



2-2006

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Recommended Citation

Protecting Children by Preserving Parenthood, 14 Wm. & Mary Bill Rts. J. 969 (2005-2006) (Symposium Issue)

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PROTECTING CHILDREN BY PRESERVING PARENTHOOD

Jane C. Murphy*

INTRODUCTION

Establishing legal parentage, once a relatively straightforward matter of marriage and biology, has become increasingly complex. The determination of legal status as mother may now involve several women making claims based on genetic contribution, contract, status as gestational carrier, or other bases.¹ Paternity cases, while a more established segment of the court docket, have also become more complex. The weakening of the marital presumption, increased accessibility and reliability of genetic testing, and the rise in children born outside of marriage have made court intervention in paternity establishment more common.²

Cases involving the law's role in resolving parentage issues arise in a variety of contexts. Much has been written about the appropriate legal standards in cases involving competing claims of parenthood.³ In these "competing claims" cases, courts or legislatures are called upon to confer rights and responsibilities among two or more adults seeking to assume the emotional, financial, and care-taking role in a child's life.⁴ Some of these cases involve garden-variety adultery in which a father discovers

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¹ See, e.g., R. Alta Charo, *And Baby Makes Three — or Four, or Five, or Six: Redefining the Family After the Reprotech Revolution*, 15 WIS. WOMEN'S L.J. 231 (2000); Melanie B. Jacobs, *Micah Has One Mommy and One Legal Stranger: Adjudicating Maternity for Nonbiological Lesbian Coparents*, 50 BUFF. L. REV. 341 (2002); Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605 (2003).

² See, e.g., Theresa Glennon, *Somebody's Child: Evaluating the Erosion of the Marital Presumption of Paternity*, 102 W. VA. L. REV. 547 (2000); Jane C. Murphy, *Legal Images of Fatherhood: Welfare Reform, Child Support Enforcement, and Fatherless Children*, 81 NOTRE DAME L. REV. 325 (2005).

³ See *supra* notes 1–2; see also Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002) (noting that the circumstances contributing to the "fragmentation of parentage" on both the maternal and paternal sides can result in as many as eight potential parents).

⁴ See *infra* notes 8–13 and accompanying text.

he is not the biological father of a child born during his marriage to the child's mother.⁵ Increasingly, however, competing claims cases involve parental relationships created from artificial reproductive technology (ART), or adoption, or both.⁶ These cases occur in a variety of family structures: families with heterosexual married parents, same sex couples, and single parents. What they all have in common is that, given the costs of the legal or medical interventions involved, there are, among the claimants, at least one or two potential parents with substantial resources.⁷

The debate about the best choice for children when adults are competing for parental status is ongoing, lively, and filled with many voices. There are a variety of options presented to judges or lawmakers in these situations. They can take an all-or-nothing approach and assign exclusive parenthood to one adult based upon a range of factors, including marital status,⁸ biology,⁹ contractual intent,¹⁰ history of care-taking,¹¹ and emotional attachment with the child.¹² Or the law can allow more than

⁵ Unfortunately many of these adultery cases result in proceedings to disestablish rather than to preserve or establish paternity. But some end up as contests between the marital and biological fathers. *See, e.g.*, *Evans v. Wilson*, 856 A.2d 679 (Md. 2004) (denying a paramour's attempt to establish paternity in light of the mother's husband's status as the legal father).

⁶ DIV. OF REPROD. HEALTH, CTR. FOR DISEASE CONTROL & PREVENTION & SOC'Y FOR ASSISTED REPROD. TECH, AM. SOC'Y FOR REPROD. MED., 2001 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 3 (2003), available at <http://www.cdc.gov/ART/ART01/PDF/ART2001.pdf> (noting that "ART includes all fertility treatments in which both eggs and sperm are handled," including in vitro fertilization, gamete intrafallopian transfer, and zygote intrafallopian transfer).

⁷ This conclusion is drawn from information about the extraordinary costs of artificial reproductive technology and, to a lesser extent, the costs of private adoption. *See, e.g.*, Lori B. Andrews, *Reproductive Technology Comes of Age*, 21 WHITTIER L. REV. 375, 377 (1999) (describing the reproductive technology industry as having revenue exceeding four billion dollars annually); Katherine T. Pratt, *Inconceivable?, Deducting the Costs of Fertility Treatment*, 89 CORNELL L. REV. 1121, 1135-38 (2004) (describing the high costs of fertility treatments, as well as the fact that they are not usually covered by insurance, and analyzing the deductibility of such costs for federal income tax purposes); Kathy M. Kristof, *Aid Is Available to Help Ease Adoption Burden*, L.A. TIMES, July 31, 2005, at C2 (describing the efforts to assist parents with the high cost of private adoption and reporting that "[r]oughly 100,000 parents adopt in the U.S. each year, spending as much as \$40,000 in the process.").

⁸ *See, e.g.*, *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

⁹ One of the competing claims cases in which the biological parents "won" that captured media attention came to be known as the "Baby Jessica" case. *See In re Clausen*, 502 N.W.2d 649 (Mich. 1993).

¹⁰ *See Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *see also Storrow*, *supra* note 3, at 602.

¹¹ AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.18 (2000) (placing care-taking on the same level as marriage and biology in establishing parental rights).

¹² OR. REV. STAT. ANN. § 109.119 (West 2001) (granting rights to a "person who establishes emotional ties creating child-parent relationship or ongoing personal relationship").

one adult to share the rights and responsibilities of being a father or mother.¹³ While courts have taken a variety of approaches in resolving these cases, decisions usually turn on interpretations of contracts, custody, adoption, or parentage law.¹⁴ Increasingly, the principles in the Uniform Parentage Act (UPA)¹⁵ or state variants of the UPA¹⁶ are being adapted to address these cases.

