A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights

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Abstract

There are few uses of government power as extreme as severing parent-child relationships, yet terminating parental rights has become commonplace in the American child welfare system. Amid growing recognition of the harms of terminating parental rights and the racial injustice of current practice, this Article proposes a straightforward route to avoiding those harms while continuing to allow children to be adopted from foster care: moving from a termination of parental rights model to a transfer of parental rights model.

The Article explains how exceptional the all-or-nothing approach of terminating parental rights is. In all other areas of family law, parents' rights are infringed only to the extent specifically needed to protect a child or to resolve a dispute between parents whose rights are in tension. Outside the child welfare system, it is widely appreciated that this graduated, least-rights-intrusive approach best serves both children and parents. The Article argues that embracing a transfer approach would create harmony with other areas of family and constitutional law, as well as with contemporary understandings of child development.

The Article proposes unbundling parental rights and replacing termination of parental rights proceedings with proceedings that could dissolve a parent's right to consent to adoption without severing the full bundle of parental rights. Other than the right to prevent adoption, a parent's rights would remain intact during an interim period until either an adoption occurs or the parent establishes that they can safely regain custody. If an adoption is finalized, that would transfer the parent's remaining parental rights to the adopting parent, with the exception of the right to visitation. The birth parent would have the right to continue to visit so long as that was in the child's best interest.

Transferring—rather than terminating—parental rights would have several benefits, including: (1) eliminating the heartbreaking practice of severing loving parent-child relationships, which inflicts long-term psychological harm; (2) stopping the creation of legal orphans, an unintended consequence of terminating parental rights that leads to poor outcomes for youth; and (3) ending a practice that unnecessarily disconnects children from their communities and destroys cultural ties. In these ways, the proposed approach would safeguard against the type of abuse of state authority that has repeatedly stained American child welfare practice.

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Introduction

> "You guys are real people, a real family, and what has always been clear to me, demonstrated in the record every single appearance, at every trial and at every hearing, is that Ms. H loves her children. She has never stopped fighting for them, things have gone wrong, I wouldn't want to be in her shoes all these years, nor in yours, to the kids, but she loves her kids, wants to be with them. And as I said, at the trial has fought like hell to try to get them back . . . . [I]t's clear to her kids that she loves them and that they love her."
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> —Bronx Family Court Judge, as he terminated the legal relationship between Ms. H and her children.[1]

There are few exercises of government power as extreme as severing parent-child relationships.[2] In recent years, there has been growing recognition

[1] Transcript of Record at 1001, In the Matter of the Mck. Children, B-00530-34/15, B-13523-16 (Bronx Cty. Fam. Ct. Nov. 8, 2017) (on file with author).

[2] *See* M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) (emphasizing "the Court's unanimous view that few consequences of judicial action are so grave as the severance of natural family ties") (internal quotation marks omitted).

that it is critical to safeguard against abuse of that power.[3] Community activists, family defense advocates, and legal scholars have explained that the history of child welfare practices in the United States is marked by repeated abuse of the authority to separate children from their families based on claims that are now understood to be indefensible.[4] Far too often, private actors have sought and received legal sanction for what can accurately be described as stealing children from their families and communities.[5] Government actors have initiated family separations that were based—most often implicitly and sometimes explicitly—in racist and classist assumptions that children needed to be "saved" from their parents and placed with more privileged families.[6]

But there is growing momentum for change—from the grassroots level to the highest reaches of government.[7] Critics have rightly called on the child welfare system to take new approaches throughout its involvement with families: at the front end by reducing the number of families who are investigated and the number of children who are removed from their families

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[3] *See, e.g.,* Vivek Sankaran & Christopher Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 Fam. Ct. Rev. 246 (2023); Hum. Rights Watch, If I Wasn't Poor, I wouldn't be Unfit: The Family Separation Crisis in the US Child Welfare System 142 (2022), https://www.aclu.org/publications/if-i-wasnt-poor-i-wouldnt-be-unfit-family-separation-crisis-us-child-welfare-system [https://perma.cc/V4TE-FGVS]; U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Achieving Permanency for the Well-Being of Children and Youth 10 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf [https://perma.cc/B7MC-SJDV] [hereinafter Achieving Permanency] (emphasizing that severing a child's familial relationship should be a last resort).

[4] *See, e.g.,* Ashley Albert, Tiheba Bain, Elizabeth Brico, Bishop Marcia Dinkins, Kelis Houston, Joyce McMillan, Vonya Quarles, Lisa Sangoi, Erin Miles Cloud & Adina Marx-Arpadi, *Ending the Family Death Penalty and Building a World We Deserve*, 11 Colum. J. Race & L. 861 (2021); Laura Briggs, Taking Children: A History of American Terror (2020); Peggy Cooper Davis, *So Tall Within: The Legacy of Sojourner Truth*, 18 Cardozo L. Rev. 451 (1996).

[5] *See, e.g.*, Linda Gordon, The Great Arizona Orphan Abduction 10–11 (2001) ("[Children's Aid] Society members combed the 'lower quarters' of the city looking for street kids and hauled them in, often making only perfunctory efforts to locate their parents. Poor parents and children were sometimes terrified that these agents would snatch their children . . . . To many of the poor, the child savers were actually child stealers."); Briggs, *supra* note 4; Lorie M. Graham, *The Past Never Vanishes: A Contextual Critique of the Existing Indian Family Doctrine*, 23 Am. Indian L. Rev. 1, 15–18, 23–30 (1998) (describing the state sanctioned separation of Native American children from their families prior to the passage of the Indian Child Welfare Act of 1978).

[6] Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 J. Multicultural Soc. Work 165, 169 (1997); Hum. Rights Watch, *supra* note 3, at 23–27, 41–45; Child.'s Rights & Colum. L. Sch. Hum. Rights Inst., Racial (In)Justice in the U.S. Child Welfare System: Response to the Combined Tenth to Twelfth Periodic Reports of the United States to the Committee on the Elimination of All Forms of Racial Discrimination 7–8 (July 2022), https://www.childrensrights.org/wp-content/uploads/imported-files/Childrens-Rights-2022-UN-CERD-Report-FINAL.pdf [https://perma.cc/NM6R-DYSD]; Child.'s Rights, Fighting Institutional Racism at the Front End of Child Welfare Systems: A Call to Action 6–7 (2021), https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf [https://perma.cc/MBU6-947N] [hereinafter Fighting Institutional Racism].

[7] *See* Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, Time (Mar. 17, 2021), https://time.com/5946929/child-welfare-black-families [https://perma.cc/42N7-C5B8]; Jerry Milner, *Staying the Course for Families*, Imprint (Feb. 11, 2021), https://imprintnews.org/child-welfare-2/staying-course-families-what-got-right_/51632 [https://perma.cc/N479-9PUH].

to foster care, and at the back end by reducing the number of families that are permanently extinguished through terminations of parental rights.[8] In particular, a number of scholars have persuasively argued that when children cannot be reunified with their parents, permanent outcomes other than adoption are preferable because they avoid the need to terminate parental rights.[9] These scholars have revealed the extent to which terminating parental rights is emotionally and psychologically harmful to both children and parents, and that guardianship and custody arrangements commonly serve children better than adoptions.[10]

This paper shares the goal of reducing the harms inflicted by termination of parental rights, and offers an additional route to do so. We can and should, as the critics have proposed, reduce the number of children who enter the foster care system, increase the number of foster children who are reunified with their parents, and pursue guardianship and custody arrangements before considering adoption. But in addition, we can and should restructure the laws surrounding adoption, so that it becomes unnecessary to terminate parental rights to make adoption possible. Termination of parental rights is a relatively recent legal mechanism, and it is now clear that this mechanism does more harm than good.[11] Terminating parental rights is not a necessary antecedent to adoption and it is past time to end the practice of unnecessarily destroying family ties.

Because of its shameful history, some have questioned whether adoption can be restored to a morally defensible status.[12] Yet it is undeniable that adoption has played a critical role in expanding traditional family structures and increasing the ability of couples who cannot conceive on their own to become parents. This paper offers concrete proposals for reshaping current law to end some of the most damaging practices of the American child welfare system while maintaining the benefits of adoption as one possible outcome for foster children.

Understanding how and why we should restructure the legal path to adoption requires understanding the exceptionalism of modern termination of parental rights law. Much of the discussion of parental rights in the literature

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[8] *See, e.g.*, Hum. Rights Watch, *supra* note 3, at 14–44; Fighting Institutional Racism, *supra* note 6, at 3,17.

[9] *See, e.g.*, Sankaran & Church, *supra* note 3, at 253–54; Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 Colum. J. Race & L. 557, 585–89 (2022); Josh Gupta-Kagan, *The New Permanency*, 19 U.C. Davis J. Juv. L. & Pol'y 1, 2, 17–30 (2015); Cynthia Godsoe, *Parsing Parenthood*, 17 Lewis & Clark L. Rev. 113, 160–65 (2013).

[10] Sankaran & Church, *supra* note 3, at 257–59; Gupta-Kagan, *supra* note 9, at 12; Godsoe, *supra* note 9, at 114–17.

[11] Chris Gottlieb, *The Birth of the Civil Death Penalty and the Expansion of Forced Adoptions: Reassessing the Concept of Termination of Parental Rights in Light of its History, Purposes, and Current Efficacy*, 45 Cardozo L. Rev. (forthcoming 2024); *see also* Sankaran & Church, *supra* note 3, at 257–62.

[12] *See* Albert & Mulzer, *supra* note 9, at 559 (2022) (arguing for abolishing adoption); *see also* Malinda L. Seymore, *Adoption Ouroboros: Repeating the Cycle of Adoption As Rescue*, 50 Pepp. L. Rev. 229, 253–73 (2023); (describing the destructive effects of international adoption by Americans during humanitarian crises); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. Pub. Int. L. J. 409, 416–24 (1997) (questioning transracial adoption).

has centered on who counts as a parent.[13] Even as the pros and cons of the current federal policies that incentivize increasing adoptions of foster children have been hotly debated, there has been little discussion of the legal process by which those adoptions are achieved. It is assumed without question that unless birth parents consent to adoption, state agencies pursuing adoptions of foster children must do so by seeking first to terminate the birth parents' rights. The policies and legal structures that underlie that assumption merit examination. In an earlier piece, I analyzed the history of terminating parental rights and explained how the legal concept of termination of parental rights followed from—and was molded by—the development of adoption law.[14] That piece argued that none of the reasons policymakers enacted statutes allowing termination of parental rights outside of adoption proceedings are persuasive today and concluded that children and their families and communities would be better served by returning to an earlier legal model, in which when adoption of children is appropriate, parental rights are transferred rather than terminated. This Article provides a framework for conceiving and designing statutory change that would allow policymakers to accomplish that goal, providing a structure that serves the purposes associated with termination of parental rights, while eliminating the many negative effects termination imposes on children, families and communities.

Restructuring the legal steps by which children are made available for adoption would have several advantages. First, it would end the heartbreaking practice of severing loving parent-child relationships—and the consequent long-term psychological harm—when less drastic approaches could be used to allow adoption of the child.[15] Second, a transfer-of-rights model would eliminate the status of legal orphanhood, an unintended consequence of terminating parental rights that leads to poor outcomes for thousands of young people, who leave foster care with no connection to any family.[16] Third, replacing termination of parental rights with a transfer-of-rights model would end practices that unnecessarily disconnect children from their communities and safeguard against unwarranted destruction of cultural ties—the type of safeguard that is essential in light of the abuses of state authority that have repeatedly stained American child welfare practice.

The Article proceeds in three parts. Part I argues that the existing structure of termination and adoption law should be transformed because it does

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[13] *See generally* Emily Buss, *"Parental" Rights*, 88 Va. L. Rev. 635 (2002) (advocating for an expansive definition of "parent" beyond one defined by traditional familial norms); Douglas NeJaime, *The Constitution of Parenthood*, 72 Stan. L. Rev. 261 (2020) (arguing that constitutional protections for parents should not be based solely on biology).

[14] Gottlieb, *supra* note 11.

[15] Because less detrimental alternatives are available, there is a strong constitutional argument to be made that in a significant number of cases, terminating parental violates the constitutional rights of parents and children. *S*ee Sankaran & Church, *supra* note 3, at 262–64; Jessica E. Marcus, *The Neglectful Parens Patriae: Using Child Protective Laws to Defend the Safety Net*, 30 N.Y.U. Rev. L. & Soc. Change, 255, 273-76 (2006). This Article will focus on the option of statutory change, but many of the policy arguments offered here could also support constitutional challenges to terminations of parental rights.

[16] *See* Godsoe, *supra* note 9, at 115 (calling the creation of legal orphans "perhaps ASFA's most disturbing legacy").

not fit coherently with the broader principles of today's child welfare system and inflicts unnecessary harm on children, families and communities. This part draws on the work of prior commentators to argue that the current approach to adoption via termination of parental rights inflicts at least four types of harm: (1) harm to children of losing family connections; (2) harm to communities, particularly Black and Native American communities; (3) the creation of legal orphans, who suffer poor social outcomes; and 4) harm to the parents who lose their children.

Part II describes how thoroughly parental rights are abrogated when a court enters a termination order, explaining that parental rights can usefully be understood to fall broadly into three categories—(1) rights to custody and visitation; (2) decision-making rights; (3) inheritance and other financial benefit rights—all of which are implicated when parental rights are terminated. This part explains how the various strands in the bundle of parental rights are treated in other contexts, demonstrating that outside of child welfare proceedings, courts encroach upon these rights selectively and only to the extent necessary to achieve specific outcomes that have been justified by individualized findings. Understanding that parental rights are typically encroached upon incrementally highlights how exceptional the termination-of-rights approach in the adoption context is and points toward a more tempered approach.

Part III—the heart of this Article's contribution—proposes a new model for achieving adoptions that would allow for the *transfer* rather than the *destruction* of the parental rights described in Part II. The section recommends which rights should be transferred at different junctures in the life of a child welfare case as a court determines that adoption is the best available outcome for the child. The proposal is that policymakers replace termination of parental rights statutes with statutes that use the same causes of action currently in termination statutes in a new proceeding that would allow courts to dissolve the parent's right to consent to adoption. Under this approach, the parent's other rights would remain intact until an adoption, except to the extent they are curtailed in other legal proceedings. There would be no severing of the bundle of parental rights as there is under current law. Instead, following dissolution of the right to consent to adoption, children could be adopted without further proceedings involving the parent. If an adoption were ultimately approved by a court, the adoption finalization would transfer all the parent's remaining rights to the adopting parent with the exception of the right to visitation.

Part III also explains how this proposal would bring public adoptions into line with the prevailing norm in private adoption, where open adoption has come to be favored in light of the growing recognition that it serves children's developmental needs.[17] Post-adoption visitation rights would continue

[17] *See* The Donaldson Adoption Inst., Let's Adopt Reform Report: Adoption in America Today 13 (2016), https://dl.icdst.org/pdfs/files3/f68affc785e09b6ef770beb0207bae9a.pdf [https://perma.cc/RD5F-9JFZ]; Ryan Hanlon & Matthew Quade, Profiles in Adoption: A Survey of Adoptive Parents and Secondary Data Analysis of Federal Adoption Files 19 (2022), https://adoptioncouncil.org/wp-content/uploads/2022/07/Profiles-in-Adoption-Part-One.pdf [https://perma.cc/K527-J5C3].

to be limited in situations in which visits would be harmful to the children. The proposed model would allow courts to treat parent-child relationships in line with how they are experienced—as complex bonds with various threads that change over time—and would forgo the legal fiction that such relationships can be entirely excised. Children remain connected to their parents emotionally and psychologically even when legal ties end. The law would do better by children, families, and communities if it recognized rather than papered over the lived reality of these relationships.

A brief conclusion calls on a broad range of stakeholders to develop and advocate for the proposed statutory change and situates such change within the broader goals of the family regulation system.

I. The Counterproductive Role of Terminating Parental Rights in the Child Welfare System

A. The Introduction of Termination of Parental Rights Proceedings into American Law

The right to consent to (which is to say the right to "veto") a proposed adoption is the quintessential parental right in that it allocates to parents the exclusive power to prevent someone else from appropriating their status. Adoption was unknown at common law; states began making it possible through statutes passed in the 1850s.[18] For the next hundred years, adoptions in the United States were granted primarily based on the birth parents' consent or a finding that the parent had abandoned the child, and were relatively rare.[19] Adoptions only became a significant cultural practice in American life in the middle of the twentieth century.[20] Following World War II, adoption was embraced as part of the celebration of a certain picture of family life that centered a two-parent nuclear family, in which the father worked outside the house and the mother was a homemaker and devoted mother. Children were integral to this picture and several cultural threads came together at the time to make adoption more appealing, including a new view of childhood as an idyllic stage of life, and a new emphasis on the importance of child-rearing as

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[18] Gottlieb, *supra* note 11, at 114. Prior to the first adoption statutes, some adoptions were accomplished in the U.S. through private legislative enactments and the registration of deeds, but adoption in the modern sense is generally considered to have begun with the passage of the Massachusetts Adoption of Children Act of 1851. *See* E. Wayne Carp, Family Matters: Secrecy and Disclosure in the History of Adoption 7, 11 (1998); Julie Berebitsky, Like our Very Own: Adoption and the Changing Culture of Motherhood, 1851-1950 20 (2000); Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. Pa. L. Rev. 759, 760–61 (1954).

[19] Helen Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. Det. L.J. 347, 354, 369–70 (1962). There were grounds other than abandonment upon which consent could be waived—such as "immoral conduct" or imprisonment—if they established parental unfitness, but these grounds were less commonly used. *Id.* at 380–81, 387–88; *see also* Gottlieb, *supra* note 11, at 115.

