger family); Leventhal et al., Maltreatment of Children Born to Women Who Used Cocaine During Pregnancy: A Population-based Study, 100 PEDIATRICS 177 (2005) (“Numerous studies . . . suggest that substance-abusing parents have diminished capacity to function as parents because of impairment when using, expenditure of family resources on drugs and alcohol, time spent seeking drugs, and time spent using drugs and alcohol, and noting that substance-abusing parents are often also afflicted with mental illness, high levels of stress, and dysfunction in their larger family”); 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Leventhal et al., Maltreatment of Children Born to Women Who Used Cocaine During Pregnancy: A Population-based Study, 100 PEDIATRICS 177 (2005) (“Numerous studies . . . suggest that substance-abusing parents have diminished capacity to function as parents because of impairment when using, expenditure of family resources on drugs and alcohol, time spent seeking drugs, and time spent using drugs and alcohol, and noting that substance-abusing parents are often also afflicted with mental illness, high levels of stress, and dysfunction in their larger family”).
form even an insecure attachment with parents if parents are absent for long periods, as when parents abandon or neglect a child or go to prison, or if a child’s interactions with parents are often painful rather than nurturing, as when parents physically abuse a child. All these negative experiences can prevent 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.

In addition, children are harmed by disruption of an established attachment relationship. 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. 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. 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). Stress in general can adversely affect a child’s development, and disruption of any attachment relationship and living situation is highly stressful for a child.

48 Kelly and Lamb, supra note 36, 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”); Cohen and Youcha, supra note 28, at 18 (“[C]hildren who have experienced physical abuse… are more likely to be insecurely attached to their parents”); Wulczyn et al., supra note 25, at 32 (“Much empirical work has documented that maltreated and foster infants are more likely to exhibit… attachment disorders.”); Christopher J. Mumola, Incarcerated Parents and Their Children, U.S. DEPT. OF JUSTICE OFFICE OF JUSTICE PROGRAMS, 5 (2000) (showing that over 90% of mothers in prison see their children less often than once a week, with over half never seeing their children during their incarceration).

49 See Goldsmith, Oppenheim, and Wanlass, supra note 24, at 7.

50 See Kelly and Lamb, supra note 36, at 303 (“[T]here is a substantial literature documenting the adverse effects of disrupted parent-child relationships on children’s development and adjustment”); Wulczyn et al., supra note 25, at 29 (“[T]ransitions in living environments have an independent relationship to major indicators of adolescent deviance (e.g., delinquency and school dropout)”.

51 Kelly and Lamb, supra note 36, at 300-01.

52 See Goldsmith, Oppenheim, and Wanlass, supra note 24, 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).

53 Cohen and Youcha, supra note 28, at 16 (“When a baby faces a change in placement, fragile new relationships with foster parents are severed, reinforcing feelings of abandonment and distrust.”); Wulczyn et al., supra note 25, at 148 (citing study showing multiple foster care placements lead to behavioral problems); Leslie, et al, supra note 45, at 141 (noting that placement changes exacerbate attachment problems); Zero to Three Policy Center, Infants, Toddlers & Child Welfare, available at http://www.zerotothree.org. 3 (“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. . . . [Yet] very few communities have developed programs to prevent multiple out-of-home placements for young children in foster care.”.

54 See Nelson, supra note 29, at 216; Brotman et al., supra note 30, at 1054; Ethier, Couture, and Lacharite, Risk Factors Associated With the Chronicity of High Potential for Child Abuse and Neglect, 19 J. FAM. VIOLENCE 13, 22 (2004); Katherine C. Pears and Deborah M. Capaldi, Intergenerational transmission of abuse: a two-generation prospective study of an at-risk
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... social and behavioral abnormalities.”

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.

Children subject to early deprivation sometimes recover some lost ground in some areas of development if transitioned early to a highly nurturing environment, but some damage is irreparable and less recovery in all aspects of development is possible the longer a child goes without permanence in a good home.

Merely providing

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Kelly and Lamb, supra note 36, 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.”); Goldsmith, Oppenheim, and Wanlass, supra note 24, at 1 (warning of “the severe risk endured by the child as a result of separation from the caregiver, and the long-term effects of separation on the child”).

Zeanah et al., supra note 33, at 886. See also Nelson, supra note 29, at 216 (“[I]solation parenting also results in a host of behavioral impairments, including hyperactivity, abnormal responses to novelty and stressors, and cognitive deficits in adulthood”); Smith and Fong, supra note 32, at 66-67.

See Nelson, Zeanah, and Fox, supra note 32, at 205-09; 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”), 6 (“attachment to one’s parents can result in decreased delinquency through a process known as ‘virtual supervision’”), 14 (“children attached to both parents are less likely to be delinquent than youth attached to only one parent”), 28 (citing research concluding that “youth who are strongly attached to their parents are less likely to engage in delinquent behavior”), 28 (“inattentive 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”), 29-30 (“parents 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”), 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”).

Zeanah et al., supra note 33, at 903; Nelson, supra note 29, at 220 (“[A]t least some regions of the brain, at least under some conditions’ can recover from early deprivation), 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”); Wulczyn et al., supra note 25, 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”); Lederman et al., Promoting the Health and Well Being of Infants and Toddlers in Juvenile Court, 52 JUV. & FAM. CT. 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."); Zeanah et al., supra note 33, 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); Cohen
services to neglectful parents or special educational programs for a child is very unlikely to remedy the effects of a non-nurturing environment in infancy.59

A much larger social science literature 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 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.60 Many of these adverse outcomes are more pronounced the younger a child is when incurring the maltreatment.61 Significantly, some researchers have concluded that psychological maltreatment is more detrimental in the long run than is physical maltreatment.62

Turning to predictive parental characteristics, there is a strong correlation between child maltreatment, on the one hand, and parental substance abuse, mental

and Youcha, supra note 28, at 18 (citing 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”).

59 See, e.g., W. John Curtis and 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 464, 488 (S. Luther, ed., Cambridge University Press, 2003) (“[O]ver the last four decades scores of enriched preschool intervention programs have been implemented…. but the hoped-for and expected enduring effects on IQ have largely not been obtained”).


61 See Stahmer et al., supra note 60, at 894; Patchin, supra note 57, 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 60, at 634.

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 have CPS remove their children from their custody at some point anyway, and d) extremely unlikely to reunify successfully following removal.63 The prospects are similarly bleak for birth