Less attention has been paid to a much larger, second category of cases — cases in which the law is faced with resolving the legal status of the *one* adult who may be available to serve as the legal mother or father. For fathers, these cases frequently arise in the context of establishing (or, in some cases, disestablishing) the paternity of children of unmarried parents.¹⁷ For mothers, these cases most often arise in the context of determining their legal status as biological mothers when the state has identified them as being at risk for abusing or neglecting their children.¹⁸ These cases almost always involve mothers or fathers who are poor, often members of minority groups, and usually without legal representation in parentage establishment and/or disestablishment proceedings.¹⁹ In these “orphan” cases, the governing rules or legal standards chosen by the legislature or courts will not be used to choose among potential parents; rather, the issue is whether *anyone* will serve as a child’s parent.

The law’s response in both categories of cases will have an impact on the welfare of the children involved. In competing claims cases, the best interests of children seem to be served by policies that preserve relationships between children and the fit, loving adults in their lives rather than policies that rely on narrow definitions of parenthood based on marriage or biology alone.²⁰ But “competing claims” cases, while capturing vast resources of the legal system and vast space in legal scholarship, have significantly different implications for child welfare than those cases where the decision can leave a child fatherless or motherless. While the adults involved may

¹³ See, e.g., *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005) (holding that a child born to a same sex couple can have two mothers, both of whom have custody rights and support obligations).

¹⁴ See Storrow, *supra* note 3, at 603–612, 623–33 (summarizing the literature and analyzing statutes and cases in which there are multiple contenders for legal mother and legal father).

¹⁵ Uniform Parentage Act of 2000 (2002), available at <http://www.law.upenn.edu/bll/ulc/upa/final2002.htm>.

¹⁶ See, e.g., CAL. FAM. CODE § 7575 (West 2005); OKLA. STAT. ANN. tit. 10, § 3 (West 1998); WASH. REV. CODE ANN. § 26.26.300 (West 2002).

¹⁷ See *infra* text accompanying note 72.

¹⁸ See *infra* note 73 and accompanying text.

¹⁹ See *infra* notes 57–58 and accompanying text.

²⁰ See, e.g., Matthew M. Kavanagh, *Rewriting the Legal Family: Beyond Exclusivity to a Care-Based Standard*, 16 YALE J.L. & FEMINISM 83, 143 (2004); see also Gilbert A. Holmes, *The Tie that Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER SOC. POL’Y & L. 505 (1998).

be devastated by any legal action limiting contact with children they love, children have proven to be surprisingly resilient in circumstances where several adults are fighting to stay in their lives.²¹ Making the “wrong choice” when deciding among potential volunteers for parenthood, therefore, presents fewer risks to the welfare of a child than a decision that may leave a child without any father or mother. Legal decisions that leave children permanently without a parent — without even a name to attach to mother or father — can have devastating effects on children.²² The harm is financial, emotional, and psychological.²³ If our goal is to develop parentage laws that have child welfare as their central goal, we must focus greater attention on those cases that have the potential to leave a child motherless or fatherless or both. Reforming parentage laws must begin with recognition that poor families experience the establishment and disestablishment of parentage differently from families with greater economic resources. For poor families, parentage issues are not usually resolved by careful and nuanced readings of private contracts or the UPA in proceedings where all parties are represented in full-fledged trials through appellate review. Rather, these issues get resolved in the crowded halls of hospitals, welfare offices, and juvenile courts where caseloads are large and few parties have lawyers.²⁴ While child welfare is certainly an articulated goal of the governing law in these cases, this goal is often secondary to recouping state funds, ensuring “fairness” to non-biological fathers, and punishing “bad” mothers.

I have argued elsewhere that the recent trends in child support and welfare law have put children at risk of losing fathers.²⁵ These trends have resulted in a new definition of fatherhood based solely upon biology and are an

²¹ See, e.g., Brian Dickerson, *A Child's Life Shows Folly of Adults, Media*, DETROIT FREE PRESS, Feb. 24, 2003 (describing “Baby Jessica” nine years after being taken from her pre-adoptive home to live with her biological father as “a self-possessed 12-year-old who adores her parents” and “recognize[s] that in a world where many children lack even a single adult who cares about them, she and her sister have lucked out”), available at <http://law.gsu.edu/ecunningham/PR/JessicaUpdates.htm>.

The potential for harm for children in “competing claims” cases will, of course, vary depending upon a variety of circumstances, including the level of and exposure to conflict, the age of the child, and the nature of the relationship with the claimants. See PSYCHOLOGY AND CHILD CUSTODY DETERMINATIONS 115 (Lois A. Weithorn ed., 1987).

²² At the University of Baltimore, the author directed a family law clinical program from 1990–2004. See University of Baltimore School of Law Family Law Clinic, <http://law.ubalt.edu/clinics/familylaw.html> (last visited Feb. 20, 2006). The caseload included representation of children and parents in paternity establishment and disestablishment cases as well as abuse and neglect cases.

²³ See, e.g., Murphy, *supra* note 2, at 365–69 (describing a case study from Maryland).

²⁴ See GUGGENHEIM, *infra* note 59.

