THE CHILD PROTECTION PRETENSE: STATES' CONTINUED CONSIGNMENT OF NEWBORN BABIES TO UNFIT PARENTS

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James G. Dwyer

When adults with terrible child abuse histories or with chronic and serious substance abuse or mental illness problems have a new child, one might expect child protection agencies to take proactive steps to prevent the newborn babies these adults produce from suffering maltreatment. ... Yet despite federal legislation intended to induce a more proactive and preventive approach to child maltreatment, 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. ...

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... The agencies should assess such biological parents and their home situation before the parents take the baby home. States should aid parents who, the assessment suggests, can adequately parent with some assistance. With respect to parents who most likely cannot adequately parent within the babies' first six months of life, even if services are provided, states should terminate the parents' legal relationship to the newborn child and create a parent-child relationship instead with qualified applicants for adoption. … Newborns are simply different from older children, a basic fact that the child protection system and legal scholars have failed to fully recognize. ...

Since the mid-90s, Congress has passed several laws designed to push states to take a more proactive, preventive approach to child maltreatment. ... The Adoption and Safe Families Act of 1997 (ASFA) required that states authorize courts to terminate parental rights without waiting for child protective agencies to attempt to rehabilitate parents, in certain cases where parents have demonstrated unfitness through egregious conduct toward their other children. The Keeping Children and Families Safe Act of 2003 (KCAFSA) required states to direct birthing facilities to report to a local state child protective agency all births in which babies manifest in utero exposure to illegal drugs, thus bringing to the attention of child protection agencies newborn children at high risk of maltreatment because of parental drug abuse. KCAFSA also required states to implement a plan to ensure the safety of such offspring of drug addicts.

However, resistance among social workers and judges to “disqualifying” biological parents from raising their offspring has rendered these legal developments largely ineffective. ... Achieving the aim of child-maltreatment prevention requires further federal or state legislation to fill gaps in current law that allow local child-protection agencies to continue traditional, reactive practices. …

I. STATE CREATION OF PARENT-CHILD RELATIONSHIPS

The state creates the legal parent-child relationship, and in doing so confers on certain adults powers, rights, and responsibilities with respect to certain children. The legal relationship ensures an opportunity for a social relationship ... The state currently assigns children initially to adults for

upbringing purposes almost exclusively on the basis of biological parentage. … 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 offspring 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 to maliciously kill that next child as well, in order to be named legal parent of the new baby. By way of comparison, it is inconceivable that any adult would similarly choose a spouse without giving any consideration to that person's history in intimate relationships and, in particular, any history of partner abuse that person might have. Likewise, it is inconceivable that the state would approve any applicant for adoption of a child who has a history of severe child maltreatment. The fact that parentage law today completely disregards such disqualifying history or characteristics is difficult to explain on any grounds other than an exaggerated notion of the importance of being raised by one's biological parents and/or a morally untenable notion of parental ownership of biological offspring.

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

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A. Newborns' Developmental Needs

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B. Why Newborns Are Different

Child-protection law fails to differentiate among children by age, instead taking a "one rule fits all ages" approach. Correspondingly, many scholars writing about the child-protection system write as if all children are affected in the same ways by it, regardless of age. Yet several things clearly differentiate newborn children from older children who come to CPS attention. First, 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. 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. … In light of newborns' preattachment reality, it is a misnomer to characterize efforts at rehabilitating unfit birth parents of newborns as "reunification," and it is incorrect to characterize taking a newborn into CPS custody as disruption of a family relationship. ... 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 … or will instead immediately create a permanent relationship for the child with some other adults who are already well prepared to be nurturing caregivers. If the state chooses the former path, establishing and maintaining for a substantial period a legal relationship with unfit birth parents, it actually sets up the children for the terrifying experience Roberts describes, given the high probability of maltreatment in the birth parents' custody and the substantial possibility of ultimate adoption by someone other than the foster parents (resulting in severance of any relationship the baby has with the foster parents) in cases where birth parents are incapable of taking custody at the child's birth. ... Sensible policy and proper respect for newborns' needs and moral rights should lead agencies to try to identify the newborns whose parents have the poorest prognosis and to take the latter path with those babies--that is, immediate placement with adoptive parents. CPS agencies generally do not have sufficient funding to provide substantial services to all the parents they now attempt to rehabilitate, so the resources are spread thinly over all rather than concentrated on parents who have a reasonable chance of becoming capable of adequate care giving.

