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Parsing Parenthood

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The story public family law tells about parenthood is both inaccurate and normatively misguided. Parents are deemed “bad” because of their need for state support, and the parent–child relationship is accordingly devalued. This devaluation has resulted in costly and ineffective child welfare policies, embodied in the Adoption and Safe Families Act (ASFA) and related state laws. Child maltreatment costs an estimated $103.8 billion annually, yet its incidence is not decreasing. Thousands of youth “age out” of foster care each year as legal orphans, with no connection to a family and very poor prospects.

This Article explores the consequences of this flawed framework, including the failure to recognize the socioeconomic factors underlying most child maltreatment and the disregard for the real ties between parents and children after families are separated. It argues that child welfare policies will not succeed until the underlying parenthood framework changes; implicit cognitive biases channel even new interventions in a way that stigmatizes marginalized families and over-prioritizes adoption as a panacea. This Article concludes by considering some promising paths to remapping public parenthood, incorporating lessons from the public health preventive approach and from the private family law system’s disaggregation of parental rights and responsibilities.

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INTRODUCTION

The child welfare system is broken. More than 400,000 children a year are in foster care, but most come out of the system worse off than if they had stayed in their original homes. The direct and indirect costs of child maltreatment are estimated to be a staggering $103.8 billion annu-

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3 See the discussion of the poor outcomes for children in foster care infra Part I.B.2.a.
ally. And yet the problem of child maltreatment persists, and our approaches to it seem stagnant and even futile.

This Article argues that the assumptions about parenthood underlying the child welfare system are both inaccurate and normatively misguided. As a result, the statutory scheme governing child welfare, the Adoption and Safe Families Act (ASFA), is flawed in two important ways. It fails to recognize the socioeconomic factors underlying most child maltreatment and instead defines maltreatment primarily based upon normative parental behavior standards unrelated to child safety. It also ignores the real ties that exist between parents and children even after children have been removed from their parents' care, thereby channeling thousands of parents out of parenthood altogether. Consequently, the legal system addresses child maltreatment in an ineffective, post-hoc fashion in stark contrast to the medical community's preventive approach to the problem. The failure to parse out parental rights in this context has led to perhaps ASFA's most disturbing legacy—over a hundred thousand "legal orphans."

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4 Ching-Tung Wang & John Holton, Prevent Child Abuse Am., Total Estimated Cost of Child Abuse and Neglect in the United States 1–2 (2007), http://www.preventchildabuse.org/about_us/media_releases/pcaa_pew_economic_impact_study_final.pdf (estimating the total annual costs of child maltreatment in 2007 including direct costs such as foster care and court oversight and indirect costs such as lost productivity and future health problems). I use the term child maltreatment instead of abuse and neglect, as it is more inclusive and neutral while being equally descriptive. Abuse in particular is a very loaded term and does not reflect the majority of cases in the child welfare system. See infra Part I.B.2.a. As I argue below, the terms in which social issues are framed are very significant to how we as a society understand and address them.


7 The majority of maltreatment cases involve neglect, rather than sexual or physical abuse. Children's Bureau, U.S. Dep't of Health & Human Servs., Child Maltreatment 2009, at 23 & fig.3–4 (2010), available at http://archive.acf.hhs.gov/programs/cb/pubs/cm09/cm09.pdf. The interventions discussed herein apply primarily to neglect cases, although some of my conclusions, such as the importance of preserving family ties even after children are removed from their parents' care, apply to all types of cases.

8 The medical community, including the Centers for Disease Control and Prevention (CDC) and the American Psychological Association (APA), has defined child maltreatment as a preventable public health problem. See Am. Psychological Ass'n, Effective Strategies to Support Positive Parenting in Community Health Centers 1 (2009) [hereinafter APA], available at http://www.apa.org/pi/prevent-violence/resources/positive-parenting.pdf (reporting findings of a study commissioned by the CDC).

9 The phrase "legal orphans" refers to children whose parents' rights have been terminated but who will not be adopted, and so will likely age out of foster care alone with very poor future prospects. See infra Part I.B.2.b.
The system's flaws bring other significant consequences, both instrumental and expressive. First, the current legal framework does not represent how people really live, even though representing how people live is a stated goal of family law. Second, it has resulted in costly and ineffective child welfare policies that neither reduce child maltreatment nor provide family stability and permanency for many children. Third, it results in disparities between the treatment of public law and private law families, although the only real difference between most of these families is income. Private family law focuses on the private distribution of wealth and applies primarily to middle and upper class families, while public family law concerns state public benefits systems and thus generally applies to lower income people. Private family law assumes the interests of parents and children are aligned and protects their ties to each other, despite parental misconduct. In contrast, public family law parents are deemed "bad" because of their need, or perceived need, for state intervention, and their rights are accordingly limited. Essentially, the public parenthood framework conveys disdain for the many parents who need state support to raise their children.

Yet these mistaken assumptions about parenthood and child maltreatment, what I will term child welfare's "public policy story," continue to shape the law's response to this social problem. Scholars have proposed different approaches, including variously prioritizing reunification or adoption, focusing on problem solving or prevention. Yet

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10 Carl Schneider outlined the five functions of family law, including the expressive and channeling functions. See Carl E. Schneider, The Channeling Function in Family Law, 20 Hofstra L. Rev. 495 (1992). Channeling refers to the law's support of social institutions, such as marriage or parenthood, believed to be desirable for society as a whole, and the encouragement of people to enter into these institutions. Id. at 505-07. As to the expressive function of family law, Mary Ann Glendon explains that the law "tells stories about the culture that helped to shape it and which it in turn helps to shape. . . . Indeed, it may be that law affects our lives at least as much by these stories as it does by the specific rules, standards, institutions, and procedures of which it is composed." Mary Ann Glendon, Abortion and Divorce in Western Law 8 (1987).

11 Permanency for children is the guiding principle of child welfare policy under the ASFA statutory structure. How one defines permanency can significantly alter the treatment of biological, foster, and adoptive families. See infra Part I.A.2.b.

12 Here I focus on the child welfare system, the government system responsible for addressing child maltreatment, including the foster care and public adoption systems.

13 See Richard H. Pildes, The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium, 89 Mich. L. Rev. 936, 942 (1991) ("Public programs, in other words, do not just do things in the sense of providing benefits or offering services. They also mean something, whether this meaning is talked about in terms of their expressive character [or] their role in sustaining and creating a particular public culture . . . .")

while parenthood has been the subject of active debate recently in private family law, little scholarly attention has been accorded the construction of parenthood in public family law. This Article aims to advance this dialogue by explaining the tenacity of the "bad" parent public policy story. It looks to implicit social cognition theory, a literature largely new to family law, to explain why these mistaken child welfare policies persist and impede innovative efforts to address child maltreatment.

Implicit cognition scholars have demonstrated that unconscious biases can influence both how key decision-makers, such as judges and caseworkers, make decisions, and how society at large frames and addresses a problem. Stock stories and stereotypes result in the blaming of individual actors, particularly non-normative ones, for social problems, while allowing our socio-legal system to be legitimated as just and rational. Confirmation bias and the availability heuristic prevent individual cases or larger social problems from being viewed objectively or afresh—the lens through which a problem is viewed can virtually determine the choice of solution. I argue that the child welfare system is particularly susceptible to these implicit biases because of the pervasive judgment about parenting in our society, the racial and class marginalization of parents involved in the child welfare system, the difficulty of addressing the complex problem of child maltreatment, and the myopic focus on adoption as a panacea for every child in foster care. By suggesting that implicit biases may be shaping our response to child maltreatment, this Article concludes that the public parenthood story must change before fair and effective child welfare policies can be implemented.

The Article proceeds in four parts. Part I outlines the two-tiered parenthood framework in private and public family law. It challenges the widespread public policy story that individual parental misconduct causes child maltreatment and demonstrates how this flawed discourse results in ineffective child welfare policies and the devaluation of many families. Part II posits that social cognition theory can help explain the persistence of the flawed public parenthood story. The irrational human tendency to

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20 I use adoption here to refer to traditional closed adoption wherein a child’s adoption severs all legal ties and communication with her family of origin. In contrast, open adoption allows a child’s family of origin to have ongoing contact with the child post-adoption.
"blame the other" and to desire simplistic solutions over complex realities applies only too well to the non-normative families in the child welfare system. Part III describes two recent trends in child welfare policy: subsidized guardianship and reinstatement of parental rights statutes. It suggests that these innovations will not fulfill their promise because implicit biases have shaped them to adhere to the old, flawed parenthood framework. Part IV concludes by outlining some thoughts on remapping public parenthood, including reframing child maltreatment as a social problem to be approached preventively and expanding our concepts of permanency, while parsing out parenthood.

I. Two Tiers of Parenthood

Parenthood, like childhood, is a socio-legal construct created based on cultural norms. And the construct of parents is very different in the public family law system from that in the private family law system. The following two cases illustrate these two tiers of parenthood. Typical of the private law realm is this recent custody case: CCW and JSW, an "affluent" couple, divorced when their sons were 11 and 13 years old. The court noted approvingly that the children had attended private school and "costly sleep-away camp" as well as traveled on "numerous national and international vacations." The father JSW, a former police officer, disciplined the children physically, including using "nerve locks," pinching, cold showers, and yelling. He also assaulted the mother in front of the children and was diagnosed with several mental illnesses. Nonetheless, the court granted him shared physical and legal custody.

21 I will use the same terminology as the statutory frameworks. Accordingly, reunification refers to a child being returned to her parent before a termination of parental rights, whereas reinstatement refers to a child being returned to her parent, and the parent's rights being reinstated, after a termination. I support reinstatement statutes out of a pragmatic concern for the many legal orphans and other youth who will age out of foster care with no connection to an adult. Yet the whole notion of "reinstating" parental rights which were terminated in the name of finality and permanency for children is nonsensical and illustrates the extent to which the current system is broken.


24 Id. at *3.

25 Id.

26 Id. at *4.

27 Id. at *9.
A typical public law case proceeded quite differently. Timothy W., his twin brother Jesse, and their sister were removed from their low-income mother and put in foster care when they were 10 and 6 years old, respectively.\(^\text{28}\) They were removed because their mother, EW, had been in an alcohol-related auto accident with her children, in which no one was injured, and had allegedly not attended adequately to the children's dental care. Although EW completed treatment and was deferred prosecution, her parental rights were terminated. Her daughter was adopted, but Tim and Jesse did not fare well in foster care: they dropped out of school in seventh grade, were sometimes homeless, abused drugs, and Jesse ended up in juvenile prison for burglary. Both boys repeatedly asserted their desire to return to their mother and ran away to her home.

The disparate result in these two cases is best explained by the framing of the situation from the start as a private or public family law case. The private family law system reflects the idealized vision of the caring mother and accords parents strong rights over their children. Accordingly, parenthood in this realm exists on a continuum; for instance, custody is often shared between parents, and even a flawed parent such as JSW is almost always granted visitation and other rights to his child. Public family law parents such as EW, in contrast, are designated “bad” by the very fact of their needing state support to raise their children. As a result, their relationships with their children are devalued and their rights rarely parsed. This focus on individual parental pathology as a cause of child maltreatment has led to ineffective and costly child welfare policies.

A. The Nuanced View of Parenthood in Private Family Law

The usual story of parental rights reflects the fundamental nature of a parent’s freedom to raise her child as she sees fit.\(^\text{29}\) As the Supreme Court has repeatedly confirmed that “[the] primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.”\(^\text{30}\) Parents are presumed to act with their children’s best interests in mind, reflecting the widespread view of the good parent as one whose “natural bonds of affection lead [her] to act in the best interests of [her] children.”\(^\text{31}\) Accordingly, parents are free to

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\(^\text{29}\) See Troxel v. Granville, 530 U.S. 57, 65 (2000) (recognizing a parent’s right to raise her children as she sees fit as “perhaps the oldest of the fundamental liberty interests”); Meyer v. Nebraska, 262 U.S. 390, 400–01 (1923) (holding that parents may choose to have their children taught a language in addition to English in school).


raise their children as they see fit. The epitome of this vision is the self-sacrificing mother, who continues to be romanticized in both our socio-legal system and popular culture. It is a truism that this vision of the family does not reflect reality; most American families are not white and middle class with two parents. Yet this normative vision continues to guide family law.

Accordingly, custody and visitation are parsed in a nuanced fashion. For instance, joint custody, both physical and, even more frequently, legal, has increased tremendously since the 1970s. Some states have created a presumption in favor of joint custody. The increasing recognition of functional parenthood by courts and in the American Law Institute’s (ALI) Principles of the Law of Family Dissolution, as well as the concomitant award of rights to non-parent third parties, also illustrate this trend. This disaggregation of rights among multiple parents reflects a broad understanding of permanency—children can be stable and thrive in a variety of living situations.

Courts in this realm very rarely deny visitation or even curtail it significantly out of the widespread recognition that having both parents maintain contact with the child and be involved in child rearing is good.


34 See, e.g., TEX. FAM. CODE ANN. § 153.001(a)(1) (West 2008); In re Marriage of Hansen, 733 N.W.2d 683, 693 (Iowa 2007).

35 See, e.g., ELEANOR E. MACKOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 107–08 (1992) (reporting on a California study of custody disputes between 1985 and 1989 that found that 79% of cases resulted in joint custody, even when neither parent requested it, up from 25% of cases before 1979).

36 See, e.g., CAL. FAM. CODE § 3020(b) (West 2004); FLA. STAT. ANN. § 61.13(2) (b)(2) (West 2006).


38 See, e.g., In re Sheavlier v. Melendrez, 744 N.Y.S.2d 264, 266 (N.Y. App. Div. 2002) (“The denial of visitation to a noncustodial parent is a drastic remedy which may be ordered only in the presence of compelling reasons and substantial evidence that such visitations are detrimental to the child’s welfare.”); see also Mo. ANN. STAT. § 452.375 (West 2002) (declaring “that it is the public policy of this state that frequent, continuing and meaningful contact with both parents after the parents have separated or [divorced] is in the best interest of the child”). In fact, some argue that private family law parenthood has become virtually indissoluble. Patrick Parkinson, Family Law and the Indissolubility of Parenthood, 40 FAM. L.Q. 237 (2006) (outlining the shift in various countries in the construction of post-divorce parenthood, including the U.S., towards an erosion of distinctions between the custodial and non-custodial parent).
This is so even where a parent has committed some wrongdoing. Parents who have physically abused the other spouse, for example, are quite frequently granted joint or even sole custody, and almost always awarded visitation. The parental rights of the large number of mothers and fathers who abuse alcohol are similarly left intact, despite the potential risk to children from this behavior.

B. The “Bad Mother” Story in Public Family Law

The story of public parenthood is starkly different from the nuanced view of parenthood in custody cases, and rarely told. In the public realm, parents are seen as “immoral” “monsters” who brutalize their children. Once a parent enters the child welfare system, often because she lacks resources, she is deemed a bad parent. As a bad parent, she alone is culpable for child maltreatment, and her children would be better off with a new, usually adoptive, family. In sum, the mere fact that a parent requires

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39 See Garrison, supra note 22, at 379 n.31 (citing studies of middle class divorcing families showing that significant percentages of the parents suffered from mental illness or had “profoundly troubled” relationships with their children); Robin Fretwell Wilson, Children at Risk: The Sexual Exploitation of Female Children After Divorce, 86 CORNELL L. REV. 251, 253–57, 265 n.52 (2001) (outlining data showing that parents in divorcing families engage in numerous behaviors potentially posing risks to children, including violence and substance abuse).

40 Although domestic violence is now a custody consideration in most states, see, e.g., CAL. FAM. CODE § 3044 (West 2004) (outlining a presumption against batterers), batterers continue to regularly secure visitation and custody. See Joan S. Meier, Domestic Violence, Child Custody, and Child Protection: Understanding Judicial Resistance and Imagining the Solutions, 11 AM. U. J. GENDER SOC. POL’Y & L. 657, 662 & n.19 (2003) (reporting that courts quite frequently grant joint or even sole custody to batterers).