²⁵ See Murphy, *supra* note 2. For similar arguments, see Melanie B. Jacobs, *When Daddy Doesn't Want to Be Daddy Anymore: An Argument Against Paternity Fraud Claims*, 16 YALE J.L. & FEMINISM 193 (2004), and Paula Roberts, *Truth and Consequences* (pts. 1–3), 37 FAM. L.Q. 35, 55, 69 (2003).

unintended consequence[] of three decades of . . . legislation designed to reform the nation's welfare system. . . . [A]ppled most aggressively against low-income fathers of children receiving public benefits, welfare-driven child support policies are pushing those fathers to seek disestablishment of paternity. In resolving these claims, courts and legislatures are reinstating . . . a definition of fatherhood grounded in biology that ignores other potential bases for fatherhood-based caretaking. As a result, children are becoming fatherless²⁶

While reversing these developments may require a fundamental shift in our approach to welfare, I have argued for incremental changes in child support and public benefits law to achieve "the overarching goal of keeping fathers in children's lives."²⁷

In this Article, the focus shifts to mothers and the laws that establish and disestablish the maternal rights of poor women. The Article examines patterns of state intervention in child abuse and neglect law that determine the legal recognition of motherhood for these women. It concludes that current child welfare rules and policies promote the loss of birthmothers in poor children's lives, often with no long-term maternal substitute for affected children. The Article also notes that focusing on parentage laws alone cannot preserve fit mothers (or fathers) in children's lives. Notwithstanding the limitations of this exercise, the Article highlights the policies that have removed mothers from their children and urges a shift in policy direction.

Finally, the Article concludes with some principles to guide the formulation of parentage laws that have as their primary goal protecting poor children by keeping mothers in their lives.

I. ESTABLISHING AND PRESERVING THE LEGAL STATUS OF MOTHERS

Historically, the maternal presumption provided that a woman who gives birth to a child is that child's mother under the law.²⁸ This presumption no longer answers all issues concerning the legal status of mothers. While the UPA and its state variants²⁹ are beginning to displace this assumption to resolve issues concerning maternal status, the application of such rules is primarily relevant to competing claims in cases involving same sex partners, ART, or both. For poor women and children, the laws that

²⁶ Murphy, *supra* note 2, at 329–30 (footnotes omitted).

²⁷ *Id.* at 331.

²⁸ *Nguyen v. INS*, 533 U.S. 53 (2001) (holding that a woman's maternity is verifiable from the birth itself).

²⁹ *See supra* note 16.

determine maternal status are more often those federal³⁰ and state³¹ laws that authorize the state to remove children, often as infants, and to terminate maternal parental rights.

A. *The Diminishing Impact of Biology and Its Impact on Children*

For low-income men, biology (and economic support) has increasingly defined fatherhood under the law.³² For poor women, the legal definition of motherhood seems to be moving in the opposite direction. Many would argue that the biological connection between mothers and children is even more profound than that between biological fathers and their children.³³ Despite this, biology is de-emphasized under current child welfare law, the law that most frequently defines motherhood for poor women.³⁴ For children of poor biological mothers, the maternal presumption of legal parenthood at birth is being increasingly displaced under federal and state child welfare law by an idealized notion of motherhood to be created and recognized through adoption.

Poor women, particularly African American women, have a history of losing their children in juvenile court child protection proceedings. This history is well-documented:

[F]rom their inception, child welfare programs focused on poor children. The children of single mothers (particularly women of

³⁰ Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

³¹ State laws governing child protection proceedings are often divided between those standards, usually vague and indeterminate, that permit removal of children and somewhat more specific standards that permit termination of parental rights. *See, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. §§ 3-801-830 (LexisNexis 2006) (governing the removal of children for alleged abuse or neglect); MD. CODE ANN., FAM. LAW § 5-301 (LexisNexis 2006) (governing the termination of parental rights).

³² *See generally* Murphy, *supra* note 2.

³³ *See, e.g.*, Nancy Erickson, *The Mother's Rights Must Take Priority*, 2 L. & INEQ. 447 (1984). Of course, in the rarified world of ART, where the biological connection may be limited to egg donation, there may be no difference grounded in biology between the maternal and paternal child bond.

³⁴ When parental rights are terminated to make a child theoretically available for adoption, the parental rights of biological fathers are also terminated. But, for a variety of reasons, the cases that end up in child welfare proceedings rarely involve fathers who are actively involved with their children and, thus, do not have the same impact on children's relationship with fathers. *See* Leigh Goodmark, *Achieving Batterer Accountability in the Child Protection System*, 93 KY. L.J. 613, 614-15 (2004); Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions from Welfare "Reform," Family, and Criminal Law*, 83 CORNELL L. REV. 689, 708-09 (1998) (attributing the lack of participation of fathers in child protection proceedings to the fact that women are more often primary caretakers and noting that in child protection cases, very little attention is paid by the state to ensuring fathers' presence).

color) are particularly at risk of removal. Living in a single-parent household increases the risk that a child will live in poverty. Both poverty and the loss of regular contact with both parents pose risks to child welfare. Many commentators have suggested, however, that intervention results, at least in part, from the child welfare system's adherence to the traditional idealized definition of the "good mother" rather than from thorough investigations and documentation of child abuse and neglect.³⁵

For example, Bernardine Dohrn has explained:

From the beginning, the juvenile courts and the broader social welfare system intervened in the lives of destitute women to regulate and monitor their behavior, punish them for "deviant" mothering practices, and police the undeserving poor. Women were locked at the center of the private sphere of the family; their sole responsibility was to produce healthy offspring and provide for the well-being of men. Poor women, single women, and women who worked outside the home failed, by definition, to meet this responsibility. The legal and social welfare apparatus developed to regulate and punish these "bad" mothers by "saving" their children.³⁶

This bias against poor mothers has increased as the emphasis in such proceedings has shifted from preservation of the birthfamily to swifter termination of parental rights and adoption.³⁷ Child advocates, social scientists, and legislators have long recognized that allowing children who have been removed from their mother's care to move from placement to placement in "foster care drift" is harmful to children.³⁸ Study after study demonstrates the importance of permanency³⁹ and the dangers of

³⁵ Murphy, *supra* note 34, at 708–09 (footnotes omitted).