The most common response to acknowledgement of the limited resources for reforming dysfunctional parents is to argue that the only policy change needed is to devote massively more public resources to the child-protective system and to services for unfit parents, and that terminating parental rights is unfair so long as the state does not provide parents with effective services. There are two problems with this response. First, even the best, most resource-intensive parent-rehabilitation programs, with all the facilities and services and encouragement experts typically recommend, have very little success with dysfunctional parents. [FN95] 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 twenty-four hours of assessment, and a "Recovery Coach" to coordinate their services, monitor their progress, advocate on their behalf, and give them encouragement succeeded in securing the recommended services very quickly for the vast majority of parents in the program, but raised the rate at which social workers thought it "safe" to return a child to parent custody only from 11.6% to 15.5%. Most parents whose children need to be taken into state custody have dysfunctions so deep, stemming from damage they themselves incurred as children, that they are not going to overcome them even in a couple of years, [FN97] 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. ...

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. [FN98] 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, [FN99] meaning that the child has multiple damaging disruptions during the crucial first years of life. Further, many of those who do remain in the parents' home thereafter will have only a marginal existence, suffering maltreatment that goes undetected or receiving parental care that is just above the local CPS agency's threshold for intervention.

Placing babies born to criminals in a holding pattern while birth parents serve jail terms is also very detrimental to the children, because of the impact on attachment and on a child's sense of identity. Even after release, incarcerated parents are generally not able for some time to establish a home for and take care of a child, 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.

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III. FEDERAL LAWS PUSHING STATES TO BE PROACTIVE

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IV. WHY THE POTENTIAL IS UNREALIZED

... The federal oversight agency, the Children's Bureau at the Department of Health and Human Services, gathers little information on state practices in implementing ASFA and KCASFA, and most states do not collect this information from their local CPS agencies. 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-tracked” for adoption, [FN127] and that only one percent of children adopted from foster care are under age one. That tiny fraction of cases in which adoption occurs soon after birth might well comprise solely cases in which birth parents acquiesce to TPR. This Part explains why states still almost never place children born to unfit parents in adoptive homes until after the children have been damaged by maltreatment and/or prolonged foster care.

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

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

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 of a birth parents' child maltreatment history. Even if by happenstance they are aware of such history, they have no legal grounds for notifying CPS of the birth. Reporting laws generally also do not require reporting to CPS of births to parents who are mentally ill or who are in prison. …

The one situation in which CPS now must be called in at the time of a child's birth is detection of in utero drug exposure, following KCAFSA. ... However, … birthing facilities are not required to test for exposure to illegal drugs; KCAFSA did not mandate testing, and state laws generally do not require it. 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. …

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 nontraditional interpretation of statutory language. Standards for intervention historically were drafted with only a reactive focus, an assumption that the state should get involved with respect to a given child only after a parent has maltreated that child, has overtly threatened to harm the child, or has put that child in a dangerous situation, and historically the prevailing understanding of child maltreatment was limited to conduct toward a child after birth. Thus, a newborn in the hospital cannot have been maltreated or even yet put at risk of maltreatment; that can only happen after birth parents take the baby home. And CPS typically will not know how high-risk parents are treating a baby at home unless and until they receive a report of

abuse or neglect.

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

Again KCASFA ostensibly creates an exception to the general rule, one limited to newborns who happen to be tested for drug exposure and who test positive. It requires that local CPS agencies have “procedures for the immediate screening, risk and safety assessment, and prompt investigation of such reports” and “a plan of safe care” for any baby reported to have a positive toxicology screening. In practice, however, there is widespread evasion of this federal directive. States have generally complied with KCAFSA to the extent of requiring medical professionals to report drug exposure, requiring local CPS agencies to respond to any such report by conducting an initial assessment or investigation, authorizing CPS to file a petition in juvenile court for a removal order or other protective order, 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. [FN149] 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 away from the situation if the mother received any counseling or treatment during pregnancy or even if she did not receive any counseling or treatment, so long as she attempted to receive one or the other and so long as the baby has not yet been maltreated when CPS interviews the mother. DSS regulations define counseling and treatment in a quite broad way, such that it "includes, but is not limited to, education about the impact of alcohol, controlled substances and other drugs on the fetus and on the maternal relationship; education about relapse prevention to recognize personal and environmental cues which may trigger a return to the use of alcohol or other drugs." Such education might be quite minimal and might make little impression on a drug addict. Indeed, the positive toxicology test at birth will almost always mean that whatever counseling or treatment a birth mother did receive was ineffective. This major exception to the state rule purportedly implementing KCAFSA makes irrelevant whether any counseling or treatment was effective in getting the mother to stop her substance abuse. Yet her inability to stop at such a time when she should be most highly motivated to stop--that is, when she knows she is poisoning her unborn child--suggests that she will be unable to get her addiction under control anytime soon after the child is born, and this in turn suggests that the baby is at high risk 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 of conduct that falls within the state's definition of abuse or neglect. A handful of states do treat in utero exposure to controlled substances as abuse or neglect and authorize CPS protective action on that basis...