41 Nanette Reed, Comment, Sacrificing the Child’s Best Interests: Judicial Custody Awards & Parental Alcohol Abuse, 35 SW. U. L. REV. 111, 111, 127 n.104 (2005) (citing government data that approximately one in four children are exposed to alcoholism in their families, but noting that courts very rarely deny legal and physical custody to the offending parent). My point here is not to argue that the rights of flawed parents in the private law context should be more limited but rather to show the discrepancy between their treatment and the treatment of similar parents in the public law system.

42 In her seminal article, Professor Cooper Davis used the term “the good mother” to describe the idealized parent. Peggy Cooper Davis, The Good Mother: A New Look at Psychological Parent Theory, 22 N.Y.U. REV. L. & SOC. CHANGE 347 (1996). I focus on mothers here, as did Professor Cooper Davis, for most of the parents whose children are removed from their care are women. Moreover, the narrative of bad parenting that dominates child welfare is gendered in certain ways, punishing women for behavior that might not be problematic in men. For instance, women may be criticized for the partners they choose or for being perceived to have chosen a man over their children. See, e.g., In re T.J., No. 04-0684, 2004 WL 1396354, at *1 (Iowa Ct. App. June 23, 2004) (affirming a termination of parental rights despite mother’s progress because her relationship with an abusive man indicated a “decision to choose her paramour over her children’s interest”).

state support to raise her children causes her parenting to be subjected to excessive judgment and her relationship to her children to be ignored. This flawed public policy story governs at every point of intervention, from investigations of alleged maltreatment to decisions about whether to remove a child because of maltreatment into foster care to ultimately, and most extremely, terminations of parental rights. And this story governs hundreds of thousands of families at any one time.

1. The ASFA Statutory Scheme

ASFA, the federal statutory scheme governing child welfare, both reflects and perpetuates this punitive vision of public parenthood. ASFA was enacted largely to reduce the burgeoning number of children in long-term foster care “drift” and to expedite permanent homes for them. These continue to be laudable goals that should guide child welfare policy today. Yet the legislative history surrounding ASFA’s passage, and its implementation in practice, reflect the flawed assumption that bad parenting alone is responsible for child maltreatment and that children from these families should accordingly be adopted. At the time of ASFA’s enactment, parents in the public family law realm were viewed as deviant, even criminal, and thus were referred to as “perpetrators.” As one Senator argued in supporting the statute’s excusal of state efforts to


45 It has been particularly harmful to children and parents who are farthest from the normative family ideal, such as older children or children with special needs who want ongoing contact with their birth parents rather than a closed adoption.

46 See 42 U.S.C. §§ 629, 670-79 (2006). The focus here is on the federal child welfare statutory scheme because this dictates to a large degree what measures courts must take. See Vivek S. Sankaran, Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?, 41 U. Mich. J.L. Reform 281, 287 (2007) (describing the stifling of court discretion and innovation in this realm as a result of the increasingly rigid federal statutory frameworks and concomitant funding streams). However, the public policy story of bad parenting also permeates the scarce published opinions in this realm. As one court recently put it: “[I]n a contest between a neurotic, dysfunctional, criminal, or otherwise marginal parent who, despite these qualities, can provide minimally adequate care for a child, on the one hand, and the state, which may have identified an adoptive placement where the child will probably thrive and flourish, on the other, the bad parent wins.” In re L.G.T., 214 P.3d 1, 18-19 (Or. Ct. App. 2009) (Schuman, J., dissenting) (emphasis added).


48 The difficulty of collecting and measuring data in the family law context has been noted. See Schneider, supra note 10, at 517. Yet “all schemes of statutory regulation are ultimately based on unprovable assumptions about human nature.” Id. at 522. Here, I do not seek to empirically demonstrate that ASFA was inspired by a desire to punish certain types of parents, but rather to point out that this story of parenthood surrounded ASFA’s passage and that the result was a focus on channeling children into new, adoptive families.

help families reunify: "[R]easonable efforts . . . have come to mean efforts to reunite families which are families in name only. I am speaking now of dangerous, abusive adults who represent a threat to the health and safety and even the lives of these children."\(^5\)

Accordingly, ASFA mandates terminations in many more cases, requiring termination where a child has spent 15 of the past 22 months in foster care.\(^5\) States that do not comply with this mandate are sanctioned through the denial of federal funds. ASFA also excuses states from aiding families to reunify in certain cases and prioritizes adoptions, bringing numerous new measures and funding sources to promote them.\(^5\) This funding scheme has created a skewed incentive system which prioritizes foster care and adoption rather than in-home services and reunification.\(^5\) In sum, ASFA has created a "one-size-fits-all [child welfare] model which places poor children in foster care, terminates parental rights expeditiously and [in theory] locates adoptive homes immediately."\(^5\)

2. The Resultant Flawed Child Welfare Policies

So what's wrong with this story? It seems sensible that parents who harm their children are bad and that these children would be better off with new families. The ASFA structure is simply enforcing appropriate conduct by families and protecting children under the state's parens patriae authority.

Yet this story is based on assumptions unconnected to reality and thus is flawed in two significant ways: First, child maltreatment is defined as an individual moral problem and its social-environmental causes are ignored. Second, the relationship between these parents and their children is devalued and families are often unnecessarily disrupted. The legal framework ignores the real data about child maltreatment and family bonds, assigning causation and blame in a way that is not legitimated and is frequently harmful.

a. Obscuration of the Real Picture of Child Maltreatment

By positing parental character deficiencies and immorality as the causes of child maltreatment,\(^5\) the public family law framework ignores

\(^{50}\) 143 CONG. REC. 26,400 (1997) (statement of Sen. DeWine) (emphasis added).
\(^{51}\) 42 U.S.C. § 675.
\(^{52}\) Id. at §§ 671, 675. ASFA was also "expected to increase the number of adoptions" by expediting terminations of parental rights and providing adoption subsidies. H.R. REP. No. 105-77, at 7.
\(^{53}\) For instance, in FY 2010, a conservative estimate shows that the federal government allocated $7 on foster care and $4 on adoption for every $1 spent on foster care prevention or reunification. See CHILD WELFARE LEAGUE OF AM., THE PRESIDENT'S FY 2010 BUDGET AND CHILDREN 2–3, 6–7 (2009), http://www.cwla.org/advocacy/FY2010_PresidentBudget_analysis.pdf.
\(^{54}\) Sankaran, supra note 46, at 287.
\(^{55}\) See, e.g., Adoption of Warren, 693 N.E.2d 1021, 1026 (Mass. App. Ct. 1998) (holding that "the deficiencies of a parent's character, temperament, capacity, or conduct" can be grounds for a termination of parental rights). A state senator
the real causes of most child maltreatment. The vast majority of child welfare cases are neglect, not abuse, cases: neglect accounts for nearly four fifths of cases nationally, including the majority of cases where a parent's rights are terminated. Neglect includes both a lack of resources, such as housing and child care, and a very vague standard of parental conduct. One typical state statute defines neglect to include a parent who has failed to "provide adequate food, clothing, shelter... or supervision that a prudent parent would take" or where "[t]he child lacks proper parental care."

The vagueness of these standards leaves individual parents unaware of what behavior is expected of them, yet exposed to significant harms if they violate this standard. It also significantly reduces the law's effectiveness as a shaper or reflection of social norms, for the behavioral expectations are unclear and hidden.

Moreover, the definition of neglect as a lack of resources results in a large correlation between maltreatment and poverty. For instance, child advocating for criminal prosecutions of mothers who drink alcohol or use drugs while pregnant describes motherhood in a similarly moralizing tone: "I look at the tens of millions of good mothers who make the right decisions. My mother, for instance, smoked forever. The day she found out she was pregnant with me, she put down her cigarettes for the last time. If we turn our back on this, we say to all these good mothers who have made good decisions that it's meaningless to society to be a good mother or a good father." Ada Calhoun, The Criminalization of Bad Mothers, NYTIMES.COM (Apr. 25, 2012), http://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html (internal quotation marks omitted).

CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH AND HUMAN SERVICES, CHILD MALTREATMENT 2010, at 24 & fig. 3-6 (2011), available at http://archive.acf.hhs.gov/programs/cb/pubs/cm10/cm10.pdf (reporting that in 2010 78% of children reported to CPS were victims of neglect, 18% were victims of physical abuse, 9% were victims of sexual abuse, and 8% were victims of psychological abuse); see also CHILDREN'S BUREAU, supra note 7, at 23 & fig.3-4 (reporting that in 2009 78.3% of child maltreatment reports indicated neglect, while 17.8% indicated physical abuse, 9.5% indicated sexual abuse, and 7.6% indicated psychological maltreatment); Janet L. Wallace & Lisa R. Pruitt, Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights, 77 Mo. L. Rev. 95, 112-13 (2012) (outlining the role of poverty in neglect findings and terminations of parental rights).

COLO. REV. STAT. §§ 19-1-103, 19-3-102 (2012). Virtually every state's definition of neglect encompasses the failure to provide adequate resources to one's children. See, e.g., OKLA. STAT. ANN. tit. 10A, § 1-105 (West 2009) (defining neglect as "the failure... to provide... adequate nurturance and affection, food, clothing, shelter, sanitation, hygiene, or appropriate education").

For an example of parents' understandable ignorance of the standards of child care expected of them, see the discussion of the Alabama case infra Part II.A.3.

See Elizabeth S. Scott, Social Norms and the Legal Regulation of Marriage, 86 Va. L. Rev. 1901, 1926 (2000) (outlining the law's role in "clarify[ing] and announc[ing] the specific behavioral expectations embodied in social norms").

See Richard P. Barth et al., Placement into Foster Care and the Interplay of Urbanicity, Child Behavior Problems, and Poverty, 76 Am. J. Orthopsychiatry 358 (2006). ASFA was passed only one year after the major welfare reform legislation, the Personal Responsibility and Work Opportunity Act (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (1996), and legislators explicitly connected the two statutes, see, e.g., 143 Cong.
maltreatment is seven times more common in poor families, and most states identify poverty as one of the top two challenges facing child welfare-involved families.\textsuperscript{61} This correlation is so strong that child maltreatment appears to trend downwards during periods of economic prosperity and upwards during recession.\textsuperscript{62} And the lack of resources determines case outcomes: demonstrating this, repeated studies have shown that about 30\% of foster children could be returned home if their parents could secure safe, affordable housing.\textsuperscript{63} The relationship between poverty and child maltreatment is complex, and I am not claiming that low-income parents are more likely to abuse their children. Instead I am pointing out that, possibly because low-income families have fewer resources or are under greater state scrutiny, poverty is a risk factor for involvement in the child welfare system.\textsuperscript{64} The current legal parenthood framework assigns causation to this correlation: parents themselves are blamed as bad parents for a lack of resources. In this way, the problem of child maltreatment is privatized, as our legal system privatizes other social problems.

The story of bad parents and the vagueness of neglect standards also means that a finding of child maltreatment often focuses on parental conduct that, while perhaps undesirable, does not cause proven harm to children.\textsuperscript{65} As a result, children are routinely removed to foster care...
where there is little or no risk to them: one recent study of the Washington D.C. system found that 75% of children removed did not meet the necessary standard of risk and yet many of them stayed in foster care for weeks or months. Children are also routinely placed in foster care in part for "dirty houses" and parental marijuana use. For instance, New York City's child welfare agency often investigates parents, and sometimes removes their children, where parents possess amounts of marijuana so small they do not merit a misdemeanor criminal charge. They do so despite the lack of showing of any risk or harm to the children. Such slightly non-normative behaviors can and do result in terminations of parental rights.

The focus on parental conduct also allows for the importation of subjective values into the neglect determination, with some courts ex-
pressly stating that they focus on parental conduct independent of harm to children. For instance, one family court judge has routinely advised immigrant women to learn English or risk having their parental rights terminated: "If the mother is able to learn English, she will . . . show her [daughter] that she loves her and is willing to do anything necessary to connect with her." He thereby turned his personal belief about appropriate parenting into the legal definition of neglect, despite any psychological or other data that speaking a language other than English at home is harmful.

Under this framework, child maltreatment is defined as behavior by non-normative families. This same behavior when engaged in by normative families is often not punished. As noted above, many parents in the private family law realm demonstrate many of the same flaws, such as mental illness, domestic violence and substance abuse, yet are almost always able to maintain custody or visitation rights. Once a parent is involved in the child welfare system, however, her parenting behavior is scrutinized and even legal behaviors, such as smoking or ordering too much take-out food, are frowned upon.

This increased policing of even minor parenting imperfections is homogenizing, failing to recognize the diversity of parenting styles, a recognition which was one of the original rationales for parental rights. And it is overwhelmingly cultural and racial minorities whose parenting styles and practices are deemed to be problematic. For instance, shared parenting among a circle of female relatives is a common practice in many African-American communities, yet is sometimes deemed to be maltreatment. Similarly, Native Americans live in large extended family groups in one dwelling, a tradition quite often now termed "neglect.”

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70 See, e.g., In re Cheatwood, 697 P.2d 1232, 1234 (Idaho Ct. App. 1985) ("[N]othing in the statutory definition of neglect suggests that a child must suffer demonstrable harm before the parent-child relationship can be terminated.").


72 See supra Part I.A; see also Reed, supra note 41, at 133 (pointing out that lower-income parents become involved with the child welfare system because of alcohol abuse but middle and upper income people usually do not because the "alcohol habits of middle class families are rarely investigated by the State").


74 See supra note 29 (discussing the Meyer line of cases).


The state, which is permitted to intervene in families only in situations of extreme harm, now routinely enforces a panoply of parenting behaviors that are culture- and class-specific, including some that are not even proven harmful to children. Given this misguided approach, it is not surprising that ASFA has been largely ineffective at reducing child maltreatment and has in fact brought some significant harms. Any involvement with the child welfare system, even an investigation that results in no finding, brings stigma and considerable intrusion into families. Moreover, child welfare agencies disfavor preventive services, and their focus on post hoc remedies to punish parents means that child welfare investigation results in no assistance to families. Essentially, state intervention "represents a missed opportunity to improve outcomes for children at high risk for future maltreatment, medical problems, and behavioral problems." The drive towards termination and adoption has also led states to neglect family reunification. The most comprehensive study of ASFA's effects to date reports both that the legislation did not improve the likelihood or speed of reunification, and that states show "few innovations" in regard to reunification than to guardianship and adoption.

Although adoptions have increased and average lengths of stay in foster care have decreased under ASFA, far more children age out of foster homes despite empty Native American foster homes, a practice reminiscent of the boarding schools to "re-educate" Native Americans in the 1950s and 1960s.

Evolutionary psychologist Steven Pinker recently described the dramatic decrease in violence against children in the last 20 years, and argues persuasively that "the effort to protect children against violence has begun to overshoot its target and is veering" too far, pathologizing an array of previously acceptable parenting behaviors. STEVEN PINKER, THE BETTER ANGELS OF OUR NATURE: WHY VIOLENCE HAS DECLINED 439-43 (2011).

A case wherein a child was reported for a rash which turned out to be eczema which her parents were treating provides a vivid recent example of this. The child welfare agency stated that it was obligated to investigate the family for 30 days anytime a report was called in; even when the family provided proof of the child's skin condition. Melissa Russo, Poll Worker Sees Child with Rash, Reports Family to ACS, NBC NEW YORK (Apr. 27, 2012), http://www.nbcnewyork.com/news/local/ACS-Call-Eczema-Board-of-Elections-Voting-Booth-Child-Welfare-149121865.html. For an outline of some of the harms from a child welfare investigation, see Cynthia Godsoe, Just Intervention: Differential Response in Child Protection, 21 J. L. & POL'Y 73 (2012).