³⁶ *Id.* at 709 (quoting Bernardine Dohrn, *Bad Mothers, Good Mothers, and the State: Children at the Margins*, 2 U. CHI. L. SCH. ROUNDTABLE 1, 6 (1995) (footnotes omitted)).

³⁷ See Mary O'Flynn, *The Adoption and Safe Families Act of 1997: Changing Child Welfare Without Addressing Parental Substance Abuse*, 16 J. CONTEMP. HEALTH L. & POL'Y 243, 247 (1999); Dorothy E. Roberts, *Poverty, Race, and New Directions in Child Welfare Policy*, 1 WASH. U. J.L. & POL'Y 63, 64 (1999); Deborah L. Sanders, *Toward Creating a Policy of Permanence for America's Disposable Children: The Evolution of Federal Foster Care Funding Statutes from 1961 to Present*, 29 J. LEGIS. 51, 72 (2002).

³⁸ See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 423–24 (1983).

³⁹ One of the most influential of these studies is found in the landmark work of psychologists Joseph Goldstein, Anna Freud, and Albert J. Solnit. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 17–20 (1979).

foster care for children.⁴⁰ While this knowledge once led to federal and state policies designed to limit state intervention and reunify mothers and children, the persistent problem of large numbers of children remaining for extended periods of time in foster care led to a dramatic shift in state policy.⁴¹ Many experts believed the failure was not in the policies favoring reunification but in the failure to implement them.⁴² Rather than focus on ensuring meaningful services to needy families, the political response to the child welfare failures was to *limit* rather than *expand* the obligation to provide those services.⁴³

B. Motherhood Through Adoption: The Impact of ASFA on Poor Children and Mothers

This shift from policies favoring reunification to policies encouraging quicker termination of parental (maternal) rights and adoption culminated with the enactment of the Adoption and Safe Families Act of 1997 (ASFA).⁴⁴ Under ASFA, states' receipt of federal funds is conditioned upon establishing procedures that make child welfare bureaucracies move more quickly to rule out parents as caretakers, making children available for adoption sooner. Hearings to determine permanent placement of children removed from parents must now begin no later than twelve months after a child enters foster care, a reduction from the former eighteen-month limit.⁴⁵ Terminating parental rights for a child is required if the child has been removed from her

⁴⁰ The findings of the court in *Nicholson v. Williams*, 203 F. Supp. 2d 153 (E.D.N.Y. 2003), are instructive:

Another serious implication of removal is that it introduces children to the foster care system which can be much more dangerous and debilitating than the home situation. Dr. Stark testified that foster homes are rarely screened for the presence of domestic violence, and that the incidence of abuse and child fatality in foster homes in New York City is double that in the general population. Children in foster care often fail to receive adequate medical care. Foster care placements can disrupt the child's contact with community, school and siblings.

Id. at 199 (citations omitted).

⁴¹ See, e.g., Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 251 (2002) (referring to the Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 105-89, 111 Stat. 2155, as an attempt to limit children's time in foster care).

⁴² See, e.g., *id.*

⁴³ For example, when members of Congress debated ASFA, they collected evidence that lack of permanency resulted not because the "reasonable efforts" requirement had failed but because of "overworked caseworkers [who] believed that children already in foster care were safe and thus gave them and their families 'less attention than they deserved.'" *Id.* at 257.

⁴⁴ Pub. L. No. 105-89, 111 Stat. 2155.

⁴⁵ See 42 U.S.C. § 675(5)(C) (2005).

home for fifteen of the last twenty-two months, or when an infant has been abandoned, unless a compelling reason not to terminate parental rights exists.⁴⁶ ASFA permits states to bypass family reunification efforts entirely for those children subjected to severe abuse or neglect.⁴⁷ It also provides incentive payments to increase the number of adoptions and new funding for states to promote and support adoptions.⁴⁸ Such incentives are not provided for reunification with parents or other permanency plans such as kinship care.⁴⁹

Although there has been a modest decrease in children in foster care in the last few years, the numbers are still alarmingly high and the numbers entering care have continued to increase each year from 2000 through 2004.⁵⁰ As was true under its predecessor statutes, the vast majority of children removed from their homes under ASFA are children of color⁵¹ who are removed because of parental neglect related

⁴⁶ 42 U.S.C. § 675(5)(E).

⁴⁷ 42 U.S.C. § 671(a)(15)(A), (D). State law defines aggravating circumstances, but abandonment, torture, chronic abuse, and sexual abuse are generally included.

⁴⁸ Under ASFA, the federal government pays states \$4,000 multiplied by the amount by which the number of foster child adoptions in the state during the fiscal year exceeds a base number of foster child adoptions. *See* 42 U.S.C. § 673b(d)(1)(A).

⁴⁹ In fact, states receive substantially more money when they remove kids than when they prevent removal. *See* 42 U.S.C. §§ 672–74.

⁵⁰ Children's Def. Fund, Child Abuse and Neglect Fact Sheet 2 (Apr. 2005) [hereinafter Fact Sheet] (finding that the number of children placed in foster care increased by thirty percent in the last decade), *available at* <http://www.childrensdefensefund.org/childwelfare/abuse/factsheet2005.pdf>. *But see* Children's Bureau, U.S. Dep't of Health & Human Servs., Trends in Foster Care and Adoption — FY 2000–2004, *available at* http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm (last visited Jan. 6, 2006) (finding that while the number of children entering foster care increased between 2000 to 2004, the overall number of children in foster care has decreased from 552,000 in 2000 to 518,000 in 2004). Of course, the pattern of removing children rather than providing services to children in their parents' care cannot be attributed entirely to the shortened timeframes in ASFA. As one federal court found, increased media scrutiny after horrific deaths of children in foster care has also contributed to this pattern:

Much of the actual policies as applied by ACS are driven by fear of an untoward incident of child abuse that will result in criticism of the agency and some of its employees. The concern over institutional self-protection, rather than children's best interests, explains a good deal of ACS's predisposition toward counterproductive separation of abused mothers and their children.