63 See Jill Duerr Berrick, Young Choi, Amy D’Andrade, and Laura Frame, Reasonable Efforts? Implementation of the Reunification Bypass Provision of ASFA, forthcoming CHILD WELFARE (2008) (“Evidence from a number of studies suggests…that substance abuse has become the predominant problem among many parents involved in child welfare.”); Andrade and Berrick, supra note 63, at 37 “[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%”; Leventhal et al., supra note 46, at 4-5 (“[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…approximately 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”); Patchin, supra note 57, at 9 (noting propensity of substance abusers’ children to become substance abusers themselves), 10 (“histories 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”), 11 (stating that for parents involved in criminal activity “parenting is compromised due to their own illicit activities” and “inwreathed parents cannot effectively supervise their children and may punish inconsistently or harshly”); Malbin, supra note 40, at 55-56 (listing behavioral and judgment-making problems associated with Fetal Alcohol Spectrum Disorder, which many mothers have who expose their babies to alcohol in utero); Ondersma, supra note 60, at 3-5 (noting several studies showing highly elevated rates of child maltreatment among parents with alcohol or substance abuse problems); Young, Boles, and Otero, Parental Substance Use Disorders and Child Maltreatment: Overlap, Gaps, and Opportunities, 12(2) CHILD MALTREATMENT 137, 140-42 (2007) (reviewing literature showing high percentage of parents with founded child maltreatment reports have substance abuse problems even though child protection workers fail to detect substance abuse problems 61% of the time), 142-43 (showing percentage of parents receiving drug treatment who lose custody of their children and the percentage who ultimately have parental rights terminated), 147 (“The recovery process often takes longer than is allowed under the ASFA legislation.”); NSCAW (2005), supra note 60 at § 11.3.3 and Table A-9; Steve Christian, Substance-Exposed Newborns: New Federal Law Raises Some Old Issues 4 (National Conference of State Legislatures 2004) (quoting from a report of the National Conference of State Legislatures) (“[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. ... Prenatal 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.”); Smith, Elstein, and Klein, Parental Substance Abuse, Child Protection and ASFA: Implications for Policy Makers and Practitioners 6 (2005), http://www.abanet.org/child/final_report_dec22.pdf (last visited February 1, 2008) (showing that among substance-abusing parents in the child protective system, 40% fail even to attempt treatment and 40% enter treatment but relapse) and 7 (stating that mothers are less likely to overcome addiction than fathers); Joseph P. Ryan, Illinois Alcohol and Other Drug Abuse (AODA) Waiver Demonstration: Final Evaluation Report, http://crfwww.social.uiuc.edu/pubs/pdf.files/AODA.01.06.pdf 3-3 (2006) (last visited February 1, 2008) (reporting results of intensive demonstration project that raised rates of reunification with substance abusing parents only from 11.6% to 15.5%, and stating “Historically, substance abusing families achieve very low rates of reunification.”); John D. Fluke and Dana M. Hollinshead, Child Maltreatment Recurrence, http://www.nrccps.org/PDF/MaltreatmentRecurrence.pdf 8, 22 (2003) (noting studies showing elevated risk of maltreatment recurrence when children are returned to parents who have had substance abuse problems); Dana K. Smith, et al., Child Maltreatment and Foster Care: Unpacking the Effects of Prenatal and Postnatal Parental Substance Use, 12 Child
parents suffering from serious mental illnesses. 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.

Studies of children of incarcerated parents also document the lifelong damage done to children by parental absence. 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.

Teen parents in juvenile detention have these same problems in addition to being very immature. 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.

Maltreatment 150, 151, 155, 157 (2007); SMITH AND FONG, supra note 32 at 35, 37, 45, 211-16; Kathryn Page, Fetal Alcohol Spectrum—The Hidden Epidemic in Our Courts, 52 JUV. & FAM. CT. 21, 29 (2001).

64 See NSCAW (2005) supra note 60, at § 11.3.3 (“[A]dult mental illness is a substantial contributor to the problems in parenting that child welfare services attempts to address”) and Table A-10; Andrade and Berrick, supra note 63, at 36 (“[E]motional problems of the parent… are associated with failure to reunify”); Wulczyn et al., supra note 25, at 132 (noting association between maltreatment and parents’ mental health difficulties); Fluke and Hollinshead, supra note 63, at 8 (citing study showing higher rate of maltreatment for parents with mental health problems following return of child to parent custody); Haapasalo and Aaltonen, supra note 60, 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 mental health problems of victims of partner violence and the overlap between families with partner violence and families with child abuse).

65 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 NSCAW (2005) supra note 60, at § 11.1 (finding that over half of families reported to CPS agencies for child abuse or neglect have had prior maltreatment reports as well), § 11.6 (neming “extraordinary level of prior child welfare involvement among the families and children in this study”), and Tables A-6, A-7; VIRGINIA DEPT. OF SOC. SERV., ANNUAL CHILD MALTREATMENT FATALITY REPORT 11 (2003).

66 See, e.g. PATCHIN, supra note 57, 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”).


68 See ACCOA AND DEDELL, NO PLACE TO HIDE: GIRLS IN THE CALIFORNIA JUVENILE JUSTICE SYSTEM 10 (1998) (“The vast majority (88%) of girls in the juvenile justice system are experiencing one or more serious health and/or mental healthy disorders.”).
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 parents have serious maltreatment histories with other children and/or that the parents have intractable substance abuse or mental health problems or are incarcerated. And when the state does take custody of children, temporary foster care is 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 on average. 69

More generally, child protection law fails to differentiate among children by age, instead taking a ‘one rule fits all ages’ approach.70 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.71 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.72

69 See Ryan, supra note 63, at 3-3 (showing that of 1,936 children removed from custody of substance abusing parents in Cook County, only one was in a pre-adoptive foster care placement); Smith, et al., supra note 63, at 155 (reporting results of a 2004 government study of multiple foster care placements); Clare Huntington, Rights Myopia in Child Welfare, 53 UCLA L. REV. 637, 660 (2006).

70 See Wulczyn et al., supra note 25, 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”), (“the 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).

71 Cf. Dicker and Gordon, supra note 29, at 30 (“[T]he needs of infants… are often invisible to the court and child welfare system”); 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, 33 (2001) (noting that infants “historically have been largely ignored”).

72 See BARTHOLET, supra note 22, 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”), 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”); Brian Bix, Perfectionist Policies in Family Law, 2007 ILL. L. REV. 1055, 1061 (“[G]iven 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” and citing statistics); Wulczyn et al., supra note 25, at 112; 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; Child Welfare Information Gateway, Concurrent Planning: What the Evidence Shows 5 (2005), available at www.childwelfare.gov; Martin Guggenheim, Somebody's Children: Sustaining the Family's Place in Child Welfare Policy, 113 HARV. L. REV. 1716, 1745 n.11 (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 for the courts to order termination—children will almost
Third, newborn children have no established relationship with birth parents to maintain.

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.” 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. 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, trauma. And it is not until the period when attachment solidifies, between 7 and 24 months of age, that children experience stress from being separated from a particular caregiver.

In light of newborns’ pre-attachment 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 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 certainly be older than two years, and often considerably older. These simply are not the children that these couples want to adopt.”); U.S. GENERAL ACCOUNTING OFFICE, FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN, GAO-02-585 29 (2002) (reporting difficulties states experience in finding adoptive parents for children with behavioral problems), 38 (noting that states are increasingly finding it difficult to find adoptive homes for older children in foster care); Gordon, supra note 70, at 667-68. (“If one parent’s rights are terminated but the other’s are not, then adoption will not occur absent consent by the remaining parent. But even the possibility that the remaining parent will want a new partner to adopt and co-parent the child provides some reason to sever the legal relationship between the baby and the unfit parent.”) Dorothy E. Roberts, Child Welfare and Civil Rights, 2003 U. ILL. L. REV. 171, 173 (2003).

74 See Lamb and Kelly, supra note 36, at 299 (stating that during the first two months of life infants “accept care from any caregiver” and show no preference among them” and between 2 and 7 months “begin to recognize certain caregivers and prefer interaction with them” but still “do not protest when separated from their parents”). Behavioral studies suggest that infants become familiar with caregiver voices and smells within a few weeks of life, but do not recognize faces until much later. See id. and Cassia, Kuefner, Westerlund, and Nelson, A behavioural and ERP investigation of 3-month-olds’ face preferences, 44 NEUROPSYCHOLOGIA 2113 (2006) at 2114 (“what 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”), 2115 (citing studies showing increasing selectivity, between 6 and 12 months), 2124.