See Kristine A. Campbell et al., Household, Family, and Child Risk Factors After an Investigation for Suspected Child Maltreatment: A Missed Opportunity for Prevention, 164 ARCHIVES PEDIATRICS & ADOLESCENT MED. 943, 947 (2010) (finding that CPS investigations with no finding of neglect resulted in families who were the same or worse off after the investigation on every indication of risk, such as social support, family function, poverty, and maternal depression).

Id. at 948.

Many children also still spend significant amounts of time in foster care: as of 2011, the average length of stay in foster care was 23.9 months. Foster care is not a beneficial experience for most children. In addition to the obvious emotional impact of moving homes, and often neighborhoods and schools as well, children are sometimes harmed in foster care, including being abused by adults or other children in the home. Significantly, all studies on the subject agree that children in foster care have worse outcomes on every scale—education, employment, criminal justice involvement, etc.—than similarly situated children left home. I do not mean to minimize the impact of child maltreatment, which is substantial. Rather, I am pointing out that the data show that the vast majority of children who enter foster care because of neglect would fare better if left in their parents’ care, especially with appropriate supports.

b. Devaluation of the Ties Between Children and Their Parents

The idea of bad parenthood underlying the public family law system has also resulted in a devaluation of the parent-child relationship. Because it turns on its head the legal system’s assumption that parents love their children, ASFA has channeled hundreds of thousands of parents out of parenthood altogether: these parents are bad so children would most likely benefit from the severance of all ties and membership in a new and “better” family. ASFA’s legislative history reflects this narrow definition of permanency: “Children need to know that they have permanency, which means successful, healthy reunification with their birth families or permanency in an adoptive home.” I argue that permanency under ASFA has been too narrowly framed to mean only adoption rather than other stable custodial situations or ongoing connections to biological families.

83 Id. at 25, 43.
84 AFCARS 2011, supra note 2, at 2.
85 See, e.g., PETER J. PECORA ET AL., CASEY FAMILY PROGRAMS, IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 28, 30 (2005), available at http://www.casey.org/Resources/Publications/pdf/ImprovingFamilyFosterCare_FR.pdf (finding that one third of former foster children questioned reported being abused by a foster parent or another adult in the foster home); see also D.C. CITIZEN REVIEW PANEL, supra note 65, at 12 (describing even very brief placement in foster care as a “severe, possibly life-changing event”).
86 See Joseph J. Doyle, Jr., Child Protection and Child Outcomes: Measuring the Effect of Foster Care, 97 AM. ECON. REV. 1583, 1607 (2007); Catherine R. Lawrence et. al., The Impact of Foster Care on Development, 18 DEV. & PSYCHOPATHOLOGY 57, 68–72 (2006).
87 See, e.g., APA, supra note 8, at 8–9 (outlining some of the harms of child maltreatment).
88 Dorothy Roberts has argued persuasively that this story also incorporates the historical devaluation of the parent-child relationship in African American families, who are disproportionately represented in the child welfare system. See Roberts, supra note 76, at 61–62.
Reflecting this limited view of permanency, parental rights are rarely parsed out in the child welfare context. Workers making the decision whether to remove a child often ignore strong parent–child ties. Once children are removed from their parents, visitation is usually limited and under conditions not conducive to effective family bonding. Visitations are used to judge parents' behavior; for instance missed visits, often a result of inconvenient timing or transportation problems, are instead seen as a demonstration of the absence of parental love. As one state warned parents: “repeated failure to visit according to the visiting plan shall be considered a demonstration of a lack of parental concern for the child and may result in the Department seeking a termination of parental rights.”

States admit they will use denial of visitation as a way to punish the parent for seeming noncompliant on other issues, such as mental health or substance abuse treatment.

This dynamic can, and under ASFA often does, culminate in the termination of a parent's rights, which is almost always an absolute end to any legal contact with her child. Accordingly, contracts for post-adoption contact are not enforceable in most states. Even where tremendous safeguards are built in to ensure that such contacts are not detrimental to children's interests, courts are reluctant to allow them because of the very remote chance that they may impede adoption. This extremely narrow vision of permanency and parenthood posits a zero-sum dichotomy between old and new parents.

Yet this framework is contradicted by families' real experiences. Numerous studies detail the strong ties most children in foster care feel for their birth parents, even if their parents do not have custody of them or

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90 See CTR FOR THE STUDY OF SOC. POL'Y, LINN CNTY., IOWA, INSTITUTIONAL ANALYSIS REPORT 11 (2011) [hereinafter IOWA REPORT], available at http://www.cssp.org/publications/child-welfare/institutional-analysis/Linn-County-Iowa-Institutional-Analysis-Report-August-2011.pdf (noting that “[m]ost striking was that the trauma most children experience when separated from their parents or caregivers was not accounted for in decision making”).

91 PEG HESS, VISITING BETWEEN CHILDREN IN CARE AND THEIR FAMILIES: A LOOK AT CURRENT POLICY 7, 17–18 (2003), available at http://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/visiting_report-10-29-03.pdf (making “findings... of great concern” that most states do not specify the frequency, duration or conditions of visitation or recommend only sporadic visitation).

92 Id. at 8–9.

93 Id. at 9 (quoting ILL. ADMIN. CODE. tit. 89, § 301.210(a)). Parents may also not be consulted about important medical or educational decisions about their children, despite their rights to do so and a mandate for reunification. Margaret Ryznar & Chai Park, The Proper Guardians of Foster Children's Educational Interests, 42 Loy. U. Chi. L.J. 147, 162–64 & n.76(2010).


96 See, e.g., In re Kristin Y., 712 S.E.2d 55, 68 (W. Va. 2011).
they cannot be reunified. They cannot be reunified. Children’s attachments to even absent or very flawed parents are deep, as parents play a significant role in the development of their identity and self-esteem. Many parents can still contribute to a child’s life through visits and other contacts, and children benefit from relationships with multiple loving adults. Beyond their birth parents, children also want to, and often do, stay connected to their extended families, neighborhoods, and communities, realities the current child welfare public policy story does not account for.

Even adopted children often want to retain ties to their biological parents. Most children who are adopted when they are old enough to remember their birth parents do not see one mother or father as “replacing” the other. Children who are not adopted also retain strong ties to their birth parents, despite a termination. In fact, many of them age out of foster care to voluntarily return to their birth parents, despite the lack of a legal relationship between them.

As with parental conduct, the different treatment of children’s and parents’ ties in the private and public family law realms is unwarranted. The situation and needs of children in the divorce and foster care context are not so different; as Marsha Garrison has pointed out: “In both contexts, the child’s relationship with a noncustodial parent is main-  

97 See, e.g., Garrison, supra note 22, at 380–81 (“Decades of research have . . . established that a child’s ties to his parents do not lose their importance simply as a result of separation or loss of day-to-day contact.”).

98 This is true even for children who have never met their biological parents, and largely explains the desire of many adopted children to search for their biological parents. See Appell, supra note 95, at 295–96.


100 See Johnson, supra note 99, at 414.

101 See id. at 408–09.

102 See, e.g., Madelyn Freundlich, Chafee Plus Ten: A Vision for the Next Decade 18 (2010), available at http://www.jimcaseyyouth.org/filedownload/331. The psychological research demonstrating this is amply supported by the experience of children’s advocates and attorneys, as well as others working with foster youth: these children know and care about their parents and want to maintain some kind of contact with them, despite the abuse or neglect they have suffered. See, e.g., Appell, supra note 95, at 295. One client expressed it to me thus: “I don’t care what they say. She’ll always be my mom. A piece of paper doesn’t change that.” See Cynthia Godsoe, Restoring Families, Nat’l L.J., May 31, 2010, at 35.

103 Casey Family Programs, Improving Outcomes for Older Youth in Foster Care 1 (2008), available at http://www.casey.org/resources/publications/pdf/WhitePaper_ImprovingOutcomesOlderYouth_FR.pdf; see also Gina Miranda Samuels, Chapin Hall Ctr. for Children at the Univ. of Chi., A Reason, A Season, or a Lifetime: Relational Permanence Among Young Adults with Foster Care Backgrounds 8 (2008), available at http://www.chapinhall.org/sites/default/files/old_reports/415.pdf.
tained through visitation and sporadic contact rather than a day-to-day relationship.\footnote{104} Failing to recognize the significance of these ties, the ASFA framework harshly cuts off the parent-child relationship to enable children to gain a “new” family. This ignores the realities of adoption—more terminations do not add up to more homes for children.\footnote{105}

Instead, the strict timelines for terminations coupled with the dynamics of adoption demand have led in the last decade to the creation of a huge number of “legal orphans,” or children who have no legal ties to any adult and who will not be adopted.\footnote{106} Thus, while the number of children in foster care has gone down in the last decade, the number of legal orphans, or children “aging out” of foster care, has significantly increased.\footnote{107} Large numbers of legal orphans continue to be created by the ASFA system.\footnote{108} There were 104,236 children waiting to be adopted in 2011.\footnote{109} (And this number is an underestimate as it excludes teenagers over 16 years old with a goal of independent living or emancipation, who are still “legal orphans.”) Most of these children will not be adopted, and

\footnote{104} Garrison, supra note 22, at 379.

\footnote{105} This truth reveals the flawed basis for Senator Jesse Helms’s insistence at the time of ASFA’s enactment that, if more children were offered for adoption, the adoptive parents would be there: “There is no shortage of [adoptive] parents.” 143 Cong. Rec. 25,439 (1997) (statement of Sen. Helms).

\footnote{106} Professor Martin Guggenheim identified the growing legal orphan problem even before the passage of ASFA worsened it. 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 (1995).


\footnote{108} It is hard to obtain precise data on this issue, but experts agree that large numbers of youth continue to age out of foster care. See Pew Charitable Trusts, supra note 107; see also Orphan Society of America, Assessment on the State of Parentless Children & Youth in the U.S. 4 (2007), available at http://www.theorphansociety.org/pdf/OSAResport_Final%20High%20Res.pdf (estimating that 35% of the children in the child welfare system “are orphans who are eligible for or are awaiting adoption”); Mark Courtney, Youth Aging Out of Foster Care, Network on Transitions to Adulthood Pol’y Brief, Apr. 2005, at 1, available at http://transitions.s410.sureserver.com/wp-content/uploads/2011/08/courtney-foster-care.pdf (estimating that each year, 20,000 youth age out of foster care in the United States).

\footnote{109} AFCARS 2011, supra note 2, at 4. More than one quarter of these children are between the ages of 13 and 17. Id. Moreover, analysis of AFCARS data suggests that, once children are between 8 and 9 years old, they are more likely to continue to wait for a family than be adopted. Amy Taylor, Older Youth in Foster Care: Challenges and Opportunities, Nat’l Conf. of St. Legislatures (Dec. 2010), http://www.ncsl.org/issues-research/human-services/child-welfare-legislative-policy-newsletter-decem.aspx.
many will spend significant amounts of time in foster care. Only 12% are in preadoptive homes. They have been in foster care for at least three years continuously and were freed for adoption on average 23.6 months ago. Older children constitute a disproportionately large number of those with an unmet goal of adoption and the gap between the number waiting for adoption and the number adopted widens as children age.

Most of these older children will exit foster care as legal orphans, aging out to "independent living." About 30,000 children a year exit the system with no legal ties to any family—about five times as many youth as are adopted. In several cases, the child’s desire for a family connection has led to perverse legal outcomes such as parents adopting or becoming guardians for their own biological children after a termination of parental rights. In the usual case where a child is a legal orphan with no recognized ties to any family, there are numerous harms, including serious

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There are numerous reasons these children will not be adopted including the lack of adoptive parents for certain kinds of children, such as older children, children with siblings, or those with special needs, or the refusal of caregivers to adopt, often because of a desire not to displace or create conflict with the biological parent and confusion about the need for adoption where the kinship caregiver is already related and committed to the child. See Meryl Schwartz, Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 454–55 (1996). Older children themselves often decline to be adopted, perhaps because of ties to birth parents which are usually cut off by adoption. In virtually every state, children of a certain age have the right to consent to or refuse adoption. See, e.g., N.J. STAT. ANN. § 9:3-49 (West 2002) (allowing children aged 10 and up to consent or refuse an adoption).

AFCARS 2011, supra note 2 at 4. The percentage is even lower when considering all children in foster care with a goal of adoption: as of 2011, only 4% of children in foster care were in a pre-adoptive home although 25% had a goal of adoption. Id. at 1.

Id. at 4–5.

Id. at 4; see also Mary Eschelbach Hansen & Josh Gupta-Kagan, Raising the Cut-Off: The Empirical Case for Extending Adoption and Guardianship Subsidies from Age 18 to 21, 13 U.C. DAVIS J. JUV. L. & POL’Y 1, 5–6 (2009) (analyzing data from AFCARS 2002–06). Youth aged 12 and older constitute about half of the national foster care population at any given time. AFCARS 2011, supra note 2, at 1 (showing 39% of children in foster care in 2011 were aged 12 years or older); see also Sonya J. Leathers et al., Predicting Family Reunification, Adoption, and Subsidized Guardianship Among Adolescents in Foster Care, 80 AM. J. ORTHOPSYCHIATRY 422, 422 (2010) (reporting that in 2008, 43% of children in foster care were 12 or older and 14% were 17 or older and noting that the chances for reunification diminish the longer a child stays in foster care).

AFCARS 2011, supra note 2, at 3, 5 (showing 26,286 exiting due to emancipation and 5,152 teens adopted); The AFCARS Report: Preliminary FY 2010 Estimates as of June 2011, CHILDREN’S BUREAU 2, 7 (June 30, 2011) (showing 27,854 exiting due to emancipation and 5,452 teens adopted); The AFCARS Report: Preliminary FY 2009 Estimates as of July 2010, CHILDREN’S BUREAU (July 31, 2010) (showing 29,471 exiting due to emancipation and 5,746 teens adopted).

emotional harm.\textsuperscript{116} As one foster youth put it: "I belonged to nobody."\textsuperscript{117} Significantly, children who age out of foster care without a stable family connection are at greatly increased risk for poor outcomes as adults. For instance, they are much more likely to have poor educational outcomes including dropping out of high school, becoming pregnant before the age of 21, and being arrested, incarcerated, homeless, and unemployed.\textsuperscript{118}

II. The Child Welfare System's Resistance to Change

Despite the widely acknowledged failures of the child welfare system and empirical data demonstrating social risk factors for child maltreatment, the public policy story of the "bad parent" persists. Cognitive science, specifically behavioral realist insights into the influence of heuristics and implicit biases on our decision-making, can help to explain this puzzling phenomenon. Although implicit bias has been used to examine persistent inequities in other systems, its role in the family law realm has been largely unexplored. Here, I do not seek to argue that decision-makers in the child welfare realm are explicitly biased, but rather only to draw some initial suggestions about how, once we view a problem one way and a story of blame is told, the legal framework can perpetuate this flawed narrative and make it difficult to view the problem objectively or afresh.\textsuperscript{119}

A. Implicit Social Cognition Theory

Recent insights into implicit social cognition round out the law's vision of human behavior, previously depicted as strictly rational by economists and others.\textsuperscript{120} Implicit social cognition examines "how we make

\textsuperscript{116} See Freundlich, supra note 102, at 17. Significant financial harms also result from legal orphanhood status. See Richard L. Brown, Disinheriting the "Legal Orphan": Inheritance Rights of Children After Termination of Parental Rights, 70 Mo. L. Rev. 125 (2005).