Nicholson v. Williams, 203 F. Supp. 2d 153, 205 (E.D.N.Y. 2002).

⁵¹ *See* Fact Sheet, *supra* note 50, at 2 (reporting that at least fifty-nine percent of children in foster care are children of color). Children of color are disproportionately represented in the foster care system, as children of color only comprise forty-two percent of all children under the age of eighteen in the United States. *See* Child Welfare League of Am., Nat'l Data Analysis Sys., Children of Color in the Child Welfare System, *available at* http://ndas.cwla.org/research_info/minority_child (last visited Jan. 3, 2006). Among children of color, “[b]lack

to poverty.⁵² Most recently, courts and commentators have recognized that within this group of poor children, large numbers of children of battered mothers have suffered from unnecessary separation from their mothers in child protection proceedings. In a recent case in which a class of mothers and children challenged the New York City's Administration for Children's Services' (ACS) policy of bringing neglect actions against battered mothers, the court found:

The statistics, individual cases, expert testimony and admissions of ACS employees demonstrate that many more separations of abused mothers and their children are made by ACS than are necessary for protection of the children. . . . In a large number of instances ACS removes children first and then seeks court approval. Many such non-court ordered separations are unnecessary and result in long periods of anguish for both mother and child before the courts can reinstate the mother-child relationship.⁵³

children represent sixteen percent of the general population but 37 percent of the foster care population." Fact Sheet, *supra*, at 2 (emphasis added).

⁵² See Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1735 (2000) (finding that as many as seventy percent of children in foster care have suffered no abuse and could remain at home with the adequate provision of financial services); Paul Anthony Wilhelm, Note, *Permanency at What Cost? Five Years of Imprudence Under the Adoption and Safe Families Act of 1997*, 16 NOTRE DAME J.L. ETHICS & PUB. POL'Y 617, 631 (2002) (citing estimates that ten percent of children in foster care are there because of serious abuse); see also DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 139-56 (1994) (analyzing child welfare studies and concluding that lack of income, not abuse, is the main reason most children are removed from their homes); Fact Sheet, *supra* note 50, at 1-2.

Research indicates that children who live in families with annual incomes less than \$15,000 are 22 times more likely to be abused or neglected than children living in families with annual incomes of \$30,000 or more. This higher rate can be attributed to the stress that poverty places on parents and to the increased likelihood that child abuse and neglect will be detected, reported and substantiated in low-income homes that are more closely supervised by social services and law enforcement agencies.

Id. at 1 (citations omitted).

⁵³ *Nicholson*, 203 F. Supp. 2d at 212, 214. See also Failure to Protect Working Group, *Charging Battered Mothers with "Failure to Protect": Still Blaming the Victim*, 27 FORDHAM URB. L.J. 849, 872 (2000).

[Domestic violence] advocates now find themselves assisting battered mothers who are losing their children to foster care and who are being charged with abuse or neglect for failing to protect their children from witnessing domestic violence. Mothers are punished and children are traumatized by the separation while the perpetrator of the violence generally experiences few consequences.

Id.

Furthermore, less than six out of ten children who are removed receive post-investigation services.⁵⁴ Not only are services not provided through the narrowed “reasonable efforts” requirement that remained under ASFA, poor families also experienced dramatic cutbacks in general public support throughout the post-ASFA period.⁵⁵ The lack of services and strict timelines under ASFA has led to record numbers of mothers losing their status as parents through termination of parental rights.⁵⁶

Given the apparent inevitability that certain mothers will lose that legal status through termination proceedings under ASFA, why not prevent harm to children from lack of permanency by refusing to confer legal recognition on mothers who are poor, substance abusers, or otherwise meet a profile of likely social services intervention? Why not make those parents take affirmative steps to “earn” the right to attain legal status as mothers? Won’t that finally put child welfare at the center of parentage laws? The results for children under the accelerated approach under ASFA suggest the answer to these questions is no. While some children would clearly benefit from the possibility of immediate adoption, many more would suffer under such a system.

⁵⁴ CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., CHILD MALTREATMENT 2003 ch. 6, available at <http://acf.hhs.gov/programs/cb/pubs/cm03/chaptersix.htm> (last visited Feb. 8, 2006).

⁵⁵ See CHILDREN’S DEF. FUND, THE UNPROTECTED RECESSION: RECORD NUMBERS OF FAMILIES HAVE NO WORK AND NO WELFARE IN 2001 (2003), available at <http://www.childrensdefense.org/pdf/noworknowelfare.pdf>; JENNIFER MEZY ET AL., CTR. ON BUDGET & POLICY PRIORITIES, REVERSING DIRECTION ON WELFARE REFORM: PRESIDENT’S BUDGET CUTS CHILD CARE FOR MORE THAN 300,000 CHILDREN (Feb. 10, 2004) (noting that cuts in federal funding for child care will gravely impact working families and families seeking to make the transition from welfare to work), available at <http://www.cbpp.org/2-10-04wel.htm>; Nina Bernstein, *Swelling Shelters*, N.Y. TIMES, Aug. 2, 2001, at B3; Nina Bernstein, *Use of Shelters by Families Sets Record in City*, N.Y. TIMES, Aug. 1, 2001, at 1 (“The number of homeless families lodging nightly in New York City’s shelter system has risen higher than ever and the trend is accelerating”); Press Release, Ctr. on Budget & Policy Priorities, Many Low-Income Families Would Lose Federal Housing Assistance Under Proposed Funding Cuts: New Projections Show Potential Effects in Each Community (Mar. 17, 2004), available at <http://www.cbpp.org/3-17-04hous-pr.htm>.