C. CPS Agencies Resist TPR Without Rehabilitative Efforts

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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. [FN163] Why is this the case?

First, the law … 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.

Such a mandate would be superfluous if all CPS agencies were inclined to pursue TPR without first undertaking a plan of parent rehabilitation whenever doing so would be best for a child, but they generally are not. It is contrary to historical practice, the practice dominant when most social workers of today were trained, and the practice encouraged by the "reasonable efforts" command of AACWA. 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. [FN168] 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. ... 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. ... [FN169]

This prediction of social worker resistance to ASFA is borne out by a recent survey of CPS staff in California. Attempting to discover why CPS workers in that state rarely employ the state's extensive reunification bypass law, Berrick et al. found that many social workers expressed "ambivalence about its use due to philosophical perspectives on the social work profession." 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. … When I give presentations to CPS social workers and directors and I raise this concern, there are always a couple who approach me afterwards and, in hushed tones, say something to the effect of "it is so true; CPS is all about helping parents and giving them every last chance, not about doing what is best for the children." … In addition, 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. … Perhaps in part because of this limited knowledge (and in part because of their focus on parents' supposed rights), social workers have viewed their aim for newborns and other children as just ensuring safety, not ensuring an adequate environment for a child's healthy development.[FN175] … [By way of contrast,] 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. 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. ... In many agencies, there are also cumbersome administrative procedures for approving bypass recommendations, which further deter social workers from seeking them. 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. [FN180]

2. Babies Lost in Relative Care

Even if children are removed at or soon after birth from the custody of birth parents who are manifestly unfit, they might quickly fall off the CPS radar screen if a court places them with relatives of the birth parents. Placement with relatives is generally an alternative to state assumption of custody and not a state-supervised foster care arrangement. 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. … 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 most operate with a strong bias toward relative placement. …

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, but it is no 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:

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

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

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. With newborn children, however, that interest in continuity is absent; there is only an interest in later developing family ties to biological parents and relatives. In addition, because older children are less likely than newborns to be adopted, 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. …

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

... State statutory provisions authorizing TPR are confined to specific circumstances, not allowing for TPR whenever that would simply be best for the child. ... Importantly, ASFA did not explicitly preclude inclusion of other bases for TPR without reasonable efforts, and some states have interpreted AACWA and current federal statutes as allowing them to have additional reunification bypass triggers in their TPR statutes. However, many states have interpreted the background requirement of reasonable efforts to reunify that AACWA imposed as precluding what ASFA does not explicitly authorize. Accordingly, most states have very limited and narrow grounds for TPR without rehabilitative efforts and therefore for seeking a good, permanent home immediately after birth for a child born to manifestly unfit parents. 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, [FN205] 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.

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

needs to remediate that early damage. If a set of exceptional potential parents is available to adopt a drug-exposed newborn, that is most likely to be a much better choice for the baby than being suspended in foster or kin care while CPS makes unpromising efforts to make drug-addicted, mentally ill, or mentally disabled birth parents minimally adequate.

ASFA also leaves out from the "no reasonable efforts" grounds incarceration. Several states' statutes nevertheless treat incarceration per se as an aggravated circumstance or as an independent basis for TPR, in recognition of the fact that being separated from a child by incarceration straightforwardly precludes a birth parent from caring for the child. [FN207] 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 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. [FN209]

In addition, limiting the "maltreatment of another child" basis for reunification bypass to violent felony convictions and prior TPRs leaves out situations where a birth parent has abused or neglected other children and has been unable to recover custody of them despite rehabilitative efforts CPS has already made, but as to whom there has not yet been a criminal prosecution or TPR. The parent, who is not presently fit to have custody of any children, now is faced with the challenge of becoming capable of caring not only for the older children but also for a newborn baby. The prognosis for that parent becoming a consistent, nurturing caregiver for the newborn child in time for the child successfully to develop a healthy bond and secure attachment is likely to be extremely poor. [FN210] A family court judge in upstate New York went so far as to order two such parents not to conceive another child, as a condition for return of the four children they then had in foster care. She explained: "... All babies deserve more than to be born to parents who have proven they cannot possibly raise or parent a child." Child welfare experts have stated in more restrained tones that "when parents of a child entering care have already lost multiple children to the system and have made no subsequent change to their lifestyle, providing another 12 months of services seems unlikely to effect change in the parent, while unduly burdening the child with extended stays in foster care." [FN212] 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. [FN213]

E. Courts Refuse TPR Absent Extensive Rehabilitative Efforts

... While courts currently grant most petitions for TPR, the rate of approval for TPR petitions is much lower in cases in which parents have not walked away from the scene and have not been given substantial time and services, even though the latter set of cases typically involves the most clearly unfit parents, as to whom social workers believe there is little chance of success. [FN214] …

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 par-

ents 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. [FN219] 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. [FN220]

In sum, proactive and preventive intervention to spare newborn children of unfit birth parents 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. ...