75 Lamb and Kelly, supra note 36, at 299.

76 Id.
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. CPS agencies generally do not have much funding for providing services to the families who come under their purview, so the rehabilitative efforts made are likely to be insufficient even for those parents with a reasonable chance of becoming capable of adequate care giving. The most common response to this fact 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. For example, a five-year demonstration project in Cook County, Illinois that provided 1500 randomly selected parents with a comprehensive needs assessment, entry into treatment programs within 24 hours of assessment, and a “Recovery Coach” to coordinate their services, monitor their progress, advocate on their behalf, and give

77 See Hudson et al., supra note 45, at 21 (noting lack of funding for needed mental health services); NSCAW (2005) supra note 60, at § 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, Fred Wulczyn, and Tom Crea, From Anticipation to Evidence: Research on the Adoption and Safe Families Act, 12 VA. J. SOC. POL’Y & L. 371, 395 (2005) at 395 (“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.”); GAO, supra note 72, at 42 (noting lack of substance abuse treatment); Gordon, supra note 70, at 662-66.  
78 See Fluke and Hollinshead, supra note 63, at 12 (citing study that found “duration, intensity and breadth of family preservation services had little overall impact on the recurrence of child maltreatment”); Wulczyn et al., supra note 25, at 8 (“research has so far struggled to find effective services for maltreatment, placement prevention, and family reunification”), 170 (“very few interventions that address maltreatment and placement have met the standard scientific criteria of effectiveness”); Ethier, Couture, and Lacharite, supra note 54 at 22 (reporting 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”); National Conference of State Legislatures (NCSL), States Using Evidence-Based Methods to Prevent Child Abuse, PUBLIC HEALTH NEWS, May 3, 2004, at 1, 2 (discussing studies showing that many programs that “look good cosmetically” in fact have not been proven effective), 184-85 (“there remain, at the present time, no intervention techniques that have been proven to be consistently successful with families who neglect their children”); CAPTA: Successes and Failures at Preventing Child Abuse and Neglect, Committee Hearing, H.R. Serial No. 107-28 70 (2002) (Statement of Richard Gelles) (“as 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”). 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 parents. See Zero to Three, supra note 53, at 1.
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%. Most parents entering the child protective system 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, 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 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. 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, meaning that the child has multiple damaging disruptions during the crucial first few years of life. Further, many of those who do remain in

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79 See Ryan, supra note 63, at 3-3.
80 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., NSCAW (2005), supra note 60, at Table A-11, CAPTA: Successes and Failures, supra note 78, at 69-70 (Statement of Richard Gelles); BARTHOLET, supra note 22, at X.
81 See Dicker and Gordon, supra note 29, at 31 (noting that babies who enter foster care at less than three months of age “spend twice as long in care as older children”); Cohen and Youcha, supra note 28, at 15 (noting that half of babies who enter foster care before three months of age spend 31 months or more in foster care); Barth, et al., supra note 77, 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.”).
82 See Ethier, Couture, and Lacharite, supra note 54, at 22; NCSL, supra note 78, at 1, 2.
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, 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. In addition, most incarcerated mothers suffer from a host of personal problems – in particular, 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.

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 – that is, missing out on the experience of growing up in one’s biological family, produces adverse outcomes for children. In fact, children raised from birth by adoptive parents on average have better welfare outcomes than children raised by biological parents in general, 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 not insignificant, 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. It is subjectively important for many of them to make that connection with their biological past, but having a good, secure, loving upbringing is vastly more important.

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85 Id. at 224 (“Women’s convictions tend to come in the context of dismal personal histories.”), 225 (detailing “socio-economic and health challenges” faced by mothers in prison); Mumola, supra note 48, 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), 8 (showing that 86% of mothers in state prisons had a history of illegal drug use), 9 (showing that 22.5% of mothers in state prison are mentally ill).
86 See Bartholet, supra note 20, at 331 (“Sociobiologists who promote the biological favoritism theory have produced little empirical support for its validity in the realm of human parenting.”).
87 See, e.g., GAO, supra note 72, at 14 (stating that “few adopted children returned to the child welfare system”); ELIZABETH BARTHOLET, FAMILY BONDS 164-86 (1999) (discussing empirical literature).
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.

III. Federal Laws Pushing States To Be Proactive

Since the 1970s, 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 1990’s, 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, 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, reacting to a perception 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, Congress passed the Adoption Assistance and Child Welfare Act of 1980 (hereafter “AACWA”). AACWA 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. 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.

In the mid-1990s, 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 that 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. Congress recognized that these

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90 See id.; Sec. 101; Adler, supra note 72, at 3 (noting that AACWA was an “effort to address the problem of foster care drift” but still “emphasized family preservation”).
91 See, e.g., 148 Cong. Rec. H1502-05 (daily ed. Apr. 23, 2002) (statement of Rep. Holt in support of the Adoption and Safe Families Act); Wulczyn et al., supra note 25, at 12 (“A common thread in the criticism of child welfare services is their residual or reactive nature.”).
92 See Berrick, et al., supra note 63, [introduction]; Barth et al., supra note 77, at 372-74 (noting “foster care drift” “efforts… to reunify children with even the most difficult families,” and “[r]esearch showing that even infants were experiencing multiple placements” while in foster care); BARTHOLET, supra note 22, at 24 (“[W]e try to avoid removing children from their
practices were damaging children and wasting public funds. Speaking in support of ASFA, legislators blamed states for exaggerating the AACWA reasonable efforts requirement. Senator Devine stated:

We need [this bill] because of an unintended consequence of a bill that was passed by this Congress in 1980. ... [O]ver the last 17 years, since this law went into effect and since this provision became part of our Federal law, this law, 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.  

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

families at all costs and to return children who are removed as quickly as possible”); 235 (“[T]he state [is] 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 72, 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”); Gordon, supra note 70, 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 endeavoring to return children to parents in whose care children could never be safe).

See e.g., 143 Cong. Rec. 2012, H2013 (Apr. 30, 1997) (Remarks of Rep. Price) (“Mr. Speaker, the 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.”); 143 Cong. Rec. S12198, S12200 (Nov. 8, 1997) (Remarks by 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. S 12688, 12699 (Nov. 13, 1997) (Remarks 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”).


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. Relatively, ASFA requires states to authorize TPR 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 pre-adoptive 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.

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 rehabilitative 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. 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. Further, Congressional supporters of ASFA were emphatic that the Act’s list of cases in which reasonable efforts were not required was not exclusive, and that states were free to add others.

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96 Pub. L. No. 105-89 (1997), § 103(a)(3) (codified at 42 U.S.C. § 675(5)). 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 U.S.. See Barth et al., supra note 77, at 386.

97 Pub. L. No. 105-89 (1997), § 101(a) (codified at 42 U.S.C. § 671(a)(15)(F)) (“reasonable efforts to place a child for adoption or with a legal guardian may be made concurrently with reasonable efforts” to preserve and reunify families).

98 Pub. L. No. 105-89 (1997), § 101(a) (codified at 42 U.S.C. § 671(a)(15)(D)(ii-iii)). Murder of the child’s other parent is also a basis for reunification bypass. Id.


100 See, e.g., 143 Cong. Rec. S 12668, 12670 (Nov. 13, 1997) (statement of Sen. Devine) (“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
While there is some evidence of a particular congressional concern with the damage being done to the youngest children, 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, was 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 adequately 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. 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. Supporters of KCAFSA decried the fact that substance 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.
approach of being reactive, and saw the Act as a significant step toward being
more proactive.105

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.106 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 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 the reality today is that it almost never happens.