⁵⁶ See CHILDREN’S BUREAU, U.S. DEP’T OF HEALTH & HUMAN SERVS., AFCARS REPORT #9—CURRENT ESTIMATES AS OF AUGUST 2004, available at <http://www.acf.hhs.gov/programs/cb/dis/afcars/publications/afcars.htm> (last visited Feb. 8, 2006) (finding that by September 30, 2002, 67,000 children became wards of the state through termination of their parental rights). This trend occurred even before AFSA as the political tide began to swing in favor of adoption. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care — An Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 127–32 (1995) (analyzing data from two states — New York and Michigan — and finding an “unmistakable trend” of increasing numbers of children becoming wards of the state through policies that overemphasize “termination of parental rights as a major tool of permanency planning”).

Since its enactment, commentators have expressed concern about ASFA's impact on families, particularly poor women.⁵⁷ Despite the tendency to pit mothers' and children's interests against one another, when mothers suffer, their children are harmed.⁵⁸ Law professor and child welfare attorney Martin Guggenheim has explored the "flawed premise" underlying the notion of "children's rights" as separate from "parents rights":

Regrettably, a leading characteristic of the children's rights movement is its propensity to separate children's interests from their parents'. It is also its most egregious error.

....

Children are inherently dependent for much of the time they remain in the category of "child." For this reason, it is highly problematic to discuss the rights of children in a wide variety of contexts without simultaneously considering the rights of the people on whom they are dependent. In this culture, this means their

⁵⁷ Predictions that ASFA might hurt parents and children began during its debate in Congress. See, e.g., *The Safe Adoptions and Family Environments Act: Hearing to Consider S.511 Before the Senate Comm. on Finance*, 105th Cong. 54, 62 (1997) (statement of Sister Rose Logan, Catholic Charities USA) ("[T]here is a danger that [ASFA's] very strong emphasis on adoption . . . will be a signal to state and local officials that they don't have to do anything to reunite families or keep them together, even when the abuse or neglect is not chronic or severe."); see also *Adoption and Support of Abused Children: Testimony Submitted to the Senate Finance Comm. for the Hearing on the Pass Act*, S.1195, 105th Cong. 141, 147-48 (1997) (statement of the Child Welfare League of America) (stating that the combination of ASFA's stringent time limits and failure to increase preventive or reunification services may result in prematurely sending a child home or unnecessarily terminating parental rights).

⁵⁸ See, e.g., Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957 (1999) (proposing an "interdependency theory," in which "every child needs a caregiver, and every caregiver needs support from other people and institutions," to serve children's best interests); Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 373 (1996) (rejecting the perceived conflict between parents' and children's rights given "the general emphasis on relationship protection that has characterized advocacy on behalf of children"); see also *Nicholson v. Williams*, 203 F. Supp. 2d 153, 235 (E.D.N.Y. 2002).

The interest in not being forcibly separated by the state is shared by parents and children. This right to the preservation of family integrity encompasses the reciprocal rights of both parent and children. It is the interest in the companionship, care, custody and management of his or her children, and of the children in not being dislocated from the emotional attachments that derive from the intimacy of daily association with the parent.

Id. (citation and internal quotation marks omitted).

parents. Attempting to consider the rights and needs of (very young) children without simultaneously taking into account the rights and needs of their parents is akin to attempting to isolate someone's arm from the rest of their body.⁵⁹

But even if one accepts the premise of "children's rights" and considers ASFA strictly from a child's perspective, its harm to children as a form of parentage disestablishment law is apparent. The impact on children begins with the removal stage. Few would argue that ASFA's exemption of cases of severe abuse from family preservation requirements does anything but protect children who need state intervention to protect them. But, for the majority of these children who may be removed unnecessarily or could be reunified with the "reasonable efforts" required by law, this approach is not in their best interests. The disruption and loss of a primary caretaker — in this case overwhelmingly biological mothers — is devastating to children.⁶⁰ And, given the record numbers of parental rights terminations under ASFA, we know that few of these children are reunified with their parents.⁶¹ And there is little evidence that removal will result in permanency. While adoptions have increased under ASFA,⁶² these adoptions have not kept pace with the number of children left

⁵⁹ MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 13–14 (2005).

⁶⁰ Again, the record in *Nicholson* provides substantial evidence of the harm to children when removed from their primary caretakers:

Several expert witnesses . . . testified about the primacy of the parent-child bond and the effect on a child if he or she is separated from a parent. . . . The attachment between parent and child forms the basis of who we are as humans and the continuity of that attachment is essential to a child's natural development.

Nicholson, 203 F. Supp. 2d at 198–99. See also Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy*, 86 YALE L.J. 645, 649–50 (1977).

No other animal is for so long after birth in so helpless a state that its survival depends on continuous nurture by an adult. Although breaking or weakening the ties to the responsible and responsive adults may have different consequences for children of different ages, there is little doubt that such breach in the familial bond will be detrimental to the child's well-being.

Nicholson, 203 F. Supp. 2d at 199 (quoting Goldstein, *supra*, at 649–50). The author's own experience representing children, parents, and other caretakers in the child protection system confirms these studies. One visit to a juvenile court waiting room, where children in foster care have the opportunity to visit with their birthparents from whose homes they have been removed, would illustrate this point.

⁶¹ See *supra* note 56.