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. …

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 … 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. ….

To address the clearest and most common circumstances in which newborns would likely 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. ... Iowa law authorizes immediate TPR when a "parent has a severe, chronic substance abuse problem" and "the parent's prognosis indicates that the child will not be able to be returned to the custody of the parent within a reasonable period of time considering the child's age and need for a permanent home." ...

In Virginia, I proposed legislation to address incarceration and multiple children in state custody, circumstances some other states already address in their TPR rules. 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. ... 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. It would simply create a possibility that does not now exist of moving immediately after birth to free the child legally for a permanent family relationship with fit parents, rather than consigning the baby to an indefinite period of foster care and "reunification" trials. Moreover, TPR as to the newborn would not mean CPS abandons the parents; it would continue to work with the parents on reunification with the older children unless and until there is a TPR as to those children as well.

Objections I received to expanding bases for TPR without rehabilitative efforts, objections likely to be echoed by legal scholars, include those typically leveled against CPS interventions generally--namely, that they trample the natural rights of biological parents and that they have a disparate impact on poor and minority-race parents and communities. 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 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. ... In any event, the expanded "no reasonable efforts" grounds for TPR proposed here would effect little change in birth parents' relationships with newborn children, because they would operate in cases where parents are highly likely to lose custody of their children anyway and ultimately to lose parental rights. Arguably, unfit birth parents would in many cases be better off, would suffer less, if the state effected a TPR immediately after birth, rather than pushing the birth parents for a year or more to do something they are incapable of doing, repeatedly denying their requests for custody, explicitly or implicitly condemning them for not transforming themselves, with the TPR threat hanging always over their heads. ...

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. … 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. ... 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. … 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. ...

Underlying the disparate impact criticism is an understandable basic sense of unfairness, that certain groups of adults have the misfortune of losing custody of offspring piled on top of many other misfortunes in their lives. Such sympathy, though, however admirable, cannot justifiably lead to sacrificing the welfare of today's newborn children and consigning them to the same lives of misfortune. For the state to force newborn babies into family relationships with grossly unfit parents because taking away "their" children would add insult to the injury of poverty and inadequate public assistance treats the children as mere instruments for the gratification of others and is a condemnable abuse of state power. [FN234] …

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... What is relevant from a child welfare perspective, however, is not whether there is any chance that a birth parent can ever overcome his or her problems, but rather how likely it is that the birth parent can overcome his or her problems in time to avoid the substantial and lasting damage to the newborn child that is likely to arise either from maltreatment and failure of attachment or from the delays and disruptions that foster care typically entails. With the types of circumstances and conditions identified above as potential additional bases for TPR without rehabilitation efforts, the prospects for quickly overcoming parental problems are extremely poor. Many critics of ASFA's 15-22 rule in fact base their criticism on the reality that treatment for substance abuse is typically very lengthy, and unlikely to succeed within the twelve months that ASFA allows for rehabilitation efforts, 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 to 22 provision (though that rule already contains a "best-interests exception" that states now use more often than not). Conversely, with newborns, it counsels in favor of immediate TPR and adoption.

Others argue that a lengthy foster care period, while CPS agencies undertake rehabilitative efforts, does not harm children, because most adopted children are adopted by their foster parents. ... However, the fact that most children adopted from the child protective system are adopted by foster parents does not mean that children remain in the home that was their initial post-removal placement. It simply means that adoptive parents typically serve as foster parents first. The foster parents who adopt might be the second, third, or sixth set of foster parents with whom the child lived. [FN241] 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. … Risk of foster parent fatigue is especially likely with babies who have suffered in utero exposure to drugs or alcohol, because of the developmental challenges such babies face even in the most nurturing post-natal environment.