IV. Why the Potential Is Unrealized

To what extent states are effectuating the preventive aims of the federal laws
Part III described is largely undocumented. 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 KASFA,107 and most
states do not collect this information from their local CPS agencies.108 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 care were “fast-

106 See Cohen and Youcha, supra note 28, at 18 (discussing such programs and when they are
likely to be effective); NCSL, supra note 78, at 1.
107 See GAO, supra note 72, at 23; Barth, et al., supra note 77, 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.”), 392
(“there is no federal oversight of the development or application of exemption [i.e., “no
reasonable efforts”] provisions”); Andrade and Berrick, supra note 95, at 37 (“[T]here are no
reporting requirements associated with this aspect [reunification bypass] of the law. State 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 CFR, Title 45, Subtitle B, Chap. XIII, Subch. G, Part 1335, § 1355.10 et seq.
108 See Andrade and Berrick, supra note 95, at 37 (“[M]ost states were not able to provide data
on the use of reunification exceptions (USGAO, 2003).”); 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.
and that only one percent of children adopted from foster care are under age one. This Part explains why CPS efforts still almost always come only after a baby has been permanently damaged by maltreatment.

A. High-Risk Parents Do Not Come to the State’s Attention

While 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. Likewise, if adults with chronic 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. Indeed, birthing facility staff will typically have no reason to be aware

109 GAO, supra note 72, at 24. See also id. at 3 (concluding that states use the “fast track” authorization “infrequently.”); U.S. Gen. Acct. Off., Foster Care: States’ Early Experiences in Implementing the Adoption and Safe Families Act 9 (1999) (only two states supplied data on TPR without reasonable efforts, and of those two, one reported four instances and the other reported zero); Berrick, et al, supra note 63, Figure 1 (discussing California study showing courts authorized reunification bypass in fewer than ten percent of cases in which statutes authorized it); Barth, et al., supra note 77, 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.”). 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.

110 GAO, supra note 72, at 22.


112 See, e.g., N.Y. Soc. Serv. Law § 413 (McKinney 2007); 23 PA. CONS. STAT. ANN. § 6311 (West 2007); VA. Code Ann. § 63.2-1509(A). 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 mentally ill. See, e.g., Sylvia v. Hampton Dept. Soc. Serv., 2007 WL 817444 (Va. App. 2007). *2 (unpublished opinion) (upholding juvenile court’s finding that a newborn was “abused and neglected by virtue of appellant’s behavior in the
of a birth parents’ child maltreatment history, but 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 an older brother or sister, 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, hospitals 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 it 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.”

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 KCAFS A. 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 post-partum parental abuse or neglect of children. However, KCAFS A had major gaps and states are exploiting them. First, KCAFS A covers only exposure to illegal drugs, not exposure to high amounts of alcohol, even though children born to alcoholic mothers also have special needs and are at heightened risk of maltreatment. Second, birthing facilities are not required to test for exposure to illegal drugs; KCAFS A did not mandate testing, and state laws generally do not require it.

hospital” and order 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 Weithorn, supra note 42, at 68; N.D. CENT. CODE 27-20-02 (West 2007) (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”).

113 Cf. CAPTA: Successes and Failures, supra note 78, 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.”).

114 See 42 U.S.C. § 5106a(b)(2)(A) (referring to “infants born and identified as being affected by illegal substance abuse or withdrawal symptoms resulting from prenatal drug exposure”).

115 See Malbin, supra note 78, 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.”), 54 (noting that most children with fetal alcohol spectrum disorder develop behavioral problems and many are diagnosed as having attention deficit disorder, hyperactivity, reactive attachment disorder, learning disorder, oppositional defiant disorder, serious emotional disturbance, and/or antisocial personality disorder).

116 See NAIARC, supra note 103, 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. ANN. §626.5562 (West 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) (West 2007). However, detection of substance abuse by means of such a protocol does not trigger a requirement that
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. 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, 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, 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.

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. Many states do not require prison officials to inform the local 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. Placement with a “father or other member of the family” usually means placement with non-parent

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 women herself, her representative, or her other health care providers. VA. CODE ANN. § 54.1-2403.1(B), (C). And it dictates that the information is to be used only to counsel and treat the woman. VA. CODE ANN. § 54.1-2403.1(D). Other states’ statutes might authorize hospitals to test for drug exposure but not require that they do so. See, e.g., KAN. STAT. ANN. § 214.160(2) , (3) (West 2007); WIS. STAT. § 146.0255(2) (West 2007).

117 See Dicker and Gordon, supra note 103, at 2-3, 5.

118 See id. at 4 (discussing informed consent); WIS. STAT. § 146.0255(2) (West 2007) (“no physician may test an expectant mother without first receiving her informed consent to the testing”).

119 See Dicker and Gordon, supra note 29, at 31.

120 Steven J. Ondersma et al., Child Protective Services’ Response to Prenatal Drug Exposure: Results From a Nationwide Survey, 25 CHILD ABUSE & NEGLECT 657, 661-663 (2001).

121 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.”).

122 VA. CODE ANN. § 37.2-714 (West 2008). See also MASS. GEN. LAWS 119 § 23A (West 2007).
Placement with non-parent 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. If the parent will be out a few months after the birth and immediately take custody, the disruption in care might not have any adverse consequence, because the child will not yet have attached to the non-parents. But if it will be much later than that, which is likely if the parent was convicted of a felony (other than child abuse), the child will likely either attach to the non-parent 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 eventuality would 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. Convicted criminals tend to come from pervasively dysfunctional families and communities, and most of them were themselves abused or neglected as children, by the parents who are most likely, now as grandparents, to step forward to take custody of the child. A state’s direction 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. 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 non-traditional

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123 See Downey, supra note 121, at 45 (“Seventy to ninety percent of incarcerated mothers are the sole caregivers for their children.”); Mumola, supra note 48, at 3 (showing that for only 28% of mothers in state prison were the children’s fathers caring for them).
124 See Gordon, supra note 70, at 659.
125 See Downey, supra note 121, at 47.
126 See, e.g., Smith et al., supra note 63, at 157; Brotman et al., Preventive Intervention for Urban, Low-Income Preschoolers at Familial Risk for Conduct Problems: A Randomized Pilot Study, 32 J. CLINICAL CHILD AND ADOLESCENT PSYCHOL. 246, 246-47 (2003) (noting “environmental” and community risk factors and stating: “It is well documented that antisocial behavior is familial…”); Cohen, supra note 83, at A12 (describing families of women in prison as including other members incarcerated and/or with substance abuse problems); Mumola, supra note 48, at 3 (showing that for 53% of mothers in state prison, their children are in the care of a grandparent).
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.128 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 babies 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 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. Thus, while 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. 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.129 In practice, however, there is widespread evasion of this federal directive. States have generally complied with KCAFSA by 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

128 See, e.g., Matter of Fletcher, 141 Misc. 2d 333, 533 N.Y.S.2d 241 (Fam. Ct. 1988) (holding that state legislature did not intend civil child maltreatment statute to cover conduct affecting a child before birth); Reyes v. Sup. Ct. of San Bernardino County, 75 Cal.app. 3d 214, 141, Cal. Rptr. 912 (1977) (reasoning that criminal child abuse statute applied only to living children “susceptible to care and custody”). But see Minn. Stat. § 260C.178(b) (2007) (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.”) and Minn. Stat. § 260C.007(2)(iii) (2008) (defining "Child in need of protection or services" to include a child who “resides with or would reside with a perpetrator of domestic child abuse.”).
order, and authorizing courts to order a removal of the child and placement in foster care. 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.