\textsuperscript{119} There appear to be no empirical studies comprehensively addressing the potential role of cognitive biases in public family law. However, more anecdotal localized studies often cite bias among caseworkers and other child welfare actors. See, e.g., Iowa Report, supra note 90, at 15.

sense of other people," including our perception of people and their behavior.\textsuperscript{121} It acknowledges that humans sometimes act irrationally and that implicit knowledge or bias can impact a wide range of human behavior.\textsuperscript{122} Individuals, as well as institutional actors, may be subject to cognitive biases.\textsuperscript{123} Scholars in the social sciences and law have used theories of implicit social cognition to explain individual decision-making in, for instance, employment discrimination and criminal cases, as well as the systemic persistence of inequitable social structures and dynamics.\textsuperscript{124} As psychologists Daniel Kahneman and Amos Tversky revealed in their groundbreaking studies of decision-making, the lens through which a question or problem is approached can have a profound effect on the chosen solution.\textsuperscript{125}

1. \textit{Stock Stories and Framing}

Stereotypes both underlie and are perpetuated by the legal system. Representativeness bias causes us to assign individuals to a particular group, and then unconsciously and automatically assign the characteristics of the group to the individual, despite the lack of any confirming evidence.\textsuperscript{126} Stereotypes are cognitively useful as shortcuts; we approach is-

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\textsuperscript{121} Michelle van Ryn & Steven S. Fu, \textit{Paved with Good Intentions: Do Public Health and Human Service Providers Contribute to Racial/Ethnic Disparities in Health?}, 93 \textit{AM. PUB. HEALTH} 248 (2003) (applying social cognition theory to study health care provider decision-making and systemic inequities). I recognize the critiques of social cognition theory's application to law, in that it may sweep with an overly broad brush, that not all people are equally irrational, and that cognition depends upon context. See, e.g., Gregory Mitchell, \textit{Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence}, 91 \textit{GEO. L.J.} 67 (2002). Nonetheless, I think that this literature is still helpful in understanding the persistence of an irrational child welfare system—irrational because of its proven ineffectiveness and its cost. Moreover, an awareness of potential biases can give us a more well-rounded view of the various ideals underlying and constraints limiting public policy choices as to families.\textsuperscript{122} See Linda L. Berger, \textit{How Embedded Knowledge Structures Affect Judicial Decision Making: A Rhetorical Analysis of Metaphor, Narrative, and Imagination in Child Custody Disputes}, 18 \textit{S. CAL. INTERDISC. L.J.} 259, 263 (2009); see also IAN AYRES, \textit{Pervasvie Prejudice?: Unconventional Evidence of Race and Gender Discrimination} (2001) (noting how implicit bias against members of certain races can impact a wide range of transactions from car sales to organ transplants).\textsuperscript{123} See Jeffrey J. Rachlinski, \textit{The "New" Law and Psychology: A Reply to Critics, Skeptics, and Cautious Supporters}, 85 \textit{CORNELL L. REV.} 739, 744 (2000).\textsuperscript{124} See, e.g., Burke, \textit{supra} note 19 (applying social cognition theory to prosecutorial decision-making); see also Blasi & Jost, \textit{supra} note 120 (discussing the perpetuation of systemic discrimination in employment and other contexts). My focus here is not on the intent of individual actors, as in discrimination cases, but rather on the larger public policy narrative underlying the child welfare system.\textsuperscript{125} See generally DANIEL KAHNEMAN, \textit{THINKING, FAST AND SLOW} (2011); Amos Tversky & Daniel Kahneman, \textit{Availability: A Heuristic for Judging Frequency and Probability}, 5 \textit{COGNITIVE PSYCHOL.} 207 (1973).\textsuperscript{126} van Ryn & Fu, \textit{supra} note 121, at 251.
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sues using these “stock stories” and frames of reference. Frames, or "schemata of interpretation," allow us to interpret new experiences by relating them to categories or "scripts" from prior experience. They apply not just to our perceptions of people but also to our understanding of all the circumstances of a particular situation: "Facts speak for themselves only against the background of preexisting understandings of social reality that invest those facts with meaning." Accordingly, how an issue and its participants are framed will largely determine how people decide to respond to the issue: "Every frame defines the issue, explains who is responsible, and suggests possible solutions." Frames can distort the reality of many situations, thereby perpetuating inequities and supporting ineffective policies. For instance, a house fire in which small children die can be told as a story about poverty, negligent landlords, ineffective city oversight, or parental neglect.

Public policy stories are conveyed via simplistic metaphor and archetypal black-and-white constructs. This allows the status quo to seem natural, rather than a socio-legal construct. Legal scholars such as Jon Hanson have argued that the key policy frame of our era, "choicism," allows us to attribute disparities to the character and freely selected actions of certain people. For instance, we blame low-income people for not having risen in the "meritocratic" American society rather than look at the educational and economic advantages accorded to people born into more affluent families. These "victim-blaming" stereotypes help to maintain the social status quo by blaming the individual disadvantaged for their plight. Simply put, to maintain the illusion of legitimacy in our

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127 Blasi & Jost, supra note 120, at 1150–51; see also Ziva Kunda, Social Cognition: Making Sense of People 309 (1999) (positing that people use stereotypes to compensate for insufficient "cognitive resources").


129 Dan M. Kahan et al., Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism, 122 HARV. L. REV. 837, 883 (2009). These scholars, part of the Cultural Cognition Project, have demonstrated that these understandings vary across societal groups systematically. Id. Although a discussion of cultural cognition’s application in the child welfare context is beyond the scope of this Article, these insights are consistent with my argument about the different ways in which legislators and courts view private and public families.

130 Blasi & Jost, supra note 120, at 1150.

131 See Jon Hanson & Kathleen Hanson, The Blame Frame: Justifying (Racial) Injustice in America, 41 HARV. C.R.-C.L. L. REV. 413, 425 (2006).


133 Berger, supra note 122 at 268 (noting that "story-myths" often prioritize clarity over complexity).

134 Blasi & Jost, supra note 120, at 1113.

135 Hanson & Hanson, supra note 131, at 418–19.

136 Blasi & Jost, supra note 120, at 1134–35.
legal and social systems, we "attribut[e] bad outcomes to bad people, not to a bad world."

2. Confirmation Bias and the Availability Heuristic

A desire for certainty and closure also leads people to prefer simple explanations over more nuanced ones, and to seek out or prioritize information that confirms their initial beliefs or theories. Research demonstrates that people process information selectively; they instinctively seek and overvalue information which confirms their initial belief or theory, and discount evidence tending to challenge those theories. This confirmation bias and instinctual avoidance of cognitive dissonance act to reinforce unconscious prejudices and perpetuate existing inequities and theories of blame and responsibility. For instance, a person's judgments about a particular issue, such as child maltreatment, are likely to be based on heuristics or "cognitive shortcuts" based on her prior unconscious beliefs about parents who are accused of child maltreatment, rather than on evidence about the individual facts of any one case.

The tendency to judge situations according to preexisting beliefs is worsened by the "availability heuristic" or the "process of judging frequency by the ease with which instances come to mind." Thus, for instance, once child maltreatment is represented by the media and in policy debates as being about bad parenting, caseworkers and other decision-makers will call upon those representations in making decisions about individual cases. This heuristic, rather than real risk probabilities, drives risk assessments, such as whether or not a parent is likely to harm a child. The fact that we rely on existing interpretations of problems means that it is very difficult to change policy approaches to a particular issue.

These implicit cognitive forces work together to reinforce the status quo and impede social change. Gary Blasi and John Jost have outlined how the desire to believe that the systems comprising our world are fair and legitimate lead people to support these systems, even in the face of contrary evidence. The disadvantaged may even be demonized as

138 Benforado & Hanson, supra note 137, at 386.
139 See Burke, supra note 19, at 1593–94.
140 Berger, supra note 122, at 298–99.
141 KAHNEMAN, supra note 125, at 129 (internal quotation marks omitted). See generally id. ch. 12.
143 Cass Sunstein has termed this narrowing of policy options the "availability cascade." Timur Kuran & Cass R. Sunstein, Availability Cascades and Risk Regulation, 51 STAN. L. REV. 683 (1999); see also KAHNEMAN, supra note 125, at 140–44.
144 Blasi & Jost, supra note 120, at 1122–23.
"brutes" or "beasts," allowing those better off to excuse their non-action or passive observation of suffering. For instance, mothers who are suspected of maltreatment are deemed to be "bad" people who have chosen to prioritize their own needs over those of their children. These simplistic "blame frames" allow us to overcome our own discomfort with suffering or inequality by creating an illusion of justice, rather than engaging in the difficult work of addressing the injustice itself.

3. A Recent Case Example

A recent case from Alabama illustrates how child maltreatment can be viewed through multiple frames. In July 2011, a mother left her two children alone in a public place for several hours. As a result, she faced six criminal child endangerment charges. People saw her as a selfish and irresponsible mother who put her children at risk by leaving them in a public place unsupervised. She was to blame and accordingly merited punishment, and her children would be better off in foster care or with other custodians.

But a deeper look reveals other frames through which to view this case. Perhaps the mother is low-income and has inadequate child care, particularly during the summer months. Perhaps she herself regularly went alone to the public library as a child and concluded that the bookstore was a similarly safe place for children. Leaving their children alone is widespread behavior for many parents, particularly those unable to afford child care. Research indicates that 11% of children aged 6 to 12 years old are in "self-care" both during the summer and during the school year. Parents often do not know what behavior is expected of them. Almost all states do not specify an age at which it is neglectful to leave a child alone or in a sibling's care.

According to the mother in this case, the children stayed for a few hours in the reading section of Barnes and Noble and were, by all accounts, well behaved and safe. Nonetheless, a store employee called the police. Told this way, the story may be seen as one about a parent

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145 Hanson & Hanson, supra note 131, at 420–21; see also Fraidin, supra note 43.
146 Hanson & Hanson, supra note 131, at 417.
149 Id.
152 Curry, supra note 148.
153 Id.
struggling with a lack of resources and societal support. Or of a caring
mother trying to adapt to changing, perhaps impossibly high, parenting
standards.\footnote{No longer is bad parenting the only possible explanation.}

B. Blame Framing in the Child Welfare System\footnote{The comments to one story about this case reveal both how common it is to leave children unsupervised, or younger children in the care of older children, and yet how contested this parenting behavior has become. See Curry, supra note 148; see also Emily Bazelon, My Mother, My Bodyguard, Slate (April 18, 2008), http://www.slate.com/articles/life/family/2008/04/my_mother_my_bodyguard.html (discussing the ferocious debates online after New York Sun writer Lenore Skenazy wrote about letting her nine-year-old son ride the New York subway by himself).}


1. The Constant Scrutiny of Parenting

Numerous commentators in both academia and the popular press have noted the pervasiveness of today's judgmental discourse about parenting, particularly mothering.\footnote{See, e.g., Ayelet Waldman, Bad Mother: A Chronicle of Maternal Crimes, Minor Calamities, and Occasional Moments of Grace (2009). In fact, the power of metaphors about parents and parenting is so great that George Lakoff, the "father of framing," uses images of the strict father and the nurturing parent to divide people into two camps with different moral and political viewpoints. George Lakoff, Moral Politics chs. 5–6 (2nd ed. 2002).}

There is abundant public dialogue about how children should be fed, disciplined, educated, and how many women are doing it wrong. As one commentator has written: "The litany of issues on which mothers are judged harshly is seemingly endless, with no infraction too small or too strange to elicit comment."\footnote{Gottlieb, supra note 73, at 371.} Even Sesame Street is not safe for today's children. A recent release of old episodes contains the following warning to parents: "These early 'Sesame Street'
episodes are intended for grown-ups and may not suit the needs of today’s preschool child.159

This harsh and judgmental discourse permeates the legal systems governing families, bolstered by vague standards such as the “best interests of the child.”160 Similarly, child maltreatment definitions are often based on vague standards of normative parental conduct rather than conduct connected to actual harm or imminent risk to children.161 In this framework, judges and caseworkers are vulnerable to importing their own notions of parenting onto the families they deal with.162 This wide range of discretion allows bias to play a significant role, driving judgments about parents’ unworthiness. The overly simplified treatment of the complex task of raising children allows for no nuances. For instance, a woman who uses any alcohol or drugs is per se a bad mother.163

Cognitive biases can influence both individual decision-makers and child welfare agencies as entities.164 Providers’ unconscious biases about certain types of parents may lead them to fail to offer these parents a full range of options. In the health care context, research has demonstrated that doctors are less likely to offer certain cardiac treatments to patients they assumed were going to abuse drugs or have less social support than they believed necessary.165 Systemic biases are particularly pernicious since institutional change is slow, caseworkers serve as gatekeepers for information, access to resources, and eligibility for programs, and much decision-making happens entirely outside of the court system.166 Thus,

159 Virginia Heffernan, Sweeping the Clouds Away, N.Y. TIMES, Nov. 18, 2007, § 6 (Magazine), at 34.
160 Berger, supra note 122, at 282.
161 See supra Part I.B.2.a.
162 Berger, supra note 122, at 284 (“Like the rest of us, judges draw on embedded knowledge structures, and they tend to turn first to whatever commonsense background theory [is] prevalent in the legal culture of their era” (alteration in original) (quoting Phoebe C. Ellsworth, Legal Reasoning, in The CAMBRIDGE HANDBOOK OF THINKING AND REASONING 685, 686 (Keith J. Holyoak & Robert G. Morrison eds., 2005)).
163 Iowa Report, supra note 90, at 13 (noting that stigma plays a large role in caseworker decision-making).
164 Id. at 3, 10 (noting that the county child welfare system operated on the assumption that “any use of drugs or alcohol” can compromise parenting ability).
165 Id. at 3 (examining the “problematic institutional assumptions, policies, protocols, information gathering and sharing, and decision making processes that organize or drive [worker] action”).
166 See van Ryn & Fu, supra note 121, at 251.
167 See Sally Holland, The Assessment Relationship: Interactions Between Social Workers and Parents in Child Protection Assessments, 30 Brit. J. Soc. Work 149, 152, 160–61 (2000) (outlining how child protective worker decisions turn most heavily on the CPS office where they work, on their assessments of the mother’s personality and on perceptions of her cooperation with the worker); Noonan et al., supra note 156, at 555 (2009) (noting that CPS caseworker practice “ha[s] been governed more by worker bias and the local office practice culture than by [state regulations and procedures]” (quoting Implementation of Alabama’s R. C. Consent Decree: Creating a New
their biases can lead to significant disparities in the deliverance of services to various parents.\footnote{68}

2. The Racial and Economic Marginalization of "Bad" Mothers

In our schemas of interpretation, the farther away something is from the normative ideal, the less it is valued.\footnote{169} The vast majority of parents accused of child maltreatment are low-income, and they are disproportionately single women of color.\footnote{170} Thus these families are particularly different from the white, two-parent families idealized in our law and culture.\footnote{171} Their difference is compounded by their lack of political power and often substandard levels of representation in child welfare proceedings.\footnote{172} As a result, the child welfare system has not been held to the same levels of clarity or accountability as other government programs.\footnote{173}

Moreover, the fact that parents in public family law are far from the normative ideal makes them more susceptible to the theories of poor

\footnote{68} See van Ryn & Fu, supra note 121 (pointing to the potential influence of health care providers' biases on disparities in health care delivery because the providers serve as "gatekeepers"). These disparities can result in widely different access to certain programs for which caseworkers determine eligibility, such as subsidized guardianship. See infra Part III.A. In fact, some workers blatantly abuse this discretion, deliberately undermining parents whom they do not like, even to the detriment of the children whom workers are tasked with protecting. For a recent example, see Garrett Therolf, County Workers Rebuked for Misusing Power in Child Welfare Case, L.A. TIMES (Jul. 2, 2012), http://articles.latimes.com/print/2012/jul/02/local/la-me-mdcs-20120702 (outlining how two social workers "maliciously" contacted a family's landlord and a child's school, resulting in the family's eviction and the child's expulsion, because of "bad blood" between workers and the reformed mother and how they ultimately were rebuked by the court).


\footnote{170} See supra Part I.B.2.a about the complex correlation between poverty and child maltreatment. The high correlation of poverty with race in America can result in disproportionate representation of families of color in the child welfare system.