One way partially to address these concerns is to establish a regular practice of "concurrent planning" with respect to newborns taken into state custody… At present, however, concurrent planning rarely occurs. [FN249] 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, 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. [FN250] It is also in part because there is a substantial shortage of potential adoptive parents willing to participate. [FN251] … Even when social workers are inclined and able to engage in concurrent planning, TPR might be preferable, especially with newborns. If the ultimate outcome in a given concurrent planning case is placement in the custody of birth parents, the baby's attachment to the fost-adopt parents, which is likely to resemble the normal case of child attachment to parents, is severed. This severing is detrimental to the child and might not be outweighed by the benefit of being raised by a biological parent. The birth parent or parents are likely to be marginal caregivers even after being deemed legally minimally capable of assuming custody, and, in a substantial percentage of cases, birth parents will lose custody again, resulting in 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 . . . .”

B. Identify At Birth Children at High Risk of Maltreatment

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. … Likewise, birth records and records of past commitment to mental institution are never cross-checked. …

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 state agency or the local CPS office of any births to inmates. All of this information transmission and cross-checking could occur electronically, with minimal human labor. In addition, states could mandate newborn toxicology testing. …

Privacy concerns arise in many child welfare contexts, and of course also in many contexts of crime prevention and criminal law enforcement. A parent-protective privacy objection was advanced, for example, in opposition to child support enforcement legislation in the 90s that entailed routine reporting of personal financial and employment information to state agencies. 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. ... 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 (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.

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

Furthermore, this proposed cross-checking of state databases is far less invasive than current state-mandated, routine, extensive background checking of people who want to adopt a child who is not a biological offspring, and it has greater justification than the mandatory background checking of people who just want to work in a job or take up a hobby that involves limited contact with children. … 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. ...

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

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. ... Further, to deal with CPS resistance to pre-maltreatment action, state statutes should be amended so that if the CPS investigation reveals that a newborn child would be at substantial risk of maltreatment in parental custody, CPS must petition for custody of the child, to trigger a court review of the baby's situation. ... 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. ...

A further necessary reform is to require that CPS, when it assumes custody of a newborn child, seek a pre-adoptive foster care placement. ... 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. [FN264] The maximum time allowed birth parents to become capable of caring for a child should be much shorter in the case of a newborn. [FN265] 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 foster care placements for infants.

Moreover, there should be a presumption against placement of a removed newborn child with relatives… in virtue of the tendency of dysfunction to run throughout families and in light of the fact that newborns have no existing ties to biological relatives to preserve. There are also the dangers that relatives will feign interest in adopting in order to keep a child near the birth parents and that, even if they do adopt, they might give birth parents more access to the child than is beneficial for the child, because of sympathy for or fear of the parents. ...

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. … An additional or alternative means of pushing judges to order TPR without rehabilitative efforts when that is best for a child would be to establish a statutory presumption in favor of TPR when the parental-conduct predicate for a fast-track TPR is satisfied, shifting the burden to the parents to show TPR would not be in the child's best interests. [FN268]

Additional training of social workers and judges regarding the crucial importance of permanency for newborns, with instruction as to attachment, bonding, and brain development, might also go some way toward changing their inclinations in a child-centered direction. Alternatively, CPS agencies might need to employ persons who are not social workers but who are instead trained to conduct investigations, to make prognoses of parental rehabilitation, and to make best-interest decisions for newborns, and to give those employees authority to decide which disposition the agency will seek. Agencies might limit social workers' function to overseeing parental rehabilitation efforts after prognosis specialists and courts have decided that that will be the goal. ... En-

suring 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….

CONCLUSION

This Article emphasizes terminating parental rights to prevent maltreatment of newborn children because it focuses on the worst cases, those in which parental rights are likely to be terminated anyway, and it proposes that states work harder to identify these cases at birth and terminate sooner rather than later. The urgency arises from the fundamental developmental needs of newborn babies. This approach for the worst cases actually comports with greater investment in societal programs that try to enable biological parents to retain parenting rights. Earlier TPRs in the worst cases would free up state resources to be devoted to the more hopeful cases. It would be foolish and dangerous, however, to believe that all birth parents can be made adequate parents by offering them assistance and services. Many simply face too many obstacles to becoming fit parents, and the reality is that the state is not very good at reforming deeply dysfunctional people. Moreover, babies cannot wait for a greater societal commitment to helping adults overcome problems that make them unfit to parent. ... The choice we face as a society is between clinging to an untenable and extremely expensive notion that manifestly unfit biological parents are entitled to one or more opportunities to become fit before a newborn child can have a good permanent home and, alternatively, respecting the moral right of children to enter into family relationships that they would choose if they were able.