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, 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, has issued 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.” Thus, CPS must invalidate a report of a drug-exposed baby and walk

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130 See, e.g., HAW. REV. STAT. § 587-89 (2007); LA. REV. STAT. ANN. art. 603(16.1) (2007); 22 ME. REV. STAT. ANN. tit. 22, §§ 4004-B, 4011-B (West 2007); 23 PA. CONS. STAT. ANN. § 6386 (West 2007); VA. CODE ANN. §§ 63.2-1503(I), 63.2-1505(B)(1), 63.2-1509, and 16.1-241.3 (West 2007); and 22 VA. ADMIN. CODE 40-705-40(A)(4)(d) (West 2006) (administrative regulation directing local CPS agencies to “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).

131 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 (West 2007); VA. CODE ANN. § 63.2-1505(B)(1) (West 2007) (if the report was based upon [positive toxicology in a newborn] the local department may file a petition ...”).


133 VA. CODE ANN. § 63.2-1505(B)(2) (West 2008) creates an exception to the general requirement that local CPS agencies report to the state Department 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.”

134 22 VA. ADMIN. CODE 40-705-40(A)(4) (West 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).
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. 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.” 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 KCAFS 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 of abuse or neglect. 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, 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. Pennsylvania law, for example, authorizes only provision of services to the child in response to in utero drug exposure. 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, but continued state involvement requires a CPS allegation of abuse or neglect, which CPS cannot make without a founded report. A handful of states do treat in utero exposure to controlled substances as abuse or neglect and authorize CPS protective action on that basis, but they have come under heavy criticism for doing so,

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136 Cf. Murphy and Rosenbaum, supra note X at 9 (reporting that removal of a child causes most drug-addicted mothers to use even more crack).
137 See, e.g., VA. CODE ANN. § 63.2-1508 (West 2007); 22 VA. ADMIN. CODE 40-705-40(A)(4)(i) (West 2006).
138 See e.g., CAL. PENAL CODE §1165.13 (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…”)
139 23 PA. CONS. STAT. ANN. § 6386 (West 2007).
140 See VA. CODE ANN. § 16.1-241.3 (West 2007).
141 See §§ 16.1-252 (preliminary removal order), 16.1-253(F) (adjudication following a CPS allegation of abuse or neglect).
142 See, e.g., 705 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 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. ANN. § 626.556 (West 2004), amended by 2005 Minn. Sess. Law Serv. 136 (West 2004) (amending only the child abuse reporting requirements) (“Neglect’ means: (6) 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
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, but also based on adult-centered concerns about privacy and discriminatory application.  

C. CPS Agencies Resist TPR Without Rehabilitative Efforts

Even if newborns at high risk do come to CPS attention, CPS does investigate and take custody of such a child, and 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. 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. ASFA contained a provision requiring states to make petitioning for TPR without reasonable efforts mandatory for CPS agencies in certain cases – that is, those in which the parent previously committed a violent felony against another child. 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.

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144 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 63, at X.

145 See, e.g., DEL. CODE ANN. TIT. 11, § 1103(a) (2008); TENN. CODE ANN. § 36-1-113(g) (2007).


147 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
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 AACWA. 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. They are trained to 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. Although its force is diminishing with time, this ideology of reunification creates one important barrier to ASFA’s efforts to limit reasonable efforts and promote adoption.

does include TPR as to another child in the list of triggers for a mandatory petition. See W. VA. CODE ANN. § 49-6-5b (West 2007).

148 See Gordon, supra note 70, at 677-78; CAPTA: Successes and Failures, supra note 78, at 67 (Statement of Richard Gelles) (“Case workers claim that the law requires them to make ‘every possible effort’ to keep families together.”).

149 See id. at 677-78; CAPTA: Successes and Failures, supra note 78, at 32 (statement of Rep. Greenwood) (describing inclination as a CPS case worker: “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 decision 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.”). 68 (“front-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 instituting a professional child welfare track and appropriate curriculum”).

150 Gordon, supra note 70, at 678-79.
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 that state’s extensive reunification bypass law, Berrick et al. found that many social workers “expressed a certain degree of ambivalence about its use due to philosophical perspectives on the social work profession, and on parents’ capacity to change.” 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.” 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.”

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. 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 CPS officials, I most often heard objections couched in terms of parents’ rights rather than in terms of child welfare.

Even if CPS workers were more focused on making the best permanency choice for children, rather than myopically focusing 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. Many are only recently being trained on the importance of attachment and early brain development. In addition, and perhaps in part because of this lack of knowledge, social workers have viewed their aim for newborns and other children as just ensuring safety, not ensuring an

151 Berrick, et al, supra note 63, at X.
152 Berrick, et al, supra note 63, at X. See also CAPTA: Successes and Failures, supra note 78, 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 care of caregivers that maltreat their children, is much more difficult to bring about. . . . All individuals are not equally ready to change.”).
153 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), 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.
154 See e.g., Roberts, supra note 73.
155 See Goldsmith, Oppenheim, and Wanlass, supra note 24, at 2; CAPTA: Successes and Failures, supra note 78, at 66-67 (Statement of Richard Gelles) (“child welfare workers often receive only the most minimal pre-service training before they are assigned a caseload . . . In-service training is also minimal.”).
adequate environment for a child’s healthy development.\textsuperscript{156} 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.\textsuperscript{157} 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. 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.\textsuperscript{158} 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.\textsuperscript{159} 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 for approving bypass recommendations, which further deter social workers from seeking them.\textsuperscript{160} And even if an immediate TPR would save them time and resources in the long-run, over-burdened 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.\textsuperscript{161}

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

\textsuperscript{156} See Christian, supra note 63, 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…”).

\textsuperscript{157} 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.”).

\textsuperscript{158} See GAO, supra note 72, at 3-4 (noting “reluctance on the part of some judges to allow the state to bypass reunification efforts”); CAPTA: Successes and Failures, supra note 78, 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.”).

\textsuperscript{159} GAO, supra note 72, at 25-26; Berrick, et al, supra note 63, at Y.

\textsuperscript{160} Berrick, et al, supra note 63, at Y.

\textsuperscript{161} See Gordon, supra note 70, 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.”).
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. 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. 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. 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.

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. And CPS is supposed to verify that relatives are minimally fit and willing caregivers before placing a child with them.

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. Moreover, some relatives, whatever their merits as caregivers for a child, have troubling interpersonal dynamics with the parents. Studies find that children whom CPS places with kin rather than non-kin foster parents on average have poorer outcomes. This is likely in part because they tend to receive fewer services than do children in non-relative foster care despite having similar needs.

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doubt also in part because the dysfunction manifested by the parents runs through much of the extended family and much of the birth parents’ community. As Elizabeth Bartholet explains:

> We 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.¹⁷¹

And 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.¹⁷²

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.¹⁷³ 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, older children are less likely than newborns to be adopted, so 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, there is much confusion among CPS officials and case workers 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 that CPS workers consider relatives as substitute caregivers for children whose parents are unable to have custody. It states, 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

¹⁷¹ BARTHOLET, supra note 22, at 93. See also Smith and Fong, supra note 32, at 49-52 (describing problems in communities where a high percentage of neglectful parents live), 233-34.