⁶² In the year prior to ASFA, 31,000 children were adopted. In the 2000 fiscal year, more than 45,000 children were adopted. See M. Carmela Welte, *Adoption and Safe Families Act: Has It Made a Difference?*, CONNECTION, Summer 2003, available at <http://casanet.org/library/adoption/afsa-has-made-a-difference.htm>.

without parents because of terminations under ASFA.⁶³ The children left behind in permanent foster care status are disproportionately African American and, as they age, are practically unadoptable.⁶⁴

Given this experience, there is considerable risk to children in requiring mothers to seek state intervention to *establish* parentage. If ASFA is any indicator, such a requirement would result in substantially more children becoming orphans, with all the attendant harm. Past experience with child protection courts in this country reveals that when poor mothers are before the court, they will face a system where race and economic status of the mothers are the best predictors of whether their children will be removed from them and whether they will ultimately lose their parental rights.⁶⁵ Just as we cannot expect dramatic changes in the amount of funding for fragile families,⁶⁶ changes in parentage laws cannot remove patterns of bias in the child welfare bureaucracies and court systems. And we know that children suffer when they are removed from their birthmothers.⁶⁷ This is true even if they are placed in good, stable foster care.⁶⁸ But they suffer even more when, as is more commonly the case, children experience several placements in substandard care.⁶⁹

The failure of ASFA to accomplish widespread permanency for poor children through adoption makes it clear that, even if the goal of ideal parentage through adoption is accepted, such a goal is achievable for relatively few children. Some children will inevitably have to be removed from the care of abusive and chronically unfit

⁶³ Fact Sheet, *supra* note 50, at 2 (noting that 532,000 children were reported to be in foster care as of September 30, 2002).

⁶⁴ See Edmund Mech, *Public Social Services to Minority Children and Their Families*, in CHILDREN IN NEED OF ROOTS 133 (R.O. Washington & Joan Baros-Van Hull eds., 1985) (finding that once African American children enter foster care, they remain there longer, are moved more often, and receive less desirable placements than white children); see also Josh Green, Urban Inst., *Who Will Adopt the Foster Care Children Left Behind?* 1 (Urban Inst./Caring for Children Brief No. 2, June 2003), available at http://www.urban.org/UploadedPDF/310809_caring_for_children_2.pdf (“Compared with children still in foster care, those who are adopted are younger and more likely to be female, Caucasian, and Hispanic. . . . [T]hose awaiting adoption tend to be . . . older, male, and black” (citation omitted)).

⁶⁵ See *supra* notes 34–37 and accompanying text.

⁶⁶ It is, of course, difficult to resist advocating for increased funding for additional services to poor families as a way to help promote fit, caring parents in all children’s lives. Such funding is probably a political impossibility in the United States in 2006. But, in a country that spends at least \$50 billion a year on federal funds for war, it seems at least plausible that increases in the \$16–17 billion for public benefits to poor families could be made. See Office of Mgm’t & Budget, *Budget of the United States Government, Fiscal Year 2007* 1 (2006), available at <http://www.whitehouse.gov/omb/budget/fy2007/pdf/budget/defense.pdf>.

⁶⁷ See *supra* note 60 and accompanying text.

⁶⁸ See *supra* note 64 and accompanying text.

⁶⁹ See, e.g., Baldwin, *supra* note 41, at 250, 254 (noting that most children are placed in more than one foster family and “the detrimental affect [sic] of foster care on children”); see also *supra* notes 38–40 and accompanying text.

parents, even if such removal results in permanent foster care. The best hope for the remaining children, however, is to focus efforts on reunification. Changes in parentage laws for mothers — the child welfare scheme — should, therefore, shift focus to ensure fulfillment of reasonable efforts mandate so as to increase opportunities for reunification and limit state intervention.

CONCLUSION

The matter of determining what categories of people will best fill the role of legal parents is extremely complex. Designing an ideal parentage statute will not address all of the complex political and socio-economic issues that affect the legal recognition of parents in this country. Even if the focus is limited to what laws would best promote fit, caring parents in children's lives, legal reform must go beyond parentage laws. A wide range of legal regulation determines who may acquire and maintain the status of legal parent, particularly for the poor and African Americans.

This Article has focused on one group of children — those facing legal proceedings in which they are at risk of losing their mothers, often the only parent in their lives. Even among this group, the range of circumstances in individual families is broad. But, as a starting point for designing parentage laws that have child welfare as their primary and overarching goal, we must ensure existing laws do not leave children without mothers unless that result is absolutely required to protect the child from harm. The following proposals are intended to further that goal by guiding the reform of the cross section of rules, policies, and statutes that regulate maternal status in poor families.

A. Initial Recognition of Legal Parenthood Should Occur Under Established Presumptions Without the Need for Significant State Intervention

Requiring an affirmative showing of fitness before legal recognition of parental status will hurt poor children. Their parents (a) lack the resources to participate meaningfully in court proceedings to meet such legal burdens,⁷⁰ and (b) face bias and

⁷⁰ As a general proposition, unless there is a statutory right to counsel for parents in child welfare cases, poor mothers are unlikely to be represented by counsel in legal proceedings involving access to their children. See, e.g., Steven K. Berenson, *A Family Law Residency Program? A Modest Proposal in Response to the Burdens Created by Self-Represented Litigants in Family Court*, 33 RUTGERS L.J. 105, 110 (2001) (describing a 1991–92 study of sixteen large urban areas nationwide that found that seventy-two percent of all domestic relations cases involved at least one unrepresented party); see also DEP'T OF FAM. ADMIN, MD. JUDICIARY, ANNUAL REPORT OF THE MARYLAND CIRCUIT COURT FAMILY DIVISIONS AND FAMILY SERVICES PROGRAMS 30 (2003) (reporting that sixty-four percent of litigants in family disputes in Maryland were self-represented), available at <http://www.courts.state.md.us/family/annualreport03.pdf>. Even where counsel is appointed, the potential for mothers

prejudice in legal proceedings where they are at risk of arbitrary exclusion as parents based on race and economic status.⁷¹