[20] Gottlieb, *supra* note 11, at 116–17; *see also* Berebitsky, *supra* note 18, at 20 (describing how "adoption won widespread cultural legitimacy" in the post-war era).

the nurture side of the nature-nurture debate gained traction. The idea that how children were raised shaped who they would become (as opposed to one's character being foreordained by the circumstances of one's birth) simultaneously put pressure on women to take on the nurturing mother role and made adoption an appealing option for couples who could not conceive. Earlier, adoption was disfavored because the prevailing belief that children were destined to be like their birth parents combined with prejudices against the low-income (often immigrant) parents of children most likely to be available to adopt to make adoption unappealing. With a new optimism that nurture plays an important role in shaping children into the adults they become, prospective adoptive parents became more interested in adopting children of birth parents perceived to be "inferior."[21] An increased ability to diagnose infertility, combined with the Baby Boom era emphasis on the model family life, also motivated desire to adopt. These factors resulted in a demand for children to adopt that significantly outstripped the number of available children.[22]

It was only when this newly unmet demand for children to adopt emerged in the 1950s, that a new legal concept—terminating parental rights—took hold in the law.[23] Previously, parental rights were extinguished only at the moment a child was adopted. Parental rights were *transferred* in adoption proceedings, not terminated outside the context of an adoption. In the middle of the century, child welfare authorities began suggesting there were a substantial number of children who would benefit from being assigned new parents, but who were ineligible for adoption under existing law. These were children whose parents had left them with alternate caretakers, typically because the parents were experiencing hardship—most often financial trouble and sometimes medical issues.[24] The parents usually intended the placements to be temporary, but some eventually stopped visiting their children and lost touch with them. Estimates at the time were that fewer than 25% of the children in out-of-home care would ever return home.[25] These children were described as "orphans of the living,"[26] and as "completely lacking family ties or attachments."[27] Policymakers were concerned that, although the children had been abandoned for all meaningful intents and purposes, courts were unwilling to waive the parents' consent to an adoption of their children.[28] These policymakers pushed for the introduction of termination of parental rights statutes in order to allow these children to be adopted. The goal largely was to bring law in line with reality where there was de facto abandonment, but not de jure abandonment. And the aim of at least some of these experts was to bring together what they saw as a "supply" of children in need with the

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[21] Carp, *supra* note 18, at 13.
[22] *Id.*
[23] Gottlieb, *supra* note 11, at 145–47.
[24] Gottlieb, *supra* note 11, at 136–39.
[25] Henry S. Maas & Richard E. Engler, Children in Need of Parents 5 (1959).
[26] *Id.* at 397.
[27] Welfare and Health Council of N.Y.C., Children Deprived of Adoption 14 (1955), https://catalog.hathitrust.org/Record/001743419 [https://perma.cc/22AR-NY97].
[28] *Id.* at 16.

"demand" for children to adopt.[29] In relatively short order beginning at the end of the 1950's, states passed statutes establishing causes of action to "terminate parental rights" outside of adoption proceedings.[30] This idea of terminating parental rights before an adoption proceeding has been brought was an entirely new legal concept, and it created a new legal status for children: the legal orphan—children with no legal tie to any family.

As I argued in an earlier article, none of the justifications proffered at the time legislation was enacted to establish stand-alone proceedings to terminate parental rights justify this approach today.[31] For example, at the time these statutes were passed, policymakers were concerned that agencies would not place children in adoptive homes unless a court had previously terminated the parents' rights so that it was clear that the child's birth parent could not stand in the way of adoption. But today, pre-adoptive placements typically are made well before termination proceedings are filed, so terminations do not facilitate the placements. Policymakers also wanted to provide a legal mechanism by which children could be adopted without the birth parents knowing who adopted and vice versa, so that anonymity could be maintained and the fact the child was adopted could be kept secret. Today, adoptions are not kept secret and commonly involve adoptive parents and birth parents who know each other—either because they are related or because adopting parents typically are foster parents who were regularly bringing the children to visit their parents before and during termination proceedings. There generally is no ability, let alone purpose, to keeping the birth parents and adoptive parents from appearing in the same court proceeding.

The American child welfare system operates very differently today than it did at the time termination of parental rights statutes were passed, and whatever benefit terminating parental rights brought then, the practice must be reassessed in light of its current effects. As the next section explains, the practice as currently structured conflicts with the broader principles of today's child welfare system and inflicts unnecessary harm on children, families and communities.

B. The Current Context of Terminating Parental Rights

For the first time in history, today the majority of adoptions in the United States are forced adoptions, effectuated over the objection of the parents of the children involved.[32] Not only do the parents not consent but, unlike the situations typical when termination statutes were introduced, the parents have not

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[29] Maas & Engler, *supra* note 25, at 2 (highlighting "the extent of the discrepancy which exists, county-wide, between the great demand among the adopting pubic for infants who are physically and psychologically perfect and the oversupply of somewhat less than perfect children who are older than two years of age").

[30] Gottlieb, *supra* note 11, at 145–46.

[31] *Id.* at 173.

[32] U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Child.'s Bureau, Trends in U.S. Adoptions: 2010–2019 3 (2022), https://www.childwelfare.gov/pubs/adopted2010-19 [https://perma.cc/9WA2-BQJZ].

abandoned the children or voluntarily placed them with other caretakers.[33] Instead, most of the children who are adopted have been separated from their parents by the state through the operation of the massive child protective system built in the United States beginning in the 1970s.[34] Incentivized by federal laws that made federal funding contingent on states requiring reporting, investigation and civil prosecution of suspected child maltreatment, the number of children removed from their parents and placed in foster care skyrocketed at the end of the twentieth century.[35] Today, there are near 400,000 children in state custody in the foster system.[36]

Although public perception is that children enter foster care primarily because of parental abuse, most children in foster care now have been separated from their families because of allegations of parental neglect involving issues correlated with poverty.[37] The vast majority of children who enter foster care do so because their parents are suffering from substance abuse disorder, poor mental health, or domestic violence,[38] and many are in foster care because of a lack of adequate housing.[39]

It is within the context of this system that most adoptions now take place—the children were taken from their homes over their parents' objection, and the parents desperately want to be reunited with their children. To be permitted to regain their children's custody, parents are commonly required to complete a service plan and attend scheduled visits with their children.[40] Under the 1997 Adoption and Safe Families Act (ASFA), states are required to file to terminate the rights of parents of foster children on strict timelines as a condition of federal funding for foster care.[41] In addition to imposing financial penalties for not filing to terminate rights, ASFA also offers financial rewards for increasing the number of adoptions of foster children. In the wake of ASFA's financial incentives, the number of public adoptions—meaning those initiated by state actors rather than private parties— increased dramatically.[42]

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[33] Gottlieb, *supra* note 11, at 106.

[34] *Id.*

[35] *Id.* at 176.

[36] U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., Trends in Foster Care and Adoption: FY 2012–2021 1 (2022), https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption [https://perma.cc/G22V-MAVS].

[37] *See* Josh Gupta-Kagan, *Distinguishing Family Poverty from Child Neglect*, 109 Iowa L. Rev 1541, 1547–49 (2024); U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., *Children's Bureau Child Welfare Outcomes State Data Review Portal*, cwoutcomes.acf.hhs.gov/cwodatasite/pdf/new%20york.html [https://perma.cc/9YJL-XJC3].

[38] U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., The AFCARS Report, No. 29 (2022), https://www.acf.hhs.gov/cb/report/afcars-report-29 [https://perma.cc/BVJ8-BSEU].

[39] *Id.*

[40] Shanta Trivedi, *The Adoption and Safe Families Act Is Not Worth Saving: The Case for Repeal*, 61 Fam. Ct. Rev. 315, 322 (2023).

[41] Adoption and Safe Families Act of 1997, Pub. L. 105-89, 11 Stat. 2115 (codified as 42 U.S.C. § 1305). ASFA provides exceptions in which states are not required to file terminations, *id.*, but it is not clear how often these exemptions are used. *See* Laura Radel & Emily Madden, Freeing Children for Adoption within the Adoption and Safe Families Act Timeline 5 (2007) https://aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-1.pdf. [https://perma.cc/393L-YJYC].

[42] *See* U.S. Dep't of Health & Hum. Servs., Admin. for Child. & Fams., The AFCARS Report, No. 12 (2006); https://www.acf.hhs.gov/sites/default/files/documents/cb/

Under ASFA, parents whose children enter foster care are supposed to complete their mandated service plans within 15 months, even though the required services, including substance abuse and mental health treatment, are not always available without waitlists, and effective treatment of these issues frequently cannot be completed within that timeframe.[43] When this 15-month mark is reached, states are required to file petitions to terminate parental rights.[44] Most of the termination petitions do not allege that parents abandoned their children and could not do so because the parents are visiting with their children. Rather, termination claims are most often based on the parents' alleged failure to complete service plans within the allotted time.[45]

Most termination proceedings today are contested by parents, who are fighting to regain custody and strongly oppose the adoption of their children. Although some parents surrender their rights, many of these parents do so under the threat of forcible termination. Parents are told they have a "choice" to agree to a conditional surrender that would allow them to continue to see their children after adoption or risk never seeing their children again if they choose to fight the termination case.[46] This is akin to plea bargaining in the criminal system, where defendants give up the right to trial in exchange for the assurance of lower sentences, but it entails parents being coerced to trade their rights to their children. Often, parents do not have robust legal representation as they contest the most extreme civil measure the government can attempt to impose or when deciding to waive their right to do so.[47]

Today, only about one in five children who enters foster care is under the age of one, and half are five years old or older.[48] Almost all are strongly bonded to their parents. Thus, in stark contrast to the initial intent of the termination statutes, which was to legally free children who did not have active relationships with their parents, today, termination of parental rights means permanently severing vibrant relationships between parents and children. This

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afcarsreport12.pdf [https://perma.cc/83FU-F3CS]. The term "private adoption" is used differently by some commentators, but throughout this Article, "private adoptions" will refer to adoptions that are agreed to by non-government parties and the term "public adoptions" to refer to the adoption of children who are wards of the state.

[43] *See* Trivedi, *supra* note 40, at 9; Amelia S. Watson, *A New Focus on Reasonable Efforts to Reunify*, 31 Child. L. Prac. Today, Sept. 1, 2012, at 117.

[44] *See* Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights,* 73 N.Y. State Bar Ass'n J. 41, 41 (2001).

[45] *Id.* at 43.

[46] *See* Chloe Jones, *1 in 100 Kids Lose Legal Ties to Their Parents by the Time They Turn 18. This New Bill Aims to Help*, PBS (Dec. 30, 2021), https://www.pbs.org/newshour/nation/1-in-100-kids-lose-legal-ties-to-their-parents-by-the-time-they-turn-18-this-new-bill-aims-to-help [https://perma.cc/8K8J-NCSM]; *see also* Ashley Albert, *The Adoption Safe Families Act Hinders Birth Parents From Regaining Their Parental Rights*, Seattle Medium (May 26, 2021), https://seattlemedium.com/the-adoption-safe-families-act-hinders-birth-parents-from-regaining-their-parental-rights/ [https://perma.cc/YLT6-2AYR].

[47] Lucas A. Gerber, Yuk C. Pang, Timothy Ross, Martin Guggenheim, Peter J. Pecora & Joel Miller, *Effects of an Interdisciplinary Approach to Parental Representation in Child Welfare*, 102 Child. & Youth Servs. Rev. 42, 42 (2019), https://www.sciencedirect.com/science/article/pii/S019074091930088X?via%3Dihub [https://perma.cc/6K93-ZBC6] (noting the "dearth of quality representation" in child welfare proceedings and describing the quality of parent representation "as inconsistent at best").

[48] The AFCARS Report, No. 29, *supra* note 38, at 2.

extreme measure is not justified by any need to protect children from danger presented by their parents. It is aimed at paving the way for these children to be adopted.[49]

In recent years, the communities most directly impacted by current policies around termination of parental rights have begun to call for a radical reassessment of those policies.[50] With this in mind, in order to assess whether the current approach to termination of partial rights can be justified, we must consider various harms the current regime exacts.

C. The Current Harms of Terminating Parental Rights

Commentators have identified several harms inflicted by terminating parental rights. The most troubling include: (1) the psychological and emotional harm to children of being disconnected from their families of origin; (2) the harms to communities, particularly Black and Native American communities, of routinely severing family ties within those communities; (3) the creation of legal orphans; and 4) the harm to the parents who lose their children. These harms are interrelated, of course, but it is useful to consider them distinctly.

1. Harm to Children of Losing Family Connections

A growing literature indicates that the current approach to facilitating the adoption of foster children is contrary to children's best interests. As its name indicates, termination of parental rights aims to destroy rather than support critical relationships. This approach is antithetical to the concept of relational health, "the sense of connection, belonging and relationships that people have, [which] is essential to our individual and collective well-being as human beings in the world."[51]

Vivek Sankaran and Christopher Church have provided a useful review of the literature documenting the harmful clinical effects of termination of parental rights.[52] As that literature has explained, terminating parental rights entails not only the immediate loss of an important relationship, but also long-term "ambiguous loss" because the sense of loss is ongoing and lacks the closure of losing a loved one who passes away. Such loss can be particularly difficult to carry because it is not imbued with the kinds of social meaning

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[49] *See* Gupta-Kagan, *supra* note 9, at 45–46 (describing how "[p]olicymakers expected that ASFA's push for speedier permanency hearings and termination cases would lead to more adoptions; foster children would be 'freed' for adoption, and child welfare agencies could tap into the presumably large pool of middle-class families who were able and willing to adopt minority children from foster care but were previously discouraged from doing so").

[50] *See, e.g.*, Albert et al., *supra* note 4, at 868–72; International Convention on the Elimination of All Forms of Racial Discrimination, Jan 4, 1969, U.N. Doc. CERD/C/USA/CO/10-12, at 10–11; Gottlieb, *supra* note 7.

[51] David Kelly & Jerry Milner, *The Need to Prioritize Relational Health*, Imprint (July 11, 2023), https://imprintnews.org/opinion/the-need-to-prioritize-relational-health/242912 [https://perma.cc/S42S-HGBW].

[52] *See* Sankaran & Church, *supra* note 3, at 12–14.

surrounding death, and those who experience it are not offered the kinds of social support that help people deal with losing a relative to death.[53] With terminations, the child knows the parent is out in the world somewhere, but is unavailable to the child. Moreover, it is difficult to justify the decision to cut off a parent entirely without castigating the child's origins. The implicit message is that the child's family of origin is so unworthy that the child had to be excised from it. This message at best complicates, and can impede, the development of a healthy sense of identity.

An even more extensive literature documents that adoption, even when it introduces positive relationships, does not relieve the sense of loss.[54] Adoptees "experience life-long issues, including grief and loss, depression, and problems with identity formation that are particularly acute for transracial adoptees."[55] As will be discussed below, adoption experts have debunked the idea that an adoptive family replaces the birth family in an adopted child's psychological life.[56] For the moment, the point is that the harms of terminating parental rights are not undone by adoption even for children who are successfully adopted.

In 2021, the federal Children's Bureau issued an extraordinary piece of guidance that pushed back on the contemporary conventional wisdom of the child welfare system,[57] which in the wake of ASFA embraced permanency as the most important goal of the child welfare system after child safety. ASFA not only placed a premium on getting to permanent placements for children quickly, it made adoption the touchstone of newly minted "permanency." The primary strategies for encouraging permanency were to prioritize adoption on a strict timeline and to financially incentivize termination of parental rights. For more than twenty years, that policy was widely embraced by the child welfare establishment, including children's advocates.[58] In the recent guidance, the Children's Bureau directly challenged that establishment view, taking the position that it is "not… in a child's best interest to sever parental attachments and familial connections in an effort to achieve 'timely permanency.'"[59]

This federal guidance reflects a sea change in thinking about children's best interests, emphasizing that the priority should be "preserving a child's connections and nurturing parental attachment while a child is in foster care."[60] This shift is based in part on recognition that, as Shanta Trivedi and Erin Carrington Smith explain, "[l]egal termination of parental rights cannot sever the psychological bond between a parent and child," and "the long-term

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[53] *See* Erin C. Smith & Shanta Trivedi, *The Enduring Pain of Permanent Family Separation*, Fam. Just. J. 26 (2023).

[54] *See* Sankaran & Church, *supra* note 3, at 257 (collecting sources); Albert & Mulzer, *supra* note 9, at 585–86 (collecting sources).

[55] Malinda L. Seymore, *Adoption as Substitute for Abortion?*, 95 U. Colo. L. Rev. 1089, 1096 (2024).

[56] *See infra* Part III.B.

[57] *See* Achieving Permanency, *supra* note 3.

[58] *See* Kim Phagan-Hansel, *One Million Adoptions Later: Adoption and Safe Families Act at 20*, Imprint (Nov. 28, 2018), https://imprintnews.org/adoption/one-million-adoptions-later-adoption-safe-families-act-at-20/32582 [https://perma.cc/KXU2-62KZ].

[59] *See* Achieving Permanency, *supra* note 3, at 10.