¹⁷² 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.”).

¹⁷³ See Gordon, supra note 70, at 658.
a non-related caregiver when determining a placement for a child...

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. But it also grew out of a desire to minimize state expenditures on children removed from birth parents’ custody, given that relative caregivers used to be ineligible for foster care subsidies, 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. 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 many states does not in fact require that CPS 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. Courts in several states have rendered decisions on the basis of such an interpretation that the law requires only consideration of relatives, not preference for them. 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. 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

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176 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).
178 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 (West 2007) (same); VA. CODE ANN. §§ 16.1-278.2(A)(5) (West 2007) (authorizing placement with a relative after initial removal but not requiring consideration of placement with a relative), 16.1-283(A) (West 2007) (directing that, following a TPR order, “the court shall give a consideration to granting custody to relatives of the child, including grandparents.”).
180 See, e.g., MO. STAT. § 210.565 (West 2008); MT. STAT. § 41-3-438(4) (West 2008); WASH. REV. CODE § 13.34.130 (West 2007).
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. Historically, as discussed in Part III, state law 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 the specific circumstances are limited to prior TPRs and violent felonies. 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 parental mistreatment of the present child. That definition would not facilitate preventive intervention, rather than just reactive intervention.

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 ‘no reasonable efforts’ grounds for TPR in their statutes. However, as also noted in Part III, many states have interpreted the background requirement of reasonable efforts to reunify imposed by AACWA 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. 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, 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. One 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.

181 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.’”).


183 42 U.S.C. § 671(a)(15)(D)(i)) (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).”

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 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, which precludes a birth parent from caring for a child. Several states’ statutes nevertheless treat incarceration per se as an aggravated circumstance or as an independent basis for TPR. In addition, 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 child abandonment a parent’s engaging in conduct he knew could cause him to be imprisoned and therefore separated from his child. 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.

In addition, limiting prior maltreatment to violent felonies and abuse or neglect that led to TPR leaves out situations where a birth parent has abused or neglected other children and has been unable to recover custody of them despite efforts CPS has already made to rehabilitate them, but as to whom there has not yet been a criminal prosecution nor termination of parental rights. 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

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185 See NCSL (2007); DEL. CODE ANN. tit. 13, § 1103(a)(5)a.3 (2008); IOWA CODE § 16-2005(1)(e)(2008); KY. REV. STAT. ANN. § 600.020(2)(b) (West 2008); N.D. CENT. CODE § 27-20-02 (West 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)(2008); S.D. CODIFIED LAWS § 26-8A-21.1 (West 2007) (reunification efforts need not be undertaken when parent is “incarcerated and is unavailable to care for the child during a significant period of 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) (2008) (requiring a sentence at least ten years long); TEX. FAM. CODE ANN. § 161.001(1)(Q) (2008).

186 Dwyer, supra note 11, at 958.

the newborn child in time for the child successfully to develop a healthy bond and secure attachment is likely to be extremely poor.\textsuperscript{188} A family court judge in upstate New York went so far as to order 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 society. \textsuperscript{189}

Child welfare experts have stated in more restrained tones: “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.”\textsuperscript{190} 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\textsuperscript{191}

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 that 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 yet have not been given substantial time and services, even though the latter often involve the most clearly unfit parents, as to whom social workers believe there is little chance of success.\textsuperscript{192}

\textsuperscript{188} See Fluke and Hollinshead, supra note 63, at 8 (noting study showing higher rate of maltreatment recurrence as family size increases).

\textsuperscript{189} In the Matter of BobbiJean P., 784 N.Y.S.2d 919, (N.Y. Fam.Ct., 2004).

\textsuperscript{190} Andrade and Berrick, supra note 95, at 33-34. See also Smith and Fong, supra note 32, at 41 (citing studies showing higher rates of maltreatment in larger families).

\textsuperscript{191} See National 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), \textit{available at} http://www.ncsl.org/programs/cyf/aggravat.htm (last visited February 10, 2008) (hereafter NCSL (2007)); KAN. STAT. ANN. § 38-1585(a)(3) (2008) (presumption 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”); MIND. STAT. § 260C.301(1)(b) (2008) (“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 (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”).

\textsuperscript{192} See, e.g., GAO, supra note 72, at 3-4 (citing “reluctance on the part of some judges to allow the state to bypass reunification efforts”), 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).
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 dispositional 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. 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 valuation 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. 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.” More generally, many judges simply are “not supportive of ASFA’s goals.” 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. It likely stems in part also from judges’ limited knowledge of child development and, in particular, of the crucial developmental importance of the first year of life.

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

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194 GAO, supra note 72, at 24.
195 Id. at 25.
196 Id. at 36.
197 Lederman et al., supra note 71, 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.
198 See GAO, supra note 72, at 36 (noting that most states “reported that not enough training was available for judges”); Lederman et al., supra note 71, 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.”).
are needed to realize the professed aim of sparing children born into high-risk situations from ever suffering abuse or neglect.

V. Remedies

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. 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 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 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 substantial 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

199 See Dwyer, supra note 11, at 955-56.
home." 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 interests. 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. 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. 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. This provision, though, would make it legally possible for courts to order TPR as to the newborn without delay when that is clearly best for the newborn.

Objections to expanding bases for TPR without rehabilitative efforts will 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. As explained 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, children have a moral right not to be forced into a family relationship that is clearly bad for them. 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

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200 IOWA CODE § 232.116(1)(l) (2008). See also NCSL (2007) (listing other states that include substance abuse or mental illness within “aggravated circumstances”).


203 See, e.g., Christina White, Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act, 1 NW. J. L. & SOC. POL’Y 303 (2006); CAPTA: Successes and Failures, supra note 78, at 77-84 (Statement of Patrick Fagan) (alleging violation of parental rights by over-aggressive child welfare interventions); Dorothy E. Roberts, The Community Dimension of State Child Protection, 34 HOFSTRA L. REV. 23 (2005) (lamenting the effects on poor and minority race communities of concentrated child protection intervention in those communities); Guggenheim, supra note 72, at 1744 (decrying “dismissal of the value of the rights of biological parents” and “coercive adoptions of other people’s children”); Day, supra note 84; Appell, supra note 154; NSCAW (2005) § 11.3.3. Opponents of ASFA expressed this concern about a disparate impact. See Barth, et al., supra note 77, at 377.
would operate in cases where parents are highly likely to lose custody of their children anyway and ultimately to lose parental rights. The principal effect of the proposal would be on the children, and the effect would be to act before they are maltreated 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.204 If current interventions 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, because they are not receiving assistance they need, 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

204 See, e.g., Dorothy Roberts, CAPTA Under-Intervention Versus Over-Intervention, 3 CARDOZO PUB. L. POL’Y & ETHICS J. 371, 372 (2005) (citing study showing “doctors were twice as likely to miss abuse in the case of white children than of non-white children” and 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 60, at 898 (“[Y]oung children remaining at home, are much less likely to receive services even in the presence of need”); 891-92 (“young children who are active in [child welfare agencies’ but remain with their biological parent(s) also have significant developmental and behavioral issues”); Leslie et al., The Physical, Developmental, and Mental Health Needs of Young Children in Child Welfare by Initial Placement Type, 26 DEVELOPMENTAL AND BEHAV. PEDIATRICS 177 (2005). This supports a conclusion that if CPS leaves more maltreated white children at home because of racial bias, the bias harms the under-served white children.
largely random or that is fundamentally determined by the race of the child.\footnote{205}