[FN95]. See CAPTA: Successes and Failures at Preventing Child Abuse and Neglect: Hearing Before the Subcomm. on Select Education of the Comm. on Education and the Workforce, 107th Cong. 70 (2002) [hereinafter CAPTA] (statement of Richard Gelles) ("[A]s yet, there is no empirical evidence to support the effectiveness of child welfare services in general or the newer, more innovative intensive family preservation services." (emphasis removed)); Smith & Fong, supra note 45, at 185 ("[T]here remain, at the present time, no intervention techniques that have been proven to be consistently successful with families who neglect their children ...."); Wulczyn et al., supra note 2, at 8 ("[R]esearch has so far struggled to find effective services for maltreatment, placement prevention, and family reunification." (citation omitted)); id. at 170 ("[V]ery few interventions that address maltreatment and placement have met the standard scientific criteria of effectiveness."); Ethier et al., supra note 71, at 22 (reporting the results of study of parents in rehabilitation programs, showing that "after 4 years of intervention and services received, 62% of the mothers still display a high level of abuse and neglect problems"); Fluke & Hollinshead, supra note 80, at 12 (citing a study that found "duration, intensity and breadth of family preservation services had little overall impact on the recurrence of child maltreatment" (emphasis removed)); Nat'l Conf. of State Legis., States Using Evidence-Based Methods to Prevent Child Abuse, Pub. Health News, May 3, 2004, at 1, 2 available at http://www.ncsl.org/print/health/preventabuse.pdf [hereinafter NCSL] (discussing studies showing that many programs that "look good cosmetically" in fact have not been proven effective). Successful parent rehabilitation is especially unlikely when children are removed from parent custody in infancy; only around one third of new-

borns taken into state custody ultimately "reunify" with birth parents. See Zero to Three, supra note 70, at 1.

[FN97]. Observers of child protection agency practices note that most parents reported for child maltreatment have little motivation or capacity to become rehabilitated. See, e.g., CAPTA, supra note 95, at 69-70 (statement of Richard Gelles); Bartholet, supra note 25, at 339; NSCAW, supra note 77, at tbl.A-11.

[FN98]. See Barth et al., supra note 94, at 394 ("Reunifications often result after quite a long time, well beyond what the law has now set as the time for the first permanency review (i.e., twelve months). Prior investigations have shown that about half of reunifications that occur do so in the first six to eighteen months, but that the remaining half will require an additional two or more years to do so."); Cohen & Youcha, supra note 41, at 15 (noting that half of babies who enter foster care before three months of age spend thirty-one months or more in foster care); Dicker & Gordon, supra note 42, at 31 (noting that babies who enter foster care at less than three months of age are the most likely to "spend twice as long in care as older children").

[FN99]. See Ethier et al., supra note 71, at 22; NCSL, supra note 95, at 1-2.

[FN127]. GAO, supra note 89, at 24; see also id. at 3 (concluding that states use the "fast track" authorization infrequently); U.S. Gen. Accounting Office, Foster Care: States' Early Experiences Implementing the Adoption and Safe Families Act, GAO/HEHS-00-1, 9 (1999) (noting that only two states supplied data on TPR without reasonable efforts, and of those two, one reported four instances and the other reported zero); Barth, et al., supra note 94, at 390 ("Information from over two hundred cases that have experienced TPRs in the NSCAW study shows that only five percent of these decisions were made earlier than twelve months in to the case. Around three-fourths followed an attempt at reunification services that parents did not participate in." (citation omitted)); Berrick, et al, supra note 80, (discussing a California study showing courts authorized reunification bypass in fewer than 10% of cases in which statutes authorized it). Conversations I have had with local CPS directors and CPS attorneys in Virginia are consistent with the impression these studies create; agencies continue doing business the way they long have, automatically placing children they remove, of whatever age, in foster care and, unless the parents simply refuse to cooperate, giving the parents a year or more to improve.

[FN163]. 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.

[FN168]. See CAPTA, supra note 95, at 32 (statement of Rep. Greenwood) ("I want to again rely a little bit on my experiences.... More times than not, I felt like I erred on the side of putting these people back together again, and the kids didn't turn out so well in the long run."); id. at 33 (statement of Richard Gelles) ("Caseworkers need to understand that some families can be changed, some families can't .... And some decisions are going to have to be made under the timelines of ASFA, that you are just not going to have enough time to change the family, given the child's developmental interests. CAPTA in its 30-year iteration has not done a particularly good job at spurring research and development around these decision-making issues."); id. at 68

("[F]ront-line child welfare workers still enter homes severely lacking in training, insight, and the proper skills to assess risk and family needs .... Schools of Social Work in the United States bear much of the responsibility for the dearth of professionally trained front-line child welfare workers ... [because they] remain focused on turning out clinicians trained for either private clinical practice or administration ... [and do not] commit themselves to instituting a professional child welfare track and appropriate curriculum."); Gordon, supra note 87, at 677-78.