[60] *Id.*

and complex harms" to that bond are left unaddressed by the child welfare system that inflicts them.[61]

The guidance highlights that, in addition to the loss of parent-child ties, terminating parental rights often leads to another significant harm: the loss of siblings, calling this "a grievous consequence of foster care that we must prevent at all cost."[62] The psychological literature supports the broadly shared sense that sibling relationships are among the most valuable of relationships, with studies indicating that positive sibling connections lead to better developmental, socioeconomic and mental health outcomes.[63] Additionally, studies indicate that preserving sibling relationships may play a particularly important role for children who enter foster care because they can "buffer" children "from the negative effects of maltreatment and removal from the home."[64]

While the exact number of children who lose touch with a sibling following termination of parental rights is unknown, more than half of foster children are separated from their siblings when they enter foster care and therefore are unlikely to be adopted together.[65] Children often will not even learn if they have siblings born after they are adopted. Thus, terminating parental rights not only severs parent-child ties, but, too often, sibling relationships as well.

2. Cultural and Community Harms

One way in which children are harmed through termination of parental rights is when it leads to a loss of connection to their cultures and communities of origin.[66] These community connections have many important aspects, of course, including ethnic, racial, and religious significance, among other elements. It is widely recognized that "preservation of [children's] ethnic and cultural heritage [is] an inherent right."[67] Federal guidelines require that

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[61] Smith & Trivedi, *supra* note 53, at 29, 32.

[62] *See* Achieving Permanency, *supra* note 3, at 10; *cf.* N.Y. L. Sch. Diane Abbey L. Inst. for Child. And Fams., Beyond Permanency One Year Later: Looking Forward, Looking Back 40 (2015), https://www.clcny.org/files/120560604.pdf [https://perma.cc/3RA7-MUDB] [hereinafter *BEYOND PERMANENCY*] (discussing the importance of sibling relationships and concluding "the adoption of children in foster care necessitates considerations for adoption practices that typically do not exist in traditional neonatal adoptions").

[63] *See* U.S. Child.'s Bureau, Sibling Issues in Foster Care and Adoption (2019), https://www.childwelfare.gov/pubpdfs/siblingissues.pdf [https://perma.cc/7WZM-RRFU].

[64] *Id.*; *see also* Sabrina M. Richardson & Tuppett, *Siblings in Foster Care: A Relational Path to Resilience for Emancipated Foster Youth*, 47 Child. & Youth Servs. Rev. 378, 379 (2014) ("Sibling effects may take on disproportionate salience in contexts of risk, particularly among foster youth given their relational adversity, deprivation, and disruption.").

[65] *See* Achieving Permanency, *supra* note 3, at 9.

[66] *See* Chris Gottlieb, *Remembering Who Foster Care Is for: Public Accommodation and Other Misconceptions and Missed Opportunities in Fulton v. City of Philadelphia*, 44 Cardozo L. Rev. 1, 28–30 (2022).

[67] N. Am. Council on Adoptable Child., Race/Ethnic Background and Child Welfare (2022), https://www.nacac.org/advocate/nacacs-positions/ethnic-background [https://perma.cc/LFG8-PXDD]; *see also* G.A. Res. 44/25, Art. 30, Convention on the Rights of the Child (Nov. 20, 1989) (declaring that "In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her

child welfare officials preserve the "child's connections to his or her neighborhood, community, faith, extended family, Tribe, school, and friends."[68] And the American Bar Association has specifically urged law and policymakers to "[e]nsure all legal decisions, policies, and practices regarding children's wellbeing respect the value of Black children and families' racial, cultural, and ethnic identities and the connections, needs, and strengths that arise from those identities."[69] Yet despite these aspirational statements, the child welfare establishment has long ignored the concern that terminating parental rights significantly increases the chances that children will lose these connections. As Annette Appell, put it, "[w]hen mothers lose their children, they lose their chance to pass on their language, culture, and values, and their children lose their chance to receive these social goods. This loss can compromise individual, cultural, and even political identity."[70]

It is particularly troubling that we impose these losses on foster children given that Black and Native American children are significantly overrepresented in foster care.[71] As the number of adoptions from foster care has risen in the wake of ASFA, so too has the percentage of transracial adoptions, rising to 28% in 2019,[72] and the vast majority of these adoptions involve non-

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group, to enjoy his or her own culture, to profess and practise his or her own religion, or to use his or her own language").

[68] Admin. for Child. & Fams., U.S. Dep't Health & Hum. Servs, Children and Family Services Reviews: Onsite review Instrument and Instructions 49 (2022), https://www.acf.hhs.gov/sites/default/files/documents/cb/cfsr-r4-osri-fillable.pdf [https://perma.cc/KK7R-YQRJ].

[69] American Bar Association, Resolution 606, at 1 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf [https://perma.cc/XEL9-5P7M].

[70] Annette R. Appell, *Bad Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 760 (2007).

[71] Children's Defense Fund, *The State of America's Children* (2023), https://staging.childrensdefense.org/the-state-of-americas-children/soac-2023-child-welfare/ [https://perma.cc/3FD7-VLK5] (reporting "Black children comprise 14% of children nationally, but 23% of children in foster care" and "American Indian/Alaska Native children represent less than 1% of children nationally, but over 2% of children in foster care"). Some have argued that the racial disproportionality in foster care is a result of Black and Native American parents disproportionately maltreating their children, which they attribute to disproportionate "risk factors for maltreatment, such as extreme poverty, serious substance abuse, and single parenting." *See, e.g.*, Elizabeth Bartholet, *The Racial Disproportionality Movement in Child Welfare: False Facts and Dangerous Directions*, 51 Ariz L. Rev. 871, 874 (2009). Others have persuasively argued that the racial disproportionality of foster care results from the history of structural racism in the United States and, particularly, in American child welfare efforts. *See, e.g.*, Dorothy Roberts, Torn Apart: How the Child Welfare System Destroys Black Families—and How Abolition Can Build a Safer World (2022); Fighting Institutional Racism, *supra* note 6. Even if one rejects the strong arguments that more Black and Native American children are in foster care than should be there, the fact that terminations of parental rights are more likely to sever the cultural and community connections of children from disadvantaged communities should evoke profound hesitation. *See* Gottlieb, *supra* note 66, at 38–42 (arguing for extreme caution in allowing legal rules regarding the child welfare system to perpetuate disproportionate harms given the history of indefensible family separation in American child welfare practices).

[72] Allon Kalisher, Jennah Gosciak & Jill Spielfogel, Off. of the Assistant Sec'y for Planning & Evaluation, The Multiethnic Placement Act 25 Years Later 4 (2020), https://aspe.hhs.gov/sites/default/files/private/pdf/264526/MEPA-Data-report.pdf [https://perma.cc/47YF-K2JM].

white children being adopted by white parents.[73] As a result, over the past generation, tens of thousands of children of color have lost connections to their communities of origin because their parents' rights were terminated.

In modern society, ethnic and racial identity in particular are critical aspects of self-esteem and social belonging, and challenges to the development of positive ethnic and racial identity can have negative developmental and psychological effects.[74] When adoptive parents do not share the ethnic or racial identity of their adopted children, these parents may not possess the knowledge or ability to support optimal identity development.[75] And they may be unqualified to "successfully prepare their children for survival in a society where racism and discrimination occur."[76]

One systematic literature review identified several studies of foster children that "reported disconnection from ethnic, racial or cultural backgrounds due to separation from family and community."[77] The review explained:

> [F]oster children who were transracially placed described processes of racial/ethnic identity confusion or 'identity stripping'. Because of being disconnected, they missed ethnic minority role models in order to explore their racial/ethnic minority identity.[78]

Breaking cultural and community ties by removing Black children from Black communities is not only harmful to the individual children; it also inflicts incalculable harm to the communities from which they are taken. As Dorothy Roberts has explained, "The disproportionate removal of individual Black children from their homes has a detrimental impact on the status of Blacks as a group" because it "damages Black people's sense of personal and

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[73] *Id.* at 11–12 (stating "[c]omparing trends over time, we see that the percentage of transracial adoptions among all adoptions of Black children increased 12 percentage points from 2005–2007 to 2017–2019, from 21 percent to 33 percent . . . Thus, Black children experienced the greatest increases in transracial adoption"); *see also* Nat'l Council for Adoption, Profiles in Adoption, Part One: What we Learned 33, 39 (2022), https://adoptioncouncil.org/wp-content/uploads/2022/07/Profiles-in-Adoption-Part-One.pdf [https://perma.cc/Q6AC-AF7X] (reporting approximately 68% of adoptive mothers and 74% of adoptive fathers are white while 49% of the children adopted from foster care are white); Kalisher et al., *supra* note 72, at 4 (finding 33% of Black children adopted from foster care are adopted by non-Black adoptive parents).

[74] Clementine J. Degener, Diana D. van Bergen & Hans W. E. Grietens, *The Ethnic Identity of Transracially Place Foster Children with an Ethnic Minority Background: A Systematic Literature Review*, 27 Child. & Soc'y 201, 203 (2021); Maurice Anderson & L. Oriana Linares, *The Role of Cultural Dissimilarity Factors on Child Adjustment Following Foster Placement*, 34 Child. & Youth Servs. Rev. 597, 598 (2012); Tanya M. Coakley & Kenneth Gruber, *Cultural Receptivity Among Foster Parents: Implications for Quality Transcultural Parenting*, 39 Soc. Work Res. 11, 11 (2015); Ariella Hope Stafanson, *Supporting Cultural Identity for Children in Foster Care*, Am. Bar Ass'n (Nov. 20, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/supporting-cultural-identity-for-children-in-foster-care/ [https://perma.cc/X6NS-QZS3]; Jessica Schmidt et al., *Who Am I? Who Do You Think I Am? Stability of Racial/Ethnic Self-Identification Among Youth in Foster Care and Concordance with Agency Categorization*, 56 Child. & Youth Servs. Rev. 61, 61 (2015); Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 Future Child. 75, 82 (2004).

[75] Degener et al., *supra* note 74, at 203.

[76] *Id.*

[77] *Id.* at 207.

[78] *Id.*

community identity and weakens Blacks' collective ability to overcome institutionalized discrimination and to work toward greater political and economic strength."[79] The impact is particularly severe when it is concentrated in targeted neighborhoods, as it often is.[80] Put more bluntly: "Family disintegration leads to community disintegration."[81] As I've said elsewhere, these community interests include "both the affirmative interest in retaining members born into a group to support the growth, vibrancy, and perhaps even survival of the group, and . . . an interest in avoiding the negative effects of treating certain groups as less worthy of raising children than others."[82]

Dorothy Roberts has explained the pernicious way that treating a group as less worthy not only reflects but reinforces stereotypes, with the child welfare system doubling down on numerous stereotypes of unfit, "careless" Black mothers, who put their own needs before the needs of their children (as in tropes of the "welfare queen" and "crack babies"), absent Black fathers, and dysfunctional (matriarchal) Black families.[83] These are entwined with and support stereotypes that sustain other oppressive systems as well: "The same mythology about Black maternal depravity legitimizes the massive disruption that both prison and child welfare systems inflict on Black families and communities . . . Stereotypes of maternal irresponsibility re-created by the child welfare system's disproportionate supervision of Black children help to sustain mass incarceration."[84]

The direct threat that family severance poses to Native American communities has been even more blatant. Tribes have noted "'that there is no resource more vital to the [tribes'] continued existence and integrity . . . than its children,' who 'are the future of their tribes and vital to their very existence.'"[85] The longstanding child welfare policies of taking Native American children from their families in order to "civilize" them at residential facilities or through adoption decimated Native families and tribal communities.[86] With these precise concerns at the forefront, in 1978, Congress recognized

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[79] Dorothy E. Roberts, Shattered Bonds: The Color of Child Welfare 236–37 (2002).

[80] *Id.* at 240; *see* NYC Fam. Pol'y Project, Racial Disparities (2023), https://familypolicynyc.org/data-brief/racial-disparities/ [https://perma.cc/B2JV-BER4] (noting the extreme concentration of child removals in heavily Black and Latino neighborhoods).

[81] Roberts, *supra* note 79, at 240.

[82] Gottlieb, *supra* note 66, at 30 (citing Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. Rev. L. & Soc. Change 33, 79 (1994)).

[83] Roberts, *supra* note 79, at 60–65. For an important debunking of the "crack baby" trope see The Editorial Board, Opinion, *Slandering the Unborn*, N.Y. Times (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://perma.cc/2779-JKHR].

[84] Roberts, *supra* note 71, at 211.

[85] Amelia Tidwell, *The Heart of the Matter: ICWA and the Future of Native American Child Welfare*, 43 J. Nat'l Ass'n Admin. L. Judiciary 126 (2023).

[86] *See, e.g.*, Lila J. George, *Why the Need for the Indian Child Welfare Act?*, 5 J. Multicultural Soc. Work 165, 169 (1997); Elizabeth Prine Pauls, Encyc. Britannica, The Outplacement and Adoption of Indigenous Children (2024), https://www.britannica.com/topic/Native-American/The-outplacement-and-adoption-of-indigenous-children [https://perma.cc/YY3M-HHX2]; Addie Rolnick & Kim Pearson, *Racial Anxieties in Adoption: Reflections on Adoptive Couple, White Parenthood, and Constitutional Challenges to the ICWA*, 2017 Mich. St. L. Rev. 727, 733 (2017).

the importance of preventing the harms terminating parental rights imposes. In enacting the Indian Child Welfare Act (ICWA),[87] Congress stressed the need to prevent the "racial harm . . . [of] severing Native children from tribal communities."[88]

Black and Native American children are particularly likely to be disconnected from their communities by termination of parental rights because they are significantly over-represented in foster care, but the threat of community and cultural dislocation is relevant to all children. Specialized foster care agencies have been established in attempts to counter this threat by recruiting foster parents from specific religious and ethnic communities with the aim of keeping children in those communities if they are separated from their parents, but such specialized agencies care for only a tiny fraction of the children adopted from foster care.[89]

Particularly troubling is the effect of combining ASFA's pressure to terminate parental rights with the Multiethnic Placement Act (MEPA) as revised in 1996.[90] MEPA's purpose was to prohibit agencies from "delay[ing] or deny[ing] the placement of a child for adoption or into foster care, or otherwise discriminat[ing] in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child,

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[87] H.R. Rep. No. 95-1386, at 27 (1978); *see also Indian Child Welfare Program: Hearing Before the S. Subcomm. on Indian Affairs of the Comm. on Interior and Insular Affairs*, 93d Cong. (1974).

[88] *See* Rolnick & Pearson, *supra* note 86, at 732. The destruction of Native families—and the existential threat that poses to their tribes—continues. *See* Jessica Lussenhop & Agnel Phillip, *Native American Families Are Being Broken Up in Spite of a Law Meant to Keep Children With Their Parents*, ProPublica (June 15, 2023), https://www.propublica.org/article/native-american-parental-rights-termination-icwa-scotus [https://perma.cc/98GD-AUAJ]; Christopher Wildeman *et al.*, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 Child Maltreatment 32, 35 (2020) (concluding that between 2000 and 2016, "Native Americans had higher cumulative risks of having parental rights terminated than all other groups").

[89] *See* Gottlieb, *supra* note 66, at 48–49*; see also Our Mission*, Muslim Foster Care Ass'n, https://muslimfostercare.org/our-mission [https://perma.cc/7KTK-6T5R] (last visited August 29, 2023) (describing organization's goals as encouraging Muslims to become foster parents, assisting Muslim foster families, and educating the Muslim community about the religious responsibility of fostering and adoption); About KFAM, Korean Am. Fam. Servs., https://www.kfamla.org/upage.aspx?pageid=u01 [https://perma.cc/XLP9-GQBZ] (last visited August 29, 2023) (stating Korean American Family Services' mission to "empower underserved Korean American and Asian Pacific Islander families" and "specializ[ation] in providing linguistically and culturally appropriate services through its multilingual and multicultural staff" and that "speak directly to the challenges among immigrant families undergoing trauma or adaptation stresses"); *About Us*, Coal. for Hisp. Fam. Servs., https://www.hispanicfamilyservicesny.org/about-us [https://perma.cc/R6FR-698U] (last visited August 29, 2023) (program established to address "concern[] about the status of child welfare services to Latino children and families in New York City" and "provide community-based foster care services to Hispanic families"); *Foster Care*, Ohel, https://www.ohelfamily.org/service/foster-care [https://perma.cc/M2PA-FGKF] (last visited August 29, 2023) (describing Ohel Children's Home and Family Services as "Ensuring Jewish homes for Jewish children").

[90] Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. §§ 5115a, 622(b) (1994)); *see also* Joan Heifetz Hollinger, A.B.A. Ctr. on Child. & the Law, A Guide to the Multiethnic Placement Act of 1994 as Amended by the Interethnic Adoption Provisions of 1996 22 (1998), https://www.americanbar.org/content/dam/aba/administrative/child_law/GuidetoMultiethnicPlacementAct.pdf [https://perma.cc/NEA4-NDNF].

involved."[91] Supporters of MEPA were concerned that Black children were remaining in foster care longer than white children because they were less likely to be adopted.[92] The legislation was passed in the wake of heated debate that was generated when Black social workers began denouncing transracial adoptions and the National Association of Black Social Workers (NABSW) issued a statement condemning transracial adoption as inimical to Black children's interests.[93] A full discussion of MEPA is beyond the scope of this paper, but whatever disagreement there is about whether it serves the best interests of foster children,[94] it is clear that the number of transracial adoptions has increased significantly since MEPA passed.[95] As a result, under current practice, terminating parental rights frequently leads to children being disconnected from their communities of origin.

3. Legal Orphans

Since the inception of the legal concept of terminating parental rights, its purpose has been to allow children to be adopted. When termination of parental rights statutes introduced stand-alone termination proceedings,

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[91] Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 108 Stat. 4056 (codified as amended at 42 U.S.C. §§ 5115a, 622(b) (1994)).

[92] *See* Susan L. Smith et al., Finding Families for African American Children: The Role of Race & Law in Adoption from Foster Care 30 (2008); David Ray Papke, *Transracial Adoption in the United States: The Reflection and Reinforcement of Racial Hierarchy*, 2013 Utah L. Rev. 1041, 1060 (2013); Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 Duke J. Gender L. & Pol'y 99, 104–05 (1995).

[93] Carp, *supra* note 18, at 169; Nat'l Ass'n of Black Soc. Workers, Position Statement on Trans-Racial Adoptions (1972), https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/position_statements_papers/nabsw_trans-racial_adoption_.pdf [https://perma.cc/6BX3-KC6W]. The NABSW statement was widely understood to condemn transracial adoption as a form of cultural genocide, although the statement itself did not use that term. Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 L. & Soc'y Rev. 813, 835 (2002) ("[C]ontrary to popular mythology, [the NABSW's] position statement did not include the phrase 'racial and cultural genocide.' Though the president of the association may have cast transracial adoption as 'cultural genocide' in a conference speech."). The debate over transracial adoption continues with some commentators noting "the most obvious feature of transracial adoption is that whites serve overwhelmingly as the adopting race and also exercise the most control in the adoption process," and arguing "that transracial adoption reflects and reinforces racial hierarchy," while others assert it serves Black children. *Compare* David R. Papke, *Transracial Adoption in the United States: The Reflection and Reinforcement of Racial Hierarchy*, 2013 Utah L. Rev. 1041, 1042 (2013) *with* Elizabeth Bartholet, *Commentary, Cultural Stereotypes Can and Do Die: It's Time to Move on With Transracial Adoption*, 34 J. Am. Acad. of Psychiatry & L. 315 (2006).

[94] *See In Adoption, Does Race Matter*? N.Y. Times, (June 10, 2014), https://www.nytimes.com/roomfordebate/2014/02/02/in-adoption-does-race-matter/in-adoption-race-should-not-be-ignored [https://perma.cc/353P-UH7D].

[95] *See* Mathematica, Child Welfare Snapshot: Transracial Adoption from Foster Care in the U.S. (2020), https://aspe.hhs.gov/sites/default/files/private/pdf/264526/MEPA-Graphical-Factsheet.pdf [https://perma.cc/45T9-RE8P]. While MEPA mandated efforts to recruit adoptive parents who reflect the diversity of the children in foster care, states have not met that mandate. Kalisher et al., *supra* note 72, at 1–2 (analyzing MEPA's first 25 years and concluding: "The number of adoptions has increased; transracial adoptions have increased more" and "Diligent recruitment is the systematic process through which child welfare agencies recruit, retain, and support foster and adoptive families who reflect the ethnic diversity of children awaiting placements . . . . Most states' diligent recruitment efforts are "needing improvement.").

which for the first time allowed termination of birth parents' rights separate from adoption, a new legal status was created: legal orphanhood.[96] While the goal of terminating parents' rights was to make children adoptable, there was no guarantee they would be adopted. For their first fifty years, the termination statutes were not used all that much.[97] That changed when child welfare policy took a turn in the late twentieth century with the passage of the Adoption and Safe Families Act. As intended, AFSA's strict timelines and financial penalties for failing to meet those deadlines put enormous pressure on states to file more termination of parental rights petitions, and courts began terminating parental rights in record numbers.[98] But the intended adoptions do not always materialize. Often times, adoptive homes are not found, particularly for older children. Even when pre-adoptive placements are identified, the adoptions frequently do not go through.[99] A shocking 25% of children whose parents' rights are terminated will never be adopted.[100]

Even before ASFA, there were legal orphans created by court decree. But since ASFA's enactment, as the number of terminations of parental rights has increased, so has the number of legal orphans produced each year. In the twenty-first century alone, the United States has created more than 200,000 legal orphans.[101] These young people have lost their legal ties to their families of origin, and they remain legally unconnected to any family.[102]

While there is strong disagreement about how often adoption serves children's interests, it is indisputable that legal orphanhood does not. In addition to the patent detriment of living without family connection, legal orphans experience poor outcomes on virtually all social outcome measures, including homelessness, incarceration, mental and physical health, education level, and unemployment.[103] It should not be surprising that in a family-based society, particularly one without a strong social safety net, individuals left without family ties fare poorly both emotionally and materially.

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[96] Gottlieb, *supra* note 11, at 107; *see also* 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, 121–22 (1995).

[97] Gottlieb, *supra* note 11, at 106.

[98] The AFCARS Report, No. 12, *supra* note 42, at 11.

[99] U.S. Dep't of Health and Human Services, Discontinuity and Disruption in Adoptions and Guardianships 6 (2021), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/s_discon.pdf [https://perma.cc/GQ27-5G8U] (estimating that 10 to 25 percent of adoptive placements disrupt before the children are adopted) [hereinafter Discontinuity and Disruption].

[100] Achieving Permanency, *supra* note 3, at 16. Other children will be adopted, but the adoptions will disrupt, leaving the children disconnected again. Discontinuity and Disruption, *supra* note 99, at 6.

[101] Sankaran & Church, *supra* note 3, at 258.

[102] Nat'l Council of Juv. and Fam. Ct. Judges, Forever Families: Improving Outcomes by Achieving Permanency for Legal Orphans 4–5 (2013) ("A legal orphan may have no legal relationship with her parents' extended families, might not inherit from his parents or their families, and is effectively a child of the state. With no family connections, these children frequently age-out of the foster care system once they reach adulthood.").

[103] There appears to be no data that distinguishes youth whose parents' rights have been terminated from other youth who exit foster care without family connection, but it is widely acknowledged that legal orphans suffer poor outcomes. *See id.* at 5; LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 Va. J. Soc. Pol'y & L. 318, 326–27 (2010); Sankaran & Church, *supra* note 3, at 258–59.

Legal orphanhood could be said to be the quintessential illustration of the harshness of American social welfare policy and its insistence on trying to serve children without serving their families. Although data demonstrates that providing material support to parents lowers the incidence of child maltreatment, the U.S. does not provide that support, electing instead to take children from their families and provide for their material support in foster care. If parents do not change their circumstances within 15 months, the state legally severs the family relationship without guaranteeing the child an alternative family life, and the state then ends its support for these youth when they come of age. The individualism of this policy is so extreme that it not only leaves individuals without state support, but it also actively breaks ties created in the private family realm and then leaves youths wholly untethered when they come of age.

4. Harm to Parents

In other contexts, the loss of a child is recognized as perhaps the most egregious harm one can suffer, but until recently there was little attention given to the loss experienced by those whose children are permanently taken from them by the government. Only in recent years have advocacy groups and the mainstream media begun focusing attention on the issue and acknowledging the pain terminating parental rights inflicts.[104] The lack of acknowledgment and support for those who have suffered the loss of a child due to termination of parental rights has been noted to exacerbate the harm,[105] and there have been increasing calls to center the voices of those who have been harmed.[106]

Within the growing family defense movement, directly impacted parents are speaking out about the harms of the family regulation system generally and the particular devastation of termination of parental rights. Parents whose rights have been terminated have spoken bluntly:

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[104] Agnel Phillip, Eli Hager & Suzy Khimm, *The "Death Penalty" of Child Welfare: In Six Months or Less, Some Parents Lose Their Kids Forever*, ProPublica (Dec. 20, 2023), https://www.propublica.org/article/six-months-or-less-parents-lose-kids-forever [https://perma.cc/XK35-MVBV]; Joseph Shapiro, *In Some States, An Unpaid Foster Care Bill Could Mean Parents Lose Their Kids Forever* (January 19, 2023), NPR, https://www.npr.org/2023/01/19/1148829974/foster-care-parental-rights-child-support [https://perma.cc/Q4LQ-VDGH]; Hum. Rights Watch, *supra* note 3, at 88 ("Parents told Human Rights Watch that they felt their family was 'torn apart,' 'ripped,' or 'destroyed' after their parental rights were terminated. Interviewees said they felt 'life just isn't worth living,' they 'struggle daily to push forward always wondering and worrying,' they are 'grieving [their] living child,' and experience 'pain [that] is always there.'").

[105] Sankaran & Church, *supra* note 3, at 258. ("Parents with children permanently removed from their care often experience 'disenfranchised grief,' or grief not formally recognized and sanctioned by society." (quoting Sherrie McKegney, Silenced Suffering: The Disenfranchised Grief of Birth Mothers Compulsorily Separated From Their Children (2003))).

[106] Albert et al., *supra* note 4; Repeal ASFA, https://www.repealasfa.org/ [https://perma.cc/2DLC-57DG] (last visited August 29, 2023); Kathleen Creamer & April Lee, *Reimagining Permanency: The Struggle for Racial Equity and Lifelong Connections*, Fam. Integrity & Just. Winter 2022, at 62, 66 ("We also have much to learn from parents who have experienced the pain of our punishing presumption for adoption.").

> Please believe me when I say that there isn't a single day that goes by wherein I don't long for and desperately miss my beautiful and brave children.[107]

> Even until this day I'm still fighting . . . just to have contact with my children . . . I am angry. I am tired. I am scared. I am carrying intergenerational pain . . . [that reaches my] grandmother who raised me—her fear of dying before she gets to see her great grandchildren again . . . A generational curse—it has to stop.[108]

> Far too many of us had known or witnessed the pain of TPRs—better known as the civil death penalty—and agreed that it is not an exaggeration to liken them to family death. TPRs erased families, children's names were changed, and many parents were left wondering if they would ever get to hear the voices of their babies.[109]

Even when parents are able to continue to see their children after they are adopted, termination of their parental rights brings an enormous sense of loss:

> For my family, this gruesome violation hangs over everything, all the time. When I am apart from my daughters, my life feels like a small, windowless room. When I am with them, I feel like a ghost, haunting a life that is no longer mine. I can look at them, hold them, smell them, play with them, but nothing I say or do really matters, because their lives are now dictated by someone else, someone whose values are completely at odds with my own.[110]

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[107] Open Letter from Latagia Copeland-Tyronce to Lucas Cnty. Juv. Ct. Judge Denise Navarre Cubbon (Oct. 24, 2018), https://medium.com/latagia-copeland-tyronces-tagi-s-world/an-open-letter-to-lucas-county-juvenile-court-judge-denise-navarre-cubbon-60611a6f9248 [https://perma.cc/VJ2U-27WV]; *see also* Latagia Copeland-Tyronce, *I Wrongly Lost Seven of My Children to the White Supremacist Child Welfare System and Five to Transracial Adoption: Damn NAAM!*, Medium (Nov. 11, 2019), https://medium.com/latagia-copeland-tyronces-tagi-s-world/i-wrongly-lost-seven-of-my-children-to-the-white-supremacist-child-welfare-system-and-five-to-566103aeeb44 [https://perma.cc/AW79-FNEK] ("I want to take this time to let my children know—and the countless other (Afro-American) children out there who were needlessly and heinously separated from their parents and families—that you are loved. You weren't not wanted.").

[108] Colum. J. of Race & L., *A Conversation on An Abolitionist Approach to Reimagine Child Welfare*, YouTube (Jul. 13, 2021), https://www.youtube.com/watch?v=aHXEqpU8EGY&ab_channel=ColumbiaJournalofRaceandLaw [https://perma.cc/8H9Z-SAJR]; *see also* Albert & Mulzer, *supra* note 9, at 558 (describing Albert's decision to surrender her parental rights under threat of termination: "The other parties told her she had five minutes to decide what she wanted to do: go to trial and take the risk that she would lose her children forever, or agree to surrender her rights on the condition that she be permitted postadoption visitation . . . . Ashley left the room and went into the stairwell. She kicked, screamed, sobbed, spit, and slapped the walls until her hands ached. She felt completely powerless. Every part of her wanted to fight back—to fight for her children just as she had been fighting for them ever since they had been removed from her care—but she knew she could not [risk ever seeing them again].") Although Albert surrendered her parental rights on the condition she and her son have four visits a year, they were not allowed visits.

[109] Albert et al., *supra* note 4, at 867.

[110] Elizabeth Brico, *Forced, Rapid Adoptions are a Weapon of the Drug War*, Filter (Dec. 21, 2020), https://filtermag.org/forced-adoption-drug-war/ [https://perma.cc/D873-95G5].

II. Parsing Parental Rights

In light of these profound harms, it is past time for the child welfare establishment to recognize it was a mistake to anoint adoption as the preferred outcome for children whose parents are unable to raise them alone. Over decades, numerous commentators—myself included—have recommended lowering the number of terminations of parental rights.[111] There are several possible routes to doing so. First and foremost, we should be separating far fewer children from their families.[112] Additionally, many of the children in foster care could safely return home—some without any financial support and even more if the material support provided to foster and adoptive parents were provided to birth parents instead.[113] If we reduced the number of children removed in the first place, and increased the number of children who are returned to their families, we would dramatically reduce the pool of children about whom we need to ask whether adoption is appropriate. And even when children cannot safely return home, permanent arrangements other than adoption would often serve them better.[114]

Specific recommendations for lowering the number of adoptions of foster children include loosening ASFA's requirements[115] or repealing it altogether,[116] as well as prioritizing other permanency outcomes, such as kinship guardianship.[117] In addition, prior commentators have also suggested

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[111] *See, e.g.*, Marsha Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423 (1983); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 Stan. L. Rev. 623 (1976); Sankaran & Church, *supra* note 3, at 264; Chris Gottlieb, *The Lessons Of Mass Incarceration For Child Welfare*, N.Y. Amsterdam News (Feb. 1, 2018), https://amsterdamnews.com/news/2018/02/01/lessons-mass-incarceration-child-welfare/ [https://perma.cc/TB6X-TE2Y]; Albert & Mulzer, *supra* note 9.

[112] *See* Shanta Trivedi, *The Harm of Child Removal*, 43 N.Y.U. Rev. L. & Soc. Change 523 (2019); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 Harv. L. Rev. 1716 (2000).

[113] *See* JiYoung Kang Jennifer L. Romicha, Jennifer L. Hookb, JoAnn S. Leec & Maureen Marcenkoc, *Dual-System Families: Cash Assistance Sequences of Households Involved with Child* Welfare 10, 14 J Pub. Child Welf. 352 (2016) (finding that increasing public assistance is linked to speedier reunification); Kathleen Wells & Shenyang Guo, *Reunification of Foster Children Before and After Welfare Reform*, 78 Soc. Serv. Rev. 74, 89–90 (concluding "[c]hildren whose mothers lost a significant amount of cash assistance after their children's placements were reunified more slowly than were children whose mothers did not, underscoring the centrality of a consistent source of income to reunification speed").

[114] *See* Sankaran & Church, *supra* note 3, at 261–62; *see also* Gupta-Kagan, *supra* note 9; Godsoe, *supra* note 9, at 164.

[115] Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Family Acts Can't Be Repealed, Here's How to At Least Make it Better*, Imprint, (Feb. 9, 2021), https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490 [https://perma.cc/7998-X2B8; Hum. Rights Watch, *supra* note 3, at 142 (recommending eliminating the presumption that continued family separation is in children's best interests once they have been in foster care 15 months, prohibiting termination of parental rights for children who have been in foster care less than 24 months, and creating exceptions to the ASFA timeline requirements).

[116] *See* Smith & Trivedi, *supra* note 53, at 32; Dorothy Roberts, *The Clinton-Era Adoption Law That Still Devastates Black Families Today*, Slate (Nov. 21, 2022), https://slate.com/news-and-politics/2022/11/racial-justice-bad-clinton-adoption-law.html [https://perma.cc/7TD8-NRZG].

[117] *See* Sankaran & Church, *supra* note 3, at 260–61; Gupta-Kagan, *supra* note 9, at 89; Godsoe, *supra* note 9, at 27; Mark Testa, *Disrupting the Foster Care to Termination of Parental Rights Pipeline*, Fam. Just. L. Q. 74 (2022).

adjustments to termination of parental rights statutes that would lower the number of legal orphans created when adoption is pursued,[118] none of which has yet been incorporated into statutory law.

These prior recommendations have generally accepted the basic premise that terminating parental rights is a necessary precursor to making children available for adoption.[119] In order to understand and assess the possible alternatives to this premise, it will be helpful to step back and articulate certain aspects of parental rights that are embedded in current law. These aspects often go unarticulated because they are so deeply held as to be uncontested in the case law. Bringing them to the fore reveals how anomalous the termination of parental rights approach is, and parsing the bundle of parental rights points the way to sensible alternatives.

A. The Exceptional Treatment of Rights in Termination Proceedings

When parental rights are terminated, typically all legal rights stemming from the parent-child relationship are understood to end.[120] In a termination proceeding, these rights are treated as a bundle that either remains wholly intact or is entirely severed at the end of the proceeding.[121] It is unsurprising that this all-or-nothing approach was assumed when termination of parental rights statutes were conceived and enacted because at that time policymakers were focused primarily on children whose parents were understood to have abandoned them.[122] It was believed that there was no parent who was involved with these children and therefore no one with whom it would have made sense to leave any residual parental rights.[123]

Importantly, however, the assumption that parental rights travel together in an all-or-nothing way is wholly at odds with other aspects of family law. Rather, courts routinely curtail one or some of a parents' rights without curtailing all of their parental rights. It is worth examining how the law works in these situations to understand how exceptional termination practice is and to see how it might be brought more in line with broader principles of family and constitutional law.

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[118] Kirstin Andreasen, *Eliminating the Legal Orphan Problem*, 16 J. Contemp. L. Issues 351 (2007); Guggenheim, *supra* note 96, at 134–38.

[119] For an early, insightful analysis that attacked the traditional approach to terminating parental rights, see Marsha Garrison, *Why Terminate Parental Rights?*, 35 Stan. L. Rev. 423 (1983), which proposed significantly limiting the use termination of parental rights.

[120] Some states make an exception for continued inheritance rights to survive termination of parental rights. Richard Lewis Brown, *Undeserving Heirs?—The Case Of The "Terminated" Parent*, 40 U. Rich. L. Rev. 547, 552–57 (2006).

[121] *See, e.g., In re Int. of Giavonna G.,* 876 N.W.2d 422, 431 (Neb. Ct. App. 2016) ("A termination of parental rights is a final and complete severance of the child from the parent and removes the entire bundle of parental rights; therefore, with such severe and final consequences, parental rights should be terminated only in the absence of any reasonable alternative and as the last resort.").

[122] Gottlieb, *supra* note 11, at 167.

[123] *Id.*

The occasion for courts to curtail parental rights on a case-by-case basis arises in two general categories.[124] First, courts frequently curtail a parent's right when there is an allegation that doing so is necessary to protect the child from serious harm. These are cases that are typically brought by state officials in child protective proceedings. Such proceedings frequently lead to an intrusion on parents' right to custody if being in the parent's custody is determined to present imminent risk of serious harm to the child. In these cases, when there is a determination of such a risk and even when there is a determination that the parent has abused or neglected the child, the resulting intrusion on the parents' rights is a limited intrusion, not a wholesale intrusion. The parents' right to custody may be disrupted, but the parent retains rights to visitation and to continue to make significant decisions regarding the child's upbringing (regarding for instance the child's education and religious training).[125] At other times in child protective proceedings, courts may not curtail the parents' right to custody, but may limit their right to make a specific decision for the child, such as the right to decline recommended medical treatment. Regardless of views on whether courts tend to over-reach or under-reach in such matters, there is no question that the various parental rights do not all stand or fall together, even when a parent has violated their parental responsibility. This point was highlighted by the Supreme Court in *Santosky vs. Kramer*, when it explained "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."[126]

The second category of cases in which courts regularly make determinations that limit parental rights are those in which the parents of a child are in disagreement and bring the dispute to court for resolution. Frequently, of course, these disputes involve questions of who should have physical custody, who should have legal custody (meaning decision-making authority), and the extent of visitation a non-custodial parent has. In these private party cases, courts have authority to determine which of the parents' preferences prevails, thereby curtailing the rights of the other parent, but the rights of one parent are curtailed only to the extent necessary to allow the other parent to exercise their authority.[127] For instance, when courts give one parent physical custody,

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[124] Third-party visitation cases might be considered a third category, though some third-party visitation cases are brought by adults in a parental role (for example, visitation claims brought by former partners of birth parents where the couple had been raising a child together) and therefore are better seen as cases about who counts as a parent. Parents' rights to make decisions about who visits with their children are sometimes curtailed in third-party visitation cases. As with the other types of cases discussed in the text, court determinations to intrude on parental rights to make visitation decisions leaves the parents' other rights untouched.

[125] *See* Santosky v. Kramer, 455 U.S. 745, 753 (1982); Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 828 n.20 (1977).

[126] 455 U.S. at 753.

[127] Courtney Joslin and Douglas NeJaime have demonstrated that it is not uncommon for courts to recognize and allocate parental rights to a child among more than two adults. Courtney G. Joslin & Douglas NeJaime, *Multiparenthood*, 99 N.Y.U. L. Rev. (forthcoming 2024). They explain that "parental rights can be unbundled and distributed unevenly across more than two parents." *Id.* at 39.

the default rule is that the other parent will have a right to visitation. The fact that a court is intruding on what would otherwise be the presumptive right to parental custody does not mean the parent loses the right to visitation, which remains strong (and typically can only be overcome with a particularized showing that such visitation would be significantly harmful to the child).[128]

In both these categories of cases, it is understood that courts may not intrude upon the parents' rights more than is justified by the specific need to protect the child or to resolve a dispute between parents whose rights are in tension. These legal regimes thrive on the understanding that the least-rights-intrusive approach serves not only the parents, but also the children. Indeed, these points are so broadly accepted that they generally go without comment.

The two categories discussed thus far involve situations in which an individual parent's rights are encroached upon because of something specific to their situation—either they are in a dispute with the other parent and the court must arbitrate between two competing parental rights holders, or state officials believe the parent's actions or failure to meet their parental responsibilities are putting that parent's child at risk. There are, of course, also times when legislatures intrude into areas that would otherwise be within the realm of parental authority and limit parents' rights based not on the circumstances of a particular family, but rather based on a policy view that certain aspects of children's upbringing should be regulated by the state. Compulsory education laws and child labor laws, for instance, intrude generally on all parents' rights to govern how their children spend their time.

Several of the Supreme Court cases that address parental rights do so in the context of challenges to laws that regulate children, or, in other words, laws that constrain options for all parents. In these and other cases, the Court has repeatedly emphasized it is uncontested that the right to parent is a fundamental, constitutionally-protected right.[129] Indeed, with one exception, the Court has sided with parties invoking parents' rights in challenges to democratically enacted laws that restricted parents' choices on child-rearing matters, holding these laws unconstitutional infringements on parental liberty.[130] The Court made clear in each of these cases that legislatures may encroach into parental decision-making, but because they are interfering with constitutionally protected rights, all such restrictions receive heightened scrutiny. For example, states may require children to attend school five days a week—certainly a significant intrusion on parental decision-making authority—but the Court said

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[128] Godsoe, *supra* note 9, at 120–21.

[129] Troxel v. Granville, 530 U.S. 57, 66 (2000) ("In light of this extensive precedent, it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."). Notably, when it overturned the right to abortion in 2022, the Court distinguished claims to that right as "obviously very, very far afield" from the rights at issue in substantive due process cases involving parental rights, indicating that even the current strong divisions on the Court do not put those decisions at risk. Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 273 (2022).

[130] *Compare* Meyer v. Nebraska, 262 U.S. 390 (1923), Pierce v. Society of Sisters, 268 U.S. 510 (1925), Wisconsin v. Yoder, 406 U.S. 205 (1972), *Troxel*, 530 U.S. 57 *with* Prince v. Massachusetts, 321 U.S. 158 (1944).

in *Pierce v. Society of Sisters* that parents maintain the right to choose to send their child to a private school rather than a public school.[131] And in *Wisconsin v. Yoder*, the Court held that although generally states can require compulsory education through age 16, they may not do so when the Amish seek to switch their children out of school at age 14 to pursue vocational training in line with their religious commitments.[132]

Even in the one exception among the parental rights cases where the Supreme Court upheld the application of a state law prohibiting parents from making a particular decision with respect to their child (permitting her to offer a religious periodical for sale on a public street), the Court was clear that upholding a conviction that limited the parental figure's rights in this way left intact the parental right to make other decisions about the child's upbringing.[133]

Each of these cases illustrate that parental rights may be encroached upon only to the extent deemed necessary based on a balancing of the state interest at play against the weight of the parental right. They make clear that even when a state can intrude on parental rights, those rights don't turn off as if on a switch, but rather are partially tempered as on a rheostat.

Of course, to note that these cases weigh competing interests and draw fine lines defining the parameters of the constitutional right involved is not to say anything surprising. When it comes to constitutional rights, it is understood that the particular infringement of a protected right must be justified. Thus, while there is an exception to freedom of the press for national security, it is only information that has been demonstrated to be of a very particular sort that may be restrained. The fact that the government could restrain the publication of information on the location of troops during wartime, does not mean it can restrain publication of the rest of an article in which that information appears.[134] The fact that the government can prevent individuals from carrying guns in certain locations does not mean it can prohibit them from doing so elsewhere.[135] Indeed, the idea that when the government infringes on a fundamental right, it must do so to as limited an extent as possible is baked into the standard of review, which requires that the infringement be narrowly tailored to meet the compelling state interest in play.[136]

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[131] *See* 268 U.S. at 535.

[132] 406 U.S. at 234–35.

[133] *Prince*, 321 U.S. at 171.

[134] *See* New York Times Co. v. United States, 403 U.S. 713, 726 (1971) (Brennan, J., concurring) ("[T]here is a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden . . . . Thus, only governmental allegation and proof that publication must inevitably, directly, and immediately cause the occurrence of an event kindred to imperiling the safety of a transport already at sea can support even the issuance of an interim restraining order.)

[135] D.C. v. Heller, 554 U.S. 570, 626–27 (2008) (overturning a statute prohibiting the possession of handguns, but stating that "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms").

[136] *See, e.g.*, Reno v. Flores, 507 U.S. 292, 301–02 (1993) (government infringements on fundamental rights must be narrowly tailored to serve a compelling state interest).

Put more simply, rights usually do not get turned off in blanket fashion; they get curtailed only so far as necessary to meet a principled justification. In stark contrast, the current approach to terminating parental rights operates on a model that treats parents' rights as all-or-nothing, opting in this one situation to sever the entire bundle of rights rather than to take a more rights-protective approach that would limit the intrusion. At least one appellate court has gone so far as to say that if a court is going to overcome the parent's right to prevent an adoption of her child, it *cannot* do anything less than sever every parental right, and lacks authority to order that visits between the parent and the child continue beyond that determination.[137] This is extraordinary when compared with how courts in other contexts treat parental rights and is directly at odds with the constitutional principle of narrowly tailoring constitutional infringements. It is also directly at odds with the widely espoused "least detrimental alternative" approach to child welfare decision-making, which is endorsed by mental health professionals and lawyers alike, and recommends that state intervention into family life be as unintrusive as possible.[138]

Once we recognize how at odds the all-or-nothing aspect of termination of parental rights practice is to the way we approach other fundamental rights, it becomes easier to see how we might more carefully calibrate restrictions of parental rights. The task becomes applying the more standard approach of minimizing the encroachment by abrogating rights only as far as necessary to achieve the relevant compelling government interest. Examining the rights within the parental rights bundle reveals alternatives that would achieve exactly that.

B. The Strands in the Bundle

The rights parents possess have developed through common law, which has identified the parameters of those rights when efforts to intrude on them have been challenged. Notably, more than any other constitutional right, courts and commentators have discussed parental rights in language that suggests a natural law approach.[139] Blackstone described the parent-child relationship

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[137] *Matter of Hailey ZZ,* 19 N.Y.3d 422 (2012).

[138] *See generally* Joseph Goldstein, Anna Freud & Albert J. Solńit, The Best Interests of the Child: The Least Detrimental Alternative (1996)*; see also* Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 Geo. L. J. 1745, 1747 (1987). ("[T]he theory of minimum intervention is not controversial. Indeed, in its basic form, the new philosophy states nothing more than the premise that the state should not intervene in family life without good reason. This is a proposition with which no one, including earlier advocates of broad discretionary powers for child welfare officials, would likely disagree.").

[139] I do not mean to suggest courts explicitly rely on a natural law theory; they base parental rights in the 14th Amendment (as well as the 1st Amendment when religious issues are involved). But parents' rights cases are devoid of the kind of debates over textualism and originalism seen in discussion of other substantive due process rights. The tend, instead, to describe the rights and responsibilities of parents as "natural" and "intrinsic." *See, e.g.,* Meyer v. Nebraska, 262 U.S. 390, 400 (1923) (describing "the natural duty of the parent to give his children education"); Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 845 (1977) (explaining that "the liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and

as "the most universal relation in nature,"[140] and American courts—both federal and state—have frequently used lofty language to suggest that parental rights are grounded outside of positive law.[141] While there is no comprehensive list of parental rights in statute, case law, or the law review literature, there is wide agreement about the arenas in which parents have rights.[142] The Supreme Court has typically described these arenas with the broad language of the "right to the companionship, care, custody, and management of his or her children."[143] In modern times these rights can be seen as falling into three

tradition"); Padgett v. Dep't of Health & Rehab. Servs., 577 So.2d 565, 570 (Fla. 1991) ("[W]e nevertheless cannot lose sight of the basic proposition that a parent has a natural God-given legal right to enjoy the custody, fellowship and companionship of his offspring.").

[140] 1 William Blackstone, *Commentaries* *458.

[141] *See* Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children."); Lacher v. Venus, 188 N.W. 613, 617 (Wis. 1922) (noting parents' rights have "always been recognized as an inherent, natural right, for the protection of which, just as much as for the protection of the rights of the individual to life, liberty, and pursuit of happiness, our government is formed"); Duchesne v. Sugarman, 566 F.2d 817, 824–24 (2d Cir. 1977) ("The existence of a private realm of family life which the state cannot enter has its source . . . not in state law, but in intrinsic human rights, as they have been understood in this Nation's history and tradition." (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977))).

[142] It is important to note that the term "parents' rights" is being used in contemporary political discourse in ways that have little to do with parents' rights as they have traditionally been addressed in statutes and case law and that are unrelated to the discussion in the text. Traditionally, parents' rights, like other American constitutional rights, have been understood as negative rights, i.e., as rights of individuals against government authority, including against encroachment by laws passed by democratic majorities. Whatever one thinks of the ideology behind recent right-wing efforts to restrict school curricula and otherwise push back on progressive positions, labeling these "parents' rights" measures (as done, for example, with the Parental Rights in Education Act, colloquially known as the "Don't say gay bill"), these efforts are not about parents' rights as traditionally understood. This current use of the term is a rhetorical move intended to build support to *impose* majoritarian views, not protect individual rights from government power. *See* Mary E. Ziegler, Maxine Eichner & Naomi R. Cahn, *The New Law and Politics of Parental Rights* 123 Mich. L. Rev. 26–32 (forthcoming 2024); Jamelle Bouie, *What the Republican Push for 'Parents' Rights' Is Really About*, N.Y. Times (Mar. 28, 2023), https://www.nytimes.com/2023/03/28/opinion/parents-rights-republicans-florida.html [https://perma.cc/8AK3-YRAV]. The discussion in the text is about the parental rights that have traditionally been legally protected in American law.

[143] *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (quoting Lassiter v. Dep't of Soc. Servs. of Durham Cnty., N.C., 452 U.S. 18, 27 (1981)); *see also* Troxel v. Granville, 530 U.S. 57, 66 (2000) (describing "the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

broad categories[144]: (1) rights to physical custody and visitation[145]; (2) inheritance and other financial benefit rights[146]; and (3) decision-making rights.[147]

There is, to be sure, disagreement about the exact metes and bounds of these rights, particularly those that fall into the decision-making category,[148] but there is no serious dispute that the starting point is that parents have important rights in these three areas even though there is sometimes a basis to encroach on them. Thus, for instance, in the first category, there has long been broad understanding that parents have a right to custody that in the normal course trumps the interest of any non-parent seeking custody.[149] And, as noted above, it is understood that if one parent's presumed right to custody must be limited because the two parents do not live together, the non-custodial parent is presumptively understood to have a right to visits with the child.[150] Similarly, there is broad agreement that parents typically hold the rights in the second category: every state provides rights to inheritance through the parent-child relationship;[151] parents have the right to sue for wrongful death of their

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[144] The ability to confer citizenship status may be considered a fourth type of parental rights. Certainly, whether and when a parent's citizenship transfers to a child is an important set of questions, *see* Kerry Abrams & R. Kent Piacenti, *Immigration's Family Values*, 100 Va. L. Rev. 629 (2014), but unlike the categories of parental rights discussed in the text, this right is not typically implicated in terminating parental rights because eligibility for *jus sanguinis* citizenship is conferred at birth. Kristin A. Collins, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 Harv. L. Rev. 170, 170–71 (2017) (describing derivative citizenship or *jus sanguinis* citizenship as "the transmission of citizenship from American parents to their foreign-born children at birth").

[145] *See Troxel*, 530 U.S. at 65 ("The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."); Santosky v. Kramer, 455 U.S. 745, 749 (1982) (explaining that terminating parental rights extinguishes the parent's right to visit with the child).

[146] *See* Jesse Dukeminier et al., Wills, Trusts, and Estates 115 (8th ed. 2009); Brown, *supra* note 120, at 548.

[147] Parham v. J.R., 442 U.S. 584, 624 (1979) (Stewart, J., concurring) ("Under our law, parents constantly make decisions for their minor children that deprive the children of liberty, and sometimes even of life itself."). Parental decision-making rights are often captured by the term "legal custody." Thus when courts divvy up parental rights to parents who do not live together, they generally assign physical custody and legal custody (each of which can be shared jointly by the two parents or assigned to one). For clarity, in the text I use the term "decision-making rights" rather than "legal custody."

[148] There is also disagreement about the source of those rights, with various courts and commentators identifying the justification for them in natural law, a Lockean contract view, other political theories, and the best interests of children, among other sources. *See* Clare Huntington & Elizabeth Scott, *The Enduring Importance of Parental Rights*, 90 Fordham L. Rev. 2529, 2529–35 (2022) (discussing the "traditional libertarian justification" and arguing for a "child-wellbeing rationale" for parental rights); Martin Guggenheim, What's Wrong with Children's Rights 17–27 (2005) (discussing natural law-, Lockean-, and constitutional theory-based justifications for parental rights). The point in the text is that whatever disagreement there is about the bases or extent of the rights, there is broad agreement that these categories are within the arena of parental rights.

[149] *See, e.g.*, Bennett v. Jeffreys, 40 N.Y.2d 543, 545–46 (1976); Lacher v. Venus, 188 N.W. 613, 619–20 (1922).

[150] *See, e.g.*, Zafran v. Zafran 814 N.Y.S.2d 699, 671 (2006) (noting that "as a general rule, some form of visitation by the noncustodial parent is always appropriate"); *see also* Godsoe, *supra* note 9, at 120–21.

[151] Dukeminier et al., *supra* note 146.

children;[152] and both state and federal law allow financial benefits based on parent-child relationships.[153]

Rights in the third category are the most contested because decision-making for youth unavoidably runs into many areas in which there is strong substantive disagreement about what is best for kids, e.g., with respect to vaccines, gender-affirming medical care, abortion, school curriculums, etc. But for present purposes, the critical point is that there is broad agreement that in the first instance, parents make all important decisions for their children, including in areas of contention. As discussed above, parental decision-making authority may be curbed by either (1) general, legislated requirements (so, for example, vaccines may be required, though in turn, parents' free exercise rights may require exceptions allowing them to opt their children out of vaccine requirements), and (2) particularized judicial determinations that a parent's failure to make certain decisions (such as providing medical treatment for a life threatening illness) puts a child at such risk that the parent's right is overtaken by the *parens patriae* interest in protecting the child. Even in the fraught arena of grandparent visitation rights, where courts can override parental decision-making on something less than a harm standard, the parent's preference must be given deference.[154]

Parents' decision-making rights are so strong that it is presumed as a matter of constitutional law that parents act in their children's best interests.[155] At some point, of course, young people gain the right to make their own decisions, but it is undisputed that until they are old enough to do so, parents have decision-making authority unless some significant interest has overcome that right.

C. The Strands and Adoption

The most fundamental parental decision-making right is the right to consent to an adoption of one's child because that is the right that can reassign all the others. If the parent consents, a child may be adopted, shifting decision-making rights to the adoptive parent.[156] If a parent recognized as having parental rights does not relinquish them, a child may not be adopted unless that parent's right to consent to adoption—meaning the right to prevent an adoption by withholding consent—is overcome, with a high bar protecting it.[157]

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[152] Dale Katzenmeyer, *Issues Complicating Rights of Spouses, Parents and Children to Sue for Wrongful Death*, 19 Akron L. Rev. 419, 420 (1986).

[153] *See, e.g.*, 42 U.S.C. § 402(d);
Cal. Welf. & Inst. Code § 11203(a) (1997).

[154] Troxel v. Granville, 530 U.S. 57, 69–70 (2000).

[155] *Id.* at 68.

[156] A parent can consent to a stepparent adopting without giving up their own rights, but when parents consent to anyone other than stepparents adopting, they typically are fully relinquishing their rights. There are exceptions to this rule in the small number of jurisdictions that allow more than two legal parents at a time.

[157] Santosky v. Kramer, 455 U.S. 745, 748 (1982) (holding the right to consent to adoption is a fundamental liberty interest protected by the 14th Amendment that cannot be overcome except based upon clear and convincing evidence).

Although the Supreme Court has yet to address the substantive components of the protections of this fundamental right, some state courts have done so[158] and every state lays out in statute substantive grounds required before a child can be adopted without parental consent.[159]

Three of the Supreme Court's parental rights cases are ones in which the question posed is who counts as a legal parent for purposes of determining whose consent to adoption is required.[160] Under U.S. law, birth mothers always have full parental rights, as do birth fathers who were married to the mother when the child was born. Birth fathers who were not married to the mothers of their children sometimes have parental rights and sometimes do not, based in the first instance on state statutes, with constitutional parameters established in case law.

In each of the three Supreme Court cases, mothers had had children outside marriage and then married men who were not the fathers of the children. The mothers wanted their husbands to adopt the children, but the children's fathers opposed those adoptions. The Supreme Court held that one of the fathers had the right to prevent the adoption of his child and two did not, and in the process explained that in order to have the rights of a parent, a birth father has to have taken steps to grasp the opportunity to play a parental role in the child's life. In the *Quilloin* and *Caban* cases, with one decided in each direction, the Court held that if an unwed father was sufficiently involved in a child's life, he has the right to consent to an adoption,[161] and if an unwed father was not sufficiently involved with his child, he did not have that right.[162] Notably, in the third case, *Lehr v.* Robertson, the Court not only addressed whether the father had a right to veto the adoption (it found he did not), it also separately addressed the question of whether he had the right to notice and an opportunity to be heard on an adoption petition concerning his child.[163] New York's high court had found as a matter of state statutory law that Lehr did not have a right to notice.[164] The Supreme Court noted it did not have jurisdiction to consider that state law question, but that it did have jurisdiction to consider whether there was a constitutional right to notice as a matter of due process.[165] The Court spent much of the opinion on that question before concluding there was no right to notice.[166] The Court then went on to consider as a matter of equal protection not only whether there was a

[158] *See, e.g.*, Fla. Dep't of Child. and Fams. v. F.L., 880 So.2d 602 (Fla. 2004) (terminating parental rights requires showing of substantial risk to the child); Matter of Sanjivini K., 47 N.Y.2d 374 (1979) (terminating parental rights requires more than a showing it is in the child's best interests).

[159] Child Welfare Info. Gateway, Grounds for Involuntary Termination of Parental Rights, 1–2 (July 2021) https://cwig-prod-prod-drupal-s3fs-us-east1.s3.amazonaws.com/public/documents/groundtermin.pdf?VersionId=nPgkU17Fs53FtMHM7AoFD23r.kuLCY8 [https://perma.cc/Y2CV-ZQ5Y].

[160] *See* Quilloin v. Walcott, 434 U.S. 246 (1978); Caban v. Mohammed, 441 U.S. 380 (1979); Lehr v. Robertson, 463 U.S. 248 (1983).

[161] *Caban*, 441 U.S. 380.

[162] *Quilloin*, 434 U.S. 246.

[163] *Lehr*, 463 U.S. at 263–65, 267.

[164] *Id.* at 256 n.10.

[165] *Id.*

[166] *Id.* at 263–65.

right to notice, but whether there was a right to veto the adoption (as a mother or married father would have).[167]

It is, of course, not surprising that if a father does not have a right to notice and an opportunity to be heard on the adoption, he does not have the right to prevent an adoption because the former is a lesser included component of the latter. What is interesting for present purposes, but has gone unnoticed in the commentary on the case, is that the Supreme Court took seriously the possibility that Lehr could have a right to notice and the opportunity to be heard even if he did not have the right to veto an adoption. In analyzing that question—even though it ultimately found that Lehr did not have a right to notice—the Court accepted the premise of the New York statute that some fathers have a right to veto an adoption and others have the lesser right to notice, and the Court made clear that each of these rights is of constitutional dimension. The holding that Lehr did not have the right to notice was based on the particular details of his relationship with his daughter. He did not have the right to notice because he did not have a "significant custodial, personal, or financial relationship with [her]," and therefore the Court said he had not grasped the opportunity he had to turn his "inchoate interest" into a protected right.[168] Whatever one thinks of the rule that unwed fathers must take steps mothers and married fathers are not required to take to acquire rights to their children, or of how the Court applied that rule to Jonathan Lehr, the opinion makes clear that even in the realm of determining whether a child can be adopted, there are *gradations* of parental rights. The Supreme Court ruled that Lehr didn't have any parental rights, but indicated it is likely that some parents have the right to veto an adoption and others have the lesser right to notice and an opportunity to be heard on an adoption. Thus, the limited Supreme Court law on the subject of the relation between birth parents' rights and adoption suggests that different strands of parental rights should be considered distinctly, rather than as a bundle that must remain wholly intact or be categorically severed.

III. Transferring Parental Rights: Proposed Principles for Policymakers

There is an important policy discussion underway about whether too many children are separated from their families to go into foster care and kept there longer than necessary when they could safely be returned home. I share the view of critics who believe that far too many children are taken from their parents when there is no justification for separation and that often the concerns that led to intervention could be addressed by providing services or material support that would allow the children to remain safely home with their families.[169] But even as efforts are made to reduce the number of children

[167] *Id.* at 265–67.
[168] *Id.* at 262.
[169] The pandemic provided an unprecedented opportunity to empirically assess the effects of child protective investigations and removal rates. When the number of mandated reports to

who enter foster care, policymakers must address the needs of children who are there. For those who cannot be safely reunified with their families, a number of commentators have persuasively argued that their best interests will often be served by permanency plans other than adoption.[170] But at least for the foreseeable future, the plan for some foster children will be adoption.

The question to which I now turn is what approach would best serve the children, families and communities involved when a court determines it would serve a child's interests to be adopted.

There seems little doubt that starting from a clean slate, no policymaker would suggest that the best way to serve children's interests is to establish a legal regime in which if a parent did not meet certain requirements within a fifteen-month period, the state would end that parent's relationship to their child (without a safety reason to do so), and would prohibit the parent from even having legal standing to ever again ask for contact with the child. Such a policy would be inconsistent with the general principles of family law and would not be viewed as child-friendly. If such a policy were newly proposed, it certainly would be rejected once policymakers were informed the policy would be used almost exclusively to sever parent-child relationships in low-income families and that it would be used to sever parent-child relationships in Black families at a rate 50% higher than in white families.[171] Those on both ends of the political spectrum would be unified in rejecting the idea that the state should be able to take such an extreme measure as extinguishing family ties when far less drastic steps could allow children to be adopted when they cannot return to their families of origin.

While there is value to recognizing that no one would design the system currently in place, there is no benefit to proposing an alternative legal scheme as if it could be enacted on a blank slate. Thus the starting point here is to consider how the law might better handle parental rights as they are conceived within the current framework when adoption is the goal. The parental rights in each of the three categories identified above—(1) rights to physical custody and visitation; (2) inheritance and other financial benefit rights; and (3) decision-making rights—belong to the birth parents in the first instance and, if a child is adopted, end up belonging to the adoptive parent (or parents) when they adopt.

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child abuse hotlines fell during the pandemic, leading to significant decreases in investigations and removals, children were better off. Anna Arons, *An Unintended Abolition: Family Regulation during the COVID-19 Crisis*, 12 Colum. J. Race & L. F. 1 (2022); Melissa Friedman & Daniella Rohr, *Reducing Family Separations in New York City: The Covid-19 Experiment and a Call for Change*, 123 Colum. L. R. Forum 52 (2023). Additionally, the child tax-credit provided during the pandemic was shown to dramatically reduce the incidence of child maltreatment. Lindsey Rose Bulinger & Angela Boy, *Association of Expanded Child Tax Credit Payments with Child Abuse and Neglect Emergency Department Visits,* Jama Network Open (Feb. 16, 2023), https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2801496?utm_source=For_The_Media&utm_medium=referral&utm_campaign=ftm_links&utm_term=021623 [https://perma.cc/NBU4-YMMQ].

[170] *See* Gupta-Kagan, *supra* note 9, at 2; Godsoe, *supra* note 9, at 160–65; Sankaran & Church, *supra* note 3, at 260–61; Testa, *supra* note 117, at 76–80.

[171] *See* Wildeman et al., *supra* note 88, at 34. The rate for Native American families is even higher. *Id.*

Two questions about the current approach are worth considering. First is whether the process by which the legal system currently gets to the adoption endpoint—a process we know is inconsistent with other aspects of family law and has the disadvantages described in Part I—is the best process available. Second, is whether the endpoint (life after the adoption) is structured as well as it could be.

A. Restructuring the Pre-Adoption Process

To achieve public adoptions, we currently extinguish all parental rights, give them to an agency (either the public child welfare agency or a private foster care agency that contracts with the state) and, if an adoption occurs, then transfer those rights to the adopting parent. The rights travel as a bundle from the parent to the agency and then from the agency to the adoptive parent. But there is no need for this drastic interim step to be taken. As discussed above, not only is it clear from other areas of family law that parental rights need not travel together in a bundle, but in fact they do not travel as a bundle in the first part of these very cases—the parental rights will have been encroached upon but not extinguished when the children entered foster care. Changing the permanency goal of a foster child from reunification to adoption does not alone provide justification for curtailing any of the parent's rights further except for one: the right to veto an adoption.

As noted above, for the first hundred or so years of American adoption law, curtailing the right to consent to adoption was a step taken *within* the adoption proceeding itself. Adoption proceedings entailed two steps: (1) an inquiry as to whether the parent consented to the adoption and, if they did not, whether their consent was waived; and (2) an inquiry as to whether the adoption was in the child's best interests. The enactment of termination of parental rights statutes took that two-part proceeding and bifurcated it into two separate proceedings: one in which parental rights could be terminated, and another in which a court would determine whether adoption was in a child's best interests. The purpose of separating the two proceedings was to clarify prior to an adoption proceeding whether a child was available to adopt (whether the child was "free for adoption" in the parlance of the child welfare field).[172] The view at the time, still held by many today, was that clarifying a child was available for adoption would make it easier to identify adoptive parents.[173] To achieve that goal a court must make clear that the birth parent does not have the right to veto an adoption. But there is no reason at this interim stage—between the time a court approves a goal of adoption and the time an adoption occurs—to curtail the parent's rights further than that. At this stage, the court already has given the agency custody and the day-to-day

[172] I detail elsewhere additional purposes that also originally justified bifurcating the proceedings and explain that the purpose discussed in the text is the only one that is still relevant today. Gottlieb, *supra* note 11, at 148–64.

[173] I explain below that this view is not well supported today, if it ever was. *See infra* Section III.A.2.

decision-making authority deemed necessary to protect the child. The broader decision-making rights that remained with the birth parent when the child entered foster care are given to the agency after a termination of parental rights with the goal that they will ultimately go to an adoptive parent—the only purpose of the separate termination proceeding is to facilitate getting to a subsequent adoption proceeding. But there is no need for the agency to be a middleman holding rights on a temporary basis. The rights could be transferred directly from the birth parent to the adoptive parent at the time of the adoption—as used to be the norm.

This approach of transferring rights away from birth parents only at the time of an adoption is used to a limited extent in some jurisdictions, but the standard approach for public adoptions today is to terminate parents' rights completely, transferring them to an agency, and then transferring them again at the adoption.[174] A simple alternative is available that would achieve the purpose of terminating parental rights without the harms it brings: after a court changes a child's permanency goal to adoption, the agency could seek a court determination that the parent's consent to an adoption of the child is not required. Such a determination would allow the agency to move forward in locating an adoptive placement, and prospective adoptive parents could have every expectation of being allowed to adopt if they are found to be suitable. The court determination whether to abrogate the parent's right to consent to adoption could be based on exactly the same grounds that are currently used as causes of action to terminate parental rights (including abandonment, failure to address the reasons the child entered foster care, severe abuse, etc.).[175] The change would simply be to limit the incursion on the parent's rights so that it went only as far as necessary at that point to pursue adoption. The additional, far more extensive incursion on the parent's rights would not happen unless and until an adoption occurred.[176]

In short, the proposal is that the current grounds for terminating parental rights be grounds instead for dissolving the right to veto adoption. If an adoption petition were subsequently filed, the court would determine whether

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[174] *Compare* White v. N.E.M., 358 A.2d 328 (D.C. 1976) (holding that under D.C. law, parental rights cannot be terminated prior to adoption proceedings absent unusual circumstances), *with* Child Welfare Info. Gateway, U.S. Dep't Of Health & Hum. Servs., Concurrent Planning for Timely Permanency for Children 3 (2021), https://www.childwelfare.gov/resources/concurrent-planning-timely-permanency-children/ [https://perma.cc/XD8G-F7HY] (discussing state requirements to file termination of parental rights petitions) *and* Sankaran & Church, *supra* note 3, at 249–53 (describing the prevalence of terminating parental rights).

[175] This determination would have to be made by clear and convincing evidence. Santosky v. Kramer, 455 U.S. 745, 748 (1982).

[176] Prior proposals for bringing down the number of legal orphans have maintained the basic structure of terminating parental rights, suggesting that the termination orders be time limited or subject to revocation. *See, e.g.*, Kirstin Andreasen, *Eliminating the Legal Orphan Problem*, 16 J. Contemp. L. Issues 351 (2007). While these approaches might mitigate some of the problems that flow from terminating parental rights, they tinker at the edges without addressing the fundamental flaws of the current structure and they have not proven appealing enough to be adopted in any jurisdiction. Restoration of parental rights statutes mitigate the harms of termination for a small number of families, but by design do not challenge the current legal structure or the principles upon which it rests. Godsoe, *supra* note 9, at 144, 148–54 (noting that restoration of parental rights statutes are underused and perpetuate a flawed approach to child welfare).

the adoption is in the best interests of the child; if so, the court would then approve the adoption, thereby transferring the parental rights to the adoptive parent. [177]

This proposal is so straightforward that a reader who does not practice in the field might be forgiven for wondering why it merits this much discussion. But the current approach is so entrenched that practitioners will undoubtedly have questions and concerns regarding how it would play out in practice. The next section addresses the issues that would need to be sorted under the proposed approach and concerns that might arise.

1. Rights in the Interim

If, as proposed, the determination to dissolve a parent's right to consent to adoption was not packaged with the extinguishing of other parental rights, physical custody and the decision-making authority already transferred to the agency would remain with the agency, while the other rights in the parental rights bundle would remain with the parent. Considering the three categories of rights outlined above, that would mean:

(1) In the category of custody and visitation, the parent and child would continue to have the right to visits and the parent would retain the right to petition for custody. The agency would not be allowed to cease the parent-child visits that had been occurring while the child was in foster care. Currently, agencies are allowed to stop visits as soon as a court orders termination of parental rights. This practice is not supported by the psychological literature and leads to heartbreaking scenarios, in which children are forced to say goodbye to parents to whom they are deeply attached or—perhaps worse—given no chance to say goodbye before contact is cut off.[178]

If the parent were able to show a change in circumstances, he or she could petition for the return of the child and have the petition determined based on the best interests of the child. So, for instance, if the parent's right to consent to adoption had been dissolved based on the parent's failure to address a substance use disorder or mental health issue within fifteen months (both common bases of termination of parental rights), but a year or several years later, the parent had tackled the issue and achieved stability that would allow them to safely care for the child, that parent would be able to obtain a hearing on whether family reunification would be in the child's best interests. If a court determined reunification was in the child's best interests, they would be

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[177] As now, adoptions would not be allowed to proceed without the consent of children over a certain age, typically set by state statute. *See, e.g.*, C.A. Fam. Code § 8602 (requiring consent to adoption of children 12 or older); N.Y. Dom. Rel. L. § 111(1)(a) (requiring consent of child 14 or older). When children are below the age of consent, courts would continue to consider their views to the extent courts do that now in the best interests analysis.

[178] *See* D'Juan Collins, *Losing Parental Rights Won't Stop Me from Fighting to Be a Dad*, Rise Mag. (May 18, 2017), https://www.risemagazine.org/2017/05/termination-of-parental-rights-wont-stop-me-from-fighting-to-be-a-dad/ [https://perma.cc/8N2L-H4SM] ("The last time I saw my son, I didn't know it would be our last time together.").

returned to the parent. After a provisional period, if the reunification was successful, the parent could then move to regain their right to consent to adoption, returning them to their ex ante rights-holding status. Such an outcome should be celebrated. Yet currently, after a termination of parental rights, a parent's petition to regain custody of their child is typically dismissed for lack of standing even if the child has not been adopted and is languishing in foster care—an extremely negative outcome for all involved.

(2) In the category of decision-making rights, the parent and the agency would retain the authority they had while the child was in foster care prior to the determination to dissolve the right to consent to adoption. Thus, the agency would have day-to-day decision-making, while the parent would continue to have the right to make the major decisions that typically remains with them unless a court has found a specific basis to overcome that right. For instance, the right to consent to non-emergency surgery would be with the parent unless the court had overridden that right, as it might have if the case were one of medical neglect. Similarly, decisions regarding the religious upbringing of the child would remain with the parent unless a court had specifically encroached on that right, such as to order blood transfusions for a child over the objection of a parent who is a Jehovah's Witness.

(3) Inheritance rights and rights to other financial entitlements would remain intact. These rights, of course, are less likely to come to the fore during the period between a determination dissolving the right to consent to adoption and an adoption because they often only come into play upon the death of the parent or child.

2. Concerns in the Interim

There are a number of concerns that might be raised about this proposed interim status. Some might worry that it will send mixed messages to the children if visits continue and the possibility of the parent later seeking custody is left open while an agency is pursuing an adoption of the child. Or there might be concern that having the parent remain in the picture will make it more difficult for agencies to identify potential adoptive parents. While these concerns are understandable, there simply is no basis in empirical data to conclude that they outweigh the benefits of the proposed approach.

The interim status that follows either a dissolution of the right to consent or termination of all parental rights is inherently less than ideal for the child involved. Under the proposal, as now, the interim stage is reached only after the preferred goal of family reunification is given up and adoption has been identified as the next best plan for the child; this stage is intended to be temporary on the way to adoption.[179] The proposal must be evaluated against

[179] The right to consent to adoption would be dissolved only after a child's permanency plan had been changed to adoption. At that point the agency would be obligated to make reasonable efforts to pursue adoption and would no longer be obligated to make reasonable efforts toward

the realities of the current approach, not an unavailable ideal. Those realities include that after termination of parental rights, there is at best a period during which a child has no legal family—no one visiting them, no one to notify in the case of an emergency, no one outside the state-run child welfare system for the child to raise concerns to if the child is mistreated by that system. Some of the children will pass out of the interim status to be adopted. Others, as discussed above, will never be adopted; they will leave foster care as legal orphans unconnected to any family. Given this existing context, it is difficult to defend the idea that a child's ties to a parent should be entirely severed in hopes that will make the child more emotionally available to a new parent figure. Two considerations add weight in favor of the proposal over the existing approach.

First, breaking off contact between the child and parent is at odds with much contemporary psychological theory, which highlights that eliminating contact with an emotionally important figure does not necessarily decrease the importance of that figure, but rather makes it more difficult to develop a healthy relationship. The literature supports widening, not narrowing, the number of adults with whom a child has meaningful relationships.[180] And that is the approach that has been heralded in the private custody arena.[181] As will be discussed further below, there are strong reasons to believe that in the majority of situations, it is in children's interests to continue to have contact with their birth parents even after adoption.[182]

Second, the current approach is ineffective at ensuring adoptive parents are identified. In recent years, between 64,000 and 72,000 children living in foster care have had their parents' rights terminated, but no more than 17,500 of them are in homes considered to be pre-adoptive.[183] While the exact number of young people who leave foster care as legal orphans is not tracked, the data show that in any given year, there are between 5,700 and 10,900 more foster children whose ties to their parents have been terminated than are adopted.[184] Of those who are adopted, approximately a third are adopted by relatives, who can be identified as resources without a termination of parental

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family reunification. *See* 45 § 1356.21(b)(2)(i) (requiring, as a condition of federal funding, reasonable efforts toward the permanency plan that is in effect).

[180] *See, e.g.*, Achieving Permanency, *supra* note 3, at 10; U.S. Children's Bureau, *Guidelines for Public Policy and State Legislation Governing Permanence for Children, in* Families by Law: An Adoption Reader 172, 172–73 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004).

[181] Hanlon & Quade, *supra* note 17, at 19.

[182] *See infra* Section III.B.1.

[183] *Compare Child.'s Bureau, U.S. Dep't of Health & Hum. Servs., Trends in Foster Care and Adoption: FY 2013–22* 1 (2022), https://www.acf.hhs.gov/cb/report/trends-foster-care-adoption [https://perma.cc/GH5Y-HVR8] [hereinafter *Trends in Foster Care 2013–22*], *with Child.'s Bureau, U.S. Dep't of Health & Hum. Servs., The AFCARS Report, No. 30*, at 1 (2023), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/3AA6-MYGV]; The AFCARS Report, No. 29, *supra* note 38, at 1; Child.'s Bureau, U.S. Dep't Of Health & Hum. Servs., The AFCARS Report, No. 28, at 1 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport28.pdf [https://perma.cc/V5MD-QN8X]; Child.'s Bureau, U.S. Dep't Of Health & Hum. Servs., The AFCARS Report No.,27,at1(2020),https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/5UW5-VCLF]; *and* Child.'s Bureau, U.S. Dep't Of Health & Hum. Servs., The AFCARS Report, No. 26, at 1 (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf [https://perma.cc/Y8FA-ACXB].

[184] *See Trends in Foster Care 2013–22, supra* note 184.

rights.[185] And because of the emphasis on concurrent planning, a significant percentage of non-relative adoptions result from placements that occur *before* the termination of parental rights, so termination does not affect recruitment of the adoptive parents.[186]

In sum, there are three possibilities at the end of the interim period: (1) the child is reunified with the parent; (2) the child exits foster care without having been placed in the permanent care of an adult; (3) the child is adopted (or placed in the custody or guardianship of a non-parent). For the first and second of these scenarios, except in extremely rare circumstances, it will unquestionably have been best to have continued contact between the parent and child in the interim period. In the third scenario, a prior termination is irrelevant to identifying adoptive parents in at least one third of cases and likely in a significant majority of cases. For the children who are ultimately adopted, there is a strong argument that continued contact with the birth parent is in the best interests of many of them. This argument gains further strength when we acknowledge that some of the adoptive placements will disrupt.[187] There is not sufficient data to know how many foster care adoptions fail,[188] but it has been estimated to be as high as 20%.[189] When adoptive placements do fail, there typically will be an even greater benefit to children to having maintained relationships to their birth parents, so they have some continuous connections in their lives.

The counterargument is that not having a clean break between the children and their birth parents will discourage the recruitment of potential adoptive parents. But with the clean-break/termination-of-rights approach, we know recruitment of adoptive parents falls substantially short and there is

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[185] *The AFCARS Report, No. 30*, *supra* note 184, at 6.

[186] While there does not appear to be federal data on the percentage of children who are placed with pre-adoptive homes before and after terminations of parental rights, there have been significant efforts to promote concurrent planning, the practice of placing children in potentially pre-adoptive homes as soon as they enter foster care rather than waiting until after birth parents' rights are terminated. *See generally* Child Welfare Info. Gateway, *supra* note 174. When concurrent planning is undertaken, children are typically in pre-adoptive homes before the birth parents' rights are terminated, so recruitment of adoptive parents is not an issue.

[187] *See* Discontinuity and Disruption, *supra* note 99, at 3–4 (Aug. 2021); *see also* Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 Cap. U. L. Rev. 437 (2012). One leading organization that represents children in foster care, reviewed their clients' experiences and found, "[t]he results were staggering and indicated that the child welfare system can no longer afford to ignore the issue of broken adoption." *Beyond Permanency*, *supra* note 62.

[188] Discontinuity and Disruption, *supra* note 99, at 3–4 (Aug. 2021) ("Tracking the experiences of children after adoption or guardianship is not a common practice in most child welfare agencies."); Post & Zimmerman *supra* note 187, at 440–41 (discussing the dearth of data on adopted children who return to foster care).

[189] Discontinuity and Disruption, *supra* note 99, at 3 ("Research indicates that approximately 5 to 20 percent of children who exit foster care to adoption or guardianship experience discontinuity."). Existing data almost certainly undercounts the number of disrupted adoptions because the disruptions do not always come to the attention of child welfare officials. Indeed, adoptive parents have a financial disincentive to reporting an adoption disruption because it may lead to their losing an adoption subsidy. *See* Post & Zimmerman, *supra* note 187, at 453–55; John Kelly, *New York Court Rules Adoption Subsidy Should Move if Child Does*, Imprint *(*Aug. 10, 2018), https://imprintnews.org/child-welfare-2/new-york-court-rules-adoption-subsidy-move-if-child-does/31893 [https://perma.cc/H88U-HK3C].

no empirical evidence that recruitment would suffer if the proposed approach were taken.

A different potential concern is that some parents are so abusive or dysfunctional that continued visits would be harmful to their children. The perception that parents whose children are in foster care are dangerous to their children is significantly exaggerated.[190] When parents do pose risk, the proposed approach would handle those situations in exactly the same way that safety concerns are handled in the private custody context and in foster care cases prior to termination: visits would be supervised if needed for safety and, when even supervised visits pose a threat, they would be cut off. The continued right to visitation after dissolution of the right to consent to adoption would not be an absolute right to visits, but rather a right to seek visits and to obtain them absent a showing they would be dangerous to the child. The preferences of the child regarding visits would be considered in the same way they are with respect to visit orders when children are in foster care and there has not been a termination of parental rights.[191]

Separate from potential concerns about continuing parents' rights to visitation and standing to seek custody, there may be concerns about parents retaining decision-making authority during an interim period. Policymakers might be concerned that parents who have lost the right to consent to adoption are incapable of making other decisions about the child, or that it would be administratively onerous to have them continue to do so. But this concern, too, loses much of its pull upon deeper consideration. By the time the interim period begins, courts have already made determinations about what decisions the parent is capable of making. Day-to-day care is with the agency and any larger decisions the parent has been found incapable of making (such as medical or educational decisions if those are connected to the maltreatment that led to foster care placement) have also already been placed in the agency's authority. The determination that a parent should not be able to veto an adoption is typically based on the court's assessment of their ability to care for their children day-to-day, not on the capacity for the bigger-picture decision-making that remained with the parent when the child entered foster care. Thus there is no reason to believe this determination justifies further restricting the parent's decision-making authority.

Additionally, the decision-making authority that remains with parents when their children enter foster care is the sort of value-laden decision-making we should be particularly reticent to turn over to the state. It includes decision-making regarding religious training and practices, major medical care, and educational choices. Consent for a teenager to have an abortion, marry or join the military, and decisions about whether a youth receives a first communion, keeps kosher, wears a hijab, or attends religious services are

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[190] Guggenheim, *supra* note 148, at 192–93.

[191] The extent to which children's preferences carry weight in visit orders when children are in foster care varies, but the underlying principle is that children have a right *to* visits, not a right to opt out of visits absent safety concerns. In practice this principle is necessarily subject to the reality that older youth are able to "vote with their feet" in the sense that courts are sometimes unable to force them to visit against their will.

decisions that the state is ill-equipped to make and that parents have heightened interests in making.[192]

It is not only the parents, but also the children, who have an interest in the parent making these decisions. As I have argued elsewhere, even when a parent has abused or neglected a child, it is generally in the child's best interests for the parent to continue to make as many decisions for that child as possible while ensuring the abuse or neglect cannot continue.[193] It is therefore crucial that the child welfare system resist the impulse to treat parents punitively because, whatever a parent's failings, they typically continue to have the best information and the best motivation to make decisions for their child.[194] And whatever temptation there might be to place decision-making responsibility in the hands of a different adult once a parent has failed a child, that temptation must be tempered by the fact that in a pre-adoptive period there is not another individual adult with whom that responsibility is placed—it goes from the parent to an agency. Bureaucracies are notoriously ill-equipped to do the nuanced work of child rearing. One need not look to the worst abuses that occur when children are in the care of state bureaucracies, such as the significantly increased risk of abuse and over-medication, to recognize that children are better off when an individual adult who cares about them has decision-making authority.

While there would be some administrative burden to keeping parents in the decision-making loop, all the structures to do so are already in place. Under the proposed model, after a determination that a parent had lost the right to consent to adoption, other decision-making authority would remain as it had been since the child entered foster care: daily care decisions with the agency and broader decision-making with the parent. If during the interim period the parent withholds consent to something and that decision poses substantial risk to the child, or the parent falls out of touch, the agency could seek a judicial override of the parental consent—for a medical procedure, medication, special education services, and the like—as agencies do when a child is in foster care and parental rights have not been terminated.

The concerns that might be raised about moving away from the termination-of-parental-rights model simply do not outweigh the strong reasons to support keeping parent-child ties as vibrant as possible unless and until an adoption occurs. This approach would be better aligned with the way family law typically treats parental rights—encroaching on them minimally rather

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[192] *See* Wisconsin v. Yoder, 406 U.S. 205 (1972) (holding compulsory education law inapplicable where parents had religious objections).

[193] *See* Chris Gottlieb, *Children's Attorneys' Obligation to Turn to Parents to Assess Best Interests*, 6 Nev. L.J. 1263, 1264 (2006).

[194] *Id.* ("That parents may have fallen below our minimum standards for caretaking—as serious as that is—does not change the fact that they are best situated to determine their children's interests [and] should not cause us to abandon the many common sense reasons that we normally turn to parents when decisions need to be made for children. Typically parents know their children's needs, desires, strengths, weaknesses, personality, and history in nuanced ways that others cannot come close to approaching. In virtually all instances parents also care more deeply about their children's well-being than anyone else.").

than maximally—and would return to the transfer-of-rights model that was used until the mid-twentieth century.

B. Restructuring the Adoption Outcome

The proposed approach to the pre-adoption process for foster children could be used while leaving the adoption structure itself as it currently exists. Adoption petitions would be filed after court determinations that parental consent to adoption was not required, adoptions would be granted based on a best interest of the child standard as now, and the rights granted to the adoptive parent upon adoption could remain the same as under the current scheme. But the analysis undertaken thus far suggests that a change in the status of rights post-adoption is warranted. Many of the most compelling reasons that support continuing the right to parent-child visits during the interim period support continuing that right post-adoption as well. In part that is because, as discussed above, adoptions today often occur under very different circumstances than they did when termination of parental rights statutes were introduced and there are heightened reasons to allow continued contact when the state severs existing family ties over the parent's objection. But there is another shift that has occurred with respect to adoption that adds an additional reason to restructure adoption law to allow continued contact not only in the interim period, but following adoption. This reason has to do with drawing the lessons learned in the private adoption arena into the public adoption arena.

1. The Benefits of Open Adoption and Why They are Denied to Foster Children

Approaches to adoption have changed substantially over the last 75 years. When adoption first became popular, adoption was framed and understood as providing a "substitute family" for the child that wholly replaced the birth family.[195] But as the number of adult adoptees grew, so did pushback against the idea that families were fungible and that one could be replaced by another without a sense of loss. Both adoptees and birth mothers voiced the pain of the loss they experienced as a result of adoption, with adoptees, "protest[ing] the idea that legal identity (through adoption) could erase blood kinship."[196] Researchers found that adoption routinely brings a sense of loss, describing "genealogical bewilderment" and "a sense of rupture from biological and historical origins."[197] Studies indicate that the significance of the family of origin surfaces at various stages of adoptees' identity development.[198] "It is now widely understood among mental health experts that adoptees continue to be

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[195] *Barbara Melosh, Strangers and Kin: The American Way of Adoption* 218–21 (2002).
[196] *Id.* at 220–21.
[197] *Id.* at 226–27.
[198] *See, e.g., David M. Brodzinsky, Marshall D. Schechter & Robin Marantz Henig, Being Adopted: The Lifelong Search For Self* 11 (1992).

members of their adoptive and birth families."[199] Recognition of the harms of keeping children from knowing their birth families has led to a dramatic shift toward openness in adoption, both with respect to sharing of information about birth families that had previously been withheld and with respect to increased contact between adopted children and their families of origin.[200] Today, the majority of private adoptions involve continued contact and many adoptive families who do not stay in touch with birth parents indicate they would if it were possible.[201] Indeed, the private adoption world now *celebrates* the "benefits that can come from enlarging the circle of adults connected to the child."[202]

Annette Appell put it bluntly: "The American experience with adoption law . . . illustrates that biology cannot be ignored."[203] And a leading national adoption advocacy organization summed up the prevailing view this way:

> Openness in adoption is a healthier and more humane way to experience adoption and should be incorporated into every adoption experience. Building relationships between first/birth family members and adoptive family members through openness in adoption may not always be easy, but it creates a richer and more authentic adoption experience.[204]

Why, then, do we not offer the recommended approach to the children who are adopted from foster care? If "biology remains important for a host of affective, psychological, and existential reasons,"[205] and mental health experts have debunked the idea that an adoptive family can simply replace the psychologically critical relation to birth family,[206] how can it be that the child welfare system's default is to entirely cut off children from their families of origin if they cannot go home within 15 months? I would like to suggest two related reasons that can help explain why public adoption policy has fallen so far behind the private adoption world in embracing contemporary understandings of family attachment. The first is that the parents involved are

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[199] Annette R. Appell, The *Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 BYU J. Pub. L. 289, 303 n.99 (2008).

[200] *See* Abbie Goldberg, Open Adoption and Diverse Families: Complex Relationships in the Digital Age 4–5 (distinguishing "structual openness," which includes contact and the sharing of information between the birth and adoptive families, and "communicative openness," which is openness to communicating about the adoption within the adoptive family); Appell, *supra* note 200, at 302 (describing a shift that "challenged adoption's myth of rebirth and mandate of secrecy"); Carp, *supra* note 18, at 18–20.

[201] Hanlon & Quade, *supra* note 17, at 19 (study showing ¾ of adoptive parents who adopted privately had had recent contact with the birth parents and that most who had not had contact with birth parents would if they could).

[202] *Id.* at 291.

[203] Appell, *supra* note 200, at 302–06 (describing the trajectory in private adoption from the practice of cutting off adopted children from their families of origin to the current embrace of openness in adoption).

[204] The Donaldson Adoption Inst., *supra* note 17, at 11; *see also* Goldberg, *supra* note 201, at 4 ("Both communicative openness and structural openness have been linked to better outcomes for adopted youth (e.g., fewer behavior problems).").

[205] Appell, *supra* note 200, at 291.

[206] See *supra* Part II.

disempowered—they have no leverage to negotiate for continued contact with their children.

Open adoption became the norm in private adoptions only once birth mothers gained leverage to negotiate post-adoption contact agreements when the demand for healthy infants to adopt outpaced the supply of babies who were voluntarily relinquished. In the later decades of the twentieth century, increased access to birth control and abortion and the growing acceptability of single parenthood led to a dramatic drop in the number of babies available for adoption.[207] Today, only about 18,000 babies born in the United States are voluntarily relinquished each year.[208] Because the demand for babies to adopt remained high, birth mothers began to have new bargaining power to negotiate the terms under which they give up their babies for adoption.[209] They can now choose who will adopt their children and can exclude potential adoptive parents who do not agree to allow post-adoption contact.[210] At the end of the twentieth century, states began making post-adoption contact agreements enforceable, and that trend has continued.[211] While the private adoption world now rightly celebrates the fact that open adoption serves the best interests of children, it is important to recognize that the change being celebrated occurred only once the birth parents had the leverage to press for post-adoption contact.

The second, and related, reason that open adoption has flourished in the private sector, but not yet in the public sector, also has to do with the status of the birth mothers involved, and also can be gleaned from the history of private adoption. Not only do birth mothers who are relinquishing their babies today have greater leverage because of the supply-to-demand ratio of infants, they also have more social capital than they previously did. When adoption first became popular in the post-World War II era, out-of-wedlock pregnancy was so shameful that young pregnant women were often sent away from home until they gave birth, and then hid the fact that they had given birth to babies who were adopted. This shameful status made it unimaginable that birth mothers would bargain for continued access to their children after adoption. With

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[207] Wm. Robert Johnston, *Historical Statistics On Adoption In The United States, Plus Statistics On Child Population And Welfare*, Johnston Archive (from a high of approximately 89,000 annually in 1970 to 48,000 five years later) (last updated Nov. 12, 2022), https://www.johnstonsarchive.net/policy/adoptionstats.html [https://perma.cc/S2VZ-R4WB]; *see also* Penelope L. Maza, *Adoption Trends: 1944-1975*, The Adoption History Project, (last updated Feb. 24, 2012), https://pages.uoregon.edu/adoption/archive/MazaAT.htm [https://perma.cc/G5QD-RES9]; Alfred Kadushin, Child Welfare Services 314 (3d ed. 1980); Anjani Chandra, Joyce Abma, Penelope Maza & Christine Bachrach, Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States 1 (1999).

[208] Olga Khazan, *The New Question Haunting Adoption*, The Atlantic (Oct. 19, 2021), https://www.theatlantic.com/politics/archive/2021/10/adopt-baby-cost-process-hard/620258/ [https://perma.cc/4Q89-J5W3].

[209] Carp, *supra* note 18, at 17 (describing "an effort to encourage birth mothers to relinquish their babies" by offering them bargaining power).

[210] Khazan, *supra* note 208 (quoting the head of an adoption agency saying, "[t]here is increasingly an advertising bid war to find birth parents" and contrasting that with the twentieth century experience of single pregnant women who "were pressured into closed adoptions").

[211] Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, 6(4) Adoption Q. 75, 79 (2003); Lisa A. Tucker, From *Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. Rev. 2317, 2350–53 (2020).

40% of children now born to unmarried women,[212] giving birth when single is no longer subject to the same cultural condemnation it once was. Rather than shaming unwed mothers, adoption agencies today commend those who put their children up for adoption with slogans such as "You're not giving up, you're giving life" and "Adoption, what a beautiful choice!"[213] This celebration serves multiple purposes, including aiming to discourage abortion, but the point for present purposes is the significant cultural shift from viewing relinquishing a baby for adoption as something so shameful it is to be hidden to being a praiseworthy act.

In stark contrast, parents whose rights are terminated have no leverage and no social capital. Because parental rights are treated in an all-or-nothing way in termination proceedings, the parents have no leverage to negotiate for visits or even the opportunity to convince the court that continued contact would be in the child's best interests.[214] And there are few individuals with less social capital than parents whose children have been taken from them by the child welfare system. In addition to being low income and disproportionately Black and Native American, these parents fall into one of the most despised of cultural categories: "*child abusers*." These parents are viewed—and therefore punished—as child abusers, although only a small fraction have actually abused their children. Distorted media coverage of the foster care system centers the small fraction of cases that involve extreme, intentional abuse, while the vast majority of children in foster care are there because of their parents' substance use, mental health issues, and poverty.[215] The trope of the monstrous mother,[216] who is often coded as Black,[217] looms large in discussions of the child welfare system and has allowed families with children in foster care to be treated in ways that would be unimaginable if they were more privileged.

It was only when the notion that unwed mothers were "*bad mothers*" was discarded that private adoption policy began to better serve children's interests, and the pain of putting up a child for adoption could be recognized.

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[212] Fed. Interagency F. on Child and Fam. Stat., Births to Unmarried Women (2021), https://www.childstats.gov/americaschildren/family2.asp#:~:text=The%20percentage%20of%20births%20to%20unmarried%20women%20among%20adolescents%20ages,women%20increased%20during%20the%20period [https://perma.cc/VFZ8-3EWY].

[213] Adoption Network, Giving a Baby Up For Adoption Is Not Giving Up, https://adoptionnetwork.com/birth-mothers/understanding-adoption/benefits-of-adoption/giving-a-baby-up-for-adoption-is-not-giving-up/; Brenda Destro, *Celebrating the Good Message of Adoption*, U.S. Conf. of Catholic Bishops, https://www.usccb.org/committees/pro-life-activities/celebrating-good-message-adoption [https://perma.cc/8AND-SH4N] (last visited Aug. 30, 2023).

[214] A parent facing a termination petition can sometimes negotiate a conditional surrender of their child which contemplates visits, but only if they give up their right to fight to retain their parental rights, and the visitation conditions are not always enforceable. *See* Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 Cap. U. L. Rev. 321, 348–49 (2008); *see also* Ashley Albert, *The Adoption Safe Families Act Hinders Birth Parents From Regaining Their Parental Rights*, The Seattle Medium (May 26, 2021), https://seattlemedium.com/the-adoption-safe-families-act-hinders-birth-parents-from-regaining-their-parental-rights/ [https://perma.cc/AB3L-EW2F].

[215] *See* Gupta-Kagan, *supra* note 37, at 1547, 1559–60.

[216] *See* Monstrous Mothers: Troubling Tropes (Abigail L. Palko & Andrea O'Reilly eds., 2021).

[217] Roberts, *supra* note 79, at 60–67.

If mothers who voluntarily place children for adoption experience "lasting wound[s], unresolved grief, and intense longing for the child[ren],"[218] how might we describe the pain of mothers whose children are forcibly put up for adoption? As former Children's Bureau leaders Jerry Milner and David Kelly have said of the child welfare system's undervaluing of these family relationships:

> This is an inhumane approach that reflects a fragmented and myopic view of children and their parents. It fails to see complete human beings or acknowledge the context of their lives . . . . It ignores what we know about the importance of connection and belonging and prioritizes processes and transactions over well-being. This benefits systems and purveyors far more than families.[219]

The severance-with-substitution model of adoption has rightly been rejected in the private adoption world in favor of acknowledging that birth families play a critical role in adopted children's psyche and sense of identity. The child welfare system's approach to adoption is decades behind. It is past time to jettison prejudicial tropes and reshape public adoption to respect the importance of ongoing connection and provide children adopted from foster care the benefits given to other adopted children.

2. Mechanics of and Potential Concerns About Post-Adoption Visitation Rights

Continuing birth parents' right to visitation following adoption may seem counterintuitive to practitioners trained in the termination-of-parental-rights model, but it draws on earlier approaches to adoption law and is consistent with current practices in other areas of family law. Prior to the mid-1950s, a birth parents' rights could only be terminated in an adoption proceeding in which an adoptive parent was granted parental rights. Although the case law used the phrase "termination of parental rights" to describe what occurred at the time of the adoption, it could as accurately have used the phrase "transfer of rights."[220] Indeed, adoption is better understood as a mechanism to transfer rather than to extinguish rights, and grasping that makes it easier to conceptualize that when other parental rights transfer to the adoptive parent, visitation rights could well remain with the birth parent.

When there is a rights holder, it is often the case that the law allows some of their rights to be transferred to another rights holder without requiring that all rights be transferred. This is the case, for example, when courts settle custody disputes between two parents. Often one parent will get legal custody, and thereby be granted almost all decision-making rights, while the other parent retains the right to visit. It is widely understood that such arrangements

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[218] Melosh, *supra* note 195, at 231.
[219] Kelly & Milner, *supra* note 51, at 2.
[220] Gottlieb, *supra* note 11, at 167–69.

serve the interests of children in maintaining bonds with multiple parent figures, as well as being fair to the parent who is losing many of their parental rights.

As in custody cases and private adoptions, in many public adoption cases, the birth and adoptive parents will be able to agree on the specifics of continued contact. Where they do not agree, the adoption court would make an order regarding the contact. The default in most cases could be expected to be a post-adoption visitation order that continues the contact that was occurring during the period leading up to the adoption. The governing standard, as in custody cases, would be a best interests standard that incorporated a rebuttable presumption that continued contact would be in the child's best interests. Of course, there would be exceptions to the right to continued visitation in situations in which such visitation would be harmful to the child—just as there are for all parental visitation rights. And, of course, contact orders could be changed, as they can be in custody matters, upon a showing of a change in circumstances and a finding that the child's best interests would be served by a different order.

A concern might be raised that this approach gives short shrift to adoptive parents, treating them somehow as less than full parents because parents usually have the right to make decisions about who has contact with their children.[221] But that concern misconstrues how we typically treat parental rights, which in other contexts are never ended wholesale. If a court determines that it is unsafe for a parent to see a child unsupervised, that does not mean they lose the right to visitation entirely. And when two parents live separately, if legal custody switches from one parent to the other, the parent who loses legal decision-making authority retains the right to visit the child. We give the parent with legal custody all decision-making authority (including most decision-making authority about who gets to visit the child) except they do not get the right to cut off the non-custodial parent. Thus, to say that a birth parent retains the right to visit is not to give the adoptive parent a lesser status, but rather to recognize that the child has pre-existing ties.

Will there be tension between some adoptive and birth parents? At times, certainly, as there is at times between former romantic partners who each retain ties to a child. It is an inevitable aspect of creating a familial relationship that the new relationship must deal with whatever prior attachments the individuals involved have. As one adoptive mother put it describing her children's ongoing contact with their birth mothers: "[A]s anyone who has a family knows, time with family — any family — can be complicated . . . At the same time, these visits are essential. . . [they] allow [my children] to feel secure and have a more complete sense of who they are and where they come from."[222]

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[221] *See* Troxel v. Granville, 530 U.S. 57 (2000).

[222] Amy Mulzer, *Support Children By Signing Preserving Family Bonds Act*, Times Union (Dec. 13, 2021), https://www.timesunion.com/opinion/article/Commentary-Support-children-by-signing-16696691.php [https://perma.cc/2SR5-5Q5G].

Another concern might be opening a door to an increase in litigation regarding post-adoption contact. To the extent that this is a concern about the costs—financial and emotional—of litigation, those costs would be justified by the benefits to the children involved. There is no principled way to distinguish the benefits to children of covering the cost for enforcement of post-adoption contact agreements for private adoptions and not public ones.

Will the fact that birth parents have a right to visitation discourage potential adoptive parents from wanting to adopt? Perhaps. But a willingness to keep children connected to their origins is one of many characteristics for which potential adoptive parents should be screened. An unwillingness to maintain contact, absent unusual circumstances, would indicate that the potential adoptive resource would not serve a child's best interests. Indeed, most people who adopt children in foster care begin as foster parents and foster parents should already be screened to ensure they understand that foster children have profound ties to their families and that an important part of the foster parent's role is to support those ties.[223] If we take seriously the perspective of those who have been adopted, the clear message is that they long to know their families of origin. Their message has carried the day in transforming private adoption and those adopted from foster care deserve as much.[224] Given all we now know about the significance of birth families to adoptees, it is critical for all potential adoptive parents to welcome children on the understanding that they come not free-floating, but with connections to families and communities.

Conclusion

It is virtually unimaginable that anyone today would propose initiating a program in which the government would completely cut off relationships between children and their parents when there is no safety reason to do so. The current legal structure for terminating parental rights was inherited from a bygone era and is no longer justified, if it ever was. A transfer-of-rights model would better serve children's interests, would end unnecessary harm to communities, and would avoid the pain that terminating rights inflicts on parents, siblings and extended family members who lose loved ones.

Although it can be challenging for stakeholders in the child welfare system to reconceive rather than defend entrenched approaches, it is a propitious moment for a shift from the termination model to a transfer model of parental rights. Directly impacted parents and former foster youth are calling for change.[225] Preeminent children's advocacy organizations and child welfare

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[223] Gottlieb, *supra* note 66, at 15–27.

[224] Appell, *supra* note 211, at 302–06.

[225] Albert et al., supra note 4, at 866–68; Sixto Cancel, *I Will Never Forget That I Could Have Lived With People Who Loved Me*, N.Y. Times (Sept. 16, 2021), https://www.nytimes.com/2021/09/16/opinion/foster-care-children-us.html [https://perma.cc/YJL3-CSPD]; Sarah Fathallah & Sarah Sullivan, Think of Us, Away From Home Youth Experiences of Institutional Placements in Foster Care (July 2021), https://assets.website-files.co

system leaders have begun to excavate and repudiate the injustice of past child welfare practices that unnecessarily destroyed family ties.[226] Many of these organizations and policymakers at all levels have signaled new commitment to transforming current practice to ensure that structurally embedded traditions do not continue to harm families.[227] Shifting from a termination to a transfer model of parental rights is an important way to turn that commitment into concrete action.

m/60a6942819ce8053cefd0947/60f6b1eba474362514093f96_Away%20From%20Home%20-%20Report.pdf [https://perma.cc/74D7-NKPU].

[226] Fighting Institutional Racism, *supra* note 6; Lenette Azzi-Lessing & Vandna Sinha, *Special Foreword, Family Poverty, Racism, and the Pandemic: From Crises to Opportunity for Transformation*, 99 Child Welfare VII (2021) (describing "an urgent, morally compelling call to transform the ways in which we recognize and respond to the needs, desires, and aspirations of children and families ensnared in poverty and those impacted by systemic racism," but noting "[i]t is reasonable to question whether such transformative change is possible given the poor track record of past child welfare reform efforts and the magnitude of the challenges inherent in attempting to radically change systems that operate with a great deal of autonomy across states, counties, provinces, and territories"); Casey Family Programs, Statement on the Death of George Floyd (June 3, 2020), https://www.casey.org/statement-on-death-of-george-floyd/ [https://perma.cc/5CBR-M9GB].

[227] Joseph R. Biden, *Press Release, A Proclamation on National Foster Care Month* (Apr. 29, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/04/29/a-proclamation-on-national-foster-care-month-2022/ [https://perma.cc/P6KH-76AY]; Letter from Aysha E. Schomburg, Assoc. Comm'r, Child.'s Bureau, U.S. Dep't of Health & Hum. Servs., to Child Welfare Leaders (Aug. 3, 2021) (on file with U.S. Dep't of Health & Hum. Servs.); David Hansell, *Combating Systemic Racism in the Child Welfare System*, N.Y. Daily News (Jan. 18, 2021), https://www.nydailynews.com/opinion/ny-oped-combating-systemic-racism-in-the-child-welfare-system-20210118-c2vva6vl3vdbtfhaot5iuxgpme-story.html [https://perma.cc/P96D-F8UQ].