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 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.\footnote{206} Many studies of children in foster care document that they do in fact have great needs arising from deficiencies in their care at home.\footnote{207} 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.\footnote{208} The notoriously high caseloads for CPS social workers generally lead them to focus only on the worst cases,\footnote{209} 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 at least as dangerous and detrimental as is abuse.\footnote{210} This point also

\footnote{206}See Pears and Capaldi, supra note 54, at 1442, 1454; Ethier, Couture, and Lacharite, supra note 54, at 13-15, 21-22; Haapasalo and Aaltonen, supra note 60, at 234; Smith and Fong, supra note 54, at 4-5, 48 (“Poverty is a pervasive and persistent correlate of families who neglect their children.”), 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), 219 (reporting higher rate of substance abuse among black parents than among white parents), 221 (noting social isolation of substance abusing parents), 229 (“It is clear – children who grow up in poverty are at higher risk for neglect than those who do not”) (citing numerous studies), 231-38; Barbara Needell and Richard P. Barth, Infants Entering Foster Care Compared to Other Infants Using Birth Status Indicators, 22 CHILD ABUSE & NEGLECT 1179, 1179-80 (1998); Andrea J. Sedlak and Diane D. Broadhurst, Executive Summary of the Third National Incidence Study of Child Abuse and Neglect, National Center on Child Abuse and Neglect 1996, available at http://www.childwelfare.gov/pubs/statsinfo/nis3.cfm; ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991)...
\footnote{207}See, e.g., Leslie, et al, supra note 205, at 141-42.
\footnote{208}See Smith and Fong, supra note 32, at 22-26. My conversations with CPS officials in poor urban areas of Virginia with a large black population, most of whom are themselves African-American, suggest that they are very protective of black parents and sensitive to black communities’ perceptions of their activities.
\footnote{210}See, e.g., Smith and Fong, supra note 32, at 1-4, 7 (“[N]eglect in early stages of life may lead to severe, chronic, and irreversible damage… neglect experienced in childhood has a more negative impact on early adolescent outcomes than physical abuse… neglect has an effect that is at least as devastating as abuse”), 252-53; Susan Orr, Child Protection at the Crossroads: Child Abuse, Child Protection, and Recommendations for Reform, Policy Study No. 262 (1999), 1-2 (noting that over-intervention complaints point out that most CPS cases involve neglect rather than abuse, but responding that "it is precisely neglect cases that eventually turn deadly"); Andrade and Berrick, supra note 63, at 35 (“Child deaths are more often associated
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 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:

[quote]
Keeping [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 going to do anything to promote racial and social justice. It isn't going to help groups who are at the bottom of the socioeconomic ladder to climb that ladder. It is simply going to victimize a new generation.\footnote{211}
[quote]

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, however admirable, cannot justifiably lead to sacrificing the welfare of today’s newborn children and consigning them to the same lives of misfortune.

A comparison of parentage laws with marriage laws is instructive in thinking about this fairness issue as well. 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, for that reason 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.\footnote{212} 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.\footnote{213} 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.

\footnote{211} BARTHOLET, supra note 22, at 6.
\footnote{212} See Smith and Fong, supra note 32, at 233-35.
\footnote{213} See id. at 233.
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, which are as central to life aspirations and happiness for humans as is child-rearing, 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 – that is, to use children as a form of compensation for adults who suffer great 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.

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.214 And some adoptive parents do turn out to be abusive or neglectful, but the rate of maltreatment among adoptive parents is quite low, much lower than the rate 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.215

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

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215 See Richard Barth, The Value of Special Needs Adoption, in ADOPTION POLICY AND SPECIAL NEEDS CHILDREN (Rosemary J. Avery, ed., 1997) and R.P. BARTH AND M. BERRY, ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES (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).
fifteen to twenty-two months that ASFA allows for rehabilitation efforts, and that imprisoned parents cannot be expected to become good caregivers right after release from prison. With older children, that fact might counsel in favor of relaxing the 15-22 rule (though that rule already contains a best-interests exception that states now use more often than not). But with newborns, it counsels in favor of immediate termination.

Others argue that children are not harmed by a lengthy foster care period while CPS agencies undertake rehabilitative efforts, because most children who are adopted are adopted by their foster parents. 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 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. 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, so if the state does not commence that process until after a TPR is final, including any appeals, an infant and adopting parent might wait several years for permanency.

Risk of foster parent fatigue is especially likely with babies who have suffered in utero exposure to drugs or

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217 See, e.g., Cohen, supra note 83, at A12 (quoting an advocate for mothers in prison as saying “It is unreasonable to expect these women to resume parenting and make good choices.”).

218 See GAO, supra note 72, at 27 (noting that states routinely invoke the “best interests” exception to the 15-22 rule of ASFA to justify not petitioning for TPR, and that in most states reporting on use of the 15-22 rule, “the number of children exempted from the provision greatly exceeded the number of children to whom it was applied”).

219 See CASEY FAMILY SERVICES, 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).

220 See GAO, supra note 72, at 14-15 (showing that the median length of foster care for children ultimately adopted was 39 months in 2000, while the average time spent living with the adoptive parents prior to adoption was 18 months), 18 (showing that 76% of adopted children had two or more foster care placements before the adoption and roughly half had three or more); Barth, et al., supra note 77, at 372-74 (discussing research showing infants typically experience multiple foster care placements).

221 See, e.g., CASEY FAMILY SERVICES, supra note 220, at 6 (study of adoption in Connecticut in 2002-03 showing “a median of 13 months for an adoption petition to be filed after they were freed”).

222 See CHRISTIAN, supra note 63, 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.”).
alcohol, because of the developmental challenges such babies face even in the
most nurturing post-natal environment.\textsuperscript{223}

One way partially to address these concerns is to establish a regular practice
of “concurrent planning” 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 a TPR is
effected. And 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.\textsuperscript{224} At
the same time, it allows CPS to give birth parents another chance to become fit.

At present, however, concurrent planning rarely occurs.\textsuperscript{225} In part this is
because CPS case workers do not understand it, do not have time to do it, expect
strong resistance from judges and parents’ attorneys, and/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.\textsuperscript{226} It is also in part
because there is a substantial shortage of potential adoptive parents willing to
participate. Many applicants for adoption decline to participate in a concurrent
planning situation, because there is still a lengthy period of uncertainty and
attendant anxiety and because concurrent planning typically would require 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.\textsuperscript{227}

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

\textsuperscript{223} See Christian, supra note 63, at 4 (“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.”).

\textsuperscript{224} For descriptions of concurrent planning, see Andrade and Berrick, supra note 95, at 42 and
46; CWIG, supra note 46, at 6-11.

\textsuperscript{225} 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 practices was found in case reviews.”).

\textsuperscript{226} See id. at 2 (noting opposition by courts and attorneys), 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 . . . .”); Andrade and Berrick, supra note 95, at
46-47 (relating social worker confusion over the meaning of concurrent planning).

\textsuperscript{227} Andrade and Berrick, supra note 95, at 42-43 (“[C]oncurrent planning places a significant
burden upon fost-adopt caregivers. The practice requires fost-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 fost-adopting may result in agencies having some difficulty recruiting these
special caregivers.”); Hudson et al., supra note 45, at 24; Laura Frame, Jill Duerr Berrick, and
Jennifer Foulkes Coakley, Essential Elements of Implementing a System of Concurrent
Planning, 11 CHILD & FAM. SOC. WORK 357, 364-65 (2006); CWIG, supra note 46, at 8.
of birth parents, the baby’s attachment to the fost-adopt parents, which is likely to resemble the normal case of child attachment to parents, is severed, which 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 further disruption and trauma for the child. 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.”