[FN169]. Gordon, supra note 87, at 678-79 (citations omitted).

[FN171]. Id.; see also CAPTA, supra note 95, at 69-70 (statement of Richard Gelles) ("At the core of child welfare work is the belief that most, if not all, parents want to be good and caring parents and caretakers.... If change does not occur, it is attributed to a lack of soft or hard resources, not to the parents' lack of willingness or ability to change.... In reality, change in general, and change in the particular case of caregivers that maltreat their children, is much more difficult to bring about.... All individuals are not equally ready to change.").

[FN175]. See Christian, supra note 80, at 4 ("At present, many child welfare agencies view foster care primarily as a means of protecting children's physical safety and only secondarily as a means of ensuring the healthy social and emotional development of very young children who are removed from home for reasons of abuse and neglect .... The limited perception of foster care may be changing because early brain research continues to affect policy ....").

[FN205]. 42 U.S.C. § 671(a)(15)(D)(i) (2000) (requiring that efforts to enable the child to return home need not be made if "the parent has subjected the child to aggravated circumstances (as defined in State law, which definition may include but need not be limited to abandonment, torture, chronic abuse, and sexual abuse)").

[FN207]. See Del. Code Ann. tit. 13, § 1103(a)(5)a.3. (2006); Idaho Code Ann. §16-2005(1)(e) (Supp. 2008); Ky. Rev. Stat. Ann. § 600.020(2)(b) (LexisNexis Supp. 2007); N.D. Cent. Code § 27-20-02 (Supp. 2007) (including within "aggravated circumstances" cases in which a child is under age nine and the parent "[h]as been incarcerated under a sentence for which the latest release date is: ... after the child is twice the child's current age, measured in days"); R.I. Gen. Laws § 15-7-7(a)(2)(i) (2003); S.D. Codified Laws § 26-8A-21.1 (Supp. 2008) (reunification efforts need not be undertaken when a parent "[i]s incarcerated and is unavailable to care for the child during a significant period of the child's minority, considering the child's age and the child's need for care by an adult"); Tenn. Code Ann. § 36-1-113(g)(6) (Supp. 2007) (allowing termination of parental rights if the parent is incarcerated for a period of ten years or longer); Tex. Fam. Code Ann. § 161.001(1)(Q) (Supp. 2008); Nat'l Conference of State Legislatures, Analysis of State Legislation Enacted In Response to the Adoption and Safe Families Act, P.L. 105-89, Aggravated Circumstances (1999), http:// www.ncsl.org/programs/cyf/aggravat.htm [hereinafter NCSL (2007)].

[FN209]. Colo. Rev. Stat. § 19-3-604(2)(k)(IV) (2008); Neb. Rev. Stat. §43-292.02(2) (2004).

[FN212]. D'Andrade & Berrick, supra note 80, at 33-34; see also Smith & Fong, supra note 45, at 41 (citing studies showing higher rates of maltreatment in larger families).

[FN213]. See Kan. Stat. Ann. § 38-1585(a)(3) (Supp. 2007) (presuming that a parent is unfit if "on two or more prior occasions a child in the physical custody of the parent has been adjudicated a child in need of care"); Minn. Stat. §260C.301(1)(b) (Supp. 2007) ("It is presumed that a parent is palpably unfit to be a party to the parent and child relationship upon a showing that ... the parent's custodial rights to another child have been involuntarily transferred to a relative...."); S.D. Codified Laws § 26-8A-21.1 (Supp. 2008) (directing that reunification efforts need not be undertaken when a parent has "a documented history of abuse and neglect associated with chronic alcohol or drug abuse"); NCSL (2007), supra note 207.

[FN214]. See, e.g., GAO, supra note 89, at 3-4 (citing "reluctance on the part of some judges to allow the state to bypass reunification efforts"); id. at 26 (finding that in Minnesota, in 25% of all cases in which children in foster care were not being fast-tracked, CPS had requested a fast track for the children but courts had refused).

[FN219]. See, e.g., Lederman et al., supra note 88, at 35 ("Despite the extreme risk to children in the child welfare system, they seldom appear in court and do not have a voice because they cannot articulate their needs and desires in words."). Judges at the appellate level are especially unlikely to have much experience or training in child protection matters or to come face-to-face with the child in question. See John E. B. Myers, The Legal System and Child Protection, in The APSAC Handbook on Child Maltreatment 305, 307-20 (2d ed., 2002).