B. The Unalterable Differences in Prenatal Investment Between Mothers and Fathers Require Gender-Specific Laws for Initial Recognition of Parenthood

Notwithstanding the need to protect both poor mothers and poor fathers from the risks of state intervention to establish parental status, laws affecting parentage should recognize that the different circumstances of biological mothers and fathers require some modest affirmative steps on the part of fathers to establish parentage that are not imposed on mothers who achieve that status by giving birth. These steps include requiring an affidavit or consent to judgment to establish legal paternity *after* the state has fully informed putative fathers of the legal consequences of such action, including advising such fathers of the importance and availability without cost of genetic testing.⁷²

C. The Birthmother Shall Be the Presumed Mother of Her Child

Given the risk of harm to children from extended foster care that still routinely follows removal of children, the state's burden in rebutting the maternal presumption must be made greater and more specific. To achieve that heightened burden, the court must make a meaningful inquiry to determine that the state (a) has met its burden to make reasonable efforts to reunify the child with her birthmother, and (b) has demonstrated, to the extent possible, through the identification of an adoptive resource, that continued removal and termination of parental rights will provide greater benefits to the child than return to the birthparent.⁷³

losing children through their lack of understanding and inability to fully participate in legal proceedings is high. *See, e.g., In re Blessen H.*, 877 A.2d. 161 (Md. Ct. Spec. App. 2005) (rejecting a mother's challenge of her attorney's waiver of a right to a contested hearing in a "Child in Need of Assistance" proceeding where the mother claimed the waiver was not "knowing and intelligent").

⁷¹ *See supra* notes 51–53 and accompanying text.

⁷² These steps for establishing paternity are more fully described in Murphy, *supra* note 2, at 375–77.

⁷³ The state's ability to ensure that children will not lose biological mothers without a guarantee of adoption have been improved by new laws in a few states that create proceedings where a biological parent can consent to the termination of parental rights on the condition that a child is adopted by a specific family, often a relative. *See, e.g., MD. CODE ANN., FAM. LAW § 5-320(b)(1)*; *see also* Joan Little, *Major Changes in Adoption Laws Will Speed Adoptions in CINA Cases*, MD. FAM. MONTHLY, Jan. 2006, at 5.

D. Opportunities Should Be Offered for Poor Families to Make Their Own Decisions About Parentage Issues

Agreements that are not harmful to children and maintain the involvement of multiple parents and “parent figures” in a child’s life should be recognized and substituted for judicially imposed decisions. While legitimate questions have been raised about the risks to the less powerful when decisions are made in the relatively private and informal mediation setting, the value of mediation as a way of resolving the kind of parentage disputes described in this paper is worth considering.⁷⁴ “Family group conferencing”⁷⁵ in child protection cases can also be a way to restore a central role for birthparents in the decision-making about their children’s long-term care. Some states have enacted legislation that provides for legal recognition of agreements that permit contact between biological parents and their children after the formal termination of parental rights.⁷⁶ These laws should increase the potential for using these forms of alternative dispute resolution to maintain the presence of mothers in their children’s lives.

⁷⁴ A Hastings Center study looking at “the ethical, social, and legal issues surrounding DNA-based identity testing as it affects families” notes some preliminary positive experience with mediation in paternity cases. See Mary R. Anderlik, *Disestablishment Suits: What Hath Science Wrought?*, 4 J. CTR. FAMS., CHILD. & CTS. 3, 3 (2003). See also *id.* at 19 (describing judicial opinions in California and Maine in which mediation was proffered as a way to resolve in a paternity dispute). The author’s experience in representing children in paternity disestablishment cases supports the notion that court-based mediation programs may have some potential for reaching decisions that serve the best interests of children. See Murphy, *supra* note 2, at 368 n.207 (describing the resolution of a case in which, despite limitations in the governing law that would have produced a different decision, the parties reached an agreement preserving a father in a child’s life).

⁷⁵ See Susan M. Chandler & Marilou Giovannucci, *Family Group Conferences: Transforming Traditional Child Welfare Policy and Practice*, 42 FAM. CT. REV. 216 (2004) (describing the positive consequences for children when child welfare cases are resolved by bringing together birth families, extended families and relevant community resources); see also Hon. Leonard P. Edwards, *Mediation in Child Protection Cases*, J. CTR. FAMS., CHILD. & CTS. 57 (2004) (describing the problems with the traditional adversarial process for resolving child abuse and neglect proceedings, and promoting the use of mediation that broadly defines and includes the parties in interests, promotes child safety, and produces agreements that require little or no post-agreement state supervision or intervention). But see Amy Sinden, “Why Won’t Mom Cooperate?”: A Critique of Informality in Child Welfare Proceedings, 11 YALE J.L. & FEMINISM 339 (1999) (warning about the dangers to mothers when child protection proceedings are marked by informality).

⁷⁶ See, e.g., MD. CODE ANN., FAM. LAW § 5-308(a)(1) (2006). Of course, the potential still exists that mothers will feel coerced to consent to termination of their parental rights by trading the guarantee of some contact with their children for the possibility of no contact after complex legal proceedings in which they may be unrepresented or poorly represented by counsel.

These suggested reforms are not intended to resolve the range of parentage issues courts must face in cases where more than one adult is competing for the status of legal mother, nor do they address some of the broader structural issues in welfare and child support laws that contribute to the loss of parents in children's lives. Rather, they are principles by which to measure the impact of laws affecting maternal status on children who most need protection.