In short, among situations in which the state must assume custody of a newborn child because of parental unfitness, there might be few 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 child who is forced to wait a year or two to find a permanent family.

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 –

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228 See Dicker and Gordon, supra note 29, 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… nearly 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”); Hudson et al., supra note 45, at 1; U.S. Dept. of Health and Hum. Serv., Rereporting and Recurrence of Child Maltreatment: Findings from NCANDS (2005) at 14 (showing that average rate of subsequent maltreatment report for children overall once reported as maltreated was 59 reports per child); Ellaway, Are abused babies protected from further abuse? 89 ARCHIVES OF DISEASE IN CHILDHOOD 845-846 (2004).

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. 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. However, the two databases are not put together. There 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. 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, KCAFS A’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 matches to the appropriate local CPS agency. Likewise, prisons could be required to notify a

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state agency or the local CPS office of any births to inmates. In addition, states could mandate newborn toxicology testing and include pre-natal alcohol exposure in their testing and reporting provisions.  

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 become aware of an at-risk newborn, it should take no action. Rather the 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 so-called child protection workers.

Similar objections have been made and overcome, however, in connection with other legislation aimed at improving child welfare. They were made, for example, in opposition to child support enforcement legislation in the 1990s that entailed routine reporting of personal financial and employment information to state agencies. 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. Arguably, the fact of a child’s 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 welfare office. However, an expedient CPS response to child endangerment might require that hospitals report directly to the state child welfare 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 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.

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?

It is also worth noting the state-mandated, routine, extensive background checking of people who want to adopt a child who is not a biological offspring, and even 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 period after receiving custody of a child. 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 unjustified, and it is further confirmation of the adult-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, on the supposition that someone who commits a crime is likely to do it again. Decisions to marry or not marry another person are based on predictions about what sort of spouse the other person will turn out to be. 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 occur again if the child were returned to the parent. 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 would be irrational for the state, acting as proxy for the child, to wait for the maltreatment to occur.

See Dwyer, supra note 11, at 882-904.
All that being said, an alternative approach that might be more politically palatable 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 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, they require amendment to authorize CPS scrutiny based on prior serious maltreatment of any child and based on parental imprisonment.

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. 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, such as the one Virginia has for drug-abusing mothers who made some effort to secure treatment or counseling, 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. However, it seems unlikely that many substance-abusing pregnant women are sufficiently familiar with such restrictions on CPS action 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. Ordinarily when we fear that deterring people from doing one thing that is bad will lead them to do another thing that is bad, we attach negative consequences to doing the other bad thing as well, if feasible; we do not 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. The maximum time allowed birth parents to become capable of caring for a child should be much shorter in the case of a newborn. 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, unless it is clear that the condition currently making custody with birth parents unsafe is likely to end soon. Every effort should be made to avoid multiple 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, even if they do adopt, might give birth parents more access to the child than is beneficial for the child, because of sympathy for 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. 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

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239 See Andrade and Berrick, supra note 95, at 43-45 (describing use of “prognosis indicators” in context of concurrent planning).
240 Cf. CAL. WELF. & INST. CODE § 361.5(a)(2) (West 2008).
241 Cf. MINN. STAT. § 260C.301(3)(a) (commanding CPS agency to petition for TPR in certain circumstances and to undertake concurrent planning).
242 Cf. MICH. COMP. LAWS § 712A.19b(5) (mandating that courts order TPR upon making certain factual findings, absent demonstration TPR would be contrary to child’s best interests). I recently proposed such an amendment in Virginia. See Va. Senate Bill 928 (2007).
fast-track TPR is satisfied, shifting the burden to the parents to show TPR would not be in the child’s best interests.\footnote{Cf. 750 ILL. COMP. STAT. 50/1 (2008) (positive toxicology screening creates a rebuttable presumption that birth mother is unfit to parent the child); 750 ILL. COMP. STAT. 50/1(d)(i) (murder or attempted murder of one child creates presumption of “depravity” justifying termination); KAN. STAT. ANN. § 1585 (2008) (numerous triggers for presumption of parental unfitness); MICH. COMP. LAWS § 712A.19b(5); R.I. GEN. LAWS 15-7-7(a); VT. STAT. ANN. tit. 15, § 3-504 (2008).}

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 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.\footnote{Cf. GAO, supra note 72m at 27 (noting high rate at which states invoke “best interests” exception to the 15-22 rule).} 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 \textit{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 15-22 rule 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,\footnote{See, e.g., N.J. STAT. ANN. 30:4C-15.1(a) (West 2008).} and a few use mandatory language in statutory provisions governing court decision making as to TPR.\footnote{See, e.g., MICH. COMP. LAWS § 712A.19b(5); R.I. GEN. LAWS 15-7-7(a); VT. STAT. ANN. tit. 15, § 3-504 (2008).} 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 it has been 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.\footnote{Cf. \textsc{Iowa Code} § 232.111(1) (2008) (authorizing a child’s GAL or custodian to petition for TPR); \textsc{Me. Rev. Stat. Ann.} tit. 22 § 4052(1) (2008) (authorizing “the custodian of the child” to file a TPR petition).}

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 system. CPS then not only conducts an investigation and lines up alternative caregivers, but also pays 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, \textit{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. 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.

\textit{Conclusion}

This article has emphasized termination of parental rights as a way of preventing maltreatment of newborn children, but that is because it has focused on the worst cases, those in which parental rights are likely to be terminated anyway, and has principally suggested that we try harder to identify those cases at birth and terminate sooner rather than later. The urgency arises from the fundamental developmental needs of newborn babies. This prescription for the worst cases is not incompatible with a substantially greater societal investment in programs that try to make everyone who wants to be a parent capable of doing so, including early intervention programs such as pre-natal and post-natal home visits by nurses and
social workers, residential substance abuse treatment, and more and better-trained CPS case workers. 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 fixing deeply dysfunctional people. Why should we expect it to be? 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. Earlier TPRs in the worst cases would in fact free up state resources to be devoted to the more hopeful cases. In any event, a baby born today cannot wait for a greater societal commitment to helping adults overcome problems that make them unfit to parent.

The basic proposal offered here, therefore, is that the state’s approach to minimizing child maltreatment be altered in the following ways: First, ensure that newborns at high risk of maltreatment come to the attention of CPS. Second, have CPS make an assessment at the time those children are born whether the birth parents’ history and current condition make it unlikely that they can be adequate parents within a few months of the child’s birth. Third, for those 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, invest rehabilitation resources heavily in 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 II. The benefits to children and to the public fisc of this alternative approach would be substantial. 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 another opportunity 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.

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248 See Orr, supra note 211, at X (stating that “prevention programs like ‘Healthy Families’ already have a track record that is not very promising”); Smith and Fong, Children of Neglect, supra note X at 182 (“standard child welfare services have been shown to be ineffective in reducing neglecting behavior in families”); Wulczyn et al., supra note 25, at 129-33 (noting methodological problems with studies suggesting effectiveness of early intervention programs), 134 (noting little effect from parent education programs), 137-38 (“The extant evidence suggests that prevention programs have very modest if any beneficial impacts on parenting knowledge, attitudes, and behaviors.”).