[FN220]. See GAO, supra note 89, at 36 (noting that most states "reported that not enough training was available for judges"); Lederman et al., supra note 88, at 33, 35-36 (observing that infants entering the foster care system "historically, have been largely ignored.... Juvenile courts do not conduct assessments and evaluations of babies and toddlers .... Like most adults, judges and juvenile court personnel are not aware that early trauma and other developmental risk factors to which babies and toddlers in the child welfare system are disproportionately exposed can result in long term harm. [J]udges must recognize the developmental, social, and emotional harm that can result from an unhealthy attachment... [and] must begin to make infant mental health a priority.").

[FN222]. Iowa Code § 232.116(1)(l) (Supp. 2008); see also NCSL (2007), supra note 207 (listing other states that include substance abuse or mental illness within "aggravated circumstances").

[FN241]. See GAO, supra note 89, at 14-15 (stating that, in 2000, the median length of foster care for children ultimately adopted was thirty-nine months, while, in that same year, the average time spent living with the adoptive parents prior to adoption was eighteen months); id. at 18 (showing that, in 2000, 67 percent of adopted children had two or more foster care placements before the adoption and roughly forty percent had three or more); Barth, et al., supra note 94, at 374 (discussing research showing infants typically experience multiple foster care placements).

[FN249]. See CWIG: Concurrent Planning 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."

[FN250]. See D'Andrade & Berrick, supra note 80, at 46-47 (relating the confusion that social

workers in California face over the meaning of "reasonable efforts" in concurrent planning); CWIG: Concurrent Planning, supra note 89, at 2 (noting opposition by courts and attorneys); id. at 3 ("In a number of States, concurrent goals were written in the case files, but case reviews showed that efforts toward the goals were sequential rather than concurrent. A number of reports indicated that staff's understanding of concurrent planning was unclear ....").

[FN251]. See CWIG: Concurrent Planning, at 8 ("Not surprisingly, the literature commonly points to the recruitment ... of foster/adoptive families as one of the most challenging aspects of concurrent planning.").

[FN264]. See D'Andrade & Berrick, supra note 80, at 43-46 (describing use of "prognosis indicators" in context of concurrent planning).

[FN265]. Cf. Cal. Welf. & Inst. Code § 361.5(a)(2) (West 2008) (limiting court-ordered services to six months for children who were under three years of age at the initial time of removal).

[FN268]. Cf. 750 Ill. Comp. Stat. 50/1(D)(k) (1999 & Supp. 2008) (stating that positive toxicology screening creates a rebuttable presumption that birth mother is unfit to parent the child); id. at 50/1(D)(i) (1999 & Supp. 2008) (providing that murder or attempted murder of one child creates presumption that the parent is "depraved"); Kan. Stat. Ann. § 38-1585 (repealed 2006) (showing the numerous triggers for presumption of parental unfitness); Me. Rev. Stat. Ann. tit. 22, § 4055(1-A)(C) (2004) (stating that chronic substance abuse creates a presumption that the parent is unable to protect the child from harm).

[FN270]. See, e.g., N.J. Stat. Ann. § 30:4C-15.1(a) (West 2008) (mandating the initiation of a petition to terminate if certain standards are met).

[FN271]. See, e.g., Mich. Comp. Laws § 712A.19b(5) (2002) (forcing the court to terminate parental rights in certain circumstances); R.I. Gen. Laws § 15-7-7(a) (2003) (mandating termination of parental rights if certain conditions are fulfilled); Vt. Stat. Ann. tit. 15A, § 3-504 (2002) (providing the grounds for termination of the parent and child relationship).

[FN272]. Cf. Iowa Code § 232.111(1) (2006) (authorizing a child's GAL or custodian to petition for TPR); Me. Rev. Stat. Ann. tit. 22, § 4052(1) (2004 & Supp. 2007) (authorizing "the custodian of the child or ... the department" to file a TPR petition).

[FN273]. See Orr, supra note 232, at 7 ("[P]revention programs like 'Healthy Families' already have a track record that is not very promising." (footnote omitted)); Smith & Fong, supra note 45, at 182 ("[S]tandard child welfare services have been shown to be ineffective in reducing neglecting behavior in families." (internal emphasis omitted)); Wulczyn et al., supra note 2, at 129-32 (noting methodological problems with studies suggesting effectiveness of early intervention programs); id. at 134 (noting little effect for high-risk families from parent education programs); id. at 138 ("The extant evidence suggests that prevention programs have very modest if any beneficial impacts on parenting knowledge, attitudes, and behaviors.").