\footnote{171} For an outline of the concept of difference, see the seminal work MARSHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990); see also ROBERTS, supra note 76.


\footnote{173} Gottlieb, supra note 73, at 378.
choices and blame used to justify unfair and discriminatory systems. As noted earlier, the parenting practices deemed to be neglect or abuse are often culturally specific preferences, rather than actual harmful behavior. Studies have also highlighted that workers sometimes are overly judgmental of or intrusive into non-normative families. Ultimately, the marginalization of these families reinforces the story of child maltreatment as one of individual fault and immorality.

3. The Preference for Simplistic Blaming over Difficult Solutions

That our child welfare system is broken and severely ineffective is something upon which virtually every expert agrees. The system serves neither children nor their parents, and the extent of its disrepair cannot be overstated. The services most states currently offer to families are woefully inadequate and, in some instances, proven to be ineffective. Parents are often essentially set up for failure because of these inadequate, "cookie-cutter" services.

Stock stories about good and bad parents may lead child welfare workers to make assumptions about a parent’s willingness to care for a child that are unwarranted by the facts of the situation. For instance, a caseworker may assume a parent is unwilling to care for a child when the parent asks for housing assistance and expresses concern that a pending eviction would make it difficult to care for the child. They then react by removing children rather than offering housing assistance. Or caseworkers may see the parent's lack of progress on complex issues such as substance abuse as a choice, rather than an illness or a public health problem, and may try to coerce or “motivate” the parent by, for instance,

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174 See supra Part II.B.1.
175 Id.; see also Gaia Bernstein & Zvi Triger, Over-Parenting, 44 U.C. DAVIS L. REV. 1221 (2011) (outlining how culturally specific norms are often incorporated into substantive legal standards).
176 See, e.g., IOWA REPORT, supra note 90, at 8 (documenting that child protection workers intervened extensively into some African American families “with no clear reason or rationale,” including denying one mother unsupervised visits with her children for an entire year despite the lack of any safety concerns); see also Dorothy E. Roberts, Prison, Foster Care, and the Systemic Punishment of Black Mothers, 59 UCLA L. REV. 1474, 1486 (2012) (outlining a recent study of the Michigan child welfare system which found that workers stereotyped African-American women as “‘hostile,’ ‘aggressive,’ ‘angry,’ [and] ‘loud’” and “failed to fairly assess or appreciate these [women’s] unique strengths and weaknesses related to the ability to care for children”).
177 See, e.g., Issue Brief: Rebuild the Nation’s Child Welfare System, supra note 1; Sankaran, supra note 46, at 285–85 (outlining the myriad failures of the current child welfare system).
179 See, e.g., D.C. CITIZEN REVIEW PANEL, supra note 65, at 24 (describing such a case).
filing for a termination of parental rights. These stereotypes about individual cases play out against the backdrop of the larger public policy story of individual merit and responsibility that governs child welfare debates. As Annette Appell points out, this “privatization of social problems” allows the child welfare, welfare, and other public benefits systems to simultaneously dole out assistance to “morally worthy recipients” and punish the unworthy. Supporting families with housing, child care, and substance abuse treatment would not only be difficult, but would also constitute an admission that our narrative of individual choice and blame is erroneous.

4. The Appeal of Adoption and Other Panaceas

These factors are compounded by the widespread view of adoption as the only permissible solution for most children in foster care. Adoption is the ideal “simple” solution so appealing to the innate human desire for closure and simplicity—it provides a clear-cut solution (a new legally binding family) to a messy problem (child maltreatment) with no apparent inconvenient leftovers, such as residual parental rights or a recognition of past family relationships. For these reasons, adoption has tremendous symbolic value as a type of rebirth—it represents a “legal[ ] reincarnat[ion]” for these children akin to a “baptismal or conversion experience.”

Adoptive parents are viewed as the opposite of birth parents who are involved in the child welfare system. These “good” parents are typically middle class and thus can bring the child into a new socioeconomic milieu and a higher social status. As Naomi Cahn describes the history of adoption, it is “a means of socializing culturally disfavored children—of removing them and placing them in middle-class homes.”

Adoption’s neat fit into the two-tiered parenthood system has led to its increasing predominance as the panacea for child maltreatment.
This, combined with the culture of child welfare agencies, leads many caseworkers to see adoption as their only goal. As one caseworker put it: "[I]t's the experience—my background, my love is adoption. That's what I did for eight years. It really brings me a lot of joy. So, I still think in terms of adoption as the best option." This is particularly so for younger children who are more desired by adoptive parents. Adoption thus is framed not as at the top of the permanency hierarchy, but as the only meaningful permanency option.

III. TWO RECENT CHILD WELFARE POLICY TRENDS FAIL TO SHIFT THE PARADIGM

The last decade has seen several apparent incursions into the "bad parent" story in the child welfare context, including the tremendous growth in subsidized guardianship as an alternative to adoption, and the enactment of reinstatement-of-parental-rights statutes, which allow a parent to regain her parental rights after they were terminated. These reforms were implemented in part to try to address some of the problems with the child welfare system outlined above. In particular, the reinstatement statutes reflect a recognition of the severe and growing problem of the many "legal orphans" aging out of foster care with no family connections and dire prospects.

These policy trends at first appear promising, but implicit bias, both on a systemic level and through individual workers, prevents them from being crafted or implemented to address the widespread economic and social factors underlying child maltreatment or to expand the notion of permanency much beyond adoption. Thus, rather than reflecting a new approach to child welfare or a recognition of the diverse reality of family structures and needs, these policy trends are driven largely by the desire for a "quick fix." Accordingly, the dominant discourse of parenting remains largely unchanged—a matter of individual responsibility or failure—and the reforms are doomed to failure from their inception.

construction of permanency and attachment theory to reflect normative family structures in a future piece, Permanency Puzzle.


188 Telephone Interview with Jana Heyd, Attorney, Columbia Legal Services (July 5, 2011). The Washington state child welfare agency is opposed to the reinstatement of parental rights in any cases of younger children for this reason. Id.

189 See supra Part I.B.2.b.

190 The reinstatement statutes in particular reflect a somewhat desperate attempt by states to circumvent the harsh mandate of ASFA timelines without sacrificing federal funding.
A. Subsidized Guardianship

1. State Laws

Subsidized guardianship allows a child to live free of state intervention with an adult other than a parent, who is provided with a subsidy for the child’s care. The guardian is legally responsible for the child and can make significant decisions on her behalf, but does not legally “replace” the parent as does an adult who adopts a child. Unlike adoption, most guardianship frameworks allow for some visitation or contact between the biological parent and the child. Although guardianship has been a custodial option for a long time, it was usually not subsidized until very recently, in contrast to foster care and adoption. Without this subsidy, caregivers outside of the foster care and adoption systems could only rely on the public assistance TANF rate, which is considerably lower than payments in the child welfare system, and so many caregivers could not afford to take on guardianship of children from foster care.

Subsidized guardianship as an option for children in the foster care system has grown extremely rapidly in the last 20 years. In 1990, only three states had subsidized guardianship statutes, whereas as of 2010, 40 states did. The passage of the federal Fostering Connections to Success and Increasing Adoptions Act of 2008 (Fostering Connections Act) allowed states to use federal Title IV-E foster care funds for subsidized guardianship by relatives without a waiver, thus inspiring more states to enact such statutes. The subsidy rates vary considerably among states, with some states providing a subsidy equivalent to the foster care and adoption assistance payments, and others providing considerably less. Not surprisingly, the amount of the rate has a significant impact on the success or failure of a child’s guardianship placement as it does in the adoption context.

191 For a general overview, see Cynthia Godsoe, Subsidized Guardianship: A New Permanency Option, 23 CHILD. LEGAL RTS. J., Fall 2003, at 11. ASFA defines guardianship as a “judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of [many] parental rights.” Id. at 12 (quoting 42 U.S.C. § 675(7) (2000)).

192 See Schwartz, supra note 110, at 461, 472.

193 See id. at 456.


197 See Mark F. Testa, The Quality of Permanence—Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption, 12 VA. J. SOC. POL’Y & L. 499, 514 (2005) (noting that the payment rates affect permanency of all types, including in foster care and adoption); see also Leathers et al., supra note 113, at 428.
Most states limit subsidized guardianship to children leaving the child welfare system, usually those exiting foster care. It is seen as a particularly appropriate placement for certain groups of children in foster care, such as older children who do not wish to be adopted and children in kinship care whose providers do not want to or cannot adopt. Some states limit eligibility to those groups. Subsidized guardianship has been shown to have numerous positive outcomes for families involved with the child welfare system, including fewer children in foster care and shorter stays in care, and more children achieving permanent placements. It also brings significant fiscal savings for states because of decreased foster care caseloads. For instance, Massachusetts reported saving as much as $10,000 per year on each case moved from foster care to guardianship and Illinois reported total savings of over $54 million over five years.

2. Stock Stories About Ideal Families Lead to a Narrow Interpretation of Permanency

Subsidized guardianship fails to significantly alter the public policy story in part because stereotypes about ideal family structures lead it to be viewed as a narrow exception for a select group of families who do not fit into the preferred categories of biological or adoptive families. For instance, federal and many state laws limit subsidized guardianship to kin caregivers. Restrictive definitions of kin often further narrow the programs.
Subsidized guardianship also remains vastly underutilized in practice. For instance, in 2011, only 4% of children in foster care had subsidized guardianship as their goal, far less than the 25% with an adoption goal, and even less than those having the admittedly undesirable goals of long term foster care (6%) or emancipation (5%). Experts studying subsidized guardianship systems have noted the fact that it is frequently not offered to families in situations where it is an appropriate option.

The desire for simplicity and stock stories about worthy families result in a continued priority of adoption over subsidized guardianship. Accordingly, virtually all states require that adoption be ruled out before subsidized guardianship is an option, and continue to fund adoption at higher rates than guardianship. These “rule-out” requirements are contradicted by studies showing that guardianship usually feels as permanent and secure as adoption for children, and that where the programs are funded at the same levels, guardianship and adoption are equally likely to succeed over time.

Consistent with the implicit cognition literature discussed above, unconscious biases can lead workers to make decisions based on entrenched practices and their own preferences, rather than on empirical research or the needs of families. Accordingly, workers often refuse to believe the data that subsidized guardianship is usually as permanent as adoption; as one worker put it:

[Subsidized guardianship] is not the most permanent plan for the kids. Not the same ownership, level of responsibility, or commitment to the child. The kid still knows that that’s the guardian, not the parent. The kid knows that this person didn’t want to adopt. That’s why we always strive for adoption, because the psychological benefits are much better for the kid.

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206 AFCARS 2011, supra note 2, at 1; see also Oregon Report, supra note 187, at 9-10 (finding that subsidized guardianship is underutilized).

207 Oregon Report, supra note 187, at 10; see also Children’s Bureau, supra note 201, at iii.

208 Children’s Def. Fund, supra note 196, at 14-15 tbl.III. The adoption rule-out is also a requirement under the federal Fostering Connections Act. 42 U.S.C. § 673(d)(3)(A)(ii) (Supp. II 2008). Sometimes this finding of unadoptability is to be made by the court, and sometimes the child welfare agency is the initial gatekeeper, having the power to screen cases before subsidized guardianship can even be proposed as an option in court. This is the case, for instance, in New York.


210 Oregon Report, supra note 187, at 92 (emphasis added).
Acting upon their unsupported bias towards adoptive families, many workers fail to inform families about guardianship.\textsuperscript{21} Other workers mislead caregivers about guardianship or “pressure” them to go along with the agency preference for adoption.\textsuperscript{212} Workers sometimes even threaten families with removal of the children in their care or actually move teenagers out of secure kinship homes into non-kinship pre-adoptive homes if the kinship caregiver refuses to adopt.\textsuperscript{213} These agency practices are directly contradictory to the psychological literature on permanency and the likelihood of adoption disruption, particularly for older children.

B. Reinstatement of Parental Rights Statutes

1. State Laws

Another very recent trend illustrating a potential incursion into the dominant narrative is the reinstatement of parental rights after a termination. Eleven states have enacted statutes in the last six years permitting the reinstatement of parental rights, and several more have similar legislation pending. California was the first state to pass reinstatement legislation, in 2005,\textsuperscript{214} and since then, Nevada, Washington, Louisiana, Oklahoma, Illinois, Hawaii, Alaska, New York, North Carolina, and Maine have enacted similar legislation.\textsuperscript{215} Minnesota and Georgia have introduced similar bills.\textsuperscript{216} The laws differ in several key respects, including who may petition the court for reinstatement and under what circumstances. For instance, some states only allow the child (or child’s lawyer) to petition for reinstatement of parental rights.\textsuperscript{217} Nevada allows only the child or the child’s legal custodian or guardian to do so.\textsuperscript{218} In others, only

\textsuperscript{21} Id. at 10, 26; see also CHILDREN’S BUREAU, supra note 201 at iii (finding that workers “expressed reluctance to offer [subsidized guardianship] due to deep-seated professional beliefs regarding the preferability of adoption”).
\textsuperscript{212} OREGON REPORT, supra note 187, at 75.
\textsuperscript{213} Kendra Hurley, Preserving Family Ties, 15 CHILD WELFARE WATCH 8, 11-13 (2008); see also MaryLee Allen & Beth Davis-Pratt, The Impact of ASFA on Family Connections for Children, in CTR. FOR THE STUDY OF SOC. POLICY & URBAN INST., INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 70, 74 (2009), http://www.urban.org/UploadedPDF/1001351_safe_families_act.pdf (noting the inconsistent application of ASFA in California and also finding that the prioritization of adoption led caseworkers to pressure caregivers to adopt or risk losing custody of, and contact with, children in their care).
\textsuperscript{217} See, e.g., CAL. WELF. & INST. CODE § 366.26(h) (3) (C) (i) (3) (West 2012).
\textsuperscript{218} NEV. REV. STAT. § 128.170.
the state child welfare agency,\textsuperscript{219} or a parent who voluntarily relinquished
his or her parental rights, may do so.\textsuperscript{220} Still other states grant multiple
parties standing to bring such petitions including parents whose rights
have been involuntarily terminated and the child protective agency,\textsuperscript{221} or
the agency and the child, or all three.\textsuperscript{222}

The cases eligible for reinstatement proceedings vary. Every state
mandates a certain time period between the termination and a rein-
statement proceeding, from one year, as in Hawaii, to two years, as in
New York, or even three years, as in California, Illinois, Oklahoma and
Washington.\textsuperscript{223} The most common findings required for reinstatement
include that a child is not likely to be adopted or otherwise achieve
“permanency”\textsuperscript{224} or is not in a “permanent” placement,\textsuperscript{225} and that rein-
statement is in the child’s best interest.\textsuperscript{226} Additionally, a few states re-
quire findings that the parent is capable of providing appropriate care
for the child or even that there has been a “material change” in the par-
ent’s circumstances.\textsuperscript{227} Every state except Nevada requires that the rein-
statement be proven by clear and convincing evidence, the same stand-
ard used in terminations of parental rights.\textsuperscript{228} The consent of one or
more parties to the original termination is usually required, for instance

\textsuperscript{219} For example, in Illinois, a motion to reinstate parental rights can only be filed
by the Department of Children and Family Services. 705 ILL. COMP. STAT. ANN. §
405/2-34.

\textsuperscript{220}See, e.g., ALASKA STAT. § 47.10.089. Advocates have postulated that this
distinction might have been made because parents who voluntarily surrender their
rights are more worthy than those whose rights are terminated after a contested
hearing. However, this distinction may not be so meaningful as parents often do not
actually surrender their rights voluntarily; rather, they are pressured to do so or do so
under threat of a termination proceeding.

\textsuperscript{221}See, e.g., HAW. REV. STAT. § 571-65 (2006).

\textsuperscript{222}See, e.g., N.Y. FAM. CT. ACT. § 636 (McKinney Supp. 2012).

\textsuperscript{223}CAL. WELF. & INST. CODE § 366.26; HAW. REV. STAT. § 587A-34; 705 ILL. COMP.
STAT. ANN. 405/1-18; Family Court Act, N.Y. FAM. CT. ACT § 635 (West Supp. 2012);
OKLA. STAT. ANN. tit. 10A, § 1-4-909 (West 2009); WASH. REV. CODE ANN. § 13.34.215

\textsuperscript{224}CAL. WELF. & INST. CODE § 366.26; 705 ILL. COMP. STAT. ANN. § 405/2-34.

\textsuperscript{225}WASH. REV. CODE ANN. § 13.34.215. This has been interpreted by attorneys
and caseworkers to include situations where the child is in a pre-adoptive placement,
with a guardian, or with a third party custodian. Telephone Interview with Jana Heyd,
supra note 188.

\textsuperscript{226}Washington, for example, lists several factors for courts to consider when
making a “best interests” determination, including the age, maturity, and ability of
the child to express a preference. WASH. REV. CODE ANN. § 13.34.215 (7).

\textsuperscript{227}HAW. REV. STAT. § 587A-34; ME. REV. STAT. tit.22, § 4059 (2011) (requiring
the petition to show facts constituting “a substantial change in circumstances” and
requiring the judge to consider extent to which parent has “remedied the
circumstances that resulted in the termination of parental rights”).

\textsuperscript{228}NEV. REV. STAT. § 128.190(3) (2011) (requiring preponderance of the
the child and sometimes the parent or agency. In some jurisdictions, the reinstatement may be conditionally granted to allow for parent-child visitation or reunification before parental rights are permanently reinstated. Some states, such as New York, exclude cases of abuse and limit reinstatement to terminations based on abandonment, mental illness, or permanent neglect. Finally, about half the states limit reinstatement to cases involving older youth, those who are the hardest to place for adoption and who usually must consent to adoption under state law.

The impetus behind reinstatement statutes is largely uniform: they are an attempt to address the large number of legal orphans created by the increase in terminations under ASFA. This problem has been increasingly recognized by courts, policy institutes and others. The legislative history of reinstatement statutes acknowledges that legal orphans face both social stigma and financial disadvantages, and that children do better if they "have a significant connection to an adult," and that states

[202] New York, for instance, requires the consent of all three parties but the failure to obtain consent of the agency can be excused if the court finds consent was denied without good cause. See N.Y. Fam. Ct. Act. § 637 (McKinney Supp. 2012).
[205] See, e.g., 705 Ill. Comp. Stat. Ann. § 405/2-34 (Supp. 2012) (child 13 or older or the younger sibling of child 13 or older seeking reinstatement); Nev. Rev. Stat. § 128.190 (child 14 or older who consents, or if child is under 14, court shall specify the factual basis of the best interest finding); N.Y. Fam. Ct. Act. § 635 (child 14 or older); Wash. Rev. Code Ann. § 13.34.215 (West Supp. 2012) (child 12 or older, or younger with a showing of good cause).
have failed to find adoptive homes for many children. Supporters of the California legislation argued successfully that the creation of large numbers of legal orphans not only reflected poorly upon the state’s child welfare system but also “undermine[d] public confidence in judicial determinations.”

These statutes are being offered as the solution to the complex problems of child maltreatment and permanency. States’ eagerness to address these problems is clear: the reinstatement statutes appear to have enjoyed broad support from all players in the child welfare system in most jurisdictions, variously being sponsored or supported by parents’ groups, children’s advocates, the state child welfare agency, and the judiciary. In most states, there was virtually no opposition to the legislation, and in some, not even any real discussion. This silence is possibly due to the pragmatic realization that such measures are necessary to help children in foster care, but do not fit in with the dominant child welfare paradigm.

2. Implicit Bias Results in an Unchanged Parenthood Framework

Reinstatement statutes perpetuate the flawed public policy story that child maltreatment is an individual problem caused by deviant parents. The focus is not on preventing child maltreatment or on determining whether these parents are now better able to care for their children, but rather on whether these children have found or are likely to find another, “better” family through adoption. One state family court judge acknowledged this “fall back” notion explicitly: “These children don’t forget their families. They see value in them where we might not. When no one else has stepped in to establish that parenting relationship, it is just mean not to remove that legal barrier to restore that family in some form.” Reflecting this view, the reinstatement statutes typically require a finding

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239 CAL. SEN. COMM. ON JUDICIARY, supra note 235, at 3 (citing a report that, as of 2002, there were 5,846 legally freed children in California not yet placed in adoptive homes).


241 For instance, the New York bill was sponsored by the State Office of Children and Family Services and supported by the Legal Aid Society (which represents children in abuse and neglect proceedings) and the parents’ bar. Similarly, the California bill was co-sponsored by the Children’s Law Center and the Judicial Council of California.

242 E-mail from Wendy C. Sotolongo, Parent Representation Coordinator, Indigent Def. Servs., N.C., to author (June 20, 2011) (on file with author).

243 Of course many parents whose rights have been terminated are capable of improving and properly caring for their children, but the focus in the reinstatement statutes is not so much on this as on the child’s status as a legal orphan.

244 Assembly Panel Votes for Parental Rights Bill, LAS VEGAS REVIEW-JOURNAL, Apr. 5, 2007, at 3B (emphasis added) (quoting Nevada Family Court Judge Gerald Hardcastle in support of the Nevada reinstatement statute).
that the child is not likely to be adopted or are frequently limited to
groups of children who are "hard to adopt," such as older children.\textsuperscript{245}

The availability heuristic thus continues to channel all approaches to
maltreatment at punishing and "fixing" parents. Rather than address the
underlying risks and challenges to families that result in child welfare in-
volve, reinstatement statutes instead purport to distinguish between
the incorrigibly bad parents and the select few bad parents who can be
redeemed. Accordingly, reinstatement is framed as an exceptional mea-
ure for morally worthy families. As a supporter of the proposed Minneso-
ta legislation put it: "[T]hose [who] . . . deserve to be a reunited family . . .
should have a second chance."\textsuperscript{246} This dialogue perpetuates the stock sto-
ries of good and bad families dominating public discussion of the child
welfare system. In fact, the dichotomy between biological and adoptive
parents is so entrenched in this realm that the new laws are often misun-
derstood and framed in terms of biological parents "adopting" their chil-
dren.\textsuperscript{247} Yet none of the statutes or agency guidelines include any specific
indications of what this deserving family would look like or how much
improvement a parent must show in order to earn reinstatement of her
rights. Instead the choice is almost entirely discretionary, rendering deci-
sion-makers particularly susceptible to the stereotypes about "bad" par-
ents in the child welfare system and to other implicit biases such as con-
firmation bias.\textsuperscript{248}

This focus on the individual parent's pathology and moral merit is
reflected in the lack of services to help families achieve reinstatement.
Not one of the statutes has services attached. Families being "restored"
need assistance with housing, child care, or substance abuse treatment to
avoid breaking down because of the same poverty-related or other risk
factors which resulted in a termination in the first instance. The lack of
services for parents whose rights are being reinstated contrasts starkly
with the treatment of adoptive families, who are entitled both to services
and financial assistance so that they do not fail. This lack of services ren-
ders reinstatement a hollow promise. Even parents' attorneys may dis-

\begin{footnotes}
\footnote{Lee Ann Schutz, Reversing Parental Terminations Calls for Caution, Minn. House
mn.us/hinfo/sessiondaily.asp?storyid=2644 (emphasis added).}
\footnote{See Leah Hope, Law Lets Woman Adopt Her Own Children, ABC Local (Jul. 5,
\footnote{Some statutes include common family law terms such as "best interests of the
child" and "changed circumstances" and a few even outline some factors to consider,
but largely the decision remains almost completely discretionary. Accordingly the
availability and success of reinstatement primarily turns on the caseworker. See Email
(June 1, 2011) (on file with author); see also Oregon Report, supra note 187, at 73
(discussing this dynamic in the subsidized guardianship context).}
\end{footnotes}
suade some of their more struggling clients from pursuing reinstatement—without the proper supports, it is a set-up for failure. Furthering the underlying narrative that parents in public family law are unworthy, they are almost completely excluded from the reinstatement process in numerous states. For instance, only New York allows parents standing to petition for reinstatement. In contrast, the supporters of the California legislation secured passage of the bill only after emphasizing that parents would not have access to the reinstatement process, so that they could not interfere with other permanency planning for their children, such as adoptions. In numerous states, parents do not have standing as parties to the proceeding or are not entitled to counsel.

This exclusion not only reflects a negative, even biased, view of the parents in these cases, but is also impractical since the parents’ exclusion makes it more difficult for courts and child welfare agencies to adequately assess the parents’ capabilities and the best interests of the children. As a result, reinstatement is underutilized. No state appears to track reinstatement cases and there are no published cases to date addressing the merits of a reinstatement petition. Some of this is to be expected given how new the statutes are, but there are few petitions even in the states that have had reinstatement for over six years. Reinstatement is not being offered to families because caseworkers, lawyers, and others involved in the child welfare system often “pre-screen” arguably appropriate cases. Confirmation bias makes this pre-screening a difficult barrier to overcome. Anecdotal evidence suggests that many case workers and others working with families in the child welfare system are firmly entrenched in the belief that “once a bad parent, always a bad parent.”

Telephone Interview with Jana Heyd, supra note 188.

Susan Getman & Steve Christian, Reinstating Parental Rights: Another Path to Permanency?, 26 PROTECTING CHILDREN, no. 1, 2011, at 58, 65. This threat is quite unlikely since many of the children in foster care, and, by definition, most of the children eligible for reinstatement, do not have adoptive prospects. Not surprisingly, then, there are few to no reported instances of parents interfering with adoptions in this fashion.

Telephone Interview with Elizabeth Thornton, Attorney, Am. Bar Ass’n Ctr. on Children and the Law (July 6, 2011).

A few courts have discussed the statutes, see, e.g., In re J.R., 230 P.3d 1087, 1090 (Wash. Ct. App. 2010) (construing the reinstatement statute language), but only one appears to have applied a reinstatement statute to make findings in a particular case, see In re Sheila CC v. Comm’r of Soc. Servs. Of Schenectady Cnty., 950 N.Y.S.2d 919, 919 (N.Y. App. Div. 2012) (affirming dismissal of mother’s petition to restore her parental rights on the grounds that the youngest child had been adopted and the other two children were not “[14] years of age or older” as required by N.Y. FAM. CT. ACT. § 635(d) (McKinney Supp. 2012)).

Telephone Interview with Jana Heyd, supra note 188.

Anecdotal evidence is the only available source to date about the reinstatement process as no study yet appears to exist on this new policy trend.

Email from Michael Heard, supra note 248 (also opining that workers are loathe to use the reinstatement statutes as it constitutes an admission their agency was
Rather than assess the deeper causes of child maltreatment, workers may erect barriers to reinstatement out of a stereotype that parents whose rights have been terminated will never be worthy of parenthood.

The fact that the institutional or, even more problematically, individual, players in the child welfare system often remain the same in reinstatement cases worsens this dynamic. It is difficult for a case worker to change her attitude towards a parent she had earlier seen as irredeemable:

To get to the point of the termination of parental rights . . . you need to believe that a parent won't change . . . [while] a reinstatement of parents' rights requires that both agency leadership and social workers need to be open to a new view of the parent and believe that parents can change."255

And it is not just agency personnel who remain the same: lawyers for the state, for the child, and even for the parent, as well as judges, are often repeat players and must be open to returning a child to parents whom they may have previously thought incorrigible.256 Even where the players are different, the desire for systemic continuity renders a new view of a case unlikely. As one attorney pointed out: "Many judges are reluctant to restore rights to someone that another judge has taken them away from . . ."257 This confirmation bias makes shifting the narrative as to individual families very difficult.258

IV. REMAPPING PUBLIC PARENTHOOD

Parenthood in the public family law sphere must be envisioned in a different way in order to effectively address child maltreatment and equally treat all children and families. Tweaking concepts or slight shifts in policy are not enough to improve the massively dysfunctional child welfare system and bridge the private and public concepts of parenthood. Only with an alternative vision will the dialogue move to more effective alternatives.259 Until the legal system begins to consider parenthood and mistaken about the parent). Lawyers and child welfare personnel in other states echo this problem. See Kendra Hurley, When You Can't Go Home, 15 CHILD WELFARE WATCH 18, 20 (2008) (discussing the views of child welfare workers).


256 One children's attorney described a reinstatement case as being particularly difficult for precisely this reason: the state agency attorney was the same one who had represented the state in the termination of the parent's rights and was very loathe to change her view of the parent.

257 Hope, supra note 247.

258 See Burke, supra note 19, at 1606 (discussing the analogous situation of prosecutors' confirmation bias resulting in a reluctance to reverse charging decisions or otherwise change their views about a particular case).

259 See Blasi, supra note 152, at 920 (noting that policy makers must be offered "alternative visions" in order to approach problems in a new way). Alternative visions are certainly possible. Although a thorough comparative analysis is beyond the scope of this Article, it is worth noting that most European countries do not address child
child maltreatment differently, implicit cognitive biases will prohibit meaningful change in the child welfare arena.

On the macro level, a new cognitive narrative can serve as the baseline for more realistic and effective legislation in this realm. The default should change—rather than assuming parents are bad and irredeemable, the legal framework should posit parents as supportable resources for their children. Relying on the empirical evidence about risk factors and effective prevention and treatment, rather than cognitive shortcuts about certain categories of parents, will lead to better child welfare policies. Such a shift can also lead to changed behavior by decision-makers in the system. Although alleviating the implicit cognitive biases of key decision-makers is not easy, studies show that implicit cognitive processes may be controllable. Awareness of these implicit biases is a significant first step. Broadening information streams, following an objective framework, and building in outside assessments for a “fresh” look at cases can also help to shift the dialogue on a more micro level. A recent pilot project to address implicit bias among family court judges indicates that such approaches can be effective at reunifying children and their parents and perhaps at reducing the overrepresentation of children of color in the foster care system.

maltreatment as we do. For instance, European countries terminate rights much less frequently than our system does, and countries including Belgium, the Netherlands and Germany address it preventively using home health visitors and parent education. See Sankaran, supra note 46, at 295–96.

See van Ryn & Fu, supra note 121, at 252 (concluding that exploration of the ways in which implicit social cognition impacts health care delivery is essential to any reform in this realm).

For instance, a major impediment to implementing subsidized guardianship in an effective way for more families is the cultural value placed upon adoption in the child welfare public policy story. To this end, caseworkers, potential guardians, attorneys, judges and others working with families in the child welfare system need to be properly informed about the pros and cons of each option and to understand the permanency potential of each.

Margo J. Monteith & Corrine I. Voils, Exerting Control over Prejudiced Responses, in Cognitive Social Psychology: The Princeton Symposium on the Legacy and Future of Social Cognition 375 (Gordon B. Moskowitz ed., 2001); see also Burke, supra note 19, at 1616–18 (arguing for training of prosecutors to overcome confirmation and other implicit cognitive biases in their decision-making); van Ryn & Fu, supra note 121, at 252.


Id. at 1230–31 (recommending audits of judicial decision-making and increased use of three-judge panels at the trial court level to mitigate bias of a sole decision-maker); see also Burke, supra note 19, at 1616–21 (making similar training recommendations for prosecutors to overcome confirmation and other implicit cognitive biases).

See Irene Sullivan, Juvenile Judges Find Benchcards Helpful in Reuniting Families, Youth Today (Aug. 18, 2011), http://www.youthtoday.org/view_blog.cfm?blog_id=518 (outlining a 45% increase in the number of children returned home in a pilot project to “attack implicit bias” where juvenile judges used a checklist developed by
Legal scholars have proposed various approaches to the child welfare system. For instance, Clare Huntington has suggested moving away from a rights-based approach to a problem-solving framework. Marsha Garrison and Annette Appell have posited a preventive, public health approach to child welfare. Martin Guggenheim incorporates both points, arguing for a preventive approach to help families before they are in crisis and for an understanding of children's rights as intrinsically embedded with those of the adults in their lives, particularly their parents. In this section, I aim to build on these perspectives by positing a preventive approach to child maltreatment and a remapping of the parent-child relationship for families who have been separated because of child maltreatment, drawing both from public health and private family law approaches. This framework should inform state policy at all points of intervention: before, during, and after involvement in the child welfare system. Although I offer no quick "fixes" to this complex problem, for I think no real fix can come until the public policy story changes, I will flag some promising child welfare initiatives which signal the potential for a new story.

A. Considerations

1. Recognizing Child Maltreatment as a Social Problem

Shifting the focus from individual bad parents to the environmental factors underlying child maltreatment is essential to any effective effort to reduce child maltreatment. The data is clear that the risk factors for most child maltreatment have more to do with contextual, environmental conditions such as poverty, than with the individual characteristics or choices of parents. To this end, the legal framework should be in-

the National Council of Juvenile and Family Court Judges); NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES, RIGHT FROM THE START: THE CCC PRELIMINARY PROTECTIVE HEARING BENCHCARD 9-10 (2010), available at http://www.ncjfcj.org/sites/default/files/Right%20from%20the%20Start_1.pdf (outlining "reflection questions" which can allow judges to "acknowledge [their] 'implicit bias[es]' and to become more conscious about potential influences on their decision-making process").

268 See Clare Huntington, Mutual Dependency in Child Welfare, 82 NOTRE DAME L. REV. 1485 (2007) (suggesting reframing the family-state relationship as one of mutual dependency in order to accomplish better outcomes in child welfare policy).

269 Garrison, supra note 17, at 599; Appell, supra note 95, at 298 (each suggesting a public health framework for addressing child maltreatment).


271 Ultimately, the ASFA statutory framework should be replaced by a more effective approach to child maltreatment and permanency, based on prevention of proven risk factors rather than post hoc and stigmatized intervention and the rush to terminate parental rights. Until then, however, a new conception of parenthood can inform state policies and practices even within the ASFA framework.

272 See supra Part I.B.2.a. A small percentage of child maltreatment, such as some of the sexual and physical abuse cases, may be very difficult to predict or prevent, but
formed by the approach to child maltreatment in other disciplines. For instance, the medical community has expressly identified child maltreatment as a preventable public health problem. 273 This approach, endorsed by the Centers for Disease Control (CDC), the American Psychological Association, and other non-legal actors, offers valuable insights for crafting effective child welfare interventions.

A public health framework focuses on a neutral and empirically-based assessment of the risk factors for child maltreatment and seeks out interdisciplinary strategies, recognizing that child maltreatment is a complex issue requiring multiple areas of expertise. 275 This entails first defining child maltreatment to focus on measurable and real risk of harm to children, rather than subjective judgments about parenting behaviors. A narrow definition of child maltreatment will lead to more effective and legitimate state interventions.

Moreover, rather than look at the problem one parent or family at a time, a public health approach assesses it from a “population” or community-wide perspective. 276 Interventions could include anti-poverty measures, programs specifically designed to prevent child maltreatment and strengthen families, or ideally both. 277 Programs should aim to facilitate social change and to help families at risk, rather than intervene after the fact and blame or punish individual parents. Such an approach is increasingly used to address a variety of social problems previously deemed to be the province of individual deviance, such as smoking, nutrition and both family and community violence. 278

most maltreatment cases entail well documented risk factors that can be targeted by prevention programs. See, e.g., APA, supra note 8, at 7, 8 tbl.1.


274 See, e.g., W. Rodney Hammond, Ctrs. For Disease Control & Prevention, Public Health and Child Maltreatment Prevention: The Role of the Centers for Disease Control and Prevention, 8 CHILD MALTREATMENT 81 (2003); APA, supra note 8, at 5 (defining child maltreatment as a “serious but potentially preventable public health problem”).

275 See Hammond, supra note 274, at 82.

276 See Scott Burris, From Health Care Law to the Social Determinants of Health: A Public Health Law Research Perspective, 159 U. PA. L. REV. 1649, 1649 (2011) (noting that population health is “shaped powerfully” by the social determinants of health including race, income and behaviors); Wilson, supra note 39, at 282 n.156 (noting that public health interventions assess the prevailing conditions underlying illness or injury).

277 Because poverty is a demonstrated risk factor for child maltreatment, see supra Part I.B.2.a, support for poor families and anti-poverty programs will also address child maltreatment. Garrison, supra note 17, at 612.

A preventive approach has numerous advantages both for individual families and for societies. First, preventing child maltreatment can avoid the traumatic and costly impact of maltreatment on children.\footnote{See supra notes 79–88, 91 and accompanying text.} Supporting families before they are in crisis would also entail fewer family disruptions and the concomitant harms of children’s removal to the foster care system.\footnote{Id.} Second, a preventive approach reduces the stigma and likelihood of bias so endemic to our current system. Third, such an approach would cost less than the current post hoc reliance on foster care, adoption, and the court system.\footnote{See Huntington, supra note 268, at 1518–19. Currently, states spend billions of dollars on foster care and adoptions, not even counting the costs of maltreatment and the legal system, dwarfing the spending on preventive services. Per the latter, states spent only $250 million total on home visiting programs in 2008. See Kay Johnson, Nat’l Ctr. for Children in Poverty, State-Based Home Visiting: Strengthening Programs Through State Leadership 4 (2009), available at http://www.nccp.org/publications/pdf/text_862.pdf.}

One preventive approach with significant potential is home visiting.\footnote{Current programs could also be reconfigured to work in a preventive fashion. For instance, subsidized guardianship could be used as a preventive measure to avoid removing children into foster care. A few states do use it in this way currently and some advocates have recommended broadening this preventive use. See Eliza Patten, The Subordination of Subsidized Guardianship in Child Welfare Proceedings, 29 N.Y.U. Rev. L. & Soc. Change 237, 237 (2004).} Home visiting programs can vary widely but usually entail a nurse or other professional visiting new mothers or other at-risk parents regularly and helping them learn parenting skills. Some have proven very successful at reducing child maltreatment in a cost-efficient fashion; one program, the Nurse–Family Partnership, has been found to reduce child maltreatment by 79% among a high-risk population.\footnote{David Olds et al., Prenatal and Early Childhood Nurse Home Visitation, Juv. Just. Bull. (U.S. Dep’t of Justice), Nov. 1998, at 3, available at https://www.ncjrs.gov/pdffiles172875.pdf.} It also greatly reduced related social problems including school failure and juvenile delinquency.\footnote{See id. at 3, 5.} Its potential to reach and support at-risk families has led home visiting to be endorsed by scholars at both ends of the child welfare spectrum, i.e. those who are more family preservation oriented and those who are more adoption oriented.\footnote{See, e.g., Bartholet, supra note 15, at 165 (noting the promise of such programs with the caveat that they should include a supervision piece in order to be most effective at protecting children); Huntington, supra note 268, at 1531–33 (endorsing the effectiveness of programs like the Nurse–Family Partnership). The controversy over the Obama Administration’s 2010 budget earmark for additional funding for nurse home-visiting as a cost-effective family support illustrates the flawed parenthood framework again. Some Republicans derided the program as “billions for babysitters.” Cheryl Wetzstein, Obama Plan Funds Nurse Visits to New Moms, Wash. Times (D.C.), Jan. 12, 2010, at A1.}
In addition to being preventive, the most effective child maltreatment interventions are holistic, looking at children and parents within the context of their families and communities. Such an approach allows for an assessment of a family's needs as well as its strengths, and it recognizes the impact of context on child maltreatment. Accordingly, rather than aiming to "fix the parent\textsuperscript{286}\textsuperscript{28} the system would aim to support the family so that the child could be raised safely by loving adults. This approach not only reduces the likelihood of bias, because it avoids blame in favor of forward-looking solutions, but is also more individualized. Differentiating among the various risk factors or treatment needs of families is much more effective than the current "cookie cutter" service plans parents must meet for reunification.\textsuperscript{287} This holistic view works well with a preventive approach, as both focus on the larger communal or social context of child maltreatment rather than on the punishment of individuals.

A holistic approach to child welfare interventions also comports with current mental health approaches to families, such as "family systems" theory.\textsuperscript{288} Family systems theory posits that an individual cannot be understood, or effectively treated, outside of the context of his or her family and personal relationships.\textsuperscript{289} It recognizes the interdependence and emotional connectedness of families, even where members are in conflict or live apart. Moreover, a family systems approach eschews blaming just one individual for a particular problem, looking instead at the complex interaction of environment and risk factors giving rise to a particular situation.\textsuperscript{290}

The use of family group decision-making structures is one promising sign of a more holistic approach to child maltreatment.\textsuperscript{291} Family group conferencing engages the extended family, often including friends and other community members who are not blood relatives, in problem-solving to address risks to child safety.\textsuperscript{292} This model can be used both preventively for cases not yet in the court system and to divert cases al-

\textsuperscript{286} See Annette R. Appell, Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System, 48 S.C. L. Rev. 577, 605 (1997) (discussing the focus of the child welfare system on fixing and punishing individual parents).

\textsuperscript{287} See Clare Huntington, Missing Parents, 42 Fam. L.Q. 131, 140 (2008) (suggesting a problem-solving model in child welfare which would "differentiate among cases," thereby providing more effective assistance to parents).


\textsuperscript{289} Id. at 4.

\textsuperscript{290} Id. at 5.


\textsuperscript{292} See Huntington, supra note 16, at 678–80 (detailing family group conferencing (FGC)).
ready being adjudicated. This model engages the family in addressing its own challenges, thereby identifying strengths and mobilizing previously unrecognized resources, and eschewing blame in favor of formulating solutions for the child care. Such programs are being used in some communities and show potential to prevent further child maltreatment while also reducing court involvement and intervention in the family.

There is also some evidence that the use of family group decision-making can reduce racial disparities in the child welfare system, perhaps because the intensive process helps decision-makers to assess cases based on individual characteristics rather than stereotypes. Finally, family group decision-making engages parents in the process, helping to overcome some of the internalized self-blame and low self-worth that impede many parents from changing.

2. Expanding Our Concepts of Permanency and Parenthood

Shifting the narrative on child maltreatment also requires expanding our notions of permanency and parenthood. To this end, we can be informed by the parsing out of parenthood in private family law and by data on the myriad ways in which parents and children are connected. Permanency in the legal system has been connected to an idealized family structure, synonymous with adoption under ASFA. Relatedly, parents who are flawed or unable to care for their children have been designated non-parents, with no residual rights or connections to their children. This framework is both starkly different from the reality of children’s and parents’ experiences, and fundamentally misguided as a normative policy matter.

The current concept of permanency in public family law is much too narrow. A legalistic notion of permanency, limited to birth or adoptive parents, is prioritized over the psychological understanding of permanency as “an enduring relationship that arises out of feelings of belongingness.” The former definition of permanency underlies the rule-out provisions of most subsidized guardianship programs and the similar requirement in reinstatement statutes that the child be deemed unlikely to be adopted.

This framework, however, overestimates the legal permanency of adoption and undervalues children’s views. Adoptive placements disrupt


\[294\] See Huntington, supra note 16, at 678–79.

\[295\] See *id.* at 680–85; Chandler & Giovannucci, supra note 293, at 218.

\[296\] Allen & Davis-Pratt, supra note 213, at 77.

\[297\] See Chandler & Giovannucci, supra note 293, at 219.

\[298\] Testa, supra note 197, at 499.

\[299\] See supra Part III.A.1. Judges in child maltreatment cases also prioritize this narrow definition of permanency. See Sullivan, supra note 267 (discussing NCJFCJ guidelines).
and adoption fails at not insignificant rates. Studies have consistently found that adoptions disrupt (the placement fails before the adoption is legally finalized) at rates of 10 to 25%. \(^{300}\) And adoptions dissolve or fail after they are finalized at rates of 3 to 15%. \(^{301}\) (This statistic is likely an underestimate as name changes and other correlations to adoption make tracking dissolutions very difficult). \(^{302}\) In fact, adoption failure rates are comparable to those of subsidized guardianships where the subsidy rates are the same. \(^{303}\)

Such disruptions can be devastating to the children involved, all the more so because they were often promised that adoptions were always and absolutely final. \(^{304}\) The frequency of failure, particularly among older children, has led many youth to become skeptical about adoption as permanent; they recognize that it "is not a cure-all," and brings its own problems. \(^{305}\) As one young woman put it:

I didn't wanna be adopted because I knew that [it] wouldn't benefit me. ... I definitely wanted the relationship. [But] to me being adopted doesn't necessarily mean you're gonna have a good relationship. ... It's just a paper that says you belong to someone.... [W]hat's on paper isn't what's important to me. \(^{306}\)

A psychological definition of permanency would reflect how children themselves view their home and family, which is important, since children are the intended recipients of permanency under ASFA. Chil-


\(^{301}\) Id. at 6; see also Susan Scarf Merrell, Adoption's Dirty Secret, Daily Beast, (Apr. 17, 2010), http://www.thedailybeast.com/articles/2010/04/17/adoptions-dirty-secret.html.

\(^{302}\) This has led parents' advocates and others to call for a comprehensive study of adoption failure. Posting of David Lansner, dlansner@lanskub.com, to child-parentsattores@mail.americanbar.org (July 11, 2011) (on file with author); see also Dawn J. Post & Brian Zimmerman, The Revolving Doors of Family Court: Confronting Broken Adoptions, 40 CAP. U. L. REV. 437 (2012) (outlining the under-documented problem of failed adoptions from the foster care system).

\(^{303}\) See supra Part II.A.1.

\(^{304}\) See, e.g., Meribah Knight, Failed Adoptions Create More Homeless Youths, N.Y. TIMES, Dec. 29, 2011, at A19 (telling the story of one youth who was devastated when his adoptive mother of 12 years abandoned him at age 17, shortly before the end of her subsidy for his care); see also OREGON REPORT, supra note 187, at 96 (quoting one youth who was adopted twice out of foster care: "Kind of weird. It's not that permanent. I didn't even know that could happen [that it could end].").


\(^{306}\) Gina Miranda Samuels, Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds, 31 CHILD. & YOUTH SERVICES REV. 1229, 1294 (2009) (first and second alterations and first omission in original).
dren think of permanency not as defined by law, but in terms of relationships, including feeling “safe” and loved, and being treated with acceptance, trust, and respect. Under this psychological definition of permanency, studies show there is no difference between children being adopted or children being cared for by a guardian. Nor is there a difference for their caregivers; sometimes guardians were not even aware of the legal distinctions between guardianship and adoption, but were committed to providing a permanent home and the children in their care felt it. Reframing permanency in psychological rather than legal terms would also increase the number of children exiting foster care to stable and lasting homes since families would have a broader array of options to choose from. Finally, an expanded understanding of permanency would acknowledge a greater diversity of family forms, especially the extended family and cooperative caregiving historically common in African-American and Native American communities.

Parenthood in the public realm similarly requires remapping in order to recognize the influence of key adults in children’s lives and equally respect all family forms. As outlined earlier, children’s relationships with parents and caregivers are not all or nothing. On the contrary, they are complex, nuanced and inclusive. Children value and continue to engage in relationships with their biological parents even when they are in other secure living arrangements, despite the lack of any legal framework to accommodate these relationships. In sum, forcing a choice between “old” biological parents and “new” adoptive parents neither reflects reality nor furthers children’s interests.

Recognition of a network of adults important to a child should replace this false dichotomy: an expanded vision of parenthood would reflect the continuum of adults with whom children in the child welfare system have relationships. To this end, the role of both birth parents and custodians or caregivers should be recognized. Numerous scholars have called for an expanded understanding of parenthood and greater

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507 Oregon Report, supra note 187, at 95–96. For many young people, subsidized guardianship seems more “normal” than adoption, in large part because they do not have to sever ties with their biological parents and take on “new” parents. Id. at 95.
508 See Testa, supra note 197, at 525.
509 Bissell & Kirana, supra note 209, at 16.
510 See Testa, supra note 197, at 533 (showing an increase in permanency when caregivers were offered a choice between adoption and subsidized guardianship).
512 See supra Part I.B.2.b.
514 Similarly, kin should be broadly defined for purposes of subsidized guardianship or other kinship care frameworks, to respect families as they actually are.
disaggregation of rights in the private family law realm. These suggestions are often based upon a functional definition of parenthood, and a desire to recognize caregivers beyond biological parents. I support these arguments but I am, in a sense, making the inverse argument: that even where biological parents are not a child’s caregivers, children still usually desire and benefit from contact with them and should be allowed this contact. This is particularly true for older children who have had more previous contact with or memories of a parent, but also true for children who may not know their biological parents very well. Moving beyond a narrow conception of parenthood to recognize the multiple adults present in the lives of many children in foster care will lead to better policies, particularly for older youth.

Given this, parental contact and rights should be completely terminated only in the rarest of circumstances, and the default should shift to favor contact even when children are in other homes, whether they be foster homes, adoptive homes, or other custodial arrangements. Visitation between parents and children in the child welfare system should be prioritized, even after the child is in another seemingly permanent living situation, rather than doled out sparingly and under unfavorable conditions.

Equally significantly, parental rights should be parsed out in the public law context as they are in the private law context. For instance, parents should still retain rights to involvement in decisions about their children even when their children are removed from their care. Although parents of children in foster care sometimes retain educational and medical decision-making powers in theory, this often is not en-
Parental rights do not have to be equally parsed out; rather, they could be disaggregated at various levels depending upon the roles and capabilities of the adults involved. An "additive, rather than substitutive" framework of parenthood would bring the vision of parenthood into line with the reality of families and relationships and treat all families equally. Most families do not conform to the dyadic parental model which dominates our socio-legal system, and children in foster care are, obviously, particularly far from this norm. Similarly to an expanded notion of permanency, such a framework would incorporate children's visions of their relationships with parents and other adults, according respect to their attachments and to all adults in relationships with children. An expanded recognition of parenthood would also ameliorate the problematic expressive effects of ASFA and related laws which render flawed parents to be non-parents. By bringing the necessary flexibility to respond to the needs and attachments of each individual child and family, the framework would embrace a multiplicity of family forms, rather than stigmatizing or ignoring those who depart from the normative ideal.

This expanded vision of permanency and parenthood would reduce the myopic focus on adoption and permit a range of equally valued custodial options, including subsidized guardianship and other less formalized arrangements. It would also recognize and support the parent-child relationship even where parents are not able to care for their children. There are some signs for guarded optimism about such a shift in vision. For instance, the recent Fostering Connections Act allows states to fund subsidized guardianship and provides for "family connection grants" to states for youth aging out of foster care to be in touch with

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rights); N.Y. COMP. CODES R. & REGS. tit. 8, § 200.5 (2012) (granting parents education rights in some circumstances even when children are in foster care).

See Ryznar & Park, supra note 93, at 163–64.

See Jacobs, supra note 18, at 334–35 (suggesting a framework with various levels of rights). This framework is permissible under the ALI Recommendations as well. Id. at 333–34.


See Susan Frelich Appleton, Parents by the Numbers, 37 HOFSTRA L. REV. 11, 58 (2008) (recognizing that the expressive value of the term parent leads many kinship caregivers to forego adoption for guardianship so that the original parent continues to be recognized).

These could include subsidized guardianship and open adoption. See Brooks, supra note 311, at 44; Schwartz, supra note 110, at 443 (advocating subsidized guardianship); ANNIE E. CASEY FOUND. & CASEY FAMILY SERVS., SUBSIDIZED GUARDIANSHIP: COLLABORATING TO IDENTIFY NEW POLICY OPPORTUNITIES 1–2 (2006) (on file with editor) (identifying a range of legally permanent options for children in foster care including guardianship in addition to adoption and reunification).
their extended families. Nonetheless, as I have pointed out, guardianship is still not funded to the same degree as adoption and most states still do not mandate such connections, nor carry them out in practice.

More interestingly, some child welfare agencies are exploring new ways for youth to achieve permanency, including finding adults to serve as role models or connections for youth, even if they are not custodial resources. It would be preferable for all youth to have a family setting to live in, but recognizing the importance of even non-custodial adult support is an important step beyond the adoption hegemony. Finally, some agencies are also exploring ways to balance the youth's old and new family connections, such as open adoption. Enabling youth to maintain both their old and new families, including parents, siblings and other relatives, increases the number of youth willing to be adopted and reflects the reality of many family structures.

B. Concerns

A new approach to public parenthood and child maltreatment is not without potential drawbacks. Below I will address some criticisms this paradigm shift may raise: that it invades family autonomy, that it stigmatizes certain types of families and that it would be overly costly or politically unviable. I will also address concerns about the instability of redefining permanence and the boundaries of an expanded notion of parenthood.

A more preventive or holistic approach to child maltreatment is sometimes criticized as an impermissible invasion of family autonomy. As noted above, parents are accorded strong rights to raise their children and state intervention in that regard may be deemed an impermissible autonomy violation. However, this is not a drawback to a preventive ap-
proach to child maltreatment for several reasons. First, as scholars have pointed out, the line between state intervention and autonomy is a false one, and in fact the state intervenes all of the time to shape, support, or otherwise direct families. This is certainly true of parents who become involved in the child welfare system, whose conduct is excessively scrutinized after the initial contact. The key question is when and how the state intervenes. A preventive approach would not increase state intervention in the lives of at-risk families. Instead, it would move the point of intervention to be less punitive and more effective.

Moreover, a preventive public health approach is often voluntary, and this is likely the best starting approach. Thus, for instance, successful home nurse visiting programs have usually been voluntary. Public education can encourage participation, particularly in high-risk communities, and experience demonstrates that individuals are willing to seek or accept help when it is offered in a non-stigmatizing and non-punitive way. Preventive programs, especially if they are broadly offered, signal that it is acceptable to ask for help in parenting.

A second possible critique of preventive approaches is that if offered to only certain communities, they will stigmatize certain kinds of families. The fact that parents in the child welfare system are already overwhelmingly marginalized by race and class undercuts this argument. As I have argued in this Article, the child welfare system is already stigmatizing certain kinds of families, resulting in a two-tiered parenthood system.

Ideally, a preventive program would be universal to avoid any further stigma. But even if that is economically or politically unfeasible, a pub-

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335 See, e.g., Huntington, supra note 268, at 1489. The state intervenes in families in ways even more invasive than family law, such as criminal law. See I. Bennett Capers, Home Is Where the Crime Is, 109 Mich. L. Rev. 979 (2011) (book review) (outlining the fact that criminal law has always invaded the home, particularly in the case of non-normative families).

336 See supra Part I.B.2.a.

337 See Lawrence O. Gostin et al., The Law and the Public’s Health: A Study of Infectious Disease Law in the United States, 99 Colum. L. Rev. 59, 94 (1999) (noting that successful public health programs usually involve voluntary compliance); see also Elizabeth Bartholet, Race & Child Welfare: Disproportionality, Disparity, Discrimination: Re-Assessing the Facts, Re-Thinking the Policy Options, Harvard L. Sch. 9 (Jul. 2011), http://www.law.harvard.edu/programs/about/cap/cap-conferences/rd-conference-papers/rdconceptpaper–final.pdf (noting that voluntary early intervention programs are disproportionately used by African-American families, who are among the most low-income families, and that these services provide the most benefit for the most disadvantaged families).

338 See Wilson, supra note 39, at 311 (noting that divorcing couples who were offered parent education programs often subsequently sought out other supports since seeking help had been normalized); see also Marsha Garrison, Taking the Risks Out of Child Protection Risk Analysis, 21 J.L. & Pol’y 5 (2012) (pointing out the dangers of using risk-assessments to make decisions in individual child welfare cases).

339 A universal program may in fact be more politically feasible given it would not be seen as a “handout” to low-income people. See Ron Haskins et al., Social Science Rising: A Tale of Evidence Shaping Public Policy, Future of Children 6 (Fall
lic health approach to child maltreatment would still be far less stigmatizing than the current system. A public health approach is, by definition, community-wide in scope and based on objective risk factors rather than judgment about an individual parent’s conduct without recognition of the environmental factors underlying much parenting behavior. I am not arguing that parents should be individually investigated for child maltreatment based on their inclusion in an at-risk category. A risk-based approach is not an appropriate rubric for dealing with individual cases of misconduct; it works from a preventive standpoint only. Instead, the data on risks for child maltreatment can be used to target scarce resources and focus the provision of services. Finally, as scholars have pointed out, some trade-off between a preventive approach to social problems such as child maltreatment and a level of group categorization by risk factors is inevitable. The same approach is being taken to other public health issues, such as smoking and obesity. Child maltreatment should be no different.

Perhaps the most salient criticism of preventive child maltreatment programs is that they are politically unviable. Some argue this is so because of their costs. Although preventive programs require resources, they are undoubtedly less costly than the child welfare system, particularly a system that proposes terminating and then reinstating parental rights after children have been in foster care for years. Even more significantly, preventing even a small measure of child maltreatment will result in significant cost savings in the long term, as child maltreatment brings with it great social costs. The more convincing argument is that the American ethos of self-sufficiency, the same ethos that helps shape the narrative of bad parent, means that preventive programs will be seen as anti-poverty programs and thus not popular.
This ethos remains a formidable barrier to changing our approach to child maltreatment. However, several factors make now a potentially promising time to shift the paradigm. First, there is a growing recognition that ASFA has created new problems, such as the large number of legal orphans, and that its successes have come at great cost to many children and to society as a whole. A clear indication of an acknowledgment that ASFA’s framework is flawed is the rush by states to enact reinstatement statutes, which are both inefficient and contradictory to ASFA’s mandate. Second, there has been heightened public attention recently to the strains the failing economy has put on children and families. Third, the increasing shift in other fields, such as medicine and public health, to a view of child maltreatment as a preventable social problem can be a valuable source of input and collaboration for policymakers. Finally, even if it is true that adequate funding of supports for families, particularly low-income families, is still not politically feasible, discussion of the flawed child welfare public policy story can at least bring transparency. Knowledge about the embedded biases and mistaken assumptions underlying the system help in the assessment of new policy trends such as subsidized guardianship and reinstatement of parental rights.

Critics of expanded permanency and parenthood frameworks raise two main points: that reliance on arrangements other than adoption leaves children too vulnerable to challenges by birth parents or other forms of disruption, and that parsing out parenthood rights blurs the boundaries to an unworkable degree. The first criticism exaggerates the vulnerability of guardianships to legal challenge because, in fact, biological parents rarely challenge guardianships. If they do, they must demonstrate the high standard of changed circumstances. In any event, such concerns can be addressed by structuring guardianships to be more secure against such challenges. For instance, certain states, including New Jersey and North Carolina, have amended their statutes to make it

547 See, e.g., Allen & Davis-Pratt, supra note 213.
548 See supra Part IV.B.1.
550 See supra Part IV.A.1.
551 The most pragmatic approach would be for the government to fund a variety of demonstration programs and assess their effectiveness. Home nurse visiting and family group conferencing are two promising areas which are being funded to some degree, and which can open the way for funding of other effective prevention programs.
552 See Patten, supra note 282, at 255, 270; Schwartz, supra note 110, at 462.
553 See Patten, supra note 282, at 261.
554 See, e.g., State ex rel. Johnson v Bail, 938 P.2d 209, 212, 214 (Or. 1997).
more difficult to overturn guardianships. More significantly, this viewpoint obscures the reality that any parent, adoptive or otherwise, is vulnerable to third party custody suits and that no family setting is ever truly permanent—any parent-child arrangement is open to legal challenge, and death, divorce, and other traumatic events unfortunately reshape families all the time.

Fears about a more nuanced public parenthood framework are also unwarranted. First, the data clearly show that parents and children aging out of foster care or in other permanent homes are often already in contact. Adapting the legal framework to reflect this reality would simply make such contact simpler and more transparent. Second, although such a disaggregation of rights is more complicated than the current all-or-nothing framework, it has existed for some time in the private family law sector. Courts in custody matters routinely parse out parental rights and responsibilities such as decision-making powers, joint physical custody and visitation. The ALI Principles of Family Dissolution, for instance, posit a framework where a biological parent may not be a legal parent but has parental rights and responsibilities pursuant to an agreement with the legal parent(s).

The same division of responsibilities among multiple parental figures could occur in families involved with the child welfare system. In fact, this recognition of multiple parental figures occurs already for some families involved in the child welfare system, as a child may be placed in the custody of one set of adults, while another retains decision-making powers over her. Some families also practice cooperative parenting, sharing responsibilities among the biological parents and other caregivers, usually in kinship foster care or subsidized guardianship cases.


531 Youth themselves recognize this truth. See Oregon Report, supra note 187, at 95 (youth reporting that opportunities for permanency exist in adoption, subsidized guardianship, and even foster care, but that none guarantee absolute permanency). The fluidity of families underlies the exception to the finality of judgments rule in custody cases, where custody may be altered for a material change in circumstances. See Bail, 938 P.2d at 212; Leslie Joan Harris et al., Family Law 684 (4th ed. 2010) (noting that the changed circumstances exception is “almost universal”).

532 See supra notes 100-03 and accompanying text.

533 Coupet, supra note 324, at 641 & n.201.


535 There is no reason to presume a greater level of conflict between a foster or adoptive parent and a birth parent than between two divorcing spouses. See Garrison, supra note 22, at 383-84.

536 See Oregon Report, supra note 187, at 71; see also Coupet, supra note 324, at 604 & n.27, (discussing how kinship caregivers often collaborate with parents to share
CONCLUSION

The child welfare system is both dysfunctional and fundamentally unfair, in large part because it relies on a flawed public policy story about parenthood. Addressing child maltreatment effectively requires a deliberate acknowledgement of its actual causes, not a quick or simplistic blaming of non-normative parents. This Article has started the process of identifying those actual causes, but it is inevitably only a start. Numerous aspects of the child welfare system deserve further study. Comprehensive data collection on the reasons for children's removal from their parents, for example, could lead to an honest assessment of the harm, if any, to children from non-normative parental conduct, as well as to a more precise measurement of the impact on families of shortages of child care, housing, and other resources.\(^{557}\) This data could also bring to light largely overlooked correlations in the child welfare statutory regime—between poverty and neglect, for instance—and thereby counteract common implicit biases about particular families. Simply telling the real story of child maltreatment would also reduce the stigma of families who need assistance, as virtually every family sometimes does.

More research is likewise needed on different approaches to permanency, parenthood, and the various custodial arrangements for families involved with the child welfare system. Broadening our conceptions of permanency and parenthood could well allow for the recognition of a variety of parent-child bonds and the essential understanding that all family relationships are complex and somewhat fragile. We know already that children, their parents, and other adults are currently living and connected in a multiplicity of settings beyond foster care and adoption. Moving beyond the "all or nothing" public parenthood story would accord with the reality of families, a stated goal of family law, and help to bridge the public and private family law systems. Only with such a shift can we begin a dialogue to respect a variety of families while also achieving the public's goal of protecting children. This Article is an attempt to start that conversation.

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\(^{557}\) As noted earlier, there has been little study of why children are actually removed to foster care, and broad and vaguely worded neglect statutes allow for wide and subjective interpretations. See supra Part II.B.2.a. Attention is beginning to come to this issue, as evidenced for instance in the study of removals in Washington D.C., see supra notes 65–66 and accompanying text, However, much work remains to be done.