FAMILY TIES: SOLVING THE CONSTITUTIONAL DILEMMA OF THE FAULTLESS FATHER

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I. INTRODUCTION

The last day of April 1995 had dawned just like any other for four-year-old Richard Warburton. It was a Sunday, chilly and gray, a perfectly average day in what passes for spring in suburban Chicago. By three o'clock that afternoon, however, Richard was fighting desperately to cling to the fragments of his life as they dissolved around him. Though his parents had told him a few hours earlier that he would be going on a "sleep over" at the home of a family he did not know, even at four years old he plainly sensed that something more life-altering was about to take place. After all, the belongings of his childhood, the silver bicycle with training wheels, his basketball, the blue toy box, his clothes, were already neatly collected near the front curb and a crowd of reporters and neighbors numbering into the hundreds had amassed on the front lawn. Inside the house, crying convulsively, oblivious to his national fame as the "Baby Richard" caught up in a well-publicized custody battle, young Richard Warburton pleaded with each member of his family to protect him. When his mother, wracked with tears, was unable to answer, Richard turned next to his father, and finally to his seven-year-old brother, begging each of them in turn to come with him. "I'll be good," he sobbed, "Don't make me leave. I'll be good."

Less than an hour later, after brief and awkward introductions to the biological parents he had never met, Richard was carried out before the television cameras and the weeping crowd to a waiting van. As he sobbed and clung to his adoptive mother, his heart racing and pounding against her chest, a family friend gently pried his fingers from her neck and shoulders so that he could be wrested into the hands of his biological father. With that, he was whisked away from all he had known to join a new home and family.[1] The mandate of the Illinois Supreme

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1. The factual details in this account come from the following eyewitness

Court that he be transferred to the custody of his biological parents "forthwith" was fulfilled.[2]

To many who watched the gut-wrenching hand-off of this four-year-old boy on television, the images were hauntingly familiar. In many details the scene resembled the highly publicized custody transfer two years earlier of two-and-a-half-year-old Jessica DeBoer of Michigan. In that case, too, an adoption was scuttled on the grounds that the child's biological father was given an inadequate opportunity to object, and a child who had bonded deeply with her adoptive parents was abruptly transferred by legal edict to the home of biological parents she regarded as strangers.[3] What made Richard's transfer especially shocking to some observers was that they had been repeatedly assured by commentators at the time of Jessica's transfer in 1993 that her case was unique, a tragedy that could be safely attributed to a tangle of bizarre circumstances unlikely ever to recur.[4] And, yet, here it was, not quite two years later, and the tragedy was unfolding again with an even older child. The reality that Richard's case forced upon the public was that such cases, where children are ordered removed from the care of adults they fully regard as their parents and transferred to the custody of biological parents they do not know, are unusual but recurring. In addition to those few, like Richard's or Jessica's, that make the network news, a steady stream of other cases challenging settled adoptive placements goes largely unnoticed.[5]

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accounts: Bob Greene, *Justices Weren't on Hand To Hear Baby Richard Sob*, SALT LAKE TRIB., May 2, 1995, at A14; Janan Hanna & Peter Kendall, *Wrenching Day for "Richard,"* CHI. TRIB., May 1, 1995, at 1; Alex Rodriguez, *Traumatic Day Tries Neighbors' Emotions*, CHI. SUN-TIMES, May 1, 1995, at 7; Kimberly Warburton & Anne Kavanagh, *I'll Never Stop Loving Baby Richard*, LADIES HOME J., June 1, 1997, at 24.

2. *See* O'Connell v. Kirchner, 513 U.S. 1138, 1138 (1995) (O'Connor, J., in chambers, dissenting) (quoting order of Illinois Supreme Court).

3. *See In re* B.G.C., 496 N.W.2d 239 (Iowa 1992).

4. Indeed, the opinion of the Iowa Supreme Court in that case had opened with an assurance along those lines. *See B.G.C.*, 496 N.W.2d at 240 ("This case is, we observe thankfully, an unusual one."). *Cf.* Deborah L. Forman, *Unwed Fathers and Adoption: A Theoretical Analysis in Context*, 72 TEX. L. REV. 967, 969 (1994) ("Admittedly, the Baby Jessica case was a disaster, but it was caused less by the decision to protect an unwed father's rights than by procedural problems with the case."); Carol A. Gorenberg, *Fathers' Rights vs. Children's Best Interests: Establishing a Predictable Standard for California Adoption Disputes*, 31 FAM. L.Q. 169, 178–79 (1997) ("[Baby Jessica] was more a battle of state law conflicts and professional ethics than over parents' or children's rights.").

5. *See* Adoption of Kelsey S., 823 P.2d 1216, 1238 (Cal. 1992) (ruling for biological father challenging adoption of then-four-year-old child); *In re* Baby Girl T., 715 A.2d 99, 106 (Del. Fam. Ct. 1998) (ordering that one-and-one-half-year-old girl be transferred from prospective adoptive parents who had raised her since she was two days old to custody of biological father she had never met); *In re* the Parentage of Unborn Child Brumfield, 673 N.E.2d 461, 467 (Ill. App. Ct. 1996) (ruling for biological father who sought custody of child who had lived with prospective adoptive parents for two years); Petersen v. Rogers, 445 S.E.2d 901, 906 (N.C. 1994) (affirming order that then-five-and-one-half-year-old boy be transferred to biological parents from prospective adoptive parents with whom he had lived since his second day of life); *In re* Adoption of a Child by P.F.R., 705 A.2d 1233, 1234–35 (N.J. Super. Ct. App. Div. 1998) (reviewing trial court order transferring custody of three-year-old boy from adoptive home in which he had been raised

since birth to biological father he had never met); *In re* Raquel Marie X., 559 N.E.2d 418, 429 (N.Y. 1990) (ruling for biological father challenging adoption of then-two-year-old daughter and remanding for further proceedings); Abernathy v. Baby Boy, 437 S.E.2d 25, 29 (S.C. 1993) (affirming order that then-eighteen-month-old boy be transferred to biological father from prospective adoptive parents with whom he had lived since his second day of life); *In re* Adoption of Baby Boy Doe, 717 P.2d 686, 691 (Utah 1986) (ruling for biological father challenging adoption of then-eighteen-month-old son who had lived with prospective adoptive parents since his third day of life); *In re* J.L.W., 306 N.W.2d 46, 57 (Wis. 1981) (ordering that two-and-one-half-year-old girl be returned to mother after living for more than two years with prospective adoptive parents); Thom Weidlich, *Tale of 2 States, Four Hearts and One Prized Baby*, NAT'L L.J., Mar. 18, 1996, at A1; Kurt Erickson, *Waiting for Baby Jane: Child's Father Still Seeking Justice in Lengthy Custody Dispute*, PANTAGRAPH, Feb. 15, 1998, at A1; *Judge Orders 2-Year-Old Back to Biological Parents*, CINC. ENQUIRER, Feb. 9, 1999, at A1; *The Next Baby Richard?*, TIME, June 5, 1995, at 20; Maryann Struman, *Parents Fight To Regain Kids*, DETROIT NEWS, Dec. 17, 1995, at B1.

As just one of the more recent examples, the Montana Supreme Court in September 1998 ordered that two brothers, ten and eleven years old, be transferred immediately from the home in which they had been raised for the past eight years to the custody of their biological father, a man they did not know. *See* Girard v. Williams, 966 P.2d 1155, 1167 (Mont. 1998). The boys' wrenching history of loss made the court's decision to order a traumatic change of custody all the more unfathomable. The boys were conceived as a result of an extramarital affair by their mother but had been raised by their mother and her husband, who was named as their father on their birth certificates. Shortly after the youngest boy was born, the mother's lover and her husband were both incarcerated for unrelated offenses. During their incarceration, the mother was murdered. The boys "were alone with [their mother's] body for approximately 24 hours before they were found[,]...likely witnessed the murder," and "continue[d] to experience emotional and psychological problems resulting from this traumatic event." *Id.* at 1157. After the murder, the boys were sent to live with their aunt and uncle in Montana and were eventually joined there by the mother's husband when he was released from prison. Three years later, the mother's husband, the man the children regarded as their father, also died and the boys remained in the care of their aunt and uncle. When the mother's lover, then released from prison himself, tracked the boys down and demanded custody, the trial court refused, awarding permanent custody to the aunt and uncle. The Montana Supreme Court reversed, finding no available legal basis for denying a biological parent's "entitle[ment]" to immediate custody of his offspring. In doing so, the court acknowledged that the children would incur yet another "trauma" but found itself powerless to reach any other result:

> [W]e are aware of—and concerned about—the children's emotional and psychological problems stemming from their mother's violent death and the subsequent upheavals in their lives. We also are aware that Frank [the biological father] and the children have had virtually no opportunity to know—or develop relationships with—each other and that the experts who testified in this case were unanimous in cautioning that a sudden change in custody and removal of David and Michael from their current home would be detrimental to the children's well-being. Thus, while no legal basis exists for delaying the change in custody, we strenuously encourage the parties to work together in planning and implementing the custody transition so as to result in as little trauma to all involved—especially, the children—as possible.

Id. at 1166–67.

In justifying this most profound exercise of judicial power, the complete obliteration and reconstruction of a child's life and family over the space of a few hours on a Sunday afternoon, Justice James Heiple of the Illinois Supreme Court had offered the following reassurance:

> As for the child,...it is to be expected that there would be an initial shock, even a longing for a time in the absence of the persons whom he had viewed as parents. This trauma will be overcome, however, as it is every day across this land by children who suddenly find their parents separated by divorce or lost to them through death.... It will work itself out in the fullness of time.[6]

In truth, however, Justice Heiple's analogy was inapt. The loss suffered by Richard at the direction of the court was far more sudden and complete than that of children whose parents divorce. In divorce the child almost always remains in the care of one parent and maintains a relationship with the other. The analogy to sudden death is closer, but it, too, is ultimately an incomplete account of the trauma. Had Richard's parents simply been killed in a traffic accident that afternoon, he would have suffered grievously, but he would not have had to wonder why his parents allowed him to be taken away.[7] Ultimately, then, the soundest justification that the Illinois Supreme Court could offer for its decision to require a four-year-old boy to suffer this agony was that the law permitted no alternative. To the court, the logic seemed ineluctable: Since the conduct of Richard's biological father was not sufficiently blameworthy to justify terminating his parental rights under Illinois law (or, probably, under the federal Constitution), the Warburtons could not adopt Richard. Since there could be no adoption, there was no legal basis to permit Richard to remain in their care.[8]

In the wake of the Baby Jessica and Baby Richard cases, many state legislatures amended their adoption laws in an effort to put an end to such tragedies, most following one of two basic strategies. First, some states sought to expand the statutory grounds for terminating the rights of absent fathers, so that even when fathers have not consciously neglected their children an adoption might be permitted to go forward over their objection. To this end, as just one example,

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6. *In re* Petition of Doe, 638 N.E.2d 181, 190 (Ill. 1994) (Heiple, J., concurring).

7. As Dr. Robert Gatson, director of child development at Chicago's Cook County Hospital, observed, "[t]his child will know that his parents didn't die. In his eyes, they will have given him away. He must have done something wrong." *See* Michele Ingrassia, *'Ordered to Surrender,'* NEWSWEEK, Feb. 6, 1995, at 44. That prophesy was fulfilled at the April 30 transfer, when Richard desperately implored his adoptive mother, "I'll be good. Don't make me leave. I'll be good." *See* Greene, *supra* note 1, at A14.

8. In explaining his refusal to stay the Illinois Supreme Court's custody order, Justice Stevens seemed to indicate his agreement, at least with the proposition that there was no basis in *federal law* for avoiding the custody transfer:

> [T]he regrettable facts that an Illinois court entered an erroneous adoption decree in 1992 and that the delay in correcting that error has had such unfortunate effects on innocent parties are, of course, not matters that I have any authority to consider in connection with the dispositions of the pending applications for federal relief.

O'Connell v. Kirchner, 513 U.S. 1303, 1304 (1995) (Stevens, J., in chambers).

more than a dozen states now have created so-called putative father registries and provide for the waiver of legal rights of fathers who fail to record their interest in custody within a relatively short period of time following the birth of the child.

The second reform strategy has been to provide for the possibility of long-term custody by non-parent caregivers in cases where the legal rights of biological parents cannot be terminated. A large handful of states now expressly empower their courts, in the event that an adoption cannot go forward, to permit the child to remain indefinitely in the custody of the adults who had sought to adopt, while giving the biological parent or parents rights of visitation and communication. Although the caregivers under this approach cannot become "parents" to the child through adoption, they and the child at least can be spared the trauma of separation.

In this Article, I contend that these legislative efforts fail in their ambition to solve the legal dilemma of the blameless biological parent. In Part II, I recount the developments in constitutional law that have created this dilemma and describe how those developments have introduced significant uncertainty into the law of adoption. In Part III, I survey recent legislative reform efforts and conclude that the strategies attempted so far are helpful but ultimately incomplete as a solution to the constitutional dilemma. Efforts to expand the grounds upon which states may involuntarily terminate parental rights ultimately run up against significant constitutional limitations. And the provision of long-term custody without adoption, while a decided improvement over the alternative of a traumatic change in custody, still falls significantly short of the goal of maximizing the child's welfare consistent with the constitutional rights of the adults involved. Such an arrangement leaves the long-term caregivers in a state of parental purgatory, something better than temporary custodians, but something less than true parents in the eyes of the law. In this limbo, the child and her caregivers remain under a cloud of insecurity, vulnerable to repeated petitions for a change of custody, and are denied legal recognition as a true *family.* The vulnerability and the awareness that society withholds its full validation as a family work in tandem to inhibit the full and complete development of family bonds, to the detriment of all involved with no corresponding gain for society.

In Part IV, I sketch the outlines of a more satisfactory solution, the limited allowance for adoption without terminating the rights of biological parents, and explain why this approach would be both socially desirable and constitutional. By permitting adoption, the proposal would remove the nagging sense of vulnerability and impermanence that characterize many guardianship arrangements. Of equal importance, by normalizing this arrangement and giving it full legal recognition as a *family*, the proposal would make it more likely that the adults and children involved would be able to nurture the fullest possible parent-child bond, to the enormous benefit of all involved. I contend that the burden this plan contemplates upon the rights of biological parents is constitutionally permissible because the proposal would leave intact what the Supreme Court implicitly has recognized as the essential core of the parent-child relationship, the right to know and be known by one's child, while promoting powerful societal interests in the well-being of children.

II. FROM PETER STANLEY TO OTAKAR KIRCHNER: THE EVOLUTION OF FATHERS' RIGHTS AND THE DILEMMA OF THE FAULTLESS FATHER

A. The Emergence and Qualification of Unwed Fathers' Rights

One of the most striking aspects of the controversy over fathers' rights in the context of adoption is its very recent origin. Before the 1970s, there effectively was no controversy because the states had largely resolved the issue by denying unwed fathers *any* legal rights with respect to their children. Although the Supreme Court had established by 1965 that fathers of children born within marriage were constitutionally entitled to notice of any adoption proceeding involving their children,[9] the states continued to exclude fathers of non-marital children from the adoption process. To ensure a final and unimpeachable adoption of such a child, all that was needed was the valid consent of the child's mother.[10] If the father objected and desired to raise the child himself, he typically had no legal standing to block the adoption; there was no need to obtain his consent or demonstrate grounds for involuntarily terminating his parental rights. As an unwed father, he simply had no parental rights.[11]

All of this changed dramatically in 1972, when the Supreme Court decided *Stanley v. Illinois*.[12] *Stanley* vividly illustrated the irrationality and injustice of the traditional legal disregard for the unwed father. Peter Stanley had lived with Joan Stanley off and on for eighteen years.[13] The couple had three children together, and Peter Stanley had lived with them and their mother for all of

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9. *See* Armstrong v. Manzo, 380 U.S. 545, 550 (1965).

10. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.2, at 855 (1988); Note, *The Emerging Constitutional Protection of the Putative Father's Parental Rights*, 70 MICH. L. REV. 1581, 1583–84 (1972); W.J. Dunn, Annotation, *Necessity of Securing Consent of Parents of Illegitimate Child to Its Adoption*, 51 A.L.R.2d 497 (1957). *See also* Caban v. Mohammed, 441 U.S. 380, 390 n.8 (1979) (describing history of New York adoption statute); *In re* Appeal of H.R., 581 A.2d 1141, 1155–56 (D.C. 1990) (describing history of District of Columbia adoption statute); *In re* Adoption of W., 904 P.2d 1113, 1116–17 (Utah Ct. App. 1995) (per curiam) (describing history of Utah adoption statute). Some states differentiated between unwed fathers who had "legitimated" their children and those who had not, requiring the consent only of the former. *See* Quilloin v. Walcott, 434 U.S. 246, 248–49 (1978) (describing Georgia statute); Dunn, *supra*, at 503. A number of states, however, categorically excluded all unwed fathers. *See id.*

11. This rule remains the law, at least nominally, in one jurisdiction. Mississippi's statutes governing adoption continue to provide that "[i]n the case of a child born out of wedlock, the father shall not be deemed to be a parent for the purpose of this chapter...." MISS. CODE ANN. § 93-17-5 (1994 & Supp. 1998). The Mississippi Supreme Court recently acknowledged, however, that "several United States Supreme Court decisions demonstrate the unconstitutionality of our statute." Smith v. Malouf, 722 So. 2d 490, 494 (Miss. 1998).

12. 405 U.S. 645 (1972).

13. *See id.* at 646.

the children's lives.[14] When Joan Stanley died, the State of Illinois declared their children wards of the state in a dependency proceeding and placed them with court-appointed guardians on the grounds that the children had "no surviving parent or guardian."[15] Notwithstanding that he was their biological father and that he had helped to raise them along with their mother, Peter Stanley was not considered a "parent" within the meaning of the governing Illinois statute because he was not married to the children's mother.[16]

Reversing the state courts below, the Supreme Court held that Illinois could not presume that all unwed fathers to be unfit to raise their children. Justice White wrote for the Court:

> It may be as the State insists, that most unmarried fathers are unsuitable and neglectful parents. It may also be that Stanley is such a parent and that his children should be placed in other hands. But all unmarried fathers are not in this category; some are wholly suited to have custody of their children.[17]

The State's mere interest in administrative convenience, the Court ruled, could not justify reliance on a presumption of unfitness when private interests so substantial as the parent-child relationship hung in the balance.[18] Indeed, the Court noted, Stanley's interest "in the children he has sired and raised" fell squarely within the "rights to conceive and to raise one's children...[that the Court had long] deemed 'essential'" and entitled him to heightened constitutional protection.[19] Because administrative efficiency did not constitute the sort of "powerful countervailing interest" sufficient to overcome this "essential" liberty interest, the Court concluded that "*all* Illinois parents are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."[20]

With its decision in *Stanley*, the Supreme Court recognized for the first time that the interests of unwed fathers, or at least *some* unwed fathers, in relationships with their children are entitled to heightened constitutional protection against state interference. Nevertheless, some lower courts read *Stanley* narrowly and continued to uphold the wide-scale exclusion of unwed fathers from the adoption process. Thus, three years after *Stanley*, the New York Court of Appeals held that the Constitution did not require states to establish the unfitness of or obtain the consent of unwed fathers prior to authorizing the adoption of their children by others.[21] *Stanley*, after all, did not directly involve an adoption proceeding; rather, it squarely controlled only the manner in which a state may take custody of children on grounds of abuse or neglect.

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14. *See* Lehr v. Robertson, 463 U.S. 248, 258 (1983) (recounting the facts of *Stanley*).
15. *Stanley*, 405 U.S. at 649.
16. *See id.* at 650.
17. *Id.* at 654 (footnotes omitted).
18. *See id.* at 656–58.
19. *Id.* at 651 (quoting Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).
20. *Id.* at 651, 658 (emphasis added).
21. *See In re* Adoption of Malpica-Orsini, 331 N.E.2d 486, 488 (N.Y. 1975), *overruled by* Caban v. Mohammed, 441 U.S. 380 (1979).

Between 1978 and 1983, the Supreme Court returned to the question in a series of three cases that, at once, both expanded and restricted the rights of unwed fathers. The expansion came when the Court extended *Stanley* directly to adoption and held squarely that unwed fathers may not be shunted aside categorically when it comes to the adoption of their children. The restriction followed, however, in virtually the next breath, when the Court made clear that unwed fathers also are not categorically entitled to maintain ties with their children. Instead, the extent of each father's constitutional protection depends upon the substantiality of his particular relationship with his children.

In *Quilloin v. Walcott*,[22] the Court first considered the constitutional claims of an unwed father who had never lived with, sought custody of, or legitimated his child. Until the child was eleven years old, the father's only role in the child's life had been as an occasional visitor and as the maker of a few, haphazard gestures of financial support.[23] When the mother's husband, with whom the child had lived for nine years, sought to adopt the child, the father objected and, for the first time, sought to establish his paternity and visitation rights.[24] The trial court, however, granted the adoption on a bare finding that it would serve the child's "best interests" pursuant to a Georgia statute that dispensed with any requirement of consent by or an adjudicated finding of unfitness of an unwed father who had failed previously to legitimate a child.[25] The Supreme Court rejected the father's constitutional attack on the adoption. Although due process might well require a state to obtain consent or establish unfitness before acting to separate a "natural family," Quilloin himself could make no claim to being part of such a family since he had never sought custody of his child.[26] Moreover, the Court ruled the Equal Protection Clause was not offended by Georgia's differentiation between married fathers (whose consent or adjudicated unfitness was required prior to adoption) and unwed fathers such as Quilloin, because the former had undertaken legal responsibility for raising the children whereas the latter had not.[27]

The Court returned to the question the very next Term. In *Caban v. Mohammed*,[28] the Court held that New York could not permit the adoption of Abdiel Caban's biological children without first obtaining his consent or proving him unfit as a parent. In ruling in favor of the unwed father, the Court emphasized the facts that distinguished this case from *Quilloin*. Whereas Quilloin had never lived with his child or the child's mother, Caban had lived with Maria Mohammed for five years and helped raise their two children.[29] When Mohammed left Caban and took the children with her, Caban continued to visit the children regularly and for a time even took custody of them.[30] Unlike Quilloin, who had sought only to

22. 434 U.S. 246 (1978).
23. *See id.* at 251.
24. *See id.* at 249–50.
25. *See id.* at 249, 251.
26. *Id.* at 255.
27. *See id.* at 255–56.
28. 441 U.S. 380 (1979).
29. *See id.* at 389 & n.7.
30. *See id.* at 382–83.

block his child's adoption and pointedly did not seek custody himself, Caban had responded to the adoption petition filed by Mohammed and her husband by filing a cross-petition on behalf of himself and his wife seeking to adopt and take custody.[31] In short, unlike Quilloin, Caban had "established a substantial relationship" with his children prior to the attempted adoption and demonstrated his full commitment to them by seeking custody.[32]

With *Quilloin* and *Caban*, the contours of the constitutional rights of unwed fathers took much clearer form. It now was clear that unwed fathers could not be categorically excluded from the adoption process, but neither were they categorically entitled by the Constitution to insist that adoption be conditioned on their consent or adjudicated unfitness. Rather, it seemed apparent that the constitutional rights of unwed fathers to preserve a relationship with their children sprang not from the biological fact of their fatherhood alone, but from the pre-existence of a "substantial relationship" worthy of protection.[33]

That understanding was validated by the Court's 1983 decision in *Lehr v. Robertson*.[34] In *Lehr*, the Court turned aside a constitutional challenge by an unwed father whose two-year-old daughter was adopted without any prior notice to him. New York law required that notice be given only to men who had been previously identified as or adjudicated to be the child's father or who had demonstrated their interest by filing a claim of possible paternity with the state's Putative Father Registry.[35] The father in *Lehr* had failed to file with the Putative Father Registry and did not fall within any of the other classes of men entitled to notice, and the family court had granted the adoption without giving him notice or an opportunity to be heard.[36] The Court rejected the father's due process and equal protection claims and held that New York had adequately accommodated his interests in a relationship with his daughter by affording him the opportunity to register for notice with the putative father registry.[37] Any constitutional claim to greater protection, including the provision of actual notice and any conditioning of the adoption on the father's consent or unfitness, would require proof that he had

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31. *See id.*

32. *Id.* at 393.

33. *See id.* at 393 n.14 (emphasizing "the importance in cases of this kind of the relationship that in fact exists between the parent and child") (citing Quilloin v. Walcott, 434 U.S. 246 (1978)).

34. 463 U.S. 248 (1983).

35. Specifically, the Court noted:

> In addition to the persons whose names are listed on the putative father registry, New York law requires that notice of an adoption proceeding be given to several other classes of possible fathers of children born out of wedlock—those who have been adjudicated to be the father, those who have been identified as the father on the child's birth certificate, those who live openly with the child and the child's mother and who hold themselves out to be the father, those who have been identified as the father by the mother in a sworn written statement, and those who were married to the child's mother before the child was six months old.

463 U.S. at 251 (footnote omitted).

36. *See id.* at 251–53.

37. *See id.* at 263–67.

played a more substantial role in his daughter's life. The Court explained:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "com[ing] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the due process clause. At that point, it may be said that he "act[s] as a father toward his children." But the mere existence of a biological link does not merit equivalent constitutional protection.
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> ....
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> The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship and make uniquely valuable contributions to the child's development. If he fails to do so, the Federal Constitution will not automatically compel a state to listen to his opinion of where the child's best interests lie.[38]

Simply put, *being* a father, in the bare sense of having participated in the child's conception, is not enough to trigger the protection of the Constitution; rather, a father-child relationship becomes worthy of constitutional protection only if the father has "*act[ed]* as a father toward his children...."[39] After more than a decade and three additional passes at the question, the Court ultimately held the line on the rights of unwed fathers at the point where they began in *Stanley*: The Constitution will protect the parental interests of men who have both "sired *and raised*" their children,[40] but the Court has yet to extend that protection to any man who has not played a substantial role in the rearing of his child.

B. Unanswered Questions and the Faultless Father

The Supreme Court's forays into unmarried parenting have established clear rules for what might be considered the two opposite extremes of fatherhood. The man who nurtures and supports his children, successfully developing a close relationship with them, and who stands ready to assume full custodial responsibility is entitled to invoke the Constitution's full protection against state interference with that relationship.[41] Such a man has "a relationship with his children fully comparable to that of the mother[,]" and, therefore, is entitled to fully comparable parental rights, including the right to block an adoption of his children unless he is found to be unfit as a parent.[42] At the other extreme, the Supreme Court has made clear that the man who shirks the duties and hard work of parenthood, who dallies in asserting his interest in fatherhood and squanders the

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38. *Id.* at 261–62 (citations & footnote omitted).

39. Caban v. Mohammed, 441 U.S. 380, 389 n.7 (1979) (emphasis added). *See also Lehr*, 463 U.S. at 261.

40. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (emphasis added).

41. This scenario, of course, describes Abdiel Caban. *See Caban*, 441 U.S. at 389.

42. *Id.* at 389.

unique "opportunity" to "develop a relationship with his offspring," may be deemed to have forfeited his parental rights consistent with the Constitution.[43] But the Court's cases seem to contemplate only two models of fatherhood: the man of virtue who is integrally involved in the rearing of his children and the scofflaw who has slept on his rights while others changed diapers and read bedtime stories.[44] The Court's cases do not squarely resolve what should be done with the father who falls somewhere in between these two poles—for example, the man who has done everything he reasonably could to establish a relationship with his child but who has been thwarted by circumstances beyond his control.

There are two possible understandings of the Court's holdings in its unwed-father cases, and the choice between them will determine the extent to which fathers who have been unable to establish a substantial parent-child relationship through no fault of their own will be able to invoke the Constitution to unsettle pending or even completed adoptions.

Under one understanding, the Court made the validity of the father's constitutional claim turn solely on "the existence or nonexistence of a substantial relationship between parent and child[,]"[45] without regard for the *reasons why* the relationship happened to sputter or thrive. Under this account, the only reason why the Court found that Abdiel Caban was constitutionally entitled to preserve his parent-child relationship, while Leon Quilloin and Jonathan Lehr were not, is that only Caban had succeeded in developing a substantial personal relationship with his children. Supporters of this reading of the Court's opinions can point to language emphasizing "the importance in cases of this kind of the relationship that *in fact exists* between the parent and child,"[46] and to the somewhat short shrift that the Court gave to equitable claims on behalf of the fathers. That Lehr may have been rebuffed in his attempts to establish a relationship,[47] or that Quilloin was ignorant of the possibility of legally establishing his paternity at an earlier date,[48] might have made those men less culpable morally for the absence of a meaningful relationship with their children, but that finding could not change the essential fact that no substantial father-child relationship existed.

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43. *Lehr*, 463 U.S. at 262. *See also Caban*, 441 U.S. at 392 ("In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.").

44. The accuracy of these characterizations as applied to the individual litigants in *Quilloin*, *Caban*, and *Lehr* may be readily debated. Abdiel Caban, the prevailing father who won the Court's implicit praise for his parental involvement, had effectively kidnapped his children for a short time from their custodial mother. *See Caban*, 441 U.S. at 383. Leon Quilloin and Jonathan Lehr each claimed to be ignorant of the whereabouts of their children or of the legal processes available for asserting their interest as parents. *See Lehr*, 463 U.S. at 269, 271 (White, J., dissenting); Quilloin v. Walcott, 434 U.S. 246, 254 (1978). Whether accurate or not, however, the Court's opinions seem to separate these fathers into these different pigeonholes.

45. *Lehr*, 463 U.S. at 266.

46. *Caban*, 441 U.S. at 393 n.14 (emphasis added).

47. *See Lehr*, 463 U.S. at 269 (White, J., dissenting).

48. *See Quilloin*, 434 U.S. at 254.

Under this view, the Court's protection of the father-child relationship against state interference is effectively "child-centered," protecting the relationship only where the child would regard the man as a true and "loving father[]"[49] and not merely as an abstraction or a stranger. The rule would thus limit constitutional intervention to those cases where the human relationship is most worthy of protection, recognizing that the loss of a mere opportunity to develop a relationship is less substantial than the extinguishment of an existing human bond. Limiting the scope of constitutional intervention in this way would be consistent with the Court's previous recognition that "the importance of the familial relationship, to the individuals involved and to the society, stems [largely] from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot(ing) a way of life' through the instruction of children."[50] By this understanding, a father's claim that he cannot be faulted for the non-existence of a substantial relationship with his child is simply irrelevant.[51] What counts, to the Court as to the child, is not the "*potential*" for a relationship furnished by conception and childbirth, but "'the *actual* relationship between father and child.'"[52] The Court is not concerned with what might have been, but examines "the relationship that in fact exists between the parent and child."[53] There being in fact no substantial relationship between father and child, there would be no basis for invoking the Constitution to protect it.

There is, however, a second plausible way of understanding the Court's holdings, and it is one that introduces a significant measure of insecurity into the adoption process. Under this view, the Supreme Court is concerned not simply with the existence or non-existence of a meaningful father-child relationship, but ultimately also with the strength of the father's *moral* claim to a relationship with his child. By these lights, the reason why the Court made constitutional rights turn on whether the claimant "act[ed] as a father toward his children" is not solely to judge whether the loss of that relationship would be substantial enough to both father and child to warrant protection, but also to judge whether the claimant has acted in a way *deserving* of protection.

To be sure, the Court's opinions in *Quilloin*, *Caban*, and *Lehr* are laden with rhetoric that can be read to reflect judgments about the moral culpability of each of these fathers. Abdiel Caban, for instance, *did* "act as a father toward his children" because he lived with his children for some years before he separated from their mother; he visited them regularly thereafter, took custody of them for a

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49. *Caban*, 441 U.S. at 394.

50. Smith v. Organization of Foster Families for Equal. and Reform, 431 U.S. 816, 844 (1977) (quoting Wisconsin v. Yoder, 406 U.S. 205, 231–33 (1972)). *See also Lehr*, 463 U.S. at 261.

51. *See* Elizabeth Buchanan, *The Constitutional Rights of Unwed Fathers Before and After* Lehr v. Robertson, 45 OHIO ST. L.J. 313, 368 (1984) ("Blood gives the father an absolute first chance to perform the constitutional duties [of child-rearing]. If he fails, *regardless of his blamelessness*, the critical requirement of stability for the child precludes a second chance." (emphasis added)).

52. *Lehr*, 463 U.S. at 260–61 & n.16 (quoting Caban v. Mohammed, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting)) (emphasis added).

53. *Caban*, 441 U.S. at 393 n.14.

time, supported them financially, and, ultimately, sought to win permanent custody of them.[54] The father in *Quilloin*, by contrast, "fail[ed] to act as a father" because he was largely absent from his child's life for eleven years, visiting occasionally but "provid[ing] support only on an irregular basis" and never seeking custody.[55] Jonathan Lehr, too, had no substantial constitutional claim to fatherhood because he had "never had any significant custodial, personal, or financial relationship with Jessica and he did not seek to establish a legal tie until after she was two years old."[56] These men lost because they "'ha[d] never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child,'"[57] and having failed to "complain of [their] exemption from these responsibilities,"[58] had no basis for complaining that they were being deprived of "the blessings of the parent-child relationship."[59] When Justice White, dissenting in *Lehr*, suggested that Lehr was personally blameless for his lack of a relationship with his daughter,[60] the majority responded in a way that seemed calculated to underscore doubts about Lehr's claims of fatherly devotion. If Lehr were genuinely interested in parenthood, the majority observed, he could have ensured himself notice of any adoption proceeding "simply by mailing a postcard to the putative father registry."[61]

The Supreme Court itself seems torn between these competing understandings. In the Court's most recent case considering a biological father's constitutional claim to parenthood, *Michael H. v. Gerald D.*,[62] individual Justices appeared to subscribe to both points of view. In reviewing the Court's prior cases, Justice Scalia opined that *Lehr* had "assumed" some constitutional protection not only for established parent-child relationships, but also for an unwed father's

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54. *See id.* at 389.

55. *See* Quilloin v. Walcott, 434 U.S. 246, 251 (1978).

56. *Lehr*, 463 U.S. at 262.

57. *Id.* at 267 (quoting Quilloin v. Walcott, 434 U.S. 246, 251 (1978)).

58. *Id.*

59. *Id.* at 262. *See also Caban*, 441 U.S. at 392 ("In those cases where the father never has come forward to participate in the rearing of his child, nothing in the Equal Protection Clause precludes the State from withholding from him the privilege of vetoing the adoption of that child.").

60. *Lehr*, 463 U.S. at 270–71 (White, J., dissenting). Justice White, joined by Justices Marshall and Blackmun, was clearly of the view that the Due Process Clause would not permit a state to strip an unwed father of his parental rights based on his lack of a substantial relationship with the child where the father had been "prevented from forming such a relationship." *See id.* at 271 & n.3 (White, J., dissenting). The majority did not answer this point directly because it concluded that Lehr had been afforded an opportunity to establish his parental rights by way of the putative father registry and that he had, in effect, squandered it. *See id.* at 262 n.18, 264.

61. *Id.* at 262 n.18. *See also id.* at 264 ("By mailing a postcard to the putative father registry, he could have guaranteed that he would receive notice of any proceedings to adopt Jessica. The possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.").

62. 491 U.S. 110 (1989). In that case, the Court rejected a biological father's claim of a constitutional right to seek visitation with a child born of an extramarital affair with a married woman, but could not agree on a rationale.

"'opportunity...to develop a relationship with his offspring.'"[63] After all, if the Constitution afforded no protection at all to purely potential relationships, that provided a short and complete answer to Lehr's constitutional challenge to the adoption of his daughter; instead, the *Lehr* Court felt compelled to reject Lehr's claim on the narrower ground that New York's Putative Father Registry gave him a constitutionally sufficient opportunity to "grasp" his opportunity at parenthood.[64] Justice White, though dissenting from the judgment, agreed with the plurality's reading of *Lehr*, contending that "the Court in *Lehr* suggested that States must provide a biological father of an illegitimate child the means by which he may establish his paternity so that he may have the opportunity to develop a relationship with his child."[65] Justice Brennan, however, seemed to take the opposite tack, suggesting that the Court's unwed-father cases recognize constitutional protection only for established, "substantial" parent-child relationships.[66] "[A]n unwed father's biological link to his child does not," he wrote, "in and of itself, guarantee him a constitutional stake in his relationship with that child," including, by implication, any stake in trying to *establish* a substantial relationship.[67]

Although the Court itself has yet to resolve which of these competing understandings is correct, many state courts have already embraced the view that the Constitution protects not only existing relationships, but also a parent's "opportunity interest" in establishing such a relationship. Indeed, this conclusion largely explains the decisions in the Baby Richard and Baby Jessica cases. In both of those cases, the state supreme courts regarded the fathers as blameless victims of the machinations of others and held, in effect, that the Constitution would not permit these men to suffer the loss of fatherhood when they had done nothing to warrant such a grievous penalty.

In the *Baby Richard* case, for example, the Illinois Supreme Court concluded, on the basis of sharply controverted evidence, that the biological mother had schemed with the couple who sought to adopt Richard in order to deprive the biological father, Otakar Kirchner, of any chance to obtain custody.[68] The relationship between Kirchner and the child's mother, Daniella Janikova, ended suddenly during the pregnancy when Janikova suspected that Kirchner was rekindling an old flame during a visit to his native Czechoslovakia.[69] When

63. 491 U.S. at 128–29 (quoting Lehr v. Robertson, 463 U.S. 248, 262 (1983)).

64. *See Lehr*, 463 U.S. at 262–63 ("We are concerned only with whether New York has *adequately* protected [Lehr's] opportunity to form...a relationship [with his child]." (emphasis added)).

65. *Michael H.*, 491 U.S. at 159 (White, J., dissenting). This principle would have led Justice White, however, to uphold the constitutional claim of the extramarital lover in *Michael H.*: "Under *Lehr* a 'mere biological relationship' is not enough, but in light of [the biological mother's] vicissitudes, what more could Michael have done?" *Id.* at 160 (White, J., dissenting).

66. *Id.* at 142–43 (Brennan, J., dissenting).

67. *Id.* at 142. Justice Brennan made this point again when he explained why a rapist would have no constitutional claim to a relationship with a child conceived as a result of the crime. *See id.* at 143 n.2.

68. *See In re* Petition of Doe, 638 N.E.2d 181, 182 (Ill. 1994).

69. *See id.*

Kirchner returned to Chicago, Janikova's relatives informed him that the baby had died after childbirth, and Janikova thereafter hid herself and the child from Kirchner's "persistent inquiries."[70] In the weeks that followed the birth, Kirchner searched local hospitals and the homes of Janikova's relatives in an effort to discover clues about the child's fate or whereabouts.[71] When the child was fifty-seven-days-old, Janikova confessed to him that she had surrendered the child for adoption and Kirchner promptly hired an attorney and sought to block the adoption.[72]

Based on these facts, the Illinois Supreme Court unanimously concluded that the adoption was defective and could not go forward.[73] Although the lower courts had found that Kirchner's consent to the adoption was unnecessary because he had shown a lack of interest in the child during the first thirty days of the child's life, the Illinois Supreme Court held that finding to be unsupported by the evidence.[74] Without Kirchner's consent and without any grounds for involuntarily terminating his parental rights, the court concluded that the adoption must be vacated.[75]

Significantly, although the court's initial decision was grounded directly in the text of the Illinois Adoption Act, the court ultimately sought to justify the result by pointing to the commands of the federal Constitution as well. When the court took up the case again one year later on Kirchner's petition to enforce the 1994 judgment, the court surveyed the U.S. Supreme Court's cases dealing with the rights of unwed fathers and concluded that Kirchner *constitutionally* would be entitled to upset the adoptive placement of his son.[76] Although Kirchner did *not* have "a substantial relationship" with his son in the same way that Abdiel Caban had, neither had he dodged his responsibilities or slept on his rights in the way the Court had attributed to Leon Quilloin and Jonathan Lehr. Concluding that this case fell somewhere in between, the Illinois Supreme Court reasoned:

> None of th[e] United States Supreme Court decisions...discuss[es] an unwed father's rights regarding an infant placed for adoption at birth who seeks to raise his child but is prevented from doing so through deception. We find that the rationale underlying the Court's opinions dealing with the rights of unwed fathers thus far suggests that fathers such as Otto, whose parental rights are not properly terminated and who, through deceit, are kept from assuming responsibility for and developing a relationship with their children, are entitled to the same due process rights as fathers who actually are given an opportunity and do develop this relationship.[77]

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70. *Id. See also In re* Petition of Kirchner, 649 N.E.2d 324, 327 (Ill. 1995).
71. *See Kirchner*, 649 N.E.2d at 327.
72. *See id.*
73. *See Petition of Doe*, 638 N.E.2d at 181.
74. *See id.* at 182.
75. *See id.* at 182–83.
76. *See Kirchner*, 649 N.E.2d at 333.
77. *Id. See also Doe*, 638 N.E.2d at 186 (McMorrow, J., concurring) (concluding that Kirchner's behavior would not provide sufficient grounds for involuntarily terminating his parental rights so that the adoption could proceed without his consent).

The courts of Iowa and Michigan arrived at essentially the same conclusion when ordering the transfer of two-and-a-half-year-old Jessica DeBoer from her adoptive home in Michigan to the custody of her biological father in Iowa. In that case, as in the *Kirchner* case, the unmarried biological parents had a falling out during the pregnancy. Although the father knew of the mother's pregnancy, he did not inquire after the baby, purportedly because he doubted that he was the father.[78] The mother, meanwhile, named another man as the father on the child's birth certificate and, with that man, surrendered the child for adoption. As in the *Kirchner* case, second thoughts brought about a reconciliation with the biological father, who was then informed about the pending adoption and intervened to assert his interest in custody. The Iowa trial court, like the Illinois Supreme Court, invoked the Constitution in concluding that the adoption could not go forward in the absence of the father's consent or demonstrated unfitness. "It is...now clearly established," the court asserted, "that an unwed father who has not had a custodial relationship with a child nevertheless has a constitutionally protected interest in establishing that relationship."[79] The Iowa Supreme Court affirmed, emphasizing that the biological father had done "everything he could reasonably do to assert his parental rights."[80]

The courts of numerous other states have expressed agreement with this constitutional principle, although in cases that did not ultimately lead to such highly publicized transfers of custody.[81] Like the Illinois and Iowa supreme courts, these courts have held that the U.S. Supreme Court's unwed-father cases afford constitutional protection not only to established parent-child relationships, but also impliedly for the opportunity to establish such a relationship in the first place.[82] While acknowledging that an unwed father who is deprived of a fair opportunity to establish a relationship with his child constitutionally may be entitled to unsettle an adoptive placement, most of these courts, unlike their counterparts in Illinois and Iowa, have gone on to find that the particular fathers involved in those cases had a sufficient chance to assert their interests.[83] Although one court has placed an

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78. *See In re* B.G.C., 496 N.W.2d 239, 241 & n.1 (Iowa 1992).

79. *In re* Clausen, 502 N.W.2d 649, 664 (Mich. 1993) (quoting trial court's unpublished opinion).

80. *B.G.C.*, 496 N.W.2d at 246. The Michigan Supreme Court, in rejecting a subsequent attempt by the adoptive parents to avoid the Iowa Supreme Court's judgment, went out of its way to express apparent approval of the Iowa trial court's constitutional analysis. *See Clausen*, 502 N.W.2d at 664.

81. *See In re* Appeal of H.R., 581 A.2d 1141, 1162–63 (D.C. 1990); Smith v. Malouf, 722 So. 2d 490, 497 (Miss. 1998); *In re* Raquel Marie X., 559 N.E.2d 418, 424 (N.Y. 1990); *In re* Baby Boy K., 546 N.W.2d 86, 91 (S.D. 1996) (citing *In re* F.J.F., 312 N.W.2d 718, 720–21 (S.D. 1981)); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); Kessel v. Leavitt, 511 S.E.2d 720, 747–50 (W. Va. 1998), *cert. denied*, 119 S. Ct. 1035 (1999).

82. *See H.R.*, 581 A.2d at 1162–63; *Smith*, 722 So. 2d at 490, 497; *Raquel Marie X.*, 559 N.E.2d at 424; *Baby Boy K.*, 546 N.W.2d at 91; *Nale*, 871 S.W.2d at 680; *Kessel*, 511 S.E.2d at 747–50.

83. For example, in *Baby Boy K.*, 546 N.W.2d 86 (S.D. 1996), the South Dakota Supreme Court rejected a constitutional attack on an adoption by a biological father who did not assert his interests until almost four months after the court had entered an order

important qualification on this so-called "opportunity interest" of unwed fathers, insisting that any legal interest in the child be asserted within six months of the child's placement for adoption,[84] most have left a considerably wider opening for the possible disruption of an adoptive placement in cases where a biological father is genuinely blameless in failing to assert his parental interests promptly.[85]

Thus, despite the availability of a plausible and theoretically sound alternative understanding of the Supreme Court's cases on the subject, the clear consensus among state courts is that an unwed father is constitutionally entitled to object to the adoption of his child, even in the absence of an established relationship with that child, if he has been thwarted by others in his good-faith efforts to establish such a bond. As the judges in some of these cases have been quick to realize, the implications of this doctrinal development are potentially very significant for the stability of adoptions, raising, as one put it, "[t]he specter of newly named genetic fathers[] upsetting adoptions, perhaps years later...."[86] And, given the rapid increase in the incidence of non-marital births in the United States,[87] the number of cases potentially affected by this doctrine seems likely to grow.

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terminating all parental rights and freeing the child for adoption. *See id.* at 88. The court held that the father had waived his rights by failing to comply with a South Dakota statute that requires unwed fathers, unless they are so identified by the mothers, to assert any legal interests within sixty days after the child's birth. *See id.* at 90. The court further rejected the father's argument that he was constitutionally entitled to raise his interests after the statutory period because the mother had not informed him of her pregnancy and had lied to the court about the identity of the father. The court found that the father in this case had a constitutionally sufficient opportunity to assert his interests within the sixty-day statutory period because he learned of his paternity within one month of the child's birth and yet "delayed filing his paternity claim for over two months after learning of [his son's] birth" without any "reasonable or convincing explanation for this delay." *Id.* at 100.

84. *See* Robert O. v. Russell K., 604 N.E.2d 99, 103 (N.Y. 1992); *Raquel Marie X.*, 559 N.E.2d at 428. Applying this rule, the court in *Raquel Marie X.* sustained the constitutional claim of a father who came forward within the first six months of his daughter's life to assert his desire for custody and affirmed a trial court order transferring custody of the then nearly seven-month-old child. But, in *Robert O.*, the court turned aside the constitutional claim of a father who was unaware of his fatherhood, or even of the mother's pregnancy, until ten months after the adoption had been completed, when the child was eighteen-months-old.

85. Thus, the court in *Baby Boy K.* held only that "the facts in this case" did not warrant a waiver on constitutional grounds of the statutory provision requiring unwed fathers to assert their legal interest within sixty days of the child's birth. *Baby Boy K.*, 546 N.W.2d at 99. But the court carefully distinguished the facts of that case from those of the Baby Richard case, suggesting that it would permit a later constitutional attack on an adoption if the father were truly prevented from asserting his interests sooner. *See id.* at 99–100.

86. *In re* B.G.C., 496 N.W.2d 239, 247 (Iowa 1992) (Snell, J., dissenting).

87. Between 1970 and 1995, the proportion of births to unmarried women nearly tripled, growing from 11 percent to 32 percent of all births. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tbls.60, 68, 71 & 94 (115th ed. 1995); U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES tbls.93, 100 (118th ed. 1998). The non-marital birth rate

III. LEGISLATIVE RESPONSES AND INCOMPLETE SOLUTIONS

The highly publicized court-ordered transfers of Baby Jessica and Baby Richard set off an immediate firestorm of public outrage.[88] The legislative response in some states was almost as swift. In Illinois, the General Assembly convened in emergency session less than three weeks after the state supreme court issued its decision in the Baby Richard case and amended the state's adoption act in an effort to prevent a transfer of custody.[89] Numerous other states also rushed to amend their adoption statutes in the hope of heading off similar tragedies.[90]

Although these "adoption reform" efforts varied in their specific provisions, most states followed one or both of two basic strategies. The first strategy was to reduce the ability of unwed fathers to block adoptions by expanding the statutory grounds for excluding them from the adoption process. Along these lines, some states broadened the statutory grounds for terminating the legal rights of biological parents, such as child "abandonment" or parental "unfitness."[91] Many states also rushed to enact measures specifically aimed at unwed fathers, providing for a waiver of legal rights in the adoption process of any putative father who failed to take prescribed steps to assert his interest in custody.[92] The second basic legislative strategy was to mitigate the harm in those cases where adoptions could not go forward, typically by providing for the possibility of long-term custody with the caregivers who had sought to adopt. These legislative responses have reduced the likelihood that unwed fathers will be able to upset adoptions and the danger that, even if they succeed, a traumatic transfer of custody will follow. Yet, as I show in this Part, these strategies remain in important respects *incomplete* solutions. The reforms have not eliminated the risk that adoptions may be vacated by late-appearing biological fathers, and the fallback provision of long-term custody without adoption simply does not promise the same measure of stability and permanence for those children whose adoptions are scuttled.

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has edged downward, however, for each of the three years ending in 1997, the most recent year for which statistics are available. *See* Judith Havemann, *Birth Rate of Teens Is Down; Contraceptive Use Rises, Experts Say*, WASH. POST, Apr. 29, 1999, at A3.

88. *See* JEFFREY M. LEVING & KENNETH A. DACHMAN, FATHER'S RIGHTS 196, 198 (1997) (recounting the public reaction of "widespread outrage" to the Illinois Supreme Court's action in the Baby Richard case).

89. *See In re* Petition of Kirchner, 649 N.E.2d 324, 336, 338 (Ill. 1995) (reviewing legislative history of amendment).

90. For descriptions of recent legislative reform efforts in selected states, see Marianne Brower Blair, *The New Oklahoma Adoption Code: A Quest to Accommodate Diverse Interests*, 33 TULSA L.J. 177 (1997); Susan Kubert Sapp, *Easing the Delivery of Adoption Reform in Nebraska: L.B. 712*, 76 NEB. L. REV. 856 (1997); Karen R. Thompson, Comment, *The Putative Father's Right to Notice of Adoption Proceedings: Has Georgia Finally Solved the Adoption Equation?*, 47 EMORY L.J. 1475 (1998); Nancy E. Roman, *Jessica Case Prompts Adoption-Reform Rush*, WASH. TIMES, Aug. 7, 1993, at A1.

91. *See infra* Part III.A.1.

92. *See infra* Part III.A.2.

A. Expanding the Grounds for Termination of Parental Rights

In all states, an essential predicate to adoption is either the consent of the child's legal parents or grounds for involuntarily extinguishing their relationship with the child.[93] Accordingly, the first response of many states has been to expand the courts' authority to terminate the rights of non-consenting biological parents. Traditionally, state law provided that a parent's legal relationship with a child could be terminated only upon the commission of certain highly blameworthy behavior, such as serious abuse, neglect, or abandonment of the child.[94] These grounds had worked to exclude from the adoption process parents who had been involved in their children's lives and who had proven themselves to be unworthy as parents. But they did not seem clearly to apply to parents who had never gotten much involved in their children's lives in the first place. An unwed father who had never been permitted contact with his child, for example, could not be guilty of abuse or neglect. And the traditional definition of child abandonment was stringent, requiring "conduct on the part of the parent which evinces a settled purpose to forgo all parental duties and relinquish all parental claims to the child."[95] This definition might catch a father who knew of his child's existence and consistently declined to make contact, but not a father who was unaware of the child or who was stymied in his efforts to make contact.[96] Indeed, until quite recently, many courts refused to find abandonment even when the father was fully capable of contact but made only the most sporadic and token expressions of parental interest.[97] Thus, one way of preventing adoption tragedies was to alter the

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93. *See* CLARK, *supra* note 10, § 20.2, at 855.

94. *See id.* § 20.5, at 888 (noting that most statutes require "proof of parental failures so drastic as to cause serious harm to the children"); *id.* § 20.6 (reviewing traditional statutory grounds); Andre P. Derdeyn & Walter J. Wadlington, *Adoption: The Rights of Parents Versus the Best Interests of Their Children*, 16 J. AMER. ACAD. CHILD PSYCH. 238, 248 (1977) (noting that "parental intent and fault are integral to findings of abandonment and unfitness").

95. Simpson v. Rast, 258 So. 2d 233, 237 (Miss. 1972) (quoting Newman v. Sample, 205 So. 2d 650 (Miss. 1968)); *In re* Adoption of Bowling, 631 S.W.2d 386, 389 (Tenn. 1982) (quoting *Ex parte* Wolfenden, 349 S.W.2d 713, 714 (Tenn. Ct. App. 1959)). *See also* NEV. REV. STAT. § 128.012(1) (1997) (providing nearly verbatim statutory definition of abandonment); *In re* Matter of Appeal in Pima County Severance Action No. S-1607, 709 P.2d 871, 872 (Ariz. 1985) (same); *In re* Adoption of Childers, 441 N.E.2d 976, 979 (Ind. Ct. App. 1982) (same); *In re* Matter of Anonymous, 351 N.E.2d 707, 708 (N.Y. 1976) (same); CLARK, *supra* note 10, § 20.6, at 895 (noting that most states require proof of the parent's "established intention to give up all parental rights and to avoid all parental obligations").

96. *See* Regan v. Joseph P., 677 N.E.2d 434 (Ill. App. Ct. 1996) (no abandonment where parent was prevented from making contact by order of protection); Kaiser v. Esswein, 564 N.W.2d 174 (Mich. Ct. App. 1997) (same); Cocozza v. Antidormi, 316 N.Y.S.2d 471 (N.Y. App. Div. 1970); *In re* Adoption of Holcomb, 481 N.E.2d 613 (Ohio 1985); *In re* M.T.T.'s Adoption, 354 A.2d 564 (Pa. 1976) (no abandonment where father was prevented from making contact by circumstances of his incarceration); *In re* Adoption of Jameson, 432 P.2d 881 (Utah 1967) (same). *See also* CLARK, *supra* note 10, § 20.6, at 897.

97. *See Simpson*, 258 So. 2d at 236 (finding no evidence of abandonment where father, in the eight years since his divorce, had paid approximately three percent of his

statutory concepts of child "abandonment" or parental "fitness" so that more biological parents, including unwed fathers, could be found legally dispensable to the process of placing their children for adoption.

1. Broadening Concepts of "Abandonment" and "Unfitness"

States have proceeded along two fronts in their recent efforts to expand the grounds for terminating parental rights. On one front, they have focused upon parents who have abused or endangered their children and enabled courts to usher these children toward adoption more swiftly. Spurred by local horror stories of child abuse or by growing public concern over drug use, some states have amended their termination statutes to provide explicitly that a parent may be declared "unfit" for seriously abusing the child's sibling,[98] murdering the child's other parent,[99] or taking illegal drugs during pregnancy.[100] The federal government joined in the effort to make more abused or neglected children available for adoption by enacting the Adoption and Safe Families Act of 1997.[101] That Act encourages states to seek immediate termination of rights in certain egregious cases of abuse or neglect and to move more quickly toward termination in less egregious cases when a parent does not demonstrate rapid progress toward rehabilitation.[102]

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child-support obligations and visited his children "several times"); W. v. G., 312 N.E.2d 171, 174 (N.Y. 1974) ("Even where the flame of parental interest is reduced to a flicker the court may not properly intervene to dissolve the parentage."); CLARK, *supra* note 10, §20.6, at 896 ("[T]here are many cases in which the courts, out of what sometimes seems an excessive concern with biological relationships, find that no abandonment has occurred when the parent's contacts with his child have been intermittent, sporadic and seem to evince relatively little concern for the child's welfare."); Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 23 (1975).

98. *See* FLA. STAT. ANN. § 39.464(1)(d) (West 1995); R.I. GEN. LAWS § 15-7-7(1)(b)(iv) (Supp. 1994); UNIF. ADOPTION CODE § 3-504(d)(3).

99. *See* 750 ILL. COMP. STAT. 50/1(D)(i)-(*l*) (West 1996). *Cf.* UNIF. ADOPTION CODE § 3-504(c)(3) (providing for termination on the ground that the "respondent has been convicted of a crime of violence or of violating a restraining or protective order, and the facts of the crime or violation and the respondent's behavior indicate that the respondent is unfit to maintain a relationship of parent and child with the minor").

100. *See* 705 ILL. COMP. STAT. 405/2-3(1)(c) (West 1996) (declaring neglected "any newborn infant whose blood or urine contains any amount of a controlled substance"). *But cf. In re* Valerie D., 613 A.2d 748 (Conn. 1992) (concluding that mother's pre-natal cocaine use cannot be relied upon to justify termination under statute authorizing termination where parent fails to provide "the care, guidance or control necessary for...[the child's] well-being"). *See generally* Lisa Carpenter, Note, *Changing the Balance: Rhode Island's Amended Termination of Parental Rights Statute*, 50 WASH. U. J. URB. & CONTEMP. L. 153 (1996); Mary E. Taylor, *Parent's Use of Drugs as a Factor in Award of Custody of Children, Visitation, or Termination of Parental Rights*, 20 A.L.R.5th 534 (1995).

101. Adoption and Safe Families Act of 1997, Pub. L. 105-89, 111 Stat. 2125 (codified as amended in scattered sections of 42 U.S.C.).

102. Specifically, the 1997 Act makes clear that earlier federal law requiring states to make "reasonable efforts" toward reunifying families in cases of abuse or neglect

Expanding the statutory definitions of abuse and neglect, however, does little to affect the rights of parents who have had little or no involvement in the lives of their children. Thus, many states have moved simultaneously on a second front to broaden their statutory definitions of child "abandonment" with a view toward terminating the rights of absentee parents and clearing the way for adoption by others. Some states, for example, have amended their statutes to expressly provide that mere "token" contacts with a child are insufficient to stave off termination.[103] Others have supplemented the traditional concept of abandonment by adding as separate grounds for termination the failure to communicate with the child for a designated period of time[104] or to demonstrate a "reasonable" degree of interest in a newborn child.[105] In still other states, the courts have spearheaded the change, gradually demanding more substantial involvement on the part of parents to demonstrate the genuineness of their parental interest. Several state supreme courts, for example, recently have held that a court may find that a father has "abandoned" his child based upon conduct by the father before the child was born.[106] In effect, these courts have expanded the concept of

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does not mandate such efforts in cases where a parent tortures a child or murders a sibling of the child. *See* 42 U.S.C. § 671(a)(15)(D) (Supp. 1998). The Act also sets a timetable for termination of rights in those cases where "reasonable efforts" at family preservation are still required. The 1997 law provides that states must file a petition to terminate rights in cases where a child has been in foster care for 15 of the previous 20 months, unless the state shows good cause for further efforts at reunification. *See* 42 U.S.C. § 675(5)(E) (Supp. 1998). *See generally* Cristine H. Kim, Note, *Putting Reason Back Into the Reasonable Efforts Requirement in Child Abuse and Neglect Cases*, 1999 U. ILL. L. REV. 287 ("Adoption and Safe Families Act of 1997 will improve the clarity of the reasonable efforts standard."). Some states had already amended their own laws without federal prodding to encourage speedier termination in abuse and neglect cases. *See In re* J.N., 960 P.2d 403, 407–08 (Utah Ct. App. 1998) (describing recent amendments to Utah statutes).

103. *See* FLA. STAT. ANN. § 63.032(14) (West Supp. 1997) ("marginal efforts" at communication insufficient); KAN. STAT. ANN. § 59-2136(d) (1994) ("In determining whether a father's consent [to a stepparent adoption] is required under this subsection, the court may disregard incidental visitations, contacts, communications or contributions."); NEV. REV. STAT. § 128.105(2)(f) (1998) (same); UTAH CODE ANN. § 78-3a-407(6) (Supp. 1995) ("token" contact insufficient). *See also In re* Matter of Adoption of B.O., 927 P.2d 202 (Utah Ct. App. 1997) (affirming termination of father's rights based on finding that he made only "token" contacts with daughter).

104. *See* 750 ILL. COMP. STAT. 50/1(D)(n) (West 1996) (failure to communicate for one year); KAN. STAT. ANN. § 59-2136(d) (1998) (father's consent to stepparent adoption is unnecessary if he "has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption"). *Cf.* CAL. FAM. CODE § 7822 (West 1994) (presumption of abandonment where parent fails to communicate for six months). The addition of these statutory grounds constituted "a radical departure" from the traditional concept of "abandonment" because they shifted the basis for termination from the parent's subjective intent to the parent's conduct. Bodenheimer, *supra* note 97, at 22–23.

105. For example, in addition to the traditional "abandonment" ground, Illinois provides that a parent may be found "unfit" if he or she fails "to demonstrate a reasonable degree of interest, concern or responsibility as to the welfare of a new born child during the first 30 days after its birth." 750 ILL. COMP. STAT. 50/1(D)(*l*) (West 1996). *See also id.* 50/1(D)(a) (separate ground of "abandonment").

106. *See In re* Baby Boy G., No. 2970889, 1999 WL 64951, at *4 (Ala. Civ. App.

"abandonment" by permitting consideration of a father's neglectful or indifferent conduct toward the child's mother during the pregnancy.[107]

2. Taking Aim at the Unwed Father

In addition to expanding the general concepts of parental "unfitness" and "abandonment," states have enacted a raft of amendments aimed specifically at unwed fathers, providing for a waiver of parental rights if they do not come forward promptly and demonstrate their readiness to assume full parental responsibility. Such statutes have existed in one form or another since shortly after *Stanley v. Illinois* established that unwed fathers may not categorically be denied all parental rights.[108] But in recent years, a number of states have ratcheted up their demands on those men who wish to preserve their parental rights.

Among the most common statutory requirements are that the putative father seek full custody of the child, rather than merely visitation,[109] contribute financially toward the costs of the pregnancy and childbirth,[110] promptly file an action to establish his paternity,[111] and register his claim of paternity with a designated state agency (charged with administering a so-called "putative father registry") within a relatively short period of time following the birth.[112] If a

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Feb. 12, 1999); *In re* Appeal of H.R., 581 A.2d 1141, 1162 (D.C. 1990); W.T.J. v. E.W.R., 721 So. 2d 723, 725 (Fla. 1998); *In re* Adoption of Baby E.A.W., 658 So. 2d 961, 964 (Fla. 1995); *In re* Adoption No. A91-71A, 640 A.2d 1085, 1097–98 (Md. 1994); Whitney v. Pinney, 956 P.2d 785, 787 (Nev. 1998). In 1994, the drafters of the Uniform Adoption Act proposed to codify this approach to finding "abandonment." *See* UNIF. ADOPTION ACT § 3-504(c)(1) & accompanying official comment. For an analysis of the possible impact of such a change, see Gerald W. Huston, Note, *Born To Lose: The Illinois 'Baby Richard' Case—How Examining His Father's Pre-Birth Conduct Might Have Led to a Different Ending for Richard*, 16 N. ILL. U. L. REV. 543 (1996).

107. For example, the Nevada Supreme Court recently affirmed a trial court's order terminating the parental rights of an unwed father based upon the ground of "abandonment" where the father had provided no financial or emotional support to the mother during her pregnancy and informed her that he would support her decision to surrender the child for adoption. *See Whitney*, 956 P.2d at 785. At the same time, the court underscored that it was "not hold[ing] that a father's pre-birth conduct *alone* justifies termination of his parental rights." *Id.* at 788 (emphasis added).

108. For descriptions of the various ways in which states amended their adoption laws in response to the *Stanley* decision, see Jerome A. Barron, *Notice to the Unwed Father and Termination of Parental Rights: Implementing* Stanley v. Illinois, 9 FAM. L. Q. 527 (1975); Nora L. Freeman, *Remodeling Adoption Statutes After* Stanley v. Illinois, 15 J. FAM. L. 385 (1976–1977).

109. *See e.g.*, UTAH CODE ANN. § 78-30-4.14(2)(b)(i) (1998); UNIF. ADOPTION ACT § 3-504(d)(1) (1994).

110. *See* 750 ILL. COMP. STAT. 50/1(D)(n)(2)(ii) (West 1996); 50/8(b)(1)(B)(iv), (c)(1)(B)(iv) (West 1996); UTAH CODE ANN. § 78-30-4.14(2)(b)(iii) (1998); UNIF. ADOPTION ACT § 3-504(c)(1) (1994).

111. *See* 750 ILL. COMP. STAT. 50/1(D)(n)(2)(i), 50/8(b)(1)(B)(vi) (West 1996); UTAH CODE ANN. § 78-30-4.14(2)(b)(i) (1998).

112. *See* 750 ILL. COMP. STAT. 50/8(b)(1)(B)(vi), 50/12.1(b), (g) & (h) (West 1996) (defining failure to register within 30 days of child's birth as abandonment sufficient to terminate rights); UTAH CODE ANN. § 78-30-4.14(2)(b)(ii) (1998) (requiring father to

putative father fails to take any of the specific steps required by the statutes, the consequence is the complete forfeiture of his legal rights in any adoption proceeding.[113] Moreover, "[t]he trend appears to be to shorten the time period for unwed fathers to make their presence known and assert parental rights."[114] Thus, whereas the courts may allow a non-custodial parent with an established parent-child relationship to neglect that relationship for many months or even years before dropping the curtain in a termination proceeding, the point of these statutes is to require unwed fathers to demonstrate their parental interest and responsibility earlier and more consistently.

3. Pushing the Envelope: Constitutional and Judicial Limits on the Expansion of Grounds for Terminating Rights

The statutory revisions of the past several years have effectively extinguished the legal claims of many unwed fathers, but they have by no means eliminated the danger that late-appearing unwed fathers will be able to upset settled adoptive placements. Moreover, significant constitutional constraints prevent the states from continuing to enlarge their termination statutes in an attempt to close the gap.

a. Statutory and Judicial Limitations

Even after their recent expansion, most termination statutes contain important limitations that ensure that some late-appearing unwed fathers still will be able to assert legal interests in custody long after the child has been placed with prospective adoptive parents.

First, while some states have broadened the concept of "unfitness" or "abandonment," these terms generally remain heavily laden with notions of blameworthiness. Even though courts may now look deeper and wider for evidence of a parent's malfeasance, and be less forgiving of temporary lapses, some measure of parental fault or incapacity remains an indispensable predicate in almost all jurisdictions for a termination of rights.[115] Statutes that permit

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register "prior to the time the mother executes her consent for adoption or relinquishes the child to a licensed child-placing agency").

113. *See* ARIZ. REV. STAT. § 8-106.01(G) (1994); 750 ILL. COMP. STAT. 50/12.1-g (West 1996).

114. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: A Search for Definitions and Policy*, 31 FAM. L. Q. 613, 619 (1998). Typically, the states have permitted men to register their claims of possible parenthood within 30 days after the child's birth.

115. As the Nevada Supreme Court recently explained, in a statement that reflects the general rule, "[i]n order to terminate a parent's rights, both jurisdictional and dispositional grounds must be satisfied. The jurisdictional aspect of an action for termination involves *a specific fault or condition directly related to the parent*; whereas the dispositional aspect of the action focuses on the best interests of the child." Whitney v. Pinney, 956 P.2d 785, 787 (Nev. 1998) (emphasis added) (citations omitted). *Accord, e.g.*, Kingsley v. Kingsley, 623 So. 2d 780, 790 (Fla. Dist. Ct. App. 1993) (Harris, C.J., concurring in part) ("Florida does not recognize 'no-fault' termination of parental rights. That is why the focus in a termination case is (and must be), at least in the first analysis, on

termination when a parent has failed to support or contact a child typically provide that the parent must have had the opportunity to do so.[116] Virtually all of the new statutes requiring putative fathers to register their claims of possible paternity, furthermore, expressly provide that untimely registration will be excused if it was impossible for the father to comply with the statutory deadline.[117] Similarly, the statutory ground of "abandonment," even after the recent round of expansive amendments, continues to require proof of a parent's willful or conscious

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the alleged misconduct of the biological parent or parents...."); *In re* Petition of Doe, 638 N.E.2d 181, 183 (Ill. 1994) (McMorrow, J., concurring) ("[T]he Adoption Act nevertheless specifically requires that a parent who does not consent to adoption must be found unfit before parental rights may be terminated." (citation omitted)); *In re* J. P., 648 P.2d 1364, 1368–69 (Utah 1982) (holding that the welfare of the child may not be considered without prior determination that the parent is unfit); *In re* H.J.P., 789 P.2d 96, 101 (Wash. 1990) ("[I]f a parent is not shown to be unfit at the time of the parental rights termination proceeding, termination is improper." (citation omitted)).

116. *See* 750 ILL. COMP. STAT. 50/1-D(n) (West 1996) (permitting termination where parent, for a period of one year, has failed "(i) to visit the child, (ii) to communicate with the child or agency, *although able to do so and not prevented from doing so by an agency or court order*, or (iii) to maintain contact with or plan for the future of the child, *although physically able to do so*...." (emphasis added)); § 50/1-D(o) (permitting termination for "[r]epeated or continuous failure by the parents, *although physically and financially able*, to provide the child with adequate food, clothing, or shelter" (emphasis added)); MD. CODE FAM. L. § 5-312(b)(4)(i) (Michie 1999) (permitting termination where parent "has not maintained meaningful contact with the child during the time the petitioner had custody *despite the opportunity to do so*" (emphasis added)); § 5-312(b)(4)(ii) (termination where parent "has repeatedly failed to contribute to the physical care and support of the child *although financially able to do so*" (emphasis added)); UNIF. ADOPTION ACT § 3-504(c)(1) (1994) & accompanying official comment (allowing excuse of father's non-support for "compelling reasons," such as "that he had no reason to know of the minor's birth or expected birth or that he was 'thwarted' in his efforts to assume parental duties by the mother, an agency, the prospective adoptive parent, or another person"); *In re* Adoption by P.F.R., 705 A.2d 1233, 1238–39 (N.J. Super. Ct. App. Div. 1998) (excusing father's lack of contact or support on grounds of his reasonable ignorance of child's birth); *In re* Adoption of R.W.S., 951 P.2d 83, 85 (Okla. 1997) ("[A]doption without consent of the parents requires that the parent must have acted willfully in failing to contribute to the support of the child."). Illinois, moreover, also provides fathers with a separate "affirmative defense" to termination based upon lack of support or contact if "the father's failure was due to circumstances beyond his control or to impediments created by the mother or any other person having legal custody." 750 ILL. COMP. STAT. 50/1-D(n) (West 1996). *See also In re* K.D.O., 889 P.2d 1158, 1159–60 (Kan. Ct. App. 1995) (interpreting similar provision codified at KAN. STAT. ANN. § 59-2136(h)(4)).

117. *See* ARIZ. REV. STAT. § 8-106.01(E)(1) (1994); 750 ILL. COMP. STAT. 50/12.1-g (West 1996). To be sure, many legislatures and courts have grown less willing to accept weak excuses for non-compliance—such as that a father simply accepted the mother's assurance that another man was responsible for the pregnancy—but where a parent is truly faultless, termination of rights is generally held to be impermissible under the statutes. *See In re* Petition of K.J.R., 687 N.E.2d 113, 118 (Ill. App. Ct. 1997) (man's failure to register with putative father registry is not excused by mother's assurance that he was not the father because he "had independent knowledge of the fact that he could have been the father," making any reliance on the mother's statement unreasonable); *In re* A.S.B., 688 N.E.2d 1215, 1222 (Ill. App. Ct. 1997) (same).

disregard of parental obligations.[118] Remaining grounds, such as "[f]ailure to maintain a reasonable degree of interest, concern, or responsibility as to the child's welfare,"[119] implicitly require a finding of blameworthy behavior on the part of the parent.[120] And, even with legislative prodding to demand more substantial involvement on the part of parents seeking to avoid termination of rights, many courts remain pointedly reluctant to conclude that a parent has waived the legal status of parenthood through desuetude.[121] Certainly, evidence that an absent parent was thwarted by the child's custodians, or by other circumstances beyond his or her control, from contacting or supporting the child remains a complete statutory defense to termination on grounds of abandonment or non-support.[122]

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118. *See* FLA. STAT. ANN. § 63.032(14) (West Supp. 1998) ("'Abandoned' means a situation in which the parent or legal custodian of a child, while being able, makes no provision for the child's support and makes no effort to communicate with the child, which situation is sufficient to evince a willful rejection of parental obligations."); *In re* the Adoption of J.J.B., 894 P.2d 994, 1004 (N.M. 1995) (requiring proof of conscious disregard of parental obligation); State *ex rel.* Children, Youth & Families Dep't v. Joe R., 923 P.2d 1169, 1171 (N.M. Ct. App. 1996) ("abandonment requires proof of parental conduct that implies a conscious disregard of parental obligation"), *rev'd on other grounds*, 945 P.2d 76 (N.M. 1997).

119. 750 ILL. COMP. STAT. 50/1-D(b) (West 1996). Numerous other states use similar language in their termination statutes.

120. *See J.J.B.*, 894 P.2d at 1003 (concluding that a finding of "parental unfitness is inherent in a finding by the court that any of [the various statutory grounds for termination] exist").

121. In a striking illustration, the Kansas Supreme Court recently ruled that a father could not be held to have waived his legal right to object to the adoption of his children by their stepfather under a statute that made it unnecessary to obtain the consent of a parent who had only "incidental" involvement with his children during the two-year period immediately preceding the adoption. *See In re* the Adoption of K.J.B., 959 P.2d 853 (Kan. 1998). The biological father in this case had lost custody of one of his three children in a neglect proceeding and had ceased all visitation with them three years before the adoption. Indeed, his only contacts between late 1993 and late 1996 were birthday cards sent to two of the three children in 1994 and 1995 and Christmas cards sent to all three children in 1994. *See id.* at 856. Nevertheless, the state supreme court reversed the finding of two lower courts that this father had "failed or refused to assume the duties of a parent" during this time period. While conceding that "there was little or no affection, care, or interest shown to the children" by their father through these years, the state supreme court noted that a portion of the father's Social Security disability income had been diverted to pay a portion of his child-support obligation. *Id.* Emphasizing that "'[b]asic parental rights are fundamental rights protected by the Fourteenth Amendment to the Constitution,'" the court held that even a parent who "'has failed to assume the 'love and affection' side of the duties of a parent'" may not be stripped of the legal status of parenthood unless he has *also* utterly failed the "financial" duties of parenthood. *Id.* at 861 (quoting *In re* Adoption of C.R.D., 897 P.2d 181, 185 (Kan. Ct. App. 1995)). Even though the father's payment of child support in this case by means of the diversion of his Social Security income was incomplete and may well have been "accidental" and involuntary, the court held that he retained the power to block the adoption of his children.

122. *See In re* Baby Girl T., 715 A.2d 99, 103–04 (Del. Fam. Ct. 1998); Lewis v. Roberts, 495 N.E.2d 810, 812–13 (Ind. Ct. App. 1986); *In re* K.D.O., 889 P.2d 1158, 1160 (Kan. Ct. App. 1995); Chastain v. Timmons, 558 So. 2d 344, 346–47 (La. Ct. App. 1990); *In re* Sheena B., 651 A.2d 7, 10 (N.H. 1994); *In re* Adoption of a Child by P.F.R., 705 A.2d

Traditionally, the only widely accepted "no-fault" ground for terminating rights was a parent's *inability* to provide care, such as where a parent's physical or mental disability simply makes competent parenting impossible.[123] And even in that context some courts are unwilling to permit termination if the parent cannot somehow be blamed for the disability.[124] Only a few jurisdictions have gone somewhat further toward providing for the termination of parental rights without a finding of either parental fault or incapacity. Yet, the courts in these jurisdictions generally have construed the statutes in a way that re-injects notions of parental fault into the termination decision.[125] A New Mexico statute, for example, authorizes a court to terminate parental rights on the grounds that the child has lived and bonded with a new family while the "parent-child relationship" between the child and her biological parent has "disintegrated."[126] Similarly, a Connecticut statute permits termination of rights on the ground that "there is no ongoing parent-child relationship,"[127] and New Jersey has a substantially similar law.[128] On

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1233, 1239 (N.J. Super. Ct. App. Div. 1998); *In re* Guardianship of "Baby Boy" D., 602 N.Y.S.2d 102, 102–03 (N.Y. App. Div. 1993); *In re* Shawn P., 589 N.Y.S.2d 565, 566 (N.Y. App. Div. 1992); Wilson v. Moreno, 872 P.2d 434, 436–37 (Or. Ct. App. 1994); Adoption by Thompson v. Montieth, 943 S.W.2d 393, 396 (Tenn. Ct. App. 1996).

123. *See* Bush v. State, 929 P.2d 940, 940 (Nev. 1996); *In re* Guardianship and Custody of Roselyn Mercedes F., 657 N.Y.S.2d 8, 8 (N.Y. App. Div. 1997). An Illinois statute, for example, permits a finding of "unfitness" to rest upon the

> [i]nability to discharge parental responsibilities supported by competent evidence from a psychiatrist, licensed clinical social worker, or clinical psychologist of mental impairment, mental illness or mental retardation..., or developmental disability..., and there is sufficient justification to believe that the inability to discharge parental responsibilities shall extend beyond a reasonable time period.

750 ILL. COMP. STAT. 50/1-D(p) (West 1996). As one state appellate court noted, "a parent certainly can be unfit without fault.... 'A child is no less exposed to danger, no less dirty or hungry because his parent is unable rather than unwilling to give him care.'" *In re* R.M.S., 542 N.E.2d 1323, 1325 (Ill. App. Ct. 1989) (quoting *In re* Devine, 401 N.E.2d 616, 621 (Ill. App. Ct. 1980)).

124. For example, the West Virginia Supreme Court recently reversed a trial court's decision to terminate the parental rights of a mother whose terminal illness rendered her unable to care for her toddler-aged son. Although the mother was "clearly...unable to take care of [her son]" and although the child's foster parents wished to adopt, the court ruled that termination was improper because the mother was faultless in her predicament:

> Through no fault of her own, [the mother] has been victimized by a disease which is stealing her life and seriously threatening that of her son. Although she is no longer able to take care of her son or provide for his needs, it is quite evident that [she] loves her son very much.

In re Micah Alyn R., 504 S.E.2d 635, 642 (W. Va. 1998).

125. This interpretive tendency is not a new phenomenon, just an enduring one. Professor Brigitte Bodenheimer, writing almost a quarter-century ago, observed that "courts in the past have been apt to read a prerequisite of proving parental unfitness or intent to abandon into neutrally phrased dispensation-of-consent provisions." Bodenheimer, *supra* note 97, at 33. *See also* Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 897–98 (1984) (making a similar observation 15 years ago).

126. N.M. STAT. ANN. § 32-1-54(B)(3)(b) (Supp. 1999).

127. CONN. GEN. STAT. § 17a-112(c) (1998).

their faces, these statutes do not require a finding of parental fault or incapacity. Yet the courts have "severely limited"[129] the impact of these provisions by interpreting them in a way that effectively mandates a finding of parental culpability. The New Mexico Supreme Court, for example, has held that a parent must be permitted to rebut a finding that the "parent-child relationship has disintegrated" by "showing that the parent lacks responsibility for the destruction of the parent-child relationship."[130] As narrowly construed, therefore, the New Mexico statute, despite its seemingly "no-fault" language, simply provides for termination on the traditional, fault-based ground of abandonment.[131] The Connecticut Supreme Court similarly narrowed that state's termination statute, holding that in assessing whether there is "no ongoing parent-child relationship," a court must consider the extent to which a parent has been thwarted in seeking to make contact with the child.[132] And the New Jersey courts have held that parental

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128. N.J. STAT. ANN. § 9:3-46(a)(2)(a) (West Supp. 1998) (permitting termination on the ground that "the parent is unable to perform the regular and expected parental functions of care," including "the maintenance of a relationship with the child such that the child perceives the person as his parent").

129. Louise A. Leduc, Note, *No-Fault Termination of Parental Rights in Connecticut: A Substantive Due Process Analysis*, 28 CONN. L. REV. 1195, 1207 (1996). *See also In re* Danual D., 1997 WL 178081, at *9 (Conn. Super. Apr. 2, 1997) ("[A]ppellate tribunals have placed a highly restrictive interpretation on this (once known as 'no-fault') ground to terminate parental rights.").

130. *In re* the Adoption of J.J.B., 894 P.2d 994, 1005 (N.M. 1995). Thus, the court held that:

> [T]he requirements of the statute would not be satisfied if one parent placed the child into the care of others without the knowledge or consent of the other parent, and the second parent, despite good-faith efforts, has been unsuccessful in maintaining contact with, or regaining custody of, the child.

Id.

131. The Washington Supreme Court reached a similar conclusion in construing that state's revised stepparent adoption statute. In 1984 the Washington legislature amended the statute, replacing language that had permitted termination of rights only upon proof of willful desertion or abandonment by the parent, *see* WASH. REV. CODE § 26.33.056 (1979), with language that authorized termination upon proof that "the parent has failed to perform parental duties under circumstances showing a substantial lack of regard for his or her parental obligations," WASH. REV. CODE § 26.33.120(1) (1986 & Supp. 1996). Notwithstanding the arguably broader substitute language, the state supreme court concluded that "the intent of the Legislature was to retain the same substantive standard that had been developed under the previous statute," so that traditional proof of parental unfitness remains an essential predicate for termination of rights. Psaty v. Psaty, 789 P.2d 96, 101 (Wash. 1990).

132. In *In re* Valerie D., 613 A.2d 748 (Conn. 1992), the court held that the "no ongoing parent-child relationship" ground could not be used to terminate the rights of a mother whose lack of a relationship with her daughter was attributable to the fact that the state had placed the girl in foster care from infancy. *See id.* at 769 & n.35. Similarly, in *In re* Jessica M., 586 A.2d 597 (Conn. 1991), the court held that "the nature of [a parent's] relationship with her child at the time of the termination hearing must be reviewed in the light of the circumstances under which visitation had been permitted." *Id.* at 604 (citation omitted). That a child's guardians had prevented the mother from visiting more often thus supported a refusal to terminate rights on the "no ongoing relationship" ground. *See id.*

rights may not be terminated solely because a parent has no relationship with a child; rather, the court must inquire into the *reasons* for the absence of the relationship and find that the parent is fairly responsible for the situation.[133]

Indeed, even the revised Uniform Adoption Act, which contains perhaps the most expansive termination provision to date, accords significant protection to the blameless biological parent. After setting out more traditional fault-based grounds for termination, the Act broadly authorizes a court to terminate parental rights based solely on a finding that "failure to terminate the relationship of parent and child would be detrimental to the minor."[134] Although the Act's drafters have indicated that this provision could be applied to deny rights to a "thwarted" unwed father,[135] the Act itself significantly qualifies that resolve by directing that "detriment[] to the minor" be assessed specifically with reference to the father's diligence and "the role...other persons [may have played] in thwarting [his] efforts to assert parental rights."[136] Thus, even in attempting to redirect the focus of the

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Even after this judicial narrowing, however, one commentator has concluded that the statute is unconstitutional. *See* Leduc, *supra* note 129, at 1197.

133. In *In re* Adoption of Children by G.P.B., 709 A.2d 271 (N.J. Super. Ct. App. Div. 1998), *rev'd on other grounds*, 733 A.2d 1181 (N.J. 1999), the court reversed a trial court's order terminating the parental rights of a mentally ill father. Although the man concededly "ha[d] no relationship with his children," *id.* at 276, and his children "fail[ed] to perceive [him] as their parent," *id.* at 273, the appellate court held that termination was improper because the man's failures as a parent were attributable to his mental illness. The court explained:

> [A]ccording to...the trial judge's analysis, a birth parent's rights can be terminated regardless of the reason a child does not perceive the objecting parent as a parent. We cannot accept such a mechanistic application of the standards. To do so would reward the custodial parent who thwarts visitation and actively engages in conduct designed to denigrate the non-custodial parent or to minimize the role of that parent in the child's life.

id. at 276. Although the state supreme court remanded the case on other grounds, it agreed that parental fault was important.

> If the court finds that the objecting parent has failed in performing [essential parental] functions, it must determine whether the parent was able to fulfill them. When assessing the objecting parent's ability, the court should consider whether the custodial parent has contributed to that inability by blocking the objecting parent's access to the child.

733 A.2d at 1189.

134. UNIF. ADOPTION ACT § 3-504(d)(4) (1994). This provision is similar to laws found in a few jurisdictions that permit termination based upon the ground that a parent is withholding consent to an adoption "contrary to the best interest of the minor." *See* CAL. FAM. CODE § 7664 (1994); D.C. CODE ANN. § 16-304(e) (1997); N.D. CENT. CODE § 14-15-19(3)(c) (1997).

135. *See* UNIF. ADOPTION ACT § 3-504 cmt. (1994).

136. UNIF. ADOPTION ACT § 3-504 (1994). The Uniform Adoption Act states:

> In making the determination under subsection(d)(4) [i.e., whether failure to terminate parental rights would be "detrimental to the minor"], the court shall consider any relevant factor, including the respondent's efforts to obtain or maintain legal and physical custody of the minor, the role of other persons in thwarting the respondent's efforts to assert

termination decision to the child's welfare, the model statute mandates consideration of the father's conduct and interests.[137]

In sum, notwithstanding recent legislative efforts to expand the grounds for terminating the rights of biological parents or otherwise excluding them from the adoption process, few statutes purport to authorize the termination of rights of a fit parent who has never faltered in his or her willingness to assume the responsibilities of parenthood.[138] The "common theme" of virtually all statutory grounds for termination remains a requirement of proof that "the parent is unable

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> parental rights, the respondent's ability to care for the minor, the age of the minor, the quality of any previous relationship between the respondent and the minor and between the respondent and any other minor children, the duration and suitability of the minor's present custodial environment, and the effect of any change of physical custody on the minor.

UNIF. ADOPTION ACT § 3-504(e). For an explanation by the Act's principal drafter of how this language might affect the rights of a faultless, "thwarted" father, see Joan Heifetz Hollinger, *Adoption and Aspiration: The Uniform Adoption Act, the DeBoer-Schmidt Case, and the American Quest for the Ideal Family*, 2 DUKE J. GENDER L. & POL'Y 15, 27–28 (1995).

137. The only appellate decision yet to interpret this provision, which has been enacted in only two states, *see* MONT. CODE ANN. § 42-2-608(2) (1997); VA. CODE § 63.1-225.1 (1995), appears to confirm that it will not work a sea change in the law's traditional abjuration of no-fault termination of parental rights. In *Hickman v. Futty*, 489 S.E.2d 232, 235 (Va. Ct. App. 1997), the court concluded that Virginia's 1995 enactment of this provision simply "codifie[d] the standard promulgated by the Virginia appellate courts in cases decided under prior law." Moreover, the court's review of that prior case law demonstrated that preservation of the parent-child relationship is found to be "detrimental to the child" only in cases where the parent has been found previously to have abused or neglected the child—in other words, *unfit*. The court's review also demonstrated specifically that the Virginia courts consistently refuse to terminate parental rights when an otherwise fit parent has been thwarted in his or her efforts to act as a parent to the child. Indeed, the *Hickman* court found the 1995 statutory amendment to be consonant with an earlier decision of the Virginia Supreme Court that had concluded that a father who had not seen nor supported his ten-year-old son for more than eight years was "entitled" to block a stepfather's adoption desired and initiated at the suggestion of the child because the father had been thwarted in his efforts to have a relationship with the child. *See id.* at 235 (discussing Jolliff v. Crabtree, 299 S.E.2d 358 (Va. 1983)).

138. Even in California and the District of Columbia, which permit a court to terminate the rights of a parent on the ground that termination would be in the "best interest of the child," *see* CAL. FAM. CODE § 7664 (1994); D.C. CODE ANN. § 16-304(e) (1997), the courts have construed the statutes to incorporate a custodial preference for biological parents and not to permit termination based merely on a finding that a child would be "better off" with a different caregiver. *See* Jermstad v. McNelis, 258 Cal. Rptr. 519, 520 (Ct. App. 1989); *In re* Appeal of H.R., 581 A.2d 1141, 1178–79 (D.C. 1990); *id.* at 1189, 1191 (Rogers, C.J., opinion). And the California Supreme Court in 1992 recognized a major constitutional limitation on this statutory scheme when it held that the state could not constitutionally terminate the parental rights of an unwed father who had done all he reasonably could do to establish a relationship with his child without the state proving his *unfitness* as a parent. *See* Adoption of Kelsey S., 823 P.2d 1216 (Cal. 1992).

or unwilling to care for the child."[139] Accordingly, a father who can show that he always stood ready to assume custodial duties but that he was thwarted in his good-faith efforts to establish a relationship with the child retains the legal right in almost all jurisdictions to block an adoption so long as he asserts his interests promptly upon the first opportunity.[140]

b. Constitutional Limitations on "No-Fault" Termination

Whatever state legislatures would like to do to protect children, it appears doubtful that the Constitution permits the states to be much more aggressive in terminating the rights of fit and faultless biological parents. The United States Supreme Court has hinted strongly that the Constitution prohibits a state from extinguishing a parent-child relationship without proof of the parent's "unfitness."[141] And, although parental "unfitness" is a broad and flexible concept, it is almost universally taken to require proof of blameworthy conduct—such as abuse, neglect, or abandonment—or incapacity on the part of the parent. If that is true, it follows that the continued expansion of the grounds for terminating parental rights cannot serve as a complete solution to the dilemma posed by the fit and faultless father who objects to the adoption of his child.

The Supreme Court has never squarely addressed whether the Constitution limits the grounds upon which a state may terminate parental rights. A number of the Court's cases skirt the edges of the constitutional question or simply presume that parental rights cannot be terminated without a finding of unfitness. On several occasions, for example, the Court has relied upon the "quasi-criminal" nature of a proceeding to terminate parental rights in holding that procedural due process requires additional safeguards against erroneous termination. In explaining why the Constitution requires the use of a heightened standard of proof, the waiver of appellate filing fees for indigent parents when the state terminates parental rights, and, in at least some cases, the appointment of counsel, the Court has emphasized the heavy social stigma visited upon parents whose rights are extinguished by the state.[142] That stigma, of course, reflects the

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139. MARK HARDIN & ROBERT LANCOUR, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS 12 (1996).

140. The reluctance of the courts to limit parental rights in the absence of parental fault is illustrated by recent case law in New York. In 1976, the New York Court of Appeals suggested the existence of an "extraordinary circumstances" exception to the entitlement of faultless biological parents to the custody of their children. *See* Bennett v. Jeffreys, 356 N.E.2d 277 (N.Y. 1976). Specifically, the court posited that a court could invoke the exception, and deny a blameless parent custody, where a child had so bonded with other caregivers that separation could cause severe psychological harm to the child. *Id.* at 285. A review of subsequent New York cases, however, shows that the courts consistently refuse to invoke this exception even in cases where vindication of the parents' claim will indisputably result in substantial separation trauma to the children. *See* Brian L. Greben, Note, *Determining the Role of Psychological Bonding in New York Foster Care Law*, 2 CARDOZO WOMEN'S L.J. 173 (1995) (reviewing post-*Bennett* case law).

141. *See* Santosky v. Kramer, 455 U.S. 745, 760 n.10 (1982); Quilloin v. Walcott, 434 U.S. 246, 255 (1978). *See also infra* notes 148–49 and accompanying text.

142. *See* M.L.B. v. S.L.J., 519 U.S. 102, 118, 124 (1996) (acknowledging

judgment of blame that universally underlies a decision to terminate parental rights. That parental fault is an essential predicate for termination remains an *assumption* in these cases, however, rather than a constitutional holding because, in each case, the state had sought to terminate parental rights on grounds of parental unfitness.

Similarly, the Court's cases dealing with the rights of unwed fathers seem to assume that termination must be premised upon parental fault without squarely confronting the question as a constitutional matter. In *Stanley v. Illinois*, for example, the Court held that a state may not presume a parent's unfitness based simply upon his non-marital status. And in *Quilloin* and *Lehr*, the Court held that a father's parental rights could be terminated without any finding of misconduct or incapacity when the father had not seized available opportunities to become involved in his child's life. These cases plainly imply the Court's acceptance that termination of rights is constitutional if premised upon a parent's unfitness or culpable non-involvement in his child's life, but they offer only partial guidance on the question of whether the Constitution would permit termination without proof of unfitness or culpable conduct.

On this point, *Santosky v. Kramer*[143] comes closest to providing an answer. In that case, the Court held that due process requires that the state prove its grounds for terminating rights by clear and convincing evidence.[144] The grounds used in that case were fault-based, necessarily "entail[ing] a judicial determination that the parents are unfit to raise their own children,"[145] and so provided no occasion to address directly what limits due process might impose upon the use of more expansive, "no-fault" grounds. But the Court's emphasis upon the sanctity of the parent-child relationship and its conclusion that due process would tolerate little risk of error in a termination proceeding suggest some constitutional restraint upon a state's enactment of new grounds. The Court's embrace of the clear and convincing standard, after all, was based on a balancing of the competing public and private interests in termination actions, and on its conclusion that society placed a "commanding" and ultimately predominant value on avoiding the needless destruction of a parent's relationship with his or her child.[146] It would be strange indeed if the Constitution's intolerance for "the

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stigmatic effect of termination of parental rights in holding that due process requires waiver of fees if necessary to enable indigent parent to appeal); *Santosky*, 455 U.S. at 760 (acknowledging stigmatic effect in holding that due process requires that grounds be proved by clear and convincing evidence); Lassiter v. Department of Soc. Servs., 452 U.S. 18 (1981) (acknowledging stigmatic effect in holding that due process may require appointment of counsel in some cases).

143. 455 U.S. 745 (1982).

144. *See id.* at 766–68.

145. *Id.* at 760. *See also id.* at 759 (in seeking termination, "[t]he State alleges that the natural parents *are at fault*") (emphasis added).

146. *See id.* at 754–67. In weighing the private interests at stake in a termination proceeding, the Court repeatedly emphasized the parent's fundamental liberty interest in preserving his or her parental bonds with a child, *see id.* at 753, 759, and concluded that the costs of potential error in the factfinding process fell much harder on the parent than on any other party. For the child, who presumably would already be in foster or other state-supervised care, "the likely consequence of an erroneous failure to terminate is preservation

unnecessary destruction of [a] natural family" stopped abruptly with an assurance of factfinding accuracy and utterly disregarded how the state might choose to define necessity in the first instance.[147]

Indeed, the Supreme Court twice has suggested in dicta that there are substantive due process limits upon a state's creation of statutory grounds for termination. In *Santosky*, the Court tacitly approved of the refusal by the family court judge "to terminate petitioners' parental rights on a 'non-statutory, no-fault basis,'" and pointedly added that it was not "clear that the State constitutionally could terminate a parent's rights *without* showing parental unfitness."[148] The Court then repeated dictum from its opinion four years earlier in *Quilloin* expressing doubt about the constitutionality of using a no-fault ground to justify termination of parental rights.[149]

The Court's dictum in *Santosky* and *Quilloin* can be read narrowly to suggest only that it would be unconstitutional to use no-fault grounds to terminate the rights of a *custodial* parent. The Santoskys were both custodial parents, after all, and the *Quilloin* dictum expressly distinguished the case of an unwed, uninvolved father from the hypothetical (and probably unconstitutional) no-fault "breakup of a natural family."[150] But there are reasons to doubt that this factual distinction would hold. First, the foundation for the Court's constitutional intuition is the substantive due process right of parents to maintain a relationship with their children, and that interest is not confined to custodial parents. Indeed, in *Santosky* the Court emphasized that parents retained this "fundamental liberty interest" even after losing custody to the state for having neglected or abused their children.[151] And, although the government's arguably stronger countervailing interest in the context of a previously fractured family might justify somewhat wider

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of an uneasy status quo. For the natural parents, however, the consequence of an erroneous termination is the unnecessary destruction of their natural family." *Id.* at 765–66 (footnote omitted).

147. *Id.* at 766. *Santosky* holds, in effect, that a state cannot constitutionally terminate a parent's rights even upon a finding that it is more likely than not the parent committed the most heinous abuse of a child, because society so values the parent-child bond that it is unwilling to brook even a moderate chance that the factfinding is in error. If that is so, it seems inconceivable that the same longstanding and broad societal consensus about the importance of the parent-child bond would permit its destruction upon palpably insubstantial grounds—say, poverty of the parents—so long as the factfinding is accurate.

148. 455 U.S. at 760 n.10 (emphasis in original) (quoting trial court record).

149. "'We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'" *Id.* (quoting Quilloin v. Walcott, 434 U.S. 246, 255 (1978) (in turn quoting Smith v. Organization of Foster Families, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment))).

150. Quilloin v. Walcott, 434 U.S. 246, 255 (1978).

151. *Santosky*, 455 U.S. at 753 ("The 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. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."). *See also id.* at 754 n.7.

constitutional latitude,[152] there is no reason to think that the constitutional constraints on termination would wholly disappear.

Accordingly, state courts overwhelmingly have read the Court's cases to recognize a substantive due process barrier to no-fault termination of parental rights, even as applied to parents who have never had custody of their children. Although the Court's unwed-father cases establish that some men may be held to have forfeited their parental rights by failing to take available opportunities to establish a relationship with their children, the prevailing view is that if a parent has seized all available opportunities or already has established such a relationship the state can extinguish the parent's rights only upon convincing proof of his or her *unfitness* to be a parent.[153] "Unfitness" in this sense may be broadly defined to include present incompetence to be a parent as well as past misconduct inimical to the child, such as abandonment or abuse.[154] But the essential requirement is that

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152. The Court has seemed to acknowledge that the government's *parens patriae* interest in providing a child with a stable home environment outside her parent's custody would be stronger at least where the child has no "positive, nurturing" relationship with her parent. *See id.* at 766.

153. *See* Adoption of Kelsey S., 823 P.2d 1216, 1236 (Cal. 1992) ("If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent."); Thorne v. Padgett, 386 S.E.2d 155, 156 (Ga. 1989); *In re* Christmas C., 721 A.2d 629, 631 (Me. 1998); Carr v. Prader, 725 A.2d 291, 294 (R.I. 1999); Nale v. Robertson, 871 S.W.2d 674, 680 (Tenn. 1994); O'Daniel v. Messier, 905 S.W.2d 182, 186 (Tenn. Ct. App. 1995); *In re* J.P., 648 P.2d 1364, 1375 (Utah 1982); *In re* J.L.W., 306 N.W.2d 46, 55 (Wis. 1981); *In re* Kody D.V., 548 N.W.2d 837, 841 (Wis. Ct. App. 1996) ("The constitutional protection afforded parents prohibits the termination of parental rights unless the parent is unfit and requires that unfitness be proved by clear and convincing evidence." (citations omitted)). *See also* Leduc, *supra* note 129, at 1210–13. *But see In re* P.G., 452 A.2d 1183, 1185 (D.C. 1982) (*Santosky* does not require that termination of parental rights be predicated on parental unfitness); Uniform Adoption Code § 3-504 cmt. (1994) (contending that it would be constitutional for state to terminate the parental rights of a fit and blameless father if failure to terminate would inflict "substantial harm" to the child). Indeed, some courts have gone one step farther, holding that the Constitution would not permit a state to deprive a father of *permanent custody* of his child (even if he retained his parental rights) without proof of his unfitness. *See, e.g.*, *In re* Guardianship of Williams, 869 P.2d 661, 666 (Kan. 1994); *In re* Adoption of Mays, 507 N.E.2d 453, 457 (Ohio Ct. App. 1986). *Cf.* Cotton v. Wise, 977 S.W.2d 263 (Mo. 1998) (reaching the same conclusion under state guardianship law).

154. *See In re* Heather B., 11 Cal. Rptr. 2d 891, 904–05 (Ct. App. 1992); *In re* the Adoption of J.J.B., 894 P.2d 994, 1002 (N.M. 1995) ("[T]he term 'unfitness' when used by the Supreme Court with reference to a constitutional prerequisite for the termination of parental rights...is used in a very broad sense. The term at a minimum applies to cases of abandonment, neglect, or abuse of the child."). Terminology can sometimes cause confusion. At least two state courts, for example, have rejected the argument that *Santosky* recognizes a constitutional requirement that termination of parental rights be predicated on "unfitness," but have done so based on a state-law definition of "unfitness" that did not include past blameworthy parental conduct toward the child such as abandonment and non-support. *See In re* Baby Boy N., 874 P.2d 680, 684 (Kan. Ct. App. 1994); *In re* the Adoption of J.W.M., 532 N.W.2d 372, 378 (N.D. 1995). These courts thus express no

the decision to terminate rights must be focused upon the *parent's* conduct or condition as opposed to the interests of the child or other interested parties.[155]

Justice Stevens came close to approving this principle when he refused to stay the enforcement of the court order that required the transfer of Baby Jessica from her adoptive home to her biological parents. In explaining his decision, Justice Stevens praised the Michigan Supreme Court's "comprehensive and thoughtful" legal analysis, an analysis that included recognition of an unwed father's constitutional right to establish a relationship with his child,[156] and seemed to mock the very notion that a parent might forfeit parental rights, or even custody, without proof of unfitness or misconduct.[157]

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disagreement with the proposition that the Constitution requires that termination of parental rights be predicated on parental "unfitness" defined more broadly to include not only present incompetence to parent but also past misconduct such as abandonment.

155. *See In re* Adoption of A.P., 982 P.2d 985, 989 (Kan. Ct. App. 1999) (though "unfitness" can be established by a parent's "incapacity to appreciate and perform the obligations resting upon parents," "the word usually...imports something of moral delinquency" on part of parents); Champagne v. Welfare Div., 691 P.2d 849, 854 (Nev. 1984) ("there must be jurisdictional grounds for termination—to be found in some specific fault or condition directly related to the parents").

156. *See In re* Clausen, 502 N.W.2d 649, 664–65 & n.43 (Mich. 1993).

157. *See* DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993) (Stevens, J., in chambers). Justice Stevens stated:

> Neither Iowa law, nor Michigan law, nor federal law authorizes unrelated persons to retain custody of a child whose natural parents have not been found to be unfit simply because they may be better able to provide for her future and education. As the Iowa Supreme Court stated: "[C]ourts are not free to take children from their parents simply by deciding another home offers more advantages."

Id. (quoting *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992)).

Indeed, although most courts have held otherwise, *see In re* Custody & Guardianship of Ursula P., 437 N.Y.S.2d 225, 227 (N.Y. Fam. Ct. 1981); *In re* William L., 383 A.2d 1228 (Pa. 1978); Spurlock v. Texas Dep't of Protective & Reg. Servs., 904 S.W.2d 152, 159 (Tex. Ct. App. 1995), some judges continue to express doubt about whether the Constitution would permit a state to terminate the rights of a parent on grounds of incapacity where the parent is without fault in the conditions creating the incapacity. *See In re* C.N.G., 531 So. 2d 345, 345–46 (Fla. Dist. Ct. App. 1988) (Cowart, J., dissenting); Bush v. State, 929 P.2d 940, 950 (Nev. 1996) (Springer, J., dissenting) ("I tend to question...whether it is ever morally or constitutionally permissible to terminate the parental rights of a fault-free parent."); *In re* Guardianship & Custody of Gross, 425 N.Y.S.2d 220, 225 (N.Y. Fam. Ct. 1980) (holding that statute "violates substantive due process in that it terminates parental rights without fault when it is applied to the mentally ill or mentally retarded...."); *In re* Involuntary Termination of Parental Rights to W.M., III, 393 A.2d 410, 412 (Pa. 1978) (Manderino, J., dissenting) ("the state cannot constitutionally terminate parental rights if the parent is 'incapacitated' without fault"); Tennessee Dep't of Human Servs. v. Riley, 689 S.W.2d 164, 171–73 (Tenn. Ct. App. 1984) (Nearn, J., dissenting). Justice White, for one, opined that this presents an "important," unresolved issue of constitutional law. *See* Brown Trans. Corp. v. Acton, 439 U.S. 1014, 1021 (1978) (White, J., dissenting from denial of certiorari) (explaining his earlier dissent from denial of certiorari in Beatty v. Lycoming County Children's Servs., 439 U.S. 880 (1978)). One judge viscerally explained the intuition:

A constitutional requirement that parental unfitness, broadly defined to include abuse, neglect, abandonment, or other misconduct detrimental to the child, be proved before parental rights may be involuntarily extinguished would make a legal guarantee of adoption security effectively impossible. Most obviously, a constitutional requirement of parental unfitness presumably would prevent states from simply dispensing altogether with inquiry into fault or incompetence and authorizing termination based solely upon the "best interests" of a child.[158] Thus, courts already have struck down or curtailed the reach of statutes that seemed to authorize no-fault termination of parental rights.[159]

> [B]efore the state, operating through a Court, may say to parents that you may never see your child again, that you may never touch and embrace your child again, that you may never hear your child say "Mommy" or "Daddy" again, before the State can say all that, the parent must have willfully done something wrong.

Riley, 689 S.W.2d at 172 (Nearn, J., dissenting).

158. *See DeBoer*, 509 U.S. at 1302 (Stevens, J., in chambers); *Heather B.*, 11 Cal. Rptr. 2d at 904 ("[I]t is now settled that a state cannot terminate a parental relationship based solely upon the 'best interests' of the child without some showing of parental unfitness"); *In re* J.P., 648 P.2d 1364, 1374–77 (Utah 1982) (striking down statute that permitted termination based upon finding that "such termination will be in the child's best interests"); HARRY D. KRAUSE, FAMILY LAW IN A NUTSHELL 204 (3d ed. 1995) (suggesting that a proposal to permit adoption over the objection "'of a parent not having custody of a minor [who withholds consent] unreasonably...contrary to the best interests of the minor'" would "very probably [be] in violation of the noncustodial parent's Due Process rights"). *Cf. In re* Adoption of W., 904 P.2d 1113, 1119 nn. 6 & 7, 1121 n.8 (Utah Ct. App. 1995) (noting that 1990 amendments to Utah adoption law would permit a court to terminate parental rights, on a "best interests" finding alone, of a fit and faultless unwed father who had been thwarted in his attempts to establish a relationship with the child, and twice reserving judgment on the constitutionality of that provision). The District of Columbia Court of Appeals has upheld the constitutionality of a statute that permits termination of parental rights based on a finding that the parent is withholding consent contrary to the best interests of the child. *See In re* Appeal of H.R., 581 A.2d 1141 (D.C. 1990). *See also* D.C. CODE ANN. § 16-304(e) (1997). In doing so, however, the court construed the statute as implicitly incorporating a custodial preference for biological parents and as permitting "best interests" termination only in extraordinary circumstances. *See id. Appeal of H.R.*, 581 A.2d at 1178–79 (a fit parent's rights could be terminated only "based on clear and convincing evidence that parental custody would actually harm the child"); *id.* at 1189–91 (rejecting the majority's proposed "actual harm" standard but agreeing that the burden of proving that a child's "best interests" require termination of parental rights "will not be easily met where the parent is deemed fit"). Judge Ferren, moreover, noted that the court previously had "recognized 'possible constitutional infirmities' if a court were to terminate even noncustodial parental rights by merely comparing the natural parent with a prospective custodial family to determine the child's best interests." *Id.* at 1177.

159. *See In re* Adoption of Kelsey S., 823 P.2d 1216 (Cal. 1992) (striking down statute that allowed termination of an unwed father's parental rights without a finding of unfitness unless he had cohabited with child); *H.R.*, 581 A.2d at 1173; Thorne v. Padgett, 386 S.E.2d 155, 156 (Ga. 1989) (striking down statute that permitted termination based on failure to support child without regard for whether parent was *able* to provide support); *In re* Raquel Marie X., 559 N.E.2d 418, 426 (N.Y. 1990) (same); Abernathy v. Baby Boy, 437 S.E.2d 25, 29 (S.C. 1993) (statute conditioning unwed father's parental rights on payment of financial support for child cannot constitutionally be applied to terminate rights of father

By the same token, this constitutional principle would also limit a state's ability to stretch traditional concepts of parental "fault" and "unfitness" beyond recognition. Thus, although many states recently have expanded the concept of "abandonment" and stepped up their demands on unwed fathers who wish to assert parental rights in an effort to facilitate adoptions,[160] courts probably will not permit this strategy to effect an end-run around the constitutional "unfitness" requirement. Specifically in the context of the unwed father, courts have held that the Constitution will not permit states to construct statutory schemes that effectively railroad blameless fathers out of their children's lives. The highest courts of both New York and California, for example, have struck down statutes that conditioned an unwed father's right to withhold consent to an adoption on his having cohabited with the mother or the child.[161] The cohabitation requirement, these courts observed, effectively gave the mother the power to deny the father parental rights by refusing to live with him. Accordingly, the requirement was unconstitutional, the courts concluded, because it could be used to strip parental rights from a man who had diligently done everything within his power to establish a relationship with his child and assume parental responsibility.[162] Similarly, the South Carolina Supreme Court has held that a statute conditioning unwed fathers' parental rights on their financial support of their children could not constitutionally be applied to terminate the rights of a father whose attempts to provide support were rebuffed by the mother.[163]

Courts in Utah and Indiana have applied the same principle in limiting the effect of those states' putative father registries. An Indiana appellate court held that a putative father's failure to register could not be used to strip him of parental rights when he had otherwise "grasped the opportunity to undertake his parental responsibilities."[164] Although nothing had prevented the man from complying with the registry statute, the court held that his past visitation with and support of the child constitutionally entitled him to establish his paternity and block any adoption notwithstanding the statutory waiver of his rights.[165] The Utah Supreme Court

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who was thwarted in attempts to pay support); *J.P.*, 648 P.2d at 1374–77 (same). In still other cases, courts have managed to avoid the constitutional question by narrowly construing their statutes to incorporate implicitly a required finding of parental unfitness. *See In re* Juvenile Action No. JS-7359, 766 P.2d 105, 109 (Ariz. Ct. App. 1988); *In re* Valerie D., 613 A.2d 748, 769 n.35 (Conn. 1992); *Adoption of J.J.B.*, 894 P.2d at 1002; *In re* Dependency of K.R., 904 P.2d 1132, 1138–39 (Wash. 1995).

160. *See supra* Parts II.A.1 & II.A.2.

161. *See Kelsey S.*, 823 P.2d at 1216; *Raquel Marie X.*, 559 N.E.2d at 418.

162. *Kelsey S.*, 823 P.2d at 1236; *Raquel Marie X.*, 559 N.E.2d at 426.

163. *Abernathy*, 437 S.E.2d at 29. *See also* Smith v. Malouf, 722 So. 2d 490, 497 (Miss. 1998) (holding that unwed father who had done "all he could have done under the circumstances" to establish a relationship with his infant child was constitutionally entitled to block an adoption by withholding consent); Kessel v. Leavitt, 511 S.E.2d 720, 766 (W. Va. 1998) (same). *Cf. In re* Baby Girl T., 715 A.2d 99, 102–04 (Del. Fam. Ct. 1998) (finding that in light of constitutional protection of parent-child relationship, unwed father could not be held to have "abandoned" child under statute where father did all he reasonably could do to establish relationship with infant-daughter).

164. *See* Walker v. Campbell, 711 N.E.2d 42, 55 (Ind. Ct. App. 1999).

165. *See id.*

confronted the flip-side of this scenario, a putative father with no prior relationship with the child who was thwarted in his ability to register his paternity claim, and also found a constitutional defect. In *Ellis v. Social Services Department of the Church of Jesus Christ of Latter-Day Saints*,[166] the court considered a statute that required unwed fathers to register any claim of possible paternity with a state agency prior to the mother's surrender of the child for adoption.[167] The statute, like Indiana's, further provided that a father's failure to register prior to surrender would be deemed to "constitute an abandonment of said child and a waiver and surrender of any right[s]," including the right to withhold consent to the adoption.[168] The father in *Ellis* contended that his failure to register within the statutory period should be excused, however, because the mother effectively thwarted his compliance by secretly moving, giving birth, and surrendering the child for adoption in Utah before the father could ascertain her whereabouts.[169] Although the statute contained no exception for reasonable non-compliance,[170] the Utah Supreme Court held that such an exception was constitutionally required:

> In the usual case, the putative father would either know or reasonably should know approximately when and where his child was born. It is conceivable, however, that a situation may arise when it is impossible for the father to file the required notice of paternity prior to the statutory bar, through no fault of his own. In such a case, due process requires that he be afforded a reasonable opportunity to comply with the statute.[171]

On the specific facts of that case, moreover, the court remanded to permit the father a chance "to show as a factual matter that he could not reasonably have expected his baby to be born in Utah."[172] If he could make that showing, the court implied, he would be constitutionally entitled to an exemption of the time limits set out in the statute.[173] In subsequent cases, the Utah courts have taken a practical approach in determining when timely registration is reasonably impossible, holding that although simple ignorance of the law provides no excuse, misrepresentations or other efforts to thwart a father's assertion of rights may justify non-registration.[174]

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166. 615 P.2d 1250 (Utah 1980).

167. *See id.* at 1253.

168. *Id.* at 1254 (quoting UTAH CODE ANN. § 78-30-4(3)(c) (Supp. 1979)).

169. *See id.* at 1256.

170. In this regard, Utah's statute was considerably more aggressive than most putative-father-registry statutes. *Cf.* ARIZ. REV. STAT. § 8-106.01(E) (1998) (excusing failure to register where timely compliance was reasonably impossible); 750 ILL. COMP. STAT. 50/12.1(g) (West 1999) (same). Utah's statute was amended in 1990 to excuse reasonable non-compliance, and that exception was carried forward in a 1995 overhaul of the state's adoption code. *See* UTAH CODE ANN. § 78-30-4.8 (Supp. 1990); UTAH CODE ANN. § 78-30-4.15(4) (Supp. 1995). *See also In re* Adoption of W., 904 P.2d 1113, 1118–19, 1122 n.9 (Utah Ct. App. 1995) (recounting 1990 & 1995 amendments).

171. *Ellis*, 615 P.2d at 1256 (footnotes omitted).

172. *Id.*

173. *See id.*

174. *Compare* Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 642–43 (Utah 1990) (stating timely registration was not reasonably impossible when mother and father were

This approach seems consistent with the Supreme Court's decision in *Lehr v. Robertson.*[175] In that case, the Court upheld the application of New York's statute to an unwed father whose parental rights were forfeited for failing to register with the state's putative father registry. In holding that the law did not deny the unwed father due process, the Court emphasized that the man was in no way thwarted from preserving his rights through timely registration:

> If this [registry] scheme were likely to omit many responsible fathers, and *if qualification for notice were beyond the control of an interested putative father*, it might be thought procedurally inadequate. Yet, as all the New York courts that reviewed this matter observed, the right to receive notice [by timely registering his claim of paternity] *was completely within appellant's control.*[176]

Although the Court stated that an unwed father's mere ignorance of the legal requirement to register his claim of paternity would not justify a failure to register,[177] it was also careful to note that no claim had been made that the father

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both Utah residents, father maintained contact with mother and child, and father knew that mother was considering relinquishing the child for adoption), *and* Wells v. Children's Aid Soc'y of Utah, 681 P.2d 199, 207–08 (Utah 1984) (stating timely registration was not reasonably impossible where "birth occurred in the same state as the father's residence," father had "ample advance notice of the expected time of birth and the fact that the mother intended to relinquish the child for adoption," and "neither the child's mother nor the [adoption] agency was involved in any effort to prevent him from learning of the birth or from asserting his parental rights"), *and* Sanchez v. L.D.S. Social Servs., 680 P.2d 753 (Utah 1984) (stating timely registration not reasonably impossible where father resided in Utah, maintained contact with mother throughout pregnancy, and knew of her plans to relinquish child for adoption), *with In re* Adoption of Baby Boy Doe, 717 P.2d 686, 690–91 (Utah 1986) (stating timely registration was not reasonably possible, and therefore constitutionally must be excused, where mother knew of out-of-state father's objections to adoption and misrepresented that she would not relinquish child), *and Adoption of W.*, 904 P.2d at 1120–21 (stating mother's undisclosed move from Indiana to Nevada for delivery of child and surrender of child for adoption in Utah reasonably excused father's initial failure to register paternity claim in Utah, but did not excuse his failure to register for eight months after learning of the Utah adoption proceeding). In 1990, the Utah Supreme Court collected the various factors it had found relevant to the determination of whether timely registration is reasonably possible:

> [W]hether the unwed father was a Utah resident; whether he was aware of the mother's intent to place the child for adoption; whether the parties involved were aware of the father's desire to rear the child; whether the couple intended to marry or live together; whether the father was absent at the time of birth; and whether the father was misled concerning the need to protect, or prevented from asserting, his parental rights.

Swayne, 795 P.2d at 642. "Summarized," the court stated, "the blanket factor common to all our cases dealing with the due process constitutionality of [the putative father registration requirement] is simply whether an unwed father was aware of the need to protect his parental rights." *Id.*

175. Lehr v. Robertson, 463 U.S. 248 (1983).

176. *Id.* at 263–64 (emphasis added).

177. *See id.* at 264 ("The possibility that he may have failed to [register] because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself.").

had been thwarted by others in his ability to comply with the law.[178] While the father alleged that the mother attempted to thwart his contact with the child, nothing stood in the way of his compliance with the state's registry statute: both parents were longtime New York residents, the father knew of the mother's pregnancy and even visited the child in the hospital.[179] All that was needed to demonstrate the seriousness of his parental interest and to preserve his parental rights, the Court emphasized, was the simple act of "mailing a postcard to the putative father registry."[180]

Consistent with *Lehr* and the Utah cases, the courts of several states recently have sustained their putative father registry statutes against constitutional attack—but only in cases in which the courts found that the particular men involved had, and squandered, a reasonable opportunity to comply with the statute.[181] All of this suggests that putative father registries, while undoubtedly effective in excluding many unobservant men from the adoption process, ultimately cannot provide a complete answer. There will be myriad circumstances under which it would not be realistic to expect men to comply with the registration requirements. For example, a mother may surreptitiously move to a different state, or country, for purposes of delivering the child and placing it for adoption[182] or a father may reasonably believe that he does not need to register because of misrepresentations that the pregnancy has been terminated or that he will be given custody.[183] In those situations, it seems decidedly unlikely that courts would

178. *See id.* at 265 & n.23 (noting that the unwed father was "presumptively capable of asserting and protecting [his] own rights" and that "[t]here is no suggestion in the record that [the child's mother] engaged in fraudulent practices that led appellant not to protect his rights").

179. *See id.* at 269 (White, J., dissenting).

180. *Id.* at 264. *See also id.* at 262 n.18.

181. *See In re* Petition of K.J.R., 687 N.E.2d 113 (Ill. App. Ct. 1997); *In re* A.S.B., 688 N.E.2d 1215 (Ill. App. Ct. 1997); Tariah v. Hannah's Prayer Adoption Agency, 903 P.2d 304 (Okla. 1995); *In re* Adoption of W, 904 P.2d 1113 (Utah Ct. App. 1995).

182. *See In re* Appeal of H.R., 581 A.2d 1141 (D.C. 1990) (mother moved from Zaire to the United States); Swayne v. L.D.S. Soc. Servs., 795 P.2d 637, 646 (Utah 1990) (noting relevance of father's residency); Ellis v. Soc. Servs. Dept. L.D.S., 615 P.2d 1250 (Utah 1980) (mother moved from California to Utah).

183. *See* Abernathy v. Baby Boy, 437 S.E.2d 25, 29 (S.C. 1993) (father acted reasonably where his "lack of action was engendered by [mother's] assurance to him that she would not place the child for adoption"); *Swayne*, 795 P.2d at 642 (noting relevance of "whether the father was misled concerning the need to protect...his parental rights"); *In re* Baby Boy Doe, 717 P.2d 686, 690 (Utah 1986) (mother had told father she and the baby would move in with father). *Cf. Lehr*, 463 U.S. at 265 n.23 (noting the absence of any claim that the mother had "engaged in fraudulent practices that led the appellant not to protect his rights"); *In re* Baby Girl T., 715 A.2d 99, 104 (Del. Fam. Ct. 1998) (holding that an unwed father did not abandon his infant daughter by failing to follow up on rumors that mother was pregnant, because he and mother had used birth control and it "is totally unrealistic...[to] require a potential father to become involved in the pregnancy on the 'mere speculation that he might be the father because he was one of the men having sexual relations with [the pregnant mother] at the time in question.'" (quoting *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992))); Forman, *supra* note 4, at 1026–27.

permit failure to register, or any other omission entirely beyond a parent's control, to justify a permanent loss of parental rights.

B. Parental Purgatory: Custody Without Adoption

A second and distinct legislative strategy has involved attempts to mitigate the harm in those cases where adoptions cannot go forward. Here the goal has been to empower courts, in cases where adoptions fail, to award long-term custody to the caregivers who had sought to adopt. This was the point of the so-called "Baby Richard Amendment," rushed into enactment in Illinois,[184] and of similar provisions in a handful of other states.[185] Under these provisions, and indeed under the law of many states even before the recent round of adoption legislation,[186] where a biological parent succeeds in blocking an adoption, courts nevertheless may decline to award the parent custody, leaving the putative

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184. That provision states:

> In the event a judgment order for adoption is vacated or a petition for adoption is denied, the court shall promptly conduct a hearing as to the temporary and permanent custody of the minor child who is the subject of the proceedings pursuant to [the best interests of the child standard as set forth in] Part VI of the Illinois Marriage and Dissolution Act. The parties to said proceedings shall be the petitioners to the adoption proceedings, the minor child, any biological parents whose parental rights have not been terminated, and other parties who have been granted leave to intervene in the proceedings.

750 ILL. COMP. STAT. 50/20(b) (1999). Although this provision was enacted and became effective before the judgment in the Baby Richard case became final (the petitions for rehearing and for certiorari to the United States Supreme Court had not yet been denied), the Illinois Supreme Court refused to apply the provision to that case on the novel ground that to do so would violate constitutional separation of powers by vitiating the court's decision. *See In re* Petition of Kirchner, 649 N.E.2d, 324, 336–38 (Ill. 1995).

185. *See* OKLA. STAT. ANN. tit. 10 § 7505-6.4(B)(3) (Supp. 1997); UTAH CODE ANN. § 78-30-4.16(2) (Supp. 1990). *Cf.* R.I. GEN. LAWS §§ 40-11-12 to 40-11-12.3 (Supp. 1994) (creating a new form of long-term guardianship, but making it available only when the parent or parents of the child consent).

186. *See* UNIF. ADOPTION ACT § 13(d) (amended 1974), 9 U.L.A. 54 (1988); *In re* Adoption of Kelsey S., 823 P.2d 1216, 1238 (Cal. 1992); Guardianship of Marino, 106 Cal. Rptr. 655 (Ct. App. 1973); *Petition of Kirchner*, 649 N.E.2d at 350–51, 358 (McMorrow, J., dissenting); Sorentino v. Family & Children's Soc'y of Elizabeth, 367 A.2d 1168, 1171 (N.J. 1976); *In re* Hill, 937 S.W.2d 384, 387 (Mo. Ct. App. 1997); Mollander v. Chiodo, 675 A.2d 753, 755–57 (Pa. Super. Ct. 1996); Mix v. Barton, No. 02A01-9510-CH-00224, 1997 WL 739538, at *3 (Tenn. Ct. App. Dec. 2, 1997); Bartlett, *supra* note 125, at 931 & n.243 (collecting additional cases dating back to 1934); Bodenheimer, *supra* note 97, at 42–43; Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 445 & n.106 (1983). *See generally* 1 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES § 13.17, at 33, § 12.11, at 646–47 (1993); Meryl Schwartz, *Reinventing Guardianship: Subsidized Guardianship, Foster Care, and Child Welfare*, 22 N.Y.U. REV. L. & SOC. CHANGE 441, 457 (1996) (reviewing history of guardianship laws); Hasseltine B. Taylor, *Guardianship or "Permanent Placement" of Children*, 54 CAL. L. REV. 741 (1966) (advocating awards of permanent custody and guardianship in cases where adoption is blocked by a non-consenting, fit parent).

adoptive parents as custodial guardians and the biological parent with visitation rights.

The outcome offered by this form of long-term guardianship is plainly a major improvement, from the point of view of both the child and the putative adoptive parents, over the alternative of a sudden, traumatic transfer of custody. At the same time, as I show in this Part, measured against the alternative of *adoption*, long-term guardianship remains a decidedly inferior arrangement from the child's point of view. First, guardianships provide a much less secure form of custody, one that remains vulnerable to repeated challenge by the non-custodial parent. Compounding the insecurity, in many jurisdictions petitions for modification of custody are decided under a legal standard that tips the scales in favor of biological parents.[187] Second, the guardianship arrangement denies full legal recognition to the parent-child relationship that in fact exists between the child and her guardians.[188] The state's pointed refusal to normalize the parent-child relationship carries not only practical significance, limiting the custodian's responsibilities and liabilities, for instance, but also important symbolic significance, expressing the state's view that the caregivers are something less than true *parents* and that the custodial arrangement is something less than a true *family*. The message that society, speaking through the law, does not regard them as truly parent and child is not likely to be lost on the participants in this arrangement, and may well affect social dynamics within such families. Taken together with the inherent instability of the custodial arrangement, the denial of parent status to the caregivers makes the participants in a guardianship less likely to invest themselves fully in the optimal development of lasting family bonds.

1. The Unique Instability of the Guardianship Alternative

Although the custodial caregivers may be given the title of "permanent guardians" to the child, their long-term claim to that status is more precarious than the title suggests. As guardians, the putative adoptive parents are granted custody of the child and decision-making authority in matters of child-rearing substantially similar to that enjoyed by parents,[189] but they are not *parents* to the child. The child's only legal *parent* (assuming that the biological mother executed a valid consent to the adoption and surrender of her parental rights) is the biological

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187. *See infra* Part III.B.1.

188. *See infra* Part III.B.2.

189. The legal rights and duties of a guardian to a child differ only modestly from those of a parent:

> The guardian generally has the right to the care, custody, control, and education of the child, similar to the rights of the parents. The guardian generally may consent to medical care and typically may sign school, driver's license, and similar consent forms. The guardian generally has to the right to consent to the marriage of the child, but that right may be withheld by the letters of guardianship.... While the guardian takes on most of the rights of the parent, he or she does not have as broad a range of liabilities.

1 HARALAMBIE, *supra* note 180, § 13.17, at 33, § 12.03, at 640 (footnotes omitted). *See also* UNIF. PROBATE CODE § 5-209 (amended 1993), 8 U.L.A. 345 (1998).

father. And, although the father's parental rights are initially limited to visitation with the child, the custody arrangement remains subject to future modification by the court.[190] Accordingly, if the guardians divorce, remarry, change jobs, move out of state, or suffer a serious illness,[191] they may be haled back into court by the biological father and forced to defend their claim to custody. Indeed, custody decisions sometimes are reopened based solely upon scrutiny of the custodian's child-rearing decisions, such as the custodian's choices concerning the child's education or religious upbringing.[192]

In this sense, the guardians' claim to custody may seem no different from that of a divorced or never-married parent whose custody may be challenged time and again by the non-custodial parent on a showing of a "material change in circumstances."[193] But, in practice, the guardians' claim to custody is likely to be significantly more tenuous. When a non-custodial parent seeks reconsideration of a prior court decree awarding custody to the other parent, the governing legal standard is typically weighted heavily against modification. In jurisdictions following the Uniform Marriage and Divorce Act, for example, the petitioning

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190. *See* C.R.B. v. C.C., 959 P.2d 375, 380–81 & n.10 (Alaska 1998); Freshour v. West, 971 S.W.2d 263, 264 (Ark. 1998) (rejecting biological father's bid for custody but emphasizing that he remains free to seek custody in the future through a modification proceeding); *In re* Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 14 (Ct. App. 1999) (stating "permanent guardianship" is terminable at request of parent if "the guardianship is no longer necessary or termination is in the ward's best interest"); *Hill*, 937 S.W.2d at 388 (stating a parent "may petition the court at any time to modify or to terminate the custody order"); *In re* Dependency of F.S., 913 P.2d 844, 847 (Wash. Ct. App. 1996) ("The parent may seek at any time to modify the guardianship or to terminate it and request the return of the child."); Schwartz, *supra* note 186, at 462–63 ("Guardianship arrangements, unlike adoption, can be terminated at any time by the court at the request of the guardian or of any interested party, including a biological parent.").

191. All of these scenarios have been held to constitute a sufficient change of circumstances to justify reconsideration of a prior custody order. *See In re* Marriage of Whipp, 962 P.2d 1058, 1064 (Kan. 1998) (change in custodial parent's work schedule); Fraser v. Boyer, 722 A.2d 354, 355 (Me. 1998) (custodial parent's relocation); Sophia T. v. Bruce J., 25 Fam. L. Rep. (BNA) 1156, 1156 (Ohio Ct. App. Jan. 22, 1999) (same); Olson v. Olson, 701 A.2d 1030, 1031 (R.I. 1997) (custodial parent's illness); Porter v. Porter, 298 S.E.2d 130, 132 (W. Va. 1982) (custodial parent's remarriage). Likewise, if the child experiences such an event, such as being diagnosed with a serious illness, the custody decision may be reopened. *See* Daniel v. Daniel, 509 S.E.2d. 117, 119 (Ga. Ct. App. 1998) (finding child's diagnosis with asthma sufficient change of circumstances to reconsider custody).

192. *See* Gorman v. Ziegler, 690 N.E.2d 729, 733–34 (Ind. Ct. App. 1998) (finding disagreement between custodial and non-custodial parents over best course of medical treatment for child constituted "substantial change in circumstances" warranting modification of custody); Winkler v. Winkler, 689 N.E.2d 447, 452 (Ind. Ct. App. 1997) (finding a "substantial change of circumstances" warranting a change of custody based upon custodial parent's decision to enroll deaf child in a residential school for the deaf and to rear the child in "deaf culture"); Glanton v. Glanton, 443 S.E.2d 810, 812 (S.C. Ct. App. 1994) (affirming change in custody based upon custodial mother's "outlook and approach to child's education," including her decision to supervise and correct the child's homework assignments).

193. *See* KRAUSE, *supra* note 158, § 18.19, at 323–24.

parent must show that new developments in the child's custodial environment actually "endanger[] seriously" the child's basic welfare.[194] Even jurisdictions applying less stringent standards typically demand clear proof that the benefits to the child of a transfer of custody will overwhelm the presumed value of stability and continuity offered by the pre-existing placement.[195] Such standards give a custodial parent reasonable security (though certainly no guarantee) that she will retain custody until the child reaches majority. The governing rules can be quite different, however, when the custodian does not also hold the status of parent. As a general rule, variously grounded in statute, common law, equity, or the vagaries of substantive due process, almost all jurisdictions apply a powerful preference for "natural parents" in initial custody contests with non-parents. In that context, the courts hold that

> a natural parent has the right to the custody of his or her children, absent a compelling reason for placing the children in the custody of another; the 'best interests of the child' standard applicable to custody disputes between natural parents in a marriage dissolution proceeding is not applicable to custody disputes between natural parents and other persons.[196]

Accordingly, to win custody as against a parent-claimant, a non-parent generally must prove that the parent is affirmatively unfit to have custody,[197] or at least that the child would suffer demonstrable harm from living with the parent.[198]

The law's decided preference for biological parents in custody disputes is often carried over to cases in which a parent is seeking to upset a settled custodial placement with a non-parent. Most courts apply some form of the parental-preference standard when a parent seeks to reclaim custody from a non-parent guardian.[199] Accordingly, even if the child has been in the guardian's custody for

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194. UNIF. MARRIAGE & DIVORCE ACT § 409 (1982).

195. In Illinois, for example, modification of a custody decree is permitted within the first two years after entry of the decree only upon satisfaction of the UMDA's "serious endangerment" standard and after two years upon "clear and convincing evidence" that a transfer of custody is necessary to serve "the best interests of the child." 750 ILL. COMP. STAT. 5/610 (1993). This standard has been interpreted to embody "a strong presumption in favor of the present custodian" regardless of the timing of the modification petition, *see In re* Marriage of Wycoff, 639 N.E.2d 897, 902 (Ill. App. Ct. 1994), and generally to require clear proof of "egregious circumstances," MULLER DAVIS, THE ILLINOIS PRACTICE OF FAMILY LAW 312 (1996).

196. *In re* Marriage of Hruby, 748 P.2d 57, 63 (Or. 1987). *See generally* 2 JOHN P. MCCAHEY, ET AL., CHILD CUSTODY & VISITATION LAW AND PRACTICE § 11.03 (rev. ed. 1998).

197. *See* Schuh v. Roberson, 788 S.W.2d 740, 741 (Ark. 1990); Webb v. Webb, 546 So. 2d 1062, 1065 (Fla. Dist. Ct. App. 1989); Logan v. Logan, 730 So. 2d 1124, 1126 (Miss. 1998); Rutland v. Pridgen, 493 So. 2d 952, 954 (Miss. 1986); Erger v. Askren, 919 P.2d 388, 391 (Mont. 1996); Petersen v. Rogers, 445 S.E.2d 901, 905 (N.C. 1994).

198. *See* C.R.B. v. C.C., 959 P.2d 375, 379 (Alaska 1998); *In re* E.J.H., 546 N.W.2d 361, 364 (N.D. 1996); Baker v. Baker, 682 N.E.2d 661, 665 (Ohio Ct. App. 1996); *Hruby*, 748 P.2d at 63; *In re* Askew, 993 S.W.2d 1, 4–5 (Tenn. 1999).

199. *See* S.G. v. C.S.G., 726 So. 2d 806, 811 (Fla. Dist. Ct. App. 1999); *In re* Guardianship of Williams, 869 P.2d 661, 670 (Kan. 1994) (applying parental-preference

years, a parent often may win a change of custody without having to show any change of circumstances or that the child would benefit from the transfer.[200] Rather, so long as the parent is minimally "fit" and no evidence demonstrates that the child would suffer intolerable damage from the transfer, the parent is held to be entitled to wrest custody from the guardian.[201]

Even in jurisdictions that decide such custody disputes according to the "best interests" or "changed circumstances" standards that typically govern modification petitions between parents,[202] the playing field between biological-

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doctrine to petition to dissolve temporary guardianship; ordering transfer of custody of two-and-one-half-year-old boy to mother from guardian who had raised him for past two years); Grant v. Martin, No. 98-CA-00261-COA, 1999 WL 263612, at *2 (Miss. App. May 4, 1999); Litz v. Bennum, 888 P.2d 438, 440–41 (Nev. 1995) (ordering transfer of custody of eight-year-old boy to mother from grandparents who had raised him for past seven years); *In re* Guardianship of Jenae K.S., 539 N.W.2d 104, 107 (Wis. Ct. App. 1995) (applying parental-preference doctrine to petition to dissolve temporary guardianship and ordering transfer of custody of eleven-year-old girl to mother from guardians who had raised her for past six years).

200. As a Mississippi appellate court explained in a case affirming a parent's "entitlement" to reclaim her children from the guardians who had raised them for six years:

> [E]ven when a natural parent has previously been found unfit and custody awarded to [non-parent guardians], a chancellor must later modify custody if the natural parent desires custody and demonstrates fitness. There is no requirement that proof be offered that retaining custody in the [guardians] is adverse to the child's interest; it is only necessary that the petitioning parent show that she has not abandoned the children, has not engaged in immoral conduct, and is not otherwise unfit.

Grant, 1999 WL 263612, at *3. The court specifically noted that it would be error for a trial judge to deny a parent's modification petition and to "leave custody in a third party [guardian] because of the passage of a substantial period of time (but without a resulting abandonment) and a strong bond having been established between the minors and that third party." *Id.* at *4. *See* Johnson v. Lloyd, 211 A.2d 764 (D.C. 1965); *S.G.*, 726 So. 2d at 811; *In re* M.M.L., 900 P.2d 813, 821 (Kan. 1995); *Guardianship of Williams*, 869 P.2d at 670; Youmans v. Ramos, 711 N.E.2d 165, 169 (Mass. 1999) (affirming order granting absent father's petition to terminate permanent guardianship and claim custody of eleven-year-old daughter from aunt who had raised her since infancy based on finding that father was not "unfit to assume full custodial responsibilities"); *Logan*, 730 So. 2d at 1124–26; Erger v. Askren, 919 P.2d 388 (Mont. 1996); *In re* Guardianship of M.R.S., 960 P.2d 357 (Okla. 1998); *Askew*, 993 S.W.2d at 1. Arkansas law differentiates between legitimate and illegitimate children, requiring a biological father who seeks to win custody of an illegitimate child to prove that the change of custody would be in the child's best interests, while permitting parents of legitimate children to win custody based on a simple showing of "fitness." *See* Freshour v. West, 971 S.W.2d 263, 264–65 (Ark. 1998).

201. *See Guardianship of Williams*, 869 P.2d at 670; Williams v. Dunston, 609 N.Y.S.2d 643, 644 (N.Y. App. Div. 1994); *Jenae K.S.*, 539 N.W.2d at 106.

202. In recent years, some courts have rejected application of a distinct parental-preference standard in cases where a parent seeks modification of a decree awarding custody to a non-parent, holding instead that *any* party seeking to modify a prior decree, whether parent or non-parent, must make the identical showing of "changed circumstances" to overcome the presumptive value to the child of continuity. *See* C.R.B. v. C.C., 959 P.2d 375, 380 (Alaska 1998). *See also id.* at 380 n.10 (collecting additional cases). Indeed, the

parent and non-parent contestants remains uneven. When a parental preference does not overtly take the form of a trump card in a governing legal standard, status as a biological parent remains a relevant and often compelling consideration in most courts' assessment of a child's own interests.[203] Against the presumptive benefit to the child of continuity of a pre-existing placement, therefore, the courts typically balance what they presume to be a substantial benefit to a child of being reared by her own "natural parent":

> "[The presumption] is rooted in the common experience of mankind, which teaches that parent and child normally share a strong attachment or bond for each other, that a natural parent will normally sacrifice personal interest and welfare for the child's benefit, and that a natural parent is normally more sympathetic and understanding and better able to win the confidence and love the child than anyone else."[204]

Guided by this presumption, courts often conclude that the long-term benefits of being raised by a biological parent outweigh the conceded short-term detriment to the child from being displaced from loving, established non-parent caregivers.[205] Accordingly, regardless of the legal standard that applies, a biological parent is likely to have a significant advantage over a non-parent in seeking to gain custody, making the non-parent custodian's claim to continued custody less secure.

None of this imbalance of legal power, of course, is lost on the non-parent guardians. The specter of losing custody to a late-appearing biological parent has seemed to loom so large in recent years that observers have given a label to its impact on adoptive families, "the Baby Richard factor."[206] Even the perceived insecurity of *adoption* has caused many prospective adoptive parents to reconsider adopting at all or to look overseas for adoptive children.[207] The

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Alaska Supreme Court recently suggested that this might well constitute "the modern rule." *Id. See also* 1 HARALAMBIE, *supra* note 123, § 10.10, at 549 (collecting additional cases).

203. *See* Naomi Cahn, *Reframing Child Custody Decision-making*, 58 OHIO ST. L.J. 1, 16 (1997) (discussing Rowles v. Rowles, 668 A.2d 126, 128 (Pa. 1995)). One of the most common justifications for the parental-preference doctrine, after all, is that "public policy deems the doctrine as being in the best interests of the child." *M.M.L.*, 900 P.2d at 820 (quoting *In re* Guardianship of Williams, 869 P.2d 661, 666 (Kan. 1994)). *See also In re* Paternity of L.K.T., 665 N.E.2d 910, 912 (Ind. Ct. App. 1996); *In re* J.M., 940 P.2d 527, 530 (Utah Ct. App. 1997).

204. *J.M.*, 940 P.2d at 530 (quoting Kishpaugh v. Kishpaugh, 745 P.2d 1248, 1250 (Utah 1987)). *See also In re* J.M.P., 528 So. 2d 1002, 1015 (La. 1988) ("[P]reservation of the child's sense of lineage and access to his extended biological family can be important psychologically [to the child], as evidenced by the felt need of some adoptive children to search out their natural parents."); *Logan*, 730 So. 2d at 1126.

205. *See* Northland v. Starr, 581 N.W.2d 210, 213 (Iowa Ct. App. 1998); *M.M.L.*, 900 P.2d at 822–23.

206. *See* Patricia King Kendall Hamilton, *Bringing Kids All the Way Home*, NEWSWEEK, June 16, 1997, at 60 (defining "the so-called 'Baby Richard factor'" as "a fear, perhaps exaggerated, that an adopted child will be reclaimed someday by a birthparent").

207. *See* Alexandra Maravel, *Intercountry Adoption and the Flight from Unwed Fathers' Rights: Whose Right Is It Anyway?*, 48 S.C. L. REV. 497, 501 (1997); Hamilton,

spreading anxiety has given life to a new insurance concept; in 1994, the year after the court-ordered transfer of Baby Jessica, a major underwriter began offering "adoption insurance," which would compensate prospective adoptive parents for the costs of a scuttled adoption.[208] If the perceived insecurity in adoptive placements is enough to cause parents who succeed in adopting children to plan for the possibility of losing custody, then the greater insecurity of guardianships plainly justifies non-parent guardians in regarding their custody as uncertain. Additionally, unlike divorced parents who fear losing custody to an ex-spouse, a non-parent guardian must contemplate not only losing custody but also losing any relationship at all with the child.[209]

Prospective adoptive parents who are relegated to the role of long-term guardians must, therefore, attempt to build their relationship with the child in the shadow of uncertainty about how long that relationship will be permitted to endure. Social scientists have amply confirmed that emotional insecurity and other forms of parental stress interfere with bonding and communication with the child and with effective parenting generally. Numerous studies have found that parents suffering from depression, for example, or even more ordinary forms of stress relating to divorce or economic pressures are often less engaged with their children and less likely to follow the sort of child-rearing practices associated with positive child development.[210] The impairment of the parent-child bond in such cases has been documented by researchers in the form of diminished and less

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supra note 206, at 60; Ellen Warren & Louise Kiernan, *New 'Richard' Laws Fail To Quell Doubts*, CHI. TRIB., May 3, 1995, at 1.

208. *See Solace When Adoption Deals Sour*, BUS. WK., June 12, 1995, at 106.

209. In both the Baby Richard and Baby Jessica cases, the court orders awarding custody to the biological fathers did not provide any visitation rights for the prospective adoptive parents who lost custody. And in both cases, the biological parents did not permit any visitation or other contact after the day on which the transfer of custody occurred. That outcome is consistent with the tendency of most courts to limit narrowly non-parent standing to seek visitation. *See* Worrell v. Elkhart County Office of Families & Children, 704 N.E.2d 1027, 1028 (Ind. 1998) (former foster parents lacked standing to seek visitation with former foster child); Smith v. Smith, 969 P.2d 21, 30 (Wash. 1998) (striking down statute permitting non-parents to seek visitation as an unconstitutional intrusion on parents' fundamental liberty). *But see* Youmans v. Ramos, 711 N.E.2d 165, 167 (Mass. 1999) (holding that trial court had inherent equitable power to grant visitation rights to child's former custodian upon terminating permanent guardianship).

210. *See* VIRGINIA L. COLIN, HUMAN ATTACHMENT 96–97 (1996); Marguerite Stevenson Barratt, *Communication in Infancy*, *in* EXPLAINING FAMILY INTERACTIONS, at 1, 15–16 (1995); Glen H. Elder, Jr. & Stephen T. Russell, *Academic Performance and Future Aspirations*, *in* UNDERSTANDING DIFFERENCES BETWEEN DIVORCED AND INTACT FAMILIES, at 176, 178–79 (1996) [hereinafter UNDERSTANDING DIFFERENCES]; Marian Radke-Yarrow, et al., *Patterns of Attachment in Two- and Three-Year-Olds in Normal Families and Families with Parental Depression*, 56 CHILD DEVELOPMENT 884, 890–92 (1985); Ronald L. Simons, *Theoretical and Policy Implications of the Findings*, *in* UNDERSTANDING DIFFERENCES, *supra*, at 195, 207–08; Ronald L. Simons & Christine Johnson, *Mother's Parenting*, *in* UNDERSTANDING DIFFERENCES, *supra*, at 81, 83–92 (1996).

rewarding interaction between parent and child and in more anxious, less secure behavior by the child.[211]

Other studies have shown a significant correlation between impairment of parent-child bonding and serious illness in newborn infants.[212] Although researchers have found no meaningful difference in emotional attachment patterns between parents of full-term and premature healthy babies, strong evidence suggests that bonding is diminished when babies suffer from serious or life-threatening illnesses, such as respiratory distress syndrome or congenital heart disease.[213] These findings are susceptible of several interpretations, but they certainly are consistent with the conclusion that some parents bond less closely with infants when they fear that the child may be taken from them suddenly and prematurely.[214]

Similarly, evidence from the field of foster care demonstrates that successive separations or disruptions in caregiver relationships are psychologically harmful to children and inhibit their bonding with new caregivers.[215] The lesson graphically conveyed to these children by their foster care experience was that

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211. *See* COLIN, *supra* note 210, at 97; Marian Radke-Yarrow, et al., *supra* note 210, at 884–85, 887–90. Researchers in the field of family bonding and attachment theory have developed detailed criteria by which to assess the security and depth of attachments between children and their caregivers in controlled experiments. *See generally* MARY D. SALTER AINSWORTH ET AL., PATTERNS OF ATTACHMENT 31–64 (1978) (describing research methodology); COLIN, *supra* note 210, at 31–66 (same).

212. *See* COLIN, *supra* note 210, at 114–16 (collecting studies).

213. *See id.* at 115–16.

214. *See* Jeree H. Pawl & Judith H. Pekarsky, *Infant-Parent Psychotherapy: A Family in Crisis*, *in* INFANTS AND PARENTS: CLINICAL CASE REPORTS 39, 42–43, 82 (Sally Provence ed., 1983) (clinical assessment of parents of infant who had survived life-threatening trauma at birth found that lingering sense of insecurity impaired and distorted parent-child bonding; for example, "[i]n part, [father's] aggressivity [toward child] was seen as a wish to end the waiting for the ultimate, horrifying loss to occur").

215. *See* JOSEPH GOLDSTEIN, ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 105–06 & n.* (1996) ("[T]o the extent that such separations are repeated (as in multiple foster care placements), they make the child more vulnerable and make each subsequent opportunity for attachment less promising and less trustworthy than prior ones."); RUTH G. MCCOY ET AL., EMOTIONAL DISTURBANCE IN ADOPTED ADOLESCENTS: ORIGINS AND DEVELOPMENTS 34–36 (1988); Bartlett, *supra* note 125, at 903 (noting "consensus that the greater the number of separations from a caregiver, the more likely that the child's ability to form lasting attachments will be impaired"); Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 FUTURE OF CHILDREN 72, 81 (1998); David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 FUTURE OF CHILDREN 153, 162 & nn.68–71 (1993) (collecting additional sources) [hereinafter Brodzinsky, *Long-Term Outcomes*]; David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, *in* THE PSYCHOLOGY OF ADOPTION 3, 7 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) [hereinafter Brodzinsky, *A Stress and Coping Model*]; Grant Charles & Jane Matheson, *Children in Foster Care: Issues of Separation and Attachment*, 2 COMMUNITY ALTERNATIVES 37, 39–40 (1990) ("The experiences of repeated separations and abandonments, as is often the case with a child in care, will elicit ever-increasing anger and related dysfunctional responses."); Garrison, *supra* note 186, at 458–59 & n.162 (collecting additional studies).

every seemingly caring relationship was subject to abrupt loss, and the children's response appears to have been a withholding, conscious or otherwise, of full emotional investment in subsequent relationships. A similar message of vulnerability and impermanence is, of course, quite explicitly communicated to foster parents in their contracts with state agencies and assuredly inhibits emotional investment on the part of many foster parents as well.[216]

This research demonstrates, in extreme situations at least, that insecurity concerning the continuity of a loving relationship negatively affects the bonding process between adult and child, resulting in a less gratifying and fulfilling relationship for each. The insecurity inherent in long-term guardianship certainly is less gnawing than that experienced by children in "foster care drift" or by a parent of a terminally ill child. But there is no reason to think that the correlation between custodial insecurity and impaired bonding vanishes outside the context of these extreme cases. To the contrary, the lesser degree of insecurity associated with long-term guardianship should be expected to result in a lesser degree of interference with the bonding process in affected relationships, but interference just the same.

European studies of children placed in adoptive homes compared with those placed in "permanent foster care" seem to confirm this hypothesis.[217] Researchers in Sweden, for instance, found that children who were adopted at an early age fared much better across a range of adjustment measures than did children placed with "socially stable foster families for a permanent stay."[218] British researchers in a similar study arrived at the same conclusion.[219] Although

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216. *See* GOLDSTEIN, ET AL., *supra* note 215, at 14–15 ("If foster parents heed the warning implicit in the agreements and go about their [child-rearing] task with the detachment of a semi-professional, they evoke in the child a response that is too lukewarm to serve either the infant's developmental needs for emotional bonding or the older child's need to feel that she is a fully wanted member of a family."). *See also* Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 860 (1977) (Stewart, J., concurring in the judgment) (noting that "the typical foster-care contract gives the agency the right to recall the child 'upon request'").

217. *See* Michael Bohman & Sören Sigvardsson, *Outcome in Adoption: Lessons from Longitudinal Studies*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 215, at 93–95; John Triseliotis & Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 215, at 107, 111–13.

218. Bohman & Sigvardsson, *supra* note 217, at 105. The study tracked 624 children who were initially registered for possible adoption in the mid-1950s and periodically evaluated their psychological and social development over 18 years. Interestingly, the study also found that adopted children fared better than children who were ultimately raised by their biological parents. The authors attribute that outcome, however, to peculiar characteristics among the biological parents who initially considered but then rejected adoption: they had a "very high frequency of social maladjustment," including criminality and alcohol abuse. *See id.* at 104. Thus, the authors conclude, the adopted children fared better because whatever additional challenges they experienced in terms of insecurity, social stigma, and the like, were more than offset by the benefits conferred by the better-adjusted adoptive parents. *See id.* at 104–05.

219. *See* Triseliotis & Hill, *supra* note 217, at 112–13. The British researchers compared the psychological and social well-being of adopted children against that of children raised in stable, permanent foster families or in residential institutions. They found

the foster children, like the adopted children, had the benefit of stable homes and expressed "considerable identification and attachment to their foster families, nevertheless there were some qualitative differences between their experiences and those of the adopted group."[220] In particular,

> [t]hese differences had to do with an element of anxiety about the impermanency of their position as foster children. They were more conscious of their fostering status than adoptees of their adoptive status. While adoptees perceived themselves as growing up 'like any other child in a family,' many of those fostered were aware of differences in their situation in spite of most foster parents' efforts to make them feel secure and one with the rest of the family.[221]

Even though these children had been committed to long-term foster care and their biological parents had long been absent from their lives, the researchers found that "[f]ears and desires of being reclaimed by a natural parent added to [the children's] sense of insecurity."[222] Moreover, "[s]imilar fears were also found among foster parents who sometimes either openly or unintentionally conveyed these feelings to the children."[223]

The implications of these studies are plainly not limited to children in foster care. In light of these studies, it seems eminently reasonable to conclude that anxiety over the potential loss of a relationship affects the bonding process between adult caregivers and children in any context.[224] Specifically in the context

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that the adopted children fared better than those raised in foster families and that the children raised in residential institutions fared worst. *See id.* at 112.

220. *Id.*

221. *Id. See also* JOHN TRISELIOTIS ET AL., ADOPTION THEORY, PRACTICE AND POLICY 57 (1997) ("[L]ong-term and even permanent foster care are not experienced as [being as] secure as adoption."). The Swedish researchers, in seeking to explain why the adopted children fared better than the foster children, even though both benefited from stable, non-disrupted placements, similarly considered it "most important" that

> there was no guarantee [for the foster families] that the child might not some day be returned to the biological mother or father. In interviews the foster parents often expressed their concern about this insecure situation, which could last for many years after placement of the child. It is conceivable that this insecurity has influenced the relationship between the foster parents and children. It may have impaired the normal, healthy psychological development of the child and made them more vulnerable to stress.

Bohman & Sigvardsson, *supra* note 217, at 104–05.

222. Triseliotis & Hill, *supra* note 217, at 113.

223. *Id.* At bottom, the researchers noted,

> [t]he insecurity present in long-term fostering generated various degrees of anxiety in both the children and their caregivers. Caught between foster parents, the majority of whom wished to offer security and continuity of care, and the possibility of disruption, children were left in an ambiguous position which inevitably affected their sense of identity.

Id. See also John Triseliotis, *Identity and Security in Adoption and Long-Term Fostering, in* ADOPTION AND FOSTERING 7, 22–31 (Roy Evans ed., 1983).

224. The West Virginia Supreme Court recently acknowledged this dynamic in deciding an adoption case. The court overturned a trial court order terminating the parental

of adoption, prominent child-development scholars have contended that delays in finalizing adoptions interfere with early bonding between adoptive parents and their children by prolonging insecurity over the permanence of the relationship.[225] Certainly prospective adoptive parents themselves have reported that uncertainty about whether they will maintain custody leads them to be more cautious in investing themselves emotionally in their fledgling relationship with a child.[226] Indeed, the same surely could be said about any intimate human bonding.[227] In

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rights of a biological mother whose terminal illness rendered her unable to care for her child, but the court simultaneously directed the trial court to enter an order guaranteeing that the child's foster parents would be permitted to adopt when the mother died. *In re* Micah Alyn R., 504 S.E.2d 635, 643 (W. Va. 1998). The court explained that such a guarantee was "[o]bviously" necessary to induce the foster parents to continue making a full "investment of emotional support and time" in the relationship. *Id.* at 642.

225. GOLDSTEIN, ET AL., *supra* note 215, at 13–14 ("The statutory requirement of a trial period before adoption is finalized may also impede bonding between parent and child. Due to the uncertainty, the adoptive parents may hesitate during the waiting period to make the full commitment that allows the child to feel wanted."). *See also id.* at 22–23; H. DAVID KIRK, SHARED FATE 10 (1964); ELINOR B. ROSENBERG, THE ADOPTION LIFE CYCLE 133 (1992) ("When the placement process has been shaky and adoptive parents feel emotionally guarded or when the child is unsettled by multiple moves, it is more difficult for there to be an early secure attachment."); Marianne Berry, *The Risks and Benefits of Open Adoption*, 3 FUTURE OF CHILDREN 125, 128 (1993) ("Wondering whether the biological parents will change their mind can inhibit healthy bonding with the newly adopted child."). As H. David Kirk wrote,

> The adopting parents know that there is at least a possibility that they will not be accepted in the end, or that for some other reason the child will not be theirs to keep. This knowledge may stop some from giving themselves to the child as completely and unqualifiedly as they otherwise would.

KIRK, *supra*, at 10. *See also* A.D. Kraft, et al., *Some Theoretical Considerations on Confidential Adoptions, II: The Adoptive Parent*, 2 CHILD & ADOLESCENT SOC. WORK J. 69 (1985).

226. In one account of a private adoption, for example, a couple who had agreed with a pregnant woman to adopt her baby frankly described their conscious decision to hold something back:

> [The match with the expectant birth mother] left Andrew and Jamie [the prospective adoptive parents] thrilled but wary. They were relieved to finally be wanted but worried that the choice would be short-lived. Their shorthand phrase was "the reserve"—their reminder to themselves that the arrangement could easily fall apart and that they needed to keep some of their emotions in check so that they did not fall apart, too.

Lisa Belkin, *Now Accepting Applications for My Baby*, N.Y. TIMES MAG., Apr. 5, 1998, at 58, 62. In many other cases, of course, the "reserve" may be unconscious, but just as real. *See* ROSENBERG, *supra* note 225, at 133 ("If [adoptive parents] are waiting, guessing, hoping, and experiencing disappointments, their readiness to open themselves up to a child is likely to be compromised.").

227. Professor Milton Regan, for example, has argued for a reassertion of "status"-based obligation in family law partly on the ground that "by protecting emotional reliance in intimate relationships," law can promote greater intimacy within the family. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 5 (1993). In support, Professor Regan points, for example, to research attributing the higher failure rate among successive marriages to the fact that "individuals who have experienced divorce tend to

sum, by fostering a sense of custodial insecurity, the law of guardianship fails to foster bonding between child and caregiver to the fullest extent possible.

2. The Denial of Societal Recognition as a "Family" and the Social Meaning of Guardianship

Relegating the child's custodial caregivers to the role of guardians is undesirable for yet another reason as well. Not only does guardian status carry with it a special form of custodial insecurity, but also the law's refusal to recognize the caregivers as *parents*, and thus to normalize fully the family relationship between the custodians and the child in their care, stands as a second potential impediment to the flourishing of the child's custodial family.

It is a commonplace now to observe that law has an expressive dimension.[228] As Professor Milton Regan has observed:

> Law does not simply establish incentives and disincentives for various forms of behavior. It also helps constitute a cultural world by investing it with moral meaning. It expresses what is valuable and what is not, what merits praise and what deserves blame, and what we may reasonably expect from one another....
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> ...In other words, law has the potential to serve as an element of socialization.[229]

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hedge their commitment because they are more sensitive to the prospect of marital dissolution." *Id.* at 48. Indeed, some legal scholars even have posited that married fathers may bond less closely with their children because of the substantial risk that they will lose custody in the event of a divorce. *See* Margaret Brinig & F.H. Buckley, *Joint Custody: Bonding and Monitoring Theories*, 73 IND. L.J. 393, 402–03 (1998). *Cf.* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2450–51 (1995). They argue that if the law provided greater assurance to fathers of maintaining custody following divorce, "[f]athers will react to the change in the law by permitting themselves, through a thousand quotidian acts, to grow more attached to their families." Brinig & Buckley, *supra*, at 403. Similarly, others have posited that the enhanced custodial security provided by guardianship, as compared to foster care, should result in fuller bonding between child and caregiver. *See* Schwartz, *supra* note 186, at 458 ("The substitution of guardianship for foster care should relieve the stress inevitable in a temporary relationship and allow a deeper bond to grow.").

228. For just a few of the leading entries in the rapidly expanding literature, see Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Richard H. Pildes, *The Unintended Cultural Consequences of Public Policy: A Comment on the Symposium*, 89 MICH. L. REV. 936 (1991); Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 910 (1996) [hereinafter Sunstein, *Social Norms*]; Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996) [hereinafter Sunstein, *Expressive Function*].

229. Milton C. Regan, Jr., *How Does Law Matter?*, 1 GREEN BAG 2D 265, 271 (1998). *See also* REGAN, *supra* note 227, at 176–83.

Sometimes this expressive dimension is fully appreciated and intended by those who make the law.[230] The current debate over whether to permit same-sex couples to become legally married, for example, is very much concerned with the expressive significance of marriage laws; proponents and opponents alike largely agree that changing the law to permit same-sex marriage would send a message that homosexuality is socially acceptable, and disagree mainly about whether that message would be desirable.[231] Implicit in the arguments of both camps, however, is acceptance of two ideas. First, laws have "social meanings." Second, communication of those social meanings in the form of statutes, regulations, and judicial opinions can serve to entrench or erode pre-existing social norms.

But the expressive dimension of legal rules also can often escape those who construct them, resulting in what may be called "unintended cultural consequences."[232] Thus, for example, when then-Professor Richard Posner proposed the idea of legalizing a regulated market for the sale of adoptive infants,[233] many critics attacked the plan on the ground that such a law would express approval of the commodification of human beings.[234] What was chiefly wrong with Posner's proposal, in this view, was not any lack of utility in serving the best interests of the particular adults and children involved in the regulated

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230. In examining the expressive function of law, Professor Cass Sunstein has focused upon instances when government deliberately seeks to shape social norms through the expressive power of legal rules. *See* Sunstein, *Expressive Function*, *supra* note 228, at 2024–25; Sunstein, *Social Norms*, *supra* note 228, at 910 (describing "law's expressive function" as "the function of law in expressing social values with the particular goal of shifting social norms").

231. Professor David Chambers has observed:

> That the social meanings of state recognition [of same-sex marriage] draw so much attention is...understandable. In our country, as in most societies throughout the world, marriage is the single most significant communal ceremony of belonging. It marks not just a joining of two people, but a joining of families and an occasion for tribal celebration and solidarity. In a law-drenched country such as ours, permission for same-sex couples to marry under the law would signify the acceptance of lesbians and gay men as equal citizens more profoundly than any other nondiscrimination laws that might be adopted. Most proponents of same-sex marriage, within and outside the gay and lesbian communities, want marriage first and foremost for this recognition. Most conservative opponents oppose it for the same reason.

David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 450–51 (1996). *See also* Carlos Ball, *Moral Foundations for a Discourse on Same-Sex Marriage: Looking Beyond Political Liberalism*, 85 GEO. L. J. 1871, 1876–77 (1997).

232. *See* Pildes, *supra* note 228, at 937.

233. *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 139–43 (3d ed. 1986); Elisabeth Landes & Richard Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978).

234. *See* Ronald A. Cass, *Coping with Life, Law & Markets: A Comment on Posner and the Law and Economics Debate*, 67 B.U. L. REV. 73, 96 (1987); Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99, 103 (1987); Regan, *supra* note 229, at 273.

transactions, but the erosion it would cause to social norms that strongly disapprove of such commodification.

The Supreme Court itself has long acknowledged that legal rules or acts can have powerful social meanings, both intended and unintended, and that communication of these meanings through law can in turn influence the development of social norms. Some of the most obvious examples are found in the Court's cases passing upon laws of racial exclusion or preference. Since at least *Strauder v. West Virginia*[235] and continuing through the Court's most recent affirmative action cases,[236] the Court has rested much of its constitutional analysis of racial classifications on its understanding of the social meaning of the challenged governmental acts or policies. Much of the Court's Establishment Clause jurisprudence is similarly founded on an appreciation of the unintended expressive content of governmental action touching on religion.[237]

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235. 100 U.S. (10 Otto) 303 (1880). In striking down West Virginia's law excluding African-Americans from jury service, the Court explained that the chief evil of the statute was not so much its direct consequence of all-white juries but rather its expression of disdain for non-whites:

> The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color, though they are citizens, and may be in other respects fully qualified, is practically a brand upon them, affixed by law, an assertion of their inferiority, and a stimulant to...race prejudice.

Id. at 308. The difference in outcome between *Plessy v. Ferguson*, 163 U.S. 537 (1896), and *Brown v. Board of Education*, 347 U.S. 483 (1954), similarly rested on the Court's changed understanding of the social meaning of segregation. *Compare Plessy*, 163 U.S. at 551 ("the underlying fallacy" of the constitutional attack on segregation was "the assumption that the enforced separation of the races stamps the colored race with a badge of inferiority"), *with Brown*, 347 U.S. at 494 ("the policy of separating the races is usually interpreted as denoting the inferiority of the negro group").

236. Justice Thomas, for example, has asserted that governmental affirmative action programs are unconstitutional because they carry an unintended, but pernicious, social meaning of white supremacy. He explained:

> [R]acial paternalism and its unintended consequences can be as poisonous and pernicious as any other form of discrimination. So-called 'benign' discrimination teaches many that because of chronic and apparently immutable handicaps, minorities cannot compete with them without their patronizing indulgence. Inevitably, such programs engender attitudes of superiority or, alternatively, provoke resentment among those who believe that they have been wronged by the government's use of race. These programs stamp minorities with a badge of inferiority and may cause them to develop dependencies or to adopt an attitude that they are 'entitled' to preferences.

Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 241 (1995) (Thomas, J., concurring).

237. *See* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 765 (1995) (rejecting Establishment Clause attack on state-authorized erection by the Ku Klux Klan of a Latin cross on the grounds of the Ohio state capitol); Lee v. Weisman, 505 U.S. 577, 587–88 (1992) (sustaining Establishment Clause attack on practice of inviting clergy members to offer prayers at public-school graduation ceremonies); Allegheny County v. ACLU, 492 U.S. 573, 598–601 (1989) (sustaining Establishment Clause attack on the

Laws that give a child's caregivers the status of long-term custodians but deny them the status of *parents* carry an explicit social meaning, that the caregivers are something less than true parents to the child and that the living arrangement thus created is something less than a true family. Despite significant demographic changes in recent years, the predominant model of family organization remains one in which children are reared in the home of at least one parent.[238] Critics have pointed out that this definition of "family" is both culturally contingent and exclusionary in that it fails to account for a growing number of children raised in other circumstances.[239] But it remains that the model of "family" assumed and explicitly preferred for the rearing of children by American law is founded on the parent-child relationship. Alternative forms of custody and child-rearing authority, including foster care, kinship care, and guardianships, are regarded as second-best or stopgap arrangements when the preferred model of family organization is impossible.[240] The preference for the parent-child model of

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display of a creche inside a county courthouse); Lynch v. Donnelly, 465 U.S. 668, 680 (1984) (rejecting Establishment Clause attack to city's inclusion of a creche in its annual Christmas display located in a downtown park). Behind the inquiry into whether a particular creche or display of the Latin cross would reasonably convey a message of governmental endorsement is the view that such a message would be exclusionary of religious minorities and corrosive to social norms favoring religious toleration. *See Allegheny County*, 492 U.S. at 595 (Blackmun, J.) (plurality opinion) ("any endorsement of religion [i]s 'invalid,' because it 'sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community'") (quoting *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring)); *id.* at 625 (O'Connor, J., concurring in part and concurring in the judgment); *Capitol Square*, 515 U.S. at 773 (O'Connor, J., concurring in part); *id.* at 797–99 (Stevens, J., dissenting).

238. *See* ALL OUR FAMILIES: NEW POLICIES FOR A NEW CENTURY vii (Mary Ann Mason et al. eds., 1998); Elizabeth Bartholet, *Beyond Biology: The Politics of Adoption and Reproduction*, 2 DUKE J. OF GENDER & POL'Y 5, 5–6 (1995).

239. As social scientists Mary Anne Fitzpatrick and Anita Vangelisti have observed:

> In the past few decades, numerous social changes have caused us to reconsider our definitions of "the family." As researchers, we know that how we define the family limits what we study and how we study it. If we define the family as a mother, a father, and at least one minor child, then that is exactly the group we examine. Definitions of the family are often thinly veiled political or ideological statements rather than scientifically neutral views.

EXPLAINING FAMILY INTERACTIONS 253 (Mary Anne Fitzpatrick & Anita L. Vangelisti eds., 1995). For criticism of the law's reluctance to recognize broader forms of family, see Bartlett, *supra* note 125, at 944; Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1650 (1995); Nancy Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood To Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 464 (1990); Barbara Bennett Woodhouse, *"It All Depends on What You Mean by Home": Toward a Communitarian Theory of the 'Nontraditional' Family*, 1996 UTAH L. REV. 569, 570.

240. *See* KATARINA WEGAR, ADOPTION, IDENTITY, AND KINSHIP 13 (1997) ("the American family ideal assumes that real families are constituted by blood"); Brodzinsky, *A Stress and Coping Model*, *supra* note 215, at 17 ("there still is a feeling among most

child rearing is expressed repeatedly and unmistakably in legal doctrine. Parents have a fundamental constitutional right to a relationship with their children; non-parent caregivers do not, at least not where the parents' legal status has not been terminated.[241] Indeed, the moniker that legal doctrine typically assigns to non-parent caregivers, "third parties,"[242] underscores that they fall outside the bilateral parent-child relationship that the law considers both natural and optimal. The subordinate status of guardians, as contrasted with parents, is reflected broadly in the myriad ways in which the law treats guardians differently and less favorably.

Thus, despite growing recognition that many children are reared by someone other than a parent, the law continues to reflect and reinforce a clear line of demarcation between "family," in which children are raised by one or more parents, or at least by someone related to one of the child's parents, and "other" arrangements, in which children are raised by a caregiver who is unrelated by blood or marriage to one of the child's parents, such as a foster parent or guardian. The Supreme Court's clearest statement of that line came in *Smith v. Organization of Foster Families for Equality and Reform*, in which the Court stated that foster families do not count fully as families for purposes of the Constitution's protection of family autonomy.[243] While acknowledging that "a deeply loving and

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cultural groups that [adoption] is a 'second best route to parenthood' and a 'second best way of entering a family'"); Joyce E. McConnell, *Securing the Care of Children in Diverse Families: Building on Trends in Guardianship Reform*, 10 YALE J.L. & FEMINISM 29, 37 (1998) ("In contrast to our cultural approval of testamentary guardianship, we have a different view of an inter vivos nomination of a guardian of a child during a parent's lifetime. This procedure is generally seen as aberrant and necessary primarily because of parenting failure or selfishness, or because of an incorrigible child."). Half of all Americans answering a nationwide survey about adoption in 1997 agreed that adopting was "better than being childless, but it is not quite as good as having one's own children." Tamar Lewin, *U.S. Is Divided on Adoption, Survey of Attitudes Asserts*, N.Y. TIMES, Nov. 9, 1997, at A10.

241. *See* Procopio v. Johnson, 994 F.2d 325, 333 (7th Cir. 1993) (foster parents have no constitutionally protected liberty interest in foster parent-child relationship); Rodriguez *ex rel.* Kelly v. McLoughlin, 49 F. Supp. 2d 186, 198–99 (S.D.N.Y. 1999) (distinguishing *Procopio* and recognizing liberty interest where biological parents' rights have already been terminated).

242. *See* Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 857 (1977) (Stewart, J., concurring in the judgment); Freshour v. West, 971 S.W.2d 263, 264–65 (Ark. 1998); Doe v. Doe, 710 A.2d 1297, 1317, 1322–23 (Conn. 1998); Van v. Zahorik, 597 N.W.2d 15, 19–20 (Mich. 1999) (man who lived with, supported, and cared for children since their birth in mutually mistaken belief that he was their biological father is a "third party" without standing to seek visitation or custody); Girard v. Williams, 966 P.2d 1155, 1159 (Mont. 1998) ("the ability of a third party—whether an individual or an entity such as a state agency—to interfere with the natural parent-child relationship must be closely monitored"); *In re* Guardianship of M.R.S., 960 P.2d 357, 362 (Okla. 1998); Bupp v. Bupp, 718 A.2d 1278, 1281 (Pa. Super. Ct. 1998) ("It is well established that persons other than natural parents are third parties for purposes of custody controversies."); Carolyn Wilkes Kaas, *Breaking Up a Family or Putting It Back Together Again: Refining the Preference in Favor of the Parent in Third-Party Custody Cases*, 37 WM. & MARY L. REV. 1045, 1049 (1996).

243. *See* Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 846 (1977).

interdependent relationship between an adult and a child in his or her care may exist even in the absence of a blood relationship," the Court concluded that "there are important distinctions between the foster family and the natural family."[244] First, the relationship between foster child and foster parent is not the product of nature but a creation entirely of the State.[245] Second, recognizing constitutional "family" rights in the foster parents would inescapably intrude upon the established rights of "natural" parents, whose family relationship with the child, being the product of biology, is beyond dispute.[246] Accordingly, the relationship between a child and her foster parents is relegated to the status of a "family-like association[],"[247] lacking the natural legitimacy of biological families and plainly subordinate to the parent-child relationship.[248] Justice Stewart, concurring in the Court's judgment, was even more direct, mockingly characterizing the foster parents' claim as being "'that third-party custodians may acquire some sort of squatter's rights in another's child,'" and concluding squarely that the state-created relationship between foster parent and child was *not* the sort of "family life" protected by the Constitution.[249]

Even where the Court has been somewhat more generous in defining the sort of family valued by the Constitution, it has drawn the outer limits at "blood, adoption, or marriage."[250] In *Moore v. City of East Cleveland*, a plurality concluded that a family composed of a grandmother, her son, and two grandsons (who were first cousins to one another) could invoke the heightened substantive due process protection reserved for "'freedom of personal choice in matters of marriage and family life.'"[251] In doing so, the plurality was willing to extend the constitutional notion of "family" beyond the confines of the traditional "nuclear" family to include members of an extended biological family. But the plurality was careful to reaffirm the Court's earlier refusal to accord similar protection to "*unrelated* individuals" who bore no ties of "blood, adoption, or marriage."[252] The scope of the Due Process Clause's heightened protection of family autonomy, the plurality explained, was defined by traditional patterns of family organization in American society:

> Ours is by no means a tradition limited to respect for the bonds uniting the members of the nuclear family. The tradition of uncles, aunts, cousins, and especially grandparents sharing a household

244. *Id.* at 844–45.

245. *See id.* at 845. *See also id.* at 856 (Stewart, J., concurring in the judgment).

246. *Id.* at 846.

247. *Id.*

248. *Id.* at 846–47. The Court ultimately left open the possibility that foster parents might have *some* constitutionally protected liberty interest in their relationship with a foster child, but made clear that any such interest would be subordinate to that of the child's "natural" parents. *See id.* at 847.

249. *Id.* at 857, 861–63 (Stewart, J., concurring in the judgment) (quoting Bennett v. Jeffreys, 356 N.E.2d 277, 285 n.2 (N.Y. 1976)).

250. Moore v. City of East Cleveland, 431 U.S. 494, 498 (1977).

251. *Id.* at 499 (plurality opinion) (quoting Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974)).

252. *Id.* at 498 (emphasis in original) (distinguishing Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

> along with parents and children has roots equally venerable and equally deserving of constitutional recognition.[253]

Because "the accumulated wisdom of civilization, gained over centuries and honored throughout our history,...supports a...conception of the family" that includes such extended biological relatives, the Constitution would require heightened scrutiny of any governmental attempt to prohibit such a "broader family."[254] By implication, however, because there is no such historical support for households made up of individuals unrelated by biology, marriage, or adoption, the Constitution does not recognize such groupings as families. Whereas defining the boundary of family at the nuclear family would be "arbitrary" in light of societal traditions, drawing that boundary at "blood, adoption, or marriage" would not.[255]

The Court's concept of family accords perfectly with traditional, structural definitions used by government agencies and by sociologists, which "delineate as members [of a family] only those who have established *biological or sociolegal legitimacy* by virtue of shared genetics, marriage, or adoption."[256] Although the rigidity of this traditional definition is giving way somewhat of late, particularly as age-old consensus about the central place of marriage to both personal happiness and societal stability has begun to fray,[257] it continues to predominate.[258] The alignment between the constitutional and sociological

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253. *Id.* at 504.

254. *Id.* at 505. *See generally* Robert J. Levy, *Rights and Responsibilities for Extended Family Members?*, 27 FAM. L.Q. 191 (1993).

255. *See Moore*, 431 U.S. at 498, 502–05; *id.* at 507–11 (Brennan, J., concurring).

256. FITZPATRICK, *supra* note 239, at 253 (emphasis added). The Census Bureau uses a similar definition: "The term 'family' refers to a group of two or more persons related by birth, marriage, or adoption and residing together in a household." U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 6 (115th ed. 1995). *See also* United States Dep't of Agric. v. Moreno, 413 U.S. 528, 546 (1973) (Rehnquist, J., dissenting) (defining "the family as we know it" as "a household consisting of related individuals").

257. *See* Judith T. Younger, *Responsible Parents and Good Children*, 14 L. & INEQUALITY 489, 499–501 (1996); *Institution of Marriage Is Weakening, Study Says*, N.Y. TIMES, July 4, 1999, at 15.

258. Despite the recent chipping away, the prevailing "American family ideology" continues strongly to identify biological families as the only *genuine* form of family organization. WEGAR, *supra* note 240, at 41. *See also, e.g.*, DAVID M. SCHNEIDER, AMERICAN KINSHIP: A CULTURAL ACCOUNT 107 (1980); ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 169 (1993). Indeed, many sociologists cling to the narrower, biological definition of "family," excluding even those having the "sociolegal legitimacy" conferred by an adoption decree. Sociologist Katarina Wegar, for instance, has attributed the relative paucity of sociological studies of family dynamics within adoptive families to

> a tendency to take biocentric definitions of the family, kinship, and parenting for granted. According to the traditional American ideal, the family is defined as a natural or biological arrangement, and despite the great variety of family forms (e.g., adoptive, foster, single-parent, stepparent), mainstream family sociologists have tended to disregard nontraditional and especially nonbiological family forms.

WEGAR, *supra* note 240, at 6 (citations omitted). Wegar also asserts that

concepts of family is not surprising, of course, since both purport to rest upon widespread and longstanding practice and social attitudes concerning family organization. Indeed, the distinction between "true families," on the one hand, and mere "family-*like* associations"[259] or "*quasi*-family unit[s],"[260] on the other, shared by both law and popular understanding is mutually reinforcing. The Constitution is held to have special solicitude for family defined as including only those relationships "traditionally *respected*" by society.[261] By giving constitutional force to popular conceptions of family, the law in turn gives special legitimacy to those conceptions and thus further entrenches them in popular understanding.

Nor is the law's stigmatizing power confined to constitutional law. Legal scholars and sociologists rightly have pointed out, for example, that statutory law encourages such stigmatization even among adoptive families, which are, in contrast to foster families and guardianships, at least given the "sociolegal legitimacy" of the parent-child form. Adoption law expresses the view that adoptive families are "unnatural" and inferior to biological families by constructing adoptive families in the model of a biological family and by expending great legal effort to ensure the secrecy of the family's adoptive origins.[262] The message suggested by these laws is that adoptive families acquire legitimacy or completeness only to the extent that they can pass themselves off as biological families, simultaneously accommodating and reinforcing social stigma associated with adoption. The social and legal stigma attached to adoption may, in turn, distort dynamics within the family, contributing to what some psychologists and social workers have claimed is an increased incidence of maladjustment among adopted children.[263]

> [another] reason for the virtual neglect of adoption in family sociology is...that adoption has not been classified in the same league as 'family' and 'kinship' but has instead been associated with 'welfare services.' As such, the study of adoption has been defined by academic sociologists as a less prestigious area of research, one that should be left to social workers.

Id. at 7.

259. Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 846 (1977) (emphasis added).

260. Michael H. v. Gerald D., 491 U.S. 110, 114 (1989) (plurality opinion) (emphasis added).

261. *Id.* at 123 n.3 (plurality opinion) (emphasis added).

262. *See* BARTHOLET, *supra* note 258, at 48–49, 170; WEGAR, *supra* note 240, at 39–42. *Cf.* Lloyd R. Cohen, *Rhetoric, the Unnatural Family, and Women's Work*, 81 VA. L. REV. 2275, 2277 (1995) ("To the extent that the word 'natural' is used with respect to familial relations, it is to describe a biological relationship as distinct from a social or legal relationship, as in 'natural parents' as opposed to 'adoptive parents.'"); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743 (1956) ("Adoption, however achieved, is essentially the factitious creation of a blood relationship between persons who are not so related.").

263. Psychologist David Brodzinsky writes: "Adopted children...experience 'status loss' associated with being different. These various losses often leave the adoptee feeling incomplete, alienated, disconnected, abandoned, or unwanted." Brodzinsky, *A Stress and Coping Model*, *supra* note 215, at 7. *See also* BARTHOLET, *supra* note 258, at 170, 182–83; KIRK, *supra* note 225, at 20; WEGAR, *supra* note 240, at 40, 45–71; Brodzinsky, *A*

If a family's status as adoptive rather than biological can distort family dynamics, then *"sub-adoption"* status under the guardianship laws can surely be expected to have an even more detrimental impact on a child's forming identity and on the dynamics of family bonding.[264] By withholding even the status of *parenthood* from a child's guardians, at least when the guardians also lack any relation to the child by marriage or biology, the law ensures that the resulting custodial arrangement will fall even more clearly on the "family-like association" side of the line and will lack the full social legitimacy that comes with legal status as a "family."

Social-science research on adopted and foster children suggests that older children are likely to be conscious of their family's place on the legal hierarchy of family forms and to be affected by the implicit legal devaluation of their own family status. To be sure, "most children do not understand the meaning of being adopted until 5 to 7 years of age, and even then their understanding is quite limited."[265] As they grow older, however, children appear to become much more conscious of the way in which the law regards their family.[266] In particular, children who had been adopted by their foster parents after spending many years living in stable foster homes seemed to attach great significance to the change in their legal status, even when they believed it had little practical significance for them in terms of the security of their placement.[267] The researchers wrote:

Stress and Coping Model, *supra* note 215, at 17 ("to be part of an adoptive family is to be exposed continually to the challenge represented by society's ambivalent attitude about adoption—a challenge that can create considerable stress among adoptive family members"); Brodzinsky, *Long-Term Outcomes*, *supra* note 215, 160–61; Janet L. Hoopes, *Adoption and Identity Formation*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 215, at 144, 155.

264. Psychologist David Brodzinsky, who has studied extensively the impact of adoptive status on family dynamics and child development, has traced psychological distress among adopted children specifically to their emerging awareness of the ways in which society differentiates among "family" types. Very young children, he notes, are likely to be oblivious to the legal status of their family arrangement, and thus to be relatively unaffected by it psychologically; as children mature, however, they come to internalize society's conception of what constitutes "family" and, with it, a sense of insecurity.

> [W]hereas preschool children tend to define family in terms of the people who live together, by the elementary school years, most children view family members as individuals who share a blood (i.e., biological) relationship. This new way of looking at the family fosters increased recognition and appreciation of the lack of biological connectedness between the child and the adoptive parents, which, in turn, often creates confusion and stress on the part of the child, and undermines his or her sense of security and permanence in the family.

Brodzinsky, *A Stress and Coping Model*, *supra* note 215, at 13 (citations omitted). It is hardly surprising, in a society where the parent-child relationship created by adoption is unabashedly described as resting upon a "great fiction," Huard, *supra* note 262, at 747, that children should experience doubts about the value of their familial status.

265. Brodzinsky, *A Stress and Coping Model*, *supra* note 215, at 12.

266. *See* Brodzinsky, *Long-Term Outcomes*, *supra* note 215, at 161; David M. Brodzinsky et al., *Children's Understanding of Adoption*, 55 CHILD DEV. 9 (1984).

267. Triseliotis & Hill, *supra* note 217, at 113–15.

> As interviewers we were struck by what the law symbolized to these children, something that we had not anticipated. The children seemed to attach a lot of importance to their family membership becoming 'legal,' even to those who were approaching adulthood. There was awareness about the legal transfer of powers that adoption brought with it, and that control was being transferred from an outside authority to the family....
>
> For these children and young people, the adoption order was a symbolic act creating a deep, satisfying psychological feeling for them. Even for those who would soon become adults, the change from fostering to adoption was a very important one. It conveyed to them a sense of security and belonging, the right to feel as part of the family and to call the foster parents, "parents."[268]

Moreover, the researchers themselves suggested that these findings have implications not only for children in long-term foster care, but also for children in the relatively more secure custodial setting of guardianships. They noted that under British law some children are placed in "custodianships" as a middle ground between foster care and adoption, similar to guardianships in American law.[269] The authors wrote that the research documenting the expressive significance to children of the legal status of adoption justified concern over the recent trend toward secure forms of custody short of adoption.[270]

To be sure, any concerns over the insecurity and expressive significance of guardianship status should be kept in proper perspective. The social-science research outlined in this section certainly does not suggest that children raised by legal guardians are likely to become maladjusted; to the contrary, the evidence is generally reassuring about the capacity of children to adapt and to overcome psychological challenges, including those presented by family form.[271] And yet the research does suggest that many children who are being raised by legal guardians would benefit from adoption, particularly if adoption did not require the severance of any emotional ties they might have with biological parents.

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268. *Id.* at 114–15 (citations omitted). For example, "[o]ne teenager remarked on the paradox that in one way [*i.e.*, in practical consequences] adoption made no difference, yet it was an important and desired change because it demonstrated to other people that she was now a member of the family." *Id.* at 114.

269. *See id.* at 115; Garrison, *supra* note 186, at 444 n.104 (describing developments in British guardianship law).

270. *See* Triseliotis & Hill, *supra* note 217, at 115. This concern is shared by some American psychiatrists. In one recent case in which a court was weighing the alternatives of adoption and permanent guardianship, a child psychiatrist testified that long-term custody without adoption would be "horrendous" for the custodial family. *See In re* Baby Boy C., 630 A.2d 670, 676 (D.C. 1993). To deny a parent-child relationship to the child and his caregivers, the psychiatrist testified, is "to make that into a subordinate kind of relationship, to take away the authority of the parents [and to] undermine[] the entire family structure." *Id.* (quoting testimony of Dr. Allen E. Marans).

271. *See* TRISELIOTIS ET AL., *supra* note 221, at 21–22; Brodzinsky, *Long-Term Outcomes*, *supra* note 215, at 153.

IV. TOWARD AN ALTERNATIVE MODEL OF ADOPTION

Accepting the premise that the law's goal should be to promote the welfare of children to the maximum extent possible without violating the constitutional rights of others,[272] I contend that legislatures could improve significantly the lives of children now living with non-parent caregivers by authorizing a new form of adoption that would not require terminating all of the rights of biological parents. In this section, therefore, I outline an alternative model of adoption that might be made available in cases where adoption now is considered a legal impossibility. In short, this form of adoption would not require the termination of the parental rights of biological parents, a feature that would make it possible to grant adoptions in cases where courts currently regard that outcome as unconstitutional, but would give the custodians the legal status of *parents*, as well as most rights currently enjoyed by adoptive parents. In Part IV.A, I establish the terms upon which states might make this form of adoption available. In Part IV.B, I examine the benefits of this legal innovation in light of anticipated policy concerns. In Part IV.C, I explain why this form of adoption, though entailing a significant intrusion on the rights of biological parents, is nevertheless constitutional.

A. Adoption Without Termination of Rights: The Outlines of a New Model

In this country, it has always been considered axiomatic that adoption necessitates the legal extinguishment of all other parental relationships with the child.[273] Accordingly, all states provide that a decree of adoption severs all ties between the child and her biological parents, extinguishing the parents' legal duties toward the child as well as all rights of custody, visitation, and communication.[274] Following an adoption, the child and her biological parents are considered, in the eyes of the law, strangers to one another.[275] Extinguishment of

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272. Although legislatures and courts commonly pledge fealty to this principle, it is by no means free from controversy. *See* Scott Altman, *Should Child Custody Rules Be Fair?*, 35 U. LOUISVILLE J. FAM. L. 325 (1996–1997) (advocating that goals of child welfare be more openly balanced against goals of fairness to adults in making child custody decisions).

273. *See* 4 SANDRA MORGAN LITTLE, CHILD CUSTODY & VISITATION PRACTICE § 28.01[2] (rev. ed. 1998) (adoption "necessarily results in a severance of the ties between the child and the natural parents"); CLARK, *supra* note 10, § 20.1, at 850.

274. *See* ALA. CODE § 26-10A-29 (1990); ALASKA STAT. § 25.23.130 (1994); CAL. PROB. CODE § 6451(a) (West 1994); 750 ILL. COMP. STAT. 50/17 (Smith-Hurd 1996); KAN. STAT. ANN. § 59-2118 (1994); N.C. GEN. STAT. § 48-1-106 (1995). As the New York Court of Appeals starkly explained, an adoption decree "leaves the parent with no right to visit or communicate with the child, to participate in, or even to know about, any important decision affecting the child's religious, educational, emotional, or physical development. For all practical purposes, the parent no longer exists." *In re* Ricky Ralph M., 436 N.E.2d 491, 493 (N.Y. 1982) (quoting Lassiter v. Department of Soc. Servs. 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting)).

275. *See* ALASKA STAT. § 25.23-130 (a)(1) (1995); A.J. v. L.O., 697 A.2d 1189, 1191 (D.C. 1997); Miller v. Walker, 514 S.E.2d 22, 23 (Ga. 1999); *In re* Adoption/Guardianship No. 94339058, 706 A.2d 144, 149 (Md. 1998).

all prior parental relationships is considered so integral to adoption that it is often included in the very definition of the term.[276] It is, of course, precisely this assumption that has generated the apparent legal quandary in cases like those of Baby Richard, Baby Jessica, and others. Where there is no legal basis for destroying the biological parent-child relationship, there is no legal possibility of adoption.[277]

In recent years, many have observed that this unswerving linkage between adoption and termination of prior parental relationships sometimes has worked to the disadvantage of children. Some critics, focusing on cases in which traditional grounds for terminating the biological parents' rights exist, have argued that the linkage harms children by insisting unnecessarily upon the destruction of biological parent-child relationships in order to give children the benefits of permanency conferred by adoption.[278] Others have focused on cases in which traditional grounds for termination do *not* exist, and argued that the linkage has harmed children by snuffing out beneficial relationships with non-parent caregivers.[279] The consensus solution of these critics, however, generally has been to advocate the invention or greater use of intermediate forms of custodial rights for non-parent caregivers that stop short of adoption, such as permanent guardianships, so that a child might have the benefits of ongoing ties with *both* the biological parents *and* the non-parent custodians.[280] Many states, by legislative enactments like the Baby Richard Amendment in Illinois, have now done precisely that.[281]

I approach the problem from a different direction. Based upon the research that suggests the intermediate forms of custody generally advocated by these critics, and, to some extent, enabled by recent legislative action, is less advantageous for children than adoption would be, I propose the creation of a new form of adoption that could be ordered, even over the objection of a fit biological parent, without terminating the biological parents' relationship with the child. To the extent that most family-law scholars even have adverted to the possibility of permitting adoption without terminating the rights of biological parents, the

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276. *See* RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES 7 (1988) ("Adoption creates or expands a family through the legal severance of biological ties of a child to his birth parents and the establishment of new ties to an adoptive family.").

277. *See supra* text accompanying notes 73–80.

278. *See* Garrison, *supra* note 186; Nancy Goldhill, *Ties That Bind: The Impact of Psychological and Legal Debates on the Child Welfare System*, 22 N.Y.U. REV. L. & SOC. CHANGE 295, 302–03 (1996); Michael Wald, *State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards*, 27 STAN. L. REV. 985, 993–94 (1975); Candace M. Zierdt, *Make New Parents But Keep the Old*, 69 N. DAK. L. REV. 497, 503–11 (1993).

279. *See* Bartlett, *supra* note 125, at 928–33; Younger, *supra* note 257, at 503–07.

280. *See* Bartlett, *supra* note 125, at 944–45, 953–55, 959; Bodenheimer, *supra* note 97, at 42–44, 49–51; Andre P. Derdeyn, *A Case for Permanent Foster-Care Placement of Dependent, Neglected and Abused Children*, 47 AM. J. ORTHOPSYCH. 604, 612 (1977); Garrison, *supra* note 186, at 425, 444–46; Taylor, *supra* note 186, at 741; Younger, *supra* note 257, at 505–06; Note, *Stability in Parent-Child Relations: Modifying Guardianship Law*, 33 STAN. L. REV. 905, 908–09 (1981).

281. *See supra* notes 184–85 and accompanying text.

suggestion generally has been limited to cases in which biological and adoptive parents might mutually *agree* upon such an arrangement.[282] This suggestion is consistent with the tentative steps by a minority of states toward validating "open adoptions," in which a biological parent consents to an adoption while reserving a contractual right to visit the child after the adoption.[283] But these jurisdictions have been careful to limit the availability of this form of adoption only to cases in which all affected adults, biological and adoptive parents alike, consent to the arrangement.[284] Moreover, existing forms of "open adoption" typically

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282. *See* Bartlett, *supra* note 125, at 944 & n.304, 956; Zierdt, *supra* note 278, at 498–99, 505 (advocating the use of a "weak," open form of adoption, not involving a termination of biological parents' rights, by mutual consent in some cases where traditional termination and adoption are now used). Professor Naomi Cahn probably has gone the farthest in exploring the idea of allowing "multiple parenthood." *See* Cahn, *supra* note 203, at 44–47. She proposes allowing recognition of more than one set of parents, both in cases where all parties consent to the arrangement and as a solution in some cases where custody is disputed, but does not directly seek to demonstrate why that outcome would be preferable to the currently available option of dividing custody and visitation rights between parents and permanent guardians. Professor Katherine Bartlett apparently would permit *non*-consensual "open adoption" only in cases where a step-parent desires to adopt. *See* Bartlett, *supra* note 125, at 952. Professor Marsha Garrison acknowledges in a short footnote the possibility of relabeling permanent guardianship as a form of "open adoption," but does not consider the alternative further. *See* Garrison, *supra* note 186, at 474 n.235.

283. Approximately a dozen states currently allow biological and adoptive parents to enter into a legally enforceable agreement for an "open adoption." *See* IND. CODE § 31-19-16-1 (West 1998); MINN. STAT. § 259.58 (West Supp. 1998); N.M. STAT. ANN. § 32A-5-35 (1998); R.I. GEN. LAWS § 15-7-14.1 (1997); S.D. CODE § 25-6-17 (Supp. 1997); WASH. REV. CODE § 26.33.295 (Supp. 1997); Loftin v. Smith, 590 So. 2d 323 (Ala. Civ. App. 1991); Michaud v. Wawruck, 551 A.2d 738, 741 (Conn. 1988); Weinschel v. Strople, 466 A.2d 1301 (Md. 1983); Groves v. Clark, 920 P.2d 981 (Mont. 1996). Roughly the same number, however, have squarely rejected the idea. *See* OHIO REV. CODE § 3107.65(A)(5) & (C) (1998); TENN. CODE ANN. § 36-1-121(f) (1995); *In re* Melanie S., 712 A.2d 1036 (Me. 1998) (trial court had no authority to order "open adoption"); *In re* Guardianship of K.H.O., No. A-224, 1999 WL 562215 (N.J. Aug. 3, 1999) (open adoption agreements "cannot be judicially enforced"); New Jersey Div. of Youth & Fam. Servs. v. B.G.S., 677 A.2d 1170, 1178 (N.J. Super. Ct. App. Div. 1996) (same). As a result of legislative action in 1989, New York now takes a compromise position, permitting biological parents to bargain for "open adoptions" when arranged through an adoption agency but not in the context of a private-placement adoption. *Compare In re* Ronald D., 673 N.Y.S.2d 559 (Fam. Ct. 1998), *with In re* Adoption of Baby Boy D., 676 N.Y.S.2d 862 (Sur. 1998). *See generally* 2 LITTLE, *supra* note 273, § 14.10.

284. Indeed, the only time that a state supreme court has flirted with the idea of ordering an "open adoption" without universal consent, it was only without the consent of the *adoptive* parents, and even then the idea was promptly squelched by legislation. In 1995, the South Dakota Supreme Court held that trial courts may grant post-adoption visitation rights to a biological parent in cases where grounds existed to terminate involuntarily all of the biological parent's parental rights. *In re* S.A.H., 537 N.W.2d 1 (S.D. 1995). Two years later, the state legislature abrogated the decision and provided that courts may order "open adoption" only by a stepparent or "where there is a written pre-adoption agreement between the natural parent or parents and the adoptive parents." S.D. CODE § 25-6-17 (Supp. 1997). *See also In re* J.H., 590 N.W.2d 473, 479 (S.D. 1999) (applying amended statute to overturn trial court's order granting biological parent post-adoption visitation rights).

contemplate that the biological parent will lose the legal status of parent while retaining visitation rights as a "former parent," not that the arrangement will result in a new form of multiple parenthood.[285] This limited form of "open adoption" may well be beneficial and, because it rests on consent, neatly sidesteps any constitutional questions. But it plainly cannot serve as a solution in those cases where fit biological parents resist adoption. In those cases, a different model of adoption, one in which adoption can go forward without either the consent of the biological parents or a termination of their rights, is necessary.

1. An Alternative to — Not a Substitute for — Traditional Adoption

I emphasize the limited scope of this proposal from the outset. Most observers agree that the traditional model of adoption, involving a severance of the child's ties with prior parents and complete and exclusive integration into the adoptive family, works well for many families. The traditional approach is no doubt preferred by biological parents who do not wish to remain involved in their children's lives and by many adoptive parents who would rather not share their parental role.[286] Most children who grow to adulthood in traditional adoptive families seem to fare quite well.[287] Thus, I do not propose to alter the legal rules currently governing traditional adoption. When biological parents wish to surrender their parental rights or when grounds exist for involuntarily terminating those rights, adoption in its traditional form is appropriate and should remain the norm.

Likewise, when biological and adoptive parents wish to create an open adoption on their own terms, courts should continue to evaluate such proposals as they currently do.[288] It is not necessary for purposes of this Article to attempt to resolve the ongoing debate over the extent to which adults should be permitted to contract around the traditional rules governing adoption.[289] It is enough to point out that the new model of adoption proposed here would not alter that debate. Although it strikes me as quite likely that the benefits of allowing parties to

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285. The Uniform Adoption Act, for example, allows a form of open adoption only by stepparents. In such an adoption, the non-custodial biological parent loses her status as a legal parent but retains a right to visit the child. *See* UNIF. ADOPTION ACT § 4-113 (1994). *See generally* Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act § 4-113*, 51 FLA. L. REV. 89 (1999). Because the Uniform Act permits such an adoption only upon the termination of the biological parent's rights, it does not require universal consent of the parties.

286. *See In re* Roger B., 418 N.E.2d 751, 754–55 (Ill. 1981) (discussing how the traditional model of adoption serves the privacy interests of many biological and adoptive parents).

287. *See* BARTHOLET, *supra* note 258, at 174–86; Brodzinsky, *Long-Term Outcomes*, *supra* note 215, at 153; Hoopes, *supra* note 263, at 144, 153–60; TRISELIOTIS ET AL., *supra* note 221, at 21–22.

288. *See supra* note 283.

289. For some accounts of this debate, see RUTH G. MCROY, HAROLD D. GROTEVANT & KERRY L. WHITE, OPENNESS IN ADOPTION (1988); Berry, *supra* note 225, at 125; D. Churchman, *The Debate Over Open Adoption*, 44 PUB. WELFARE 11 (1986).

construct their own "open adoptions," under careful court supervision, would outweigh the legitimate concerns,[290] the model of adoption I propose would not govern such voluntary arrangements.

The model of adoption proposed here, therefore, is offered not as a substitute, but as a supplement. It is not meant to displace traditional adoption or voluntary open adoption, but to extend the benefits of adoption to a new class of cases where adoption is now considered impossible. Essentially, it would be available only in those cases where courts find themselves confronted with a custody contest between a faultless biological parent and a non-parent who has an established custodial relationship with the child. Courts in such cases now have available only two options: return the child to the custody of the parent (as the courts did in the Baby Richard and Baby Jessica cases) or leave the child in the custody of the non-parent, as guardian to the child, with visitation rights to the parent.[291] This proposal would give courts a third option: leave the child with the non-parent, but transform that caregiver into a parent through a non-exclusive adoption that would leave the biological parents with visitation rights.[292] As such, acceptance of this proposal does not require reconsidering the existing framework of statutes and rules governing traditional adoption; rather, the proposal could be accomplished as a freestanding supplement to existing law. I turn now to outlining in greater detail what form that supplement might take.

2. Reduced — But Not Extinguished — Parental Rights for the Biological Parent

Because the model of adoption I propose contemplates the existence of more than one set of parents for a child, it is essential to define clearly the respective rights of each. The adoption necessarily implies that the biological parent or parents would not have *custody* of the child, just as biological parents currently lose custody when children are placed with permanent guardians.[293] In many other respects, the biological parent could then be treated just like any other non-custodial parent under the law. Like all other non-custodial parents, for example, the biological parents would have the right to visit and communicate with the child.[294] The extent and management of visitation rights could be worked

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290. Recent research seems to point in this direction. "From the research evidence available, it appears that provided the parties involved can handle the situation in a constructive and positive manner without acrimony and recriminations, there is no reason why contact should be harmful to the child." TRISELIOTIS ET AL., *supra* note 221, at 89.

291. *See supra* notes 184–85 and accompanying text.

292. In effect, the proposal contemplates a form of court-ordered "open" adoption over the objection of a biological parent, something not possible under current law. *See supra* notes 283–84 and accompanying text.

293. Adoption in this scheme necessarily implies custody with the adoptive parents because without custody there would be no justification for granting an adoption in the first place. Recall that the justification for the model of non-exclusive adoption proposed here is the facilitation of closer bonding with caregivers that comes with a more secure form of custody and with the social validation of "family" conferred by adoption. *See supra* Part III.B.

294. *See generally* CLARK, *supra* note 10, § 19.4(h), at 811–12 (discussing

out on terms identical to those applied to non-custodial parents in other contexts.[295] If conflicts arose between the adoptive and biological parents over access to the child, courts could employ the same tools they currently use to enforce visitation rights or induce sparring parents to work out child-rearing conflicts, including contempt of court, awards of money damages, and, in appropriate cases, threatening to deprive the recalcitrant parent of custody or visitation.[296]

Although the rights of the non-custodial parent under this model of adoption generally could mirror those of non-custodial parents in other contexts, two adjustments seem desirable with regard to the availability of modification and joint custody. First, the biological parent should not be permitted to seek a change of custody except upon demonstration of extraordinary circumstances, such as imminent and substantial harm to the child.[297] Under this standard, courts would be permitted to change custody upon proof of abuse or neglect, for example, but not upon the bare conviction that the child, on balance, would benefit from living with genetic family members.[298]

Ordinarily, non-custodial parents are permitted to seek reconsideration of a prior custody order upon any substantial change of circumstances.[299] Given the deep bias in favor of biological parents, however, it is doubtful that the guardian's change of status to adoptive parent would alone confer the sort of custodial security necessary to promote optimal bonding and family development.[300] As an initial matter, in any modification action, some courts might well be inclined to apply some version of the "parental rights" doctrine[301] to favor the biological parent over the adoptive parent. Although adoptive parents generally are permitted to claim the benefit of the parental preference in custody disputes with *non*-parents,[302] they could not count on that status in a dispute with a biological

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visitation rights of non-custodial parents).

295. Under section 407(a) of the Uniform Marriage and Divorce Act, for example, "[a] parent not granted custody of the child is entitled to reasonable visitation rights unless the courts finds, after a hearing, that visitation endangers seriously the child's physical, mental, moral, or emotional health."

296. *See* ALASKA STAT. § 25.24.300 (1983) (authorizing an award of money damages for non-compliance with visitation order); Schutz v. Schutz, 581 So. 2d 1290, 1292 (Fla. 1991) (affirming order directing custodial parent to make "a good faith effort to take those measures necessary to restore and promote the frequent and continuing positive interaction (e.g., visitation, phone calls, letters) between the children and [the non-custodial parent]").

297. It might be desirable to except stepparent adoptions from this provision for heightened custodial security. Otherwise, a custodial, biological parent could gain this special security against modification simply by encouraging a spouse to adopt.

298. This standard is quite similar to that used by the U.M.D.A. where a change of custody is sought within two years of an initial decree. *See* U.M.D.A. § 409(1).

299. *See supra* notes 193–94 and accompanying text.

300. *See supra* notes 209–27.

301. *See supra* notes 196–98 and accompanying text.

302. *In re* Guardianship of Thompson, 502 N.E.2d 916, 920–21 (Ind. Ct. App. 1986), *vacated on other grounds*, 514 N.E.2d 618 (Ind. 1987); Ruppel v. Lesner, 364 N.W.2d 665 (Mich. 1984). *See also* CLARK, *supra* note 10, at 824.

parent.[303] Some of the underlying rationales for the "parental rights" doctrine, after all, are specifically tied to a biological definition of parenthood and thus could well provide grounds for differentiating between adoptive and biological parents seeking custody.[304] It is often supposed, for example, that biological parents have a "natural" advantage in caring for a child. Specifically, some researchers have suggested that biological mothers are physiologically attuned to respond to their newborn infants in beneficial ways, giving them an unparalleled opportunity to bond with their children.[305] Other observers have contended that the biological link gives "natural parents" a uniquely powerful incentive to act for the benefit of their children.[306] Indeed, even the lingering social stigma attached to adoptive status might be turned into an argument for preferring custody with a biological parent.[307] Whatever the validity of these particular assertions, in the law of many

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303. Courts in two jurisdictions have indicated that they will not apply a preference in favor of biological parents in custody disputes with a stepparent who has adopted the child. *See* Ivey v. Ivey, 445 S.E.2d 258, 260 (Ga. 1994); Price v. Howard, 484 S.E.2d 528, 530 (N.C. 1997). But those courts did not seem to consider this issue in any depth.

304. Notably, when courts state the rule of the parental rights doctrine in judicial opinions, they very often include the terms "natural parent" or "biological parent" in describing the legal entitlement. *See* Logan v. Logan, 730 So. 2d 1124 *passim* (Miss. 1998); *In re* Guardianship of M.R.S., 960 P.2d 357, 361 (Okla. 1997) (applying "the presumption that the best interests of [a] minor child is [sic] served by placement with its natural parent"); Mason v. Moon, 385 S.E.2d 242, 244 (Va. Ct. App. 1989); *In re* Guardianship of D.A. McW., 429 So. 2d 699, 703–04 (Fla. Dist. Ct. App. 1983), *aff'd*, 460 So. 2d 368 (Fla. 1984). Because these cases concerned custody contests between a biological parent and a non-parent, however, it is unclear whether these courts would apply the doctrine to favor a biological parent in a contest with an adoptive parent.

305. Andrew Watson, *The Children of Armageddon: Problems of Custody Following Divorce*, 21 SYR. L. REV. 55, 67–76 (1969) (describing a "bonding process whereby the natural mother, if she participates in [interaction with the child following childbirth] has a large initial advantage over anyone else").

306. *See* Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117, 1176–77, 1207, 1213, 1219–20 (1997) (contending that evolutionary biology research suggests that genetic parents may be more inclined to promote the welfare of their children than caregivers who lack a genetic bond). This incentive is acknowledged even by Joseph Goldstein, Albert Solnit, and Sonja Goldstein, the scholars most often credited with emphasizing the importance of actual caregiving over biology in defining parenthood. They "see the biological connection as a powerful motivating force for most parents to provide their children with continuous affectionate and responsible care." JOSEPH GOLDSTEIN, ET AL., *supra* note 215, at 225. *See also* Parham v. J.R., 442 U.S. 584, 601–02 (1979) (asserting that society long has recognized that "natural bonds of affection lead parents to act in the best interests of their children"); Stephen G. Gilles, *On Educating Children: A Parentalist Manifesto*, 63 U. CHI. L. REV. 937, 953–57 (1996); Scott & Scott, *supra* note 227, at 2443–44.

307. *See supra* notes 262–63 and accompanying text (discussing stigma associated with adoptive status). Although the Supreme Court has rejected, on constitutional grounds, avoidance of *racial* stigma as a basis for preferring one parent in a custody dispute, *see* Palmore v. Sidoti, 466 U.S. 429, 433 (1984), the courts have considered other forms of stigma in assessing children's interests. *See* Huffman v. Fisher, 976 S.W.2d 401, 405 (Ark. Ct. App. 1998), *rev'd on other grounds*, 987 S.W.2d 269 (Ark. 1999) (non-marital child's "best interests" favored that he bear his father's surname to

states they undergird "a strong presumption that children are better off with their natural parents than with a foster or adoptive family,"[308] and they provide a ground for limiting the scope of the traditional "parental rights doctrine" to *biological* parents.[309]

Of course, a statute enacting the model of adoption proposed here might simply direct the courts *not* to apply any parental preference in a subsequent custody dispute between an adoptive and a biological parent. Such a mandate would place the biological parent in the same position, at least theoretically, as a non-custodial parent in a custody battle between two biological parents. The genetic link of the biological parent, however, would remain a basis for distinguishing *factually* between the parents on an otherwise level legal playing field. This approach would most likely be sufficient if all courts could be trusted to follow the directive faithfully and to credit fully the benefits for the child that come from stability in a custodial placement. Yet, many judges have demonstrated such a profound bias in favor of biological parents, so grossly overestimating the benefits for the child that come from living with a "natural parent," and so disregarding the likely harm to the child from a transfer of custody, that I am loathe to place so much trust in the discretion of trial courts.[310] Just as legislatures

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avoid the stigma associated with having a different last name in light of local "norms"); *D.A. McW.*, 429 So. 2d at 703–04 (preferring custody with biological father partly to avoid stigma associated with being an illegitimate child raised by a grandparent); S.E.G. v. R.A.G., 735 S.W.2d 164, 166 (Mo. Ct. App. 1987) (preferring custody with father partly to spare children the stigma associated with mother's lesbian "life style"); N.K.M. v. L.E.M., 606 S.W.2d 179, 186 (Mo. Ct. App. 1980) (same). *But cf.* S.N.E. v. R.L.B., 699 P.2d 875, 879 (Alaska 1985) (holding that trial court cannot consider stigma associated with a parent's sexual orientation in deciding custody).

308. *In re* J.D.M., 808 P.2d 1122, 1126 (Utah Ct. App. 1991). *See also* N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii) (McKinney 1997) ("[I]t is generally desirable for the child to remain with or be returned to the natural parent because the child's need for a normal family life will usually best be met in the natural home, and that parents are entitled to bring up their own children unless the best interests of the child would be thereby endangered."); UTAH CODE ANN. § 62A-4a-201(1) (Michie Supp. 1998) ("presumption that it is in the best interest and welfare of a child to be raised under the care and supervision of his [or her] *natural* parents") (emphasis added); *D.A. McW.*, 429 So. 2d at 703–04 (emphasizing "the strong public policy which exists in this state in favor of the natural family unit"); Sider v. Sider, 639 A.2d 1076, 1086 (Md. 1994); *Logan*, 730 So. 2d at 1125–26 (stating presumptive "entitle[ment]" of "natural parent" to custody would apply even in dispute between custodial stepfather-guardian, whom eight-year-old boy "regards...as his father," and biological father who had disappeared from the boy's life five years earlier); Bartholet, *supra* note 238, at 10 ("Social policy is premised in part on an assumption that adoption's differences [from the genetic family] are necessarily and inherently negative differences."); Gorenberg, *supra* note 4, at 189 (acknowledging "the law's presumption that placement with a biological parent is inherently preferable to a home with nonbiological parents").

309. *See* Jones, *supra* note 306, at 1235 (noting that "establishing a stronger preference for the biological parent in child custody actions" might be a rational response to research showing a greater incidence of child abuse by caregivers who lack a genetic relationship with the children in their care).

310. As one family court flatly stated, in explaining why a one-and-one-half-year-old girl should be required to bear the conceded trauma inherent in being transferred from the prospective adoptive parents who had raised her since she was 48 hours old to a

have seen fit to channel judicial discretion with regard to other issues where judges seemed out of step with the public judgment concerning child welfare,[311] I propose in this context to limit sharply the grounds upon which a biological parent could seek to wrest custody from the adoptive parents.

The second appropriate adjustment concerns the availability of joint custody. The law should make clear that full decision-making authority in matters of child-rearing lies exclusively with the adoptive parents. If the biological and adoptive parents *wish* to share authority in making decisions concerning the child's education, medical care, and upbringing, they should be free to do so. And, of course, as long as they are willing to cooperate, they have no need of a legal decree embodying their agreement.[312] Yet, although there remains disagreement among courts and commentators about the merits of joint legal custody generally, it plainly would be inappropriate in this context. Shared decision-making authority is most appropriate when the joint decisionmakers are predisposed to, or at least

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biological father she had never met: "The importance of finality in the lives of children...cannot...justify circumscribing the competing constitutional rights of her biological parents." *In re* Baby Girl T., 715 A.2d 99, 106 (Del. Fam. Ct. 1998). Moreover, some observers contend that the bias in favor of biological parents over adoptive parents recently has been *deepening* rather than subsiding. *See* Bartholet, *supra* note 238, at 10 ("Powerful political forces are pushing for policies that would make adoption even more of a last resort, policies that would make biology even more important to the definition of family. There seems to be an increasing sense that children 'belong' in some fundamental sense to their birth families....").

311. For example, in response to concerns that judges too often discounted the relevance of a parent's history of domestic violence in assessing a child's "best interests," *see* Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1071–74 (1991), some legislatures have codified a presumption that custody with such a parent is not in the best interest of a child. *See, e.g.*, DEL. CODE ANN. tit. 13 § 705A (Michie Supp. 1998); HAW. REV. STAT. ANN. § 571-46(9) (Michie Supp. 1998); N.D. CENT. CODE. § 14-09-06.2(1)(j) (Michie 1997). *See* Jack M. Dagleisch, Jr., *Construction and Effect of Statutes Mandating Consideration of, or Creating Presumptions Regarding, Domestic Violence in Awarding Custody of Children*, 51 A.L.R.5th 241 (1997); Family Violence Project, National Council of Juvenile and Family Court Judges, *Family Violence in Child Custody Statutes: An Analysis of State Codes and Legal Practice*, 29 FAM. L. Q. 197 (1995).

The U.M.D.A.'s restriction of judges' ability to order a change of custody within two years of an initial decree reflects the same distrust of judges' evaluation of the importance of custodial stability to children. Commentators, too, have recognized the utility of such presumptions in seeking to overcome judicial biases. *See* David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481–82 (1984) (observing "that to the extent that judges are applying the wrong values [through the amorphous 'best interests' standard], it is in large part because legislatures have failed to convey a collective social judgment about the right values"; recommending use of a presumption favoring primary caretakers); Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 893–97 (1998) (proposing a statutory presumption against custody by a gay or lesbian parent to overcome what author believes to be judicial bias in such cases in assessing children's interests).

312. Indeed, most open-adoption arrangements in this country are undertaken informally, without the possibility of or need for legal enforcement. *See* Berry, *supra* note 225, at 126.

capable of, amicably resolving potential disagreements over child-rearing philosophy.[313] That is most likely when the parties have some pre-existing relationship and a proven track record of effectively sharing power.[314] In the context of a non-exclusive adoption, however, the biological and adoptive parents are likely to be strangers to one another and, as evidenced by many contested adoption cases, to be antagonistic as well. In that setting, there is clearly a heightened risk that a diffusion of decision-making authority will lead to stalemate and conflict. Such inter-parent conflict is undesirable not only because it produces obvious inefficiencies in making basic child-rearing decisions but, more important, because it is emotionally distressing for the affected children.[315] Particularly in light of the special vulnerabilities of the fledgling adoptive family identified earlier in this Article, permitting challenges to the adoptive parents' child-rearing decisions poses a special danger of undermining the integrity of their parent-child relationship, to the ultimate detriment of the child.[316]

In sum, I propose the creation of a new model of adoption in which the adoptive parents would gain custody, full decision-making authority over the child, and full status as parents while the biological parent would retain a right to visit and communicate with the child but not to seek custody except under exceptional circumstances.

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313. *See In re* Marriage of Oros, 627 N.E.2d 1246, 1249 (Ill. App. Ct. 1994) ("For joint custody to work, for it to benefit the child, a level of cooperation unusual in divorced parents is required."); Hanson v. Spolnik, 685 N.E.2d 71, 78 (Ind. Ct. App. 1997) ("a trial court abuses its discretion when it awards joint custody to parents who have made child rearing a battleground"); Braiman v. Braiman, 378 N.E.2d 1019, 1019, 1021 (N.Y. 1978) (joint custody "is unsupportable when parents are severely antagonistic and embattled" because "it can only enhance famil[y] chaos"); June Carbone, *The Missing Piece of the Custody Puzzle: Creating a New Model of Parental Partnership*, 39 SANTA CLARA L. REV. 1091, 1139 (1999) ("even the most stalwart joint custody advocates acknowledge that shared parenting requires a level of cooperation that not all parents can provide"); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 471 (1984).

314. *See* Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 633 (1992) (suggesting that joint custody should be limited to cases in which the parents substantially shared parenting responsibility prior to divorce because "[i]n such a situation, the couple's prior experience of shared responsibility increases the likelihood of mutual commitment, competency, and respect").

315. *See* Carbone, *supra* note 313, at 1139; Scott & Derdeyn, *supra* note 313. Studies of children in high-conflict divorces confirm that prolonged exposure of a child to hostility between parents is likely to cause the child to suffer significant and damaging distress. *See* CARLA B. GARRITY & MITCHELL A. BARIS, CAUGHT IN THE MIDDLE: PROTECTING THE CHILDREN OF HIGH-CONFLICT DIVORCE 12, 20 (1994); Janet R. Johnston, *High-Conflict Divorce*, 4 FUTURE OF CHILDREN 165, 172–76 (1994); Janet R. Johnston et al., *On Going Post Divorce Conflict: Effects on Children of Joint Custody and Frequent Access*, 59 AMER. J. ORTHOPSYCH. 576 (1989).

316. In *In re Baby Boy C.*, 630 A.2d 670, 676 (D.C. 1993), for example, a child psychiatrist testified that "divided loyalties" encouraged by a proposed custodial arrangement between non-parent custodians and a non-custodial biological parent "could be a permanent negative influence on...[a child's] personality development." It is not difficult to imagine that open conflict between adoptive and biological parents over child-rearing matters could place similarly harmful pressure on a child to take sides.

3. Limitations on the Availability of the Alternative Model of Adoption

Because the model of non-consensual open adoption proposed here contemplates making a significant intrusion upon the traditional rights of biological parents without the necessity of offering any proof of their unfitness or culpability, it might seem to carry a special potential for abuse. If the statute creating this form of adoption contained no restrictions on the court's power to grant such an adoption, other than the usual requirement that the adoption be in the child's "best interests,"[317] some might fear that judges would freely curtail the rights of faultless, loving parents whenever a wealthier or better-educated do-gooder could make a plausible claim of benefit to the child. In light of the nearly universal consensus among judges that such "social engineering" would run counter to the most basic values, I am inclined to think such abuses quite unlikely.[318] But it would be easy enough, in any event, to build into a statute checks against such over-reaching.

Two limitations upon standing to petition for a non-exclusive adoption would go a long way toward eliminating the danger of abuse. Adoption should be confined to cases in which the petitioning adult: (1) already has custody of the child, either with the initial consent of one of the child's legal parents or under authority of a court order; and (2) is already a "psychological parent" to the child. These requirements would ensure that this relatively intrusive form of custody would be used only where the benefits to the child clearly outweigh the costs to the biological parent. The scenario under which the intrusion upon biological parents' rights seems most justifiable is the sort of case, as with Baby Jessica or Baby Richard, where the child has been living with a non-parent and regards that caregiver as a parent, and where the child's relationship with the absent biological parent is correspondingly diminished. This is the sort of case where many courts and legislators are now already prepared to grant permanent custody to a non-parent (though adoption itself, of course, remains unavailable).[319] Imposing "psychological parent" status as a requirement for standing would ensure that biological parents are not too easily haled into court by a social do-gooder to defend their rights to continued custody of their children.[320] Only those relatively

317. All adoption statutes provide that, in addition to the petitioner's satisfaction of standing and grounds, the adoption must be in the child's best interests. *See* ARIZ. REV. STAT. § 8-116 (West 1998); CONN. GEN. STAT. ANN. § 45a-727(c)(2) (West Supp. 1999); IND. CODE ANN. § 31-19-11-1(a)(1) (Michie 1997); MINN. STAT. ANN. § 259.57(a) (West 1998).

318. *See* DeBoer v. DeBoer, 509 U.S. 1301, 1302 (1993) (Stevens, J., in chambers) ("'[C]ourts are not free to take children from parents simply by deciding another home offers more advantages.'" (quoting *In re* B.G.C., 496 N.W.2d 239, 241 (Iowa 1992))); *In re* Baby Girl T., 715 A.2d 99, 105–06 (Del. Fam. Ct. 1998) (same); *In re* D.L.C., 834 S.W.2d 760, 767 (Mo. Ct. App. 1992); *In re* A., 649 A.2d 1310, 1316 (N.J. Super. Ct. App. Div. 1994); Nale v. Robertson, 871 S.W.2d 674, 678 (Tenn. 1994) ("Biological bonds should not be so lightly brushed aside, and the courts should not be given a license to engage in social engineering by invoking the 'best interests of the child.'").

319. *See supra* notes 184–85 and accompanying text.

320. This requirement would, for example, preclude the scenario, fancifully hypothesized by Justice Heiple in the Baby Richard case, of "persons seeking babies to

uncommon persons who legally had established a custodial relationship as a "psychological parent" to the child would have standing to seek adoption without proving grounds for terminating parental rights.

"Psychological parenthood" is admittedly an imprecise term, but it is one with which the courts already have substantial familiarity and experience. The term derives, of course, from Joseph Goldstein, Anna Freud, and Albert Solnit's influential *Beyond the Best Interests of the Child*, but it has taken deep root in both psychological and legal literature. The concept is neither complex nor obscure: Quite simply, an adult assumes the status of a "psychological parent" by interacting lovingly with a child and meeting the child's "day-to-day...needs for physical care, nourishment, comfort, affection, and stimulation."[321] The status is inherent in neither biological parenthood nor material caregiving, but emerges from the mutual and sustained exchange of love and care between an adult and a child.[322] Although considerable debate remains over the relevance or significance of the concept under existing law,[323] the courts seem to have no great difficulty in determining which adults should hold that status with regard to a particular child. Indeed, the term already appears in the statutes of at least two states[324] and in the case law of virtually every American jurisdiction, and courts have grown

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adopt" trolling "grocery stores and snatch[ing] babies from carts when the parent is looking the other way." *In re* Petition of Doe, 638 N.E.2d 181, 188 (Ill. 1994) (Heiple, J., concurring in denial of rehearing). At the same time, it would leave open the possibility of adoption in a case like *Painter v. Bannister*, in which a child, placed voluntarily by his father in the custody of the grandparents, came over time to identify them as the "parental figures in his psychological makeup." Painter v. Bannister, 140 N.W.2d 152, 157 (Iowa 1966) (quoting expert testimony of Dr. Glenn R. Hawks).

321. JOSEPH GOLDSTEIN, ET AL., *supra* note 215, at 11–13. *See also id.* at 104–05.

322. *See id.* at 11–13.

323. *See* Taylor v. Kennedy, 649 So. 2d 270, 271 (Fla. Dist. Ct. App. 1994) (rejecting "psychological parent" argument as incompatible with statute governing visitation); *In re* Dependency of M.R., 899 P.2d 1286, 1287–88 (Wash. Ct. App. 1995) (same under dependency statute).

324. *See* N.M. STAT. ANN. § 32A-4-28(B)(3)(c) (Michie 1998) (providing that the development of "a psychological parent-child relationship" between a child and "a substitute family" may serve as partial grounds for terminating the rights of a biological parent); N.M. STAT. ANN. § 32A-5-15(B)(3)(c) (Michie 1988) (same); OR. REV. STAT. § 109.119(5)(a) (1997) (defining "child-parent relationship" for purposes of standing to intervene in a custody case as including a custodial, caregiving relationship that "on a day-to-day basis, through interaction, companionship, interplay and mutuality,...fulfilled the child's psychological needs for a parent"). Moreover, the "psychological parent" concept has been held to underlie additional statutory provisions that use different terminology. *See In re* Custody of A.D.C., 969 P.2d 708, 710 (Colo. Ct. App. 1998) (holding that "the adoption by the General Assembly of § 14-10-123(1)(c) subsequent to the adoption of § 14-10-123(1)(b) recognized the significance of the concept of 'psychological parenting'"); DuMarce v. Heminger, 20 Indian L. Rep. 6077, 6078 (N. Plains Intertribal Ct. App. 1992) (citing Sisseton Wahpeton Sioux Tribal Code § 39-03-24, which permits courts to recognize informal adoptions "based on...where the child's sense of family is"). Finally, the "psychological parent" concept also has been integrated into some state regulations and administrative guidelines. *See* Tallman v. Tabor, 859 F. Supp. 1078, 1085 (E.D. Mich. 1994) (quoting from state guidelines for social workers performing evaluations of adoptive placements).

accustomed both to litigating and to relying upon the concept of "psychological parenthood."[325] Given the experience of the courts, it is not clear that a rigid statutory definition is really needed,[326] but if it seemed desirable, the courts could be guided in determining "psychological parent" status by reference to objective criteria, such as the length of time that the child has remained in the caregiver's physical custody.[327]

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325. For a relatively small sampling of recent cases litigating or relying upon a finding of "psychological parenthood," see *In re Keishia E.*, 859 P.2d 1290 (Cal. 1993); *In re Custody of C.C.R.S.*, 892 P.2d 246, 248 & n.1 (Colo. 1995); *In re Samantha B.*, 1998 WL 638461, at *8 (Conn. Super. Ct. Sept. 8, 1998); *Twigg v. Mays*, No. 88-4489-CA-01, 1993 WL 330624, at *5 (Fla. Cir. Ct. Aug. 18, 1993); *In re Marriage of Slayton*, 685 N.E.2d 1038, 1040 (Ill. App. Ct. 1997); *In re D.R.S.*, 717 So. 2d 1259, 1262 (La. Ct. App. 1998); *In re Bordelon*, 670 So. 2d 676, 680 (La. Ct. App. 1996); *Monroe v. Monroe*, 621 A.2d 898, 907 & n.9 (Md. 1993); *Bodwell v. Brooks*, 686 A.2d 1179, 1184 (N.H. 1996); *Watkins v. Nelson*, 729 A.2d 484, 489 (N.J. Super. Ct. App. Div. 1999); *In re Adoption of J.J.B.*, 894 P.2d 994, 1005–06, 1011 (N.M. 1995); *State ex rel. Children, Youth & Fam. Dep't v. John D.*, 934 P.2d 308, 311 (N.M. Ct. App. 1997); *In re Comm'r of Soc. Servs. of City of New York v. Keith H.*, 677 N.Y.S.2d 503, 504 (N.Y. App. Div. 1998) (Florio, J., dissenting); *Christopher S. v. Anna Marie S.*, 662 N.Y.S.2d 200, 202 & n.4 (N.Y. Fam. Ct. 1997); *Goter v. Goter*, 559 N.W.2d 834, 835–36 (N.D. 1997); *In re Adoption of Ryan M.*, No. L-94-018, 1995 WL 127905, at *3 (Ohio Ct. App. Mar. 24, 1995); *State ex rel. State Office for Servs. to Children and Families v. Fuller*, 964 P.2d 1140, 1143 (Or. Ct. App. 1998); *Dodge v. Dodge*, 505 S.E.2d 344, 350 (S.C. Ct. App. 1998); *Rust v. Rust*, 864 S.W.2d 52, 57 (Tenn. Ct. App. 1993); *State ex rel. H.R.V. v. S.V.*, 906 P.2d 913, 916 (Utah Ct. App. 1995); *In re J.M.*, 624 A.2d 362, 364 (Vt. 1993); *In re Jonathan G.*, 482 S.E.2d 893, 902, 912 (W. Va. 1996); *In re Kimeo C.*, 568 N.W.2d 653, 653 (Wis. Ct. App. 1997) (unpublished table decision); *Overfield v. Collins*, 483 S.E.2d 27, 37 & n.8 (W. Va. 1996); *DuMarce*, 20 Indian L. Rep. at 6078.

326. In North Dakota, for example, where status as a "psychological parent" has long been held to be relevant to a non-parent's claim for custody, the state supreme court has relied upon a rather loose judicial definition: "Those persons who provide a child's daily care and who, thereby, develop a close personal relationship with the child become the psychological parents to whom the child turns for love, guidance, and security." Patzer v. Glaser, 396 N.W.2d 740, 743 (N.D. 1986). And yet that definition has seemed to serve the court adequately over a number of years in identifying who should qualify as a child's "psychological parents." *See Goter*, 559 N.W.2d at 836; *In re* E.J.H., 546 N.W.2d 361, 364 (N.D. 1996); Simons v. Gisvold, 519 N.W.2d 585, 587 (N.D. 1994); *In re* Guardianship & Conservatorship of Nelson, 519 N.W.2d 15, 17 (N.D. 1994); Worden v. Worden, 434 N.W.2d 341, 342–43 (N.D. 1989); *Patzer*, 396 N.W.2d at 743; *In re* J.K.S., 356 N.W.2d 88, 93 (N.D. 1984); Daley v. Gunville, 348 N.W.2d 441, 447 (N.D. 1984); *In re* Buchholz, 326 N.W.2d 203, 207 (N.D. 1982).

327. Oregon's statute governing standing to intervene in custody disputes provides such guidance. It grants intervenor status to "[a]ny person...who has established emotional ties creating a child-parent relationship," and then defines "child-parent relationship" as follows:

> "Child-parent relationship" means a relationship that exists or did exist, in whole or in part, within the six months preceding filing of an action under this section, and in which relationship a person having physical custody of a child or residing in the same household as the child supplied, or otherwise made available to the child, food, clothing, shelter and incidental necessaries and provided the child with necessary care,

Permitting non-exclusive adoption only where a substantial, *de facto* parent-child relationship already exists with the adoptive parents would provide a significant limitation on judicial power to intrude on pre-existing parent-child relationships while ensuring that adoption remains available in cases where children would have the greatest interest in recognition of a new parent-child relationship.

B. The Social Benefits of this Model of Adoption and Possible Policy Objections

1. The Benefits of Adoption

I have already identified the primary benefits of this non-exclusive model of adoption in the course of explaining why permanent guardianship is an inadequate legislative response to the dilemma presented in cases pitting non-parent caregivers against biological parents who, though fit, are relative strangers to their children. I have argued that permanent guardianship is unsatisfactory because it entails some lingering measure of custodial insecurity and because it denies to guardian and ward the full measure of societal validation and familial legitimacy that come with legal status as parent and child.[328] These attributes of guardianship are particularly regrettable, I contend, because they impede optimal bonding between caregiver and child and, thus, may well deny the child the full, maximal realization of a loving family relationship.[329] Given the foundational importance of the family relationship to the happiness and healthy development of children, such impediments should be regarded with serious concern, and all the more so if they are avoidable.

Transforming permanent guardians into adoptive parents, as contemplated by the model of adoption proposed here, would go a long way toward eliminating these obstacles. First, the adoption would almost entirely eliminate the current long-term insecurity of custody that presently characterizes guardianships. By giving children and their custodial caregivers a meaningful guarantee that their relationship will endure for as long as their own bonds of affection persist, this form of adoption would remove current disincentives to

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> education and discipline, and which relationship continued on a day-to-day basis, through interaction, companionship, interplay and mutuality, that fulfilled the child's psychological needs for a parent as well as the child's physical needs.

11 OR. REV. STAT. § 109.119(1) & (5)(a) (1997). Professor Katherine Bartlett has proposed the following criteria for recognition of a "psychological parent": (a) "the adult [must] have had custody of the child for at least six months"; (b) "the adult must demonstrate that his motive for seeking parental status is his genuine care and concern for the child"; and (c) the "adult [must] prove that the relationship with the child began with the consent of the child's legal parent or under court order." Bartlett, *supra* note 125, at 946–47. For their parts, Joseph Goldstein, Albert Solnit, Sonja Goldstein, and Anna Freud focused almost exclusively on the length-of-custody criterion, and proposed that courts presume the existence of a psychological parent-child relationship if the child had been in the custody of a caregiver for a specified time period ranging from six to 24 months, depending on the age of the child. *See* JOSEPH GOLDSTEIN, ET AL., *supra* note 215, at 105–07.

328. *See supra* Part III.B.

329. *See supra* Part III.B.

unguarded emotional investments in the relationship. Social science evidence drawn from varied contexts, including adoption and foster care, suggests that the elimination of custodial insecurity would produce real improvements in the substance and quality of the relationship between the child and her caregiver.[330]

Second, the adoption decree would normalize fully the family relationship between the child and her custodial caregivers and bestow on the participants the legitimacy that society continues to reserve for the "parent-child" relationship.[331] Social science research confirms that the expressive significance of adoption and guardianship status is not lost on the children and adults whose relationships are governed by these laws.[332] The implicit legitimation that would come with an adoption decree would spare children the stigma associated with living in subordinate, "family-like" associations and would encourage children, siblings, and parents alike to regard each other as members of a true and common "family." Thus, even apart from the enhanced custodial security that adoption would provide, the change in legal (and thus societal) status that would come with adoption would itself constitute a real and substantial benefit to those involved.

2. Possible Policy Objections

It remains, of course, to demonstrate that the benefits of non-exclusive adoption would outweigh anticipated policy objections.[333] Because the model of adoption proposed here dispenses with the usual termination of the biological parents' rights (and creates, in effect, a new triangular family relationship between a child and her adoptive and biological parents), it is essential to identify the policy values that are served by the traditional requirement that the biological parent-child relationship be extinguished prior to adoption, and to balance those values against the benefits that would be generated by expanding the availability of adoption.

a. Original Justifications for "Exclusive Parenthood" in Adoption

Surprisingly, in light of its enormous consequences under traditional law, the original reasons for the invariable linkage between adoption and termination of other parents' rights under traditional law are somewhat murky. In most cases and texts, the impossibility of allowing an adoption without first destroying all prior parent-child relationships is simply assumed.[334] Perhaps this is because the reasons are considered too obvious to require expression, but it seems more likely the product of legal reflex; the axiom linking adoption with termination of the biological parents' rights is so encrusted with historical habit that few think to question it. Although some social scientists recently have contended that the obliteration of the old family aids in the child's integration and bonding with her

330. *See supra* Part III.B.1.
331. *See supra* notes 238–58 and accompanying text.
332. *See supra* notes 263–68 and accompanying text.
333. *See infra* Part IV.C for analysis of anticipated constitutional objections.
334. *See supra* notes 273, 276.

new adoptive kin,[335] these modern psychological theories were plainly not the original justification for the doctrinal tether between adoption and termination of biological parents' rights. Rather, the assumed necessity of terminating all other parents' ties to the child before permitting an adoption appears to have become ingrained in the law mostly because adoption was originally conceived of as a remedy for unwanted children, those whose ties with biological parents had already been lost due to death or abandonment. The earliest forms of adoption essentially resembled an action to transfer title to a child from one family to another.[336] Adoption, in effect, simply "made available to the public a rational forum for the voluntary transfer of rights and duties" concerning a child.[337] In this way, adoption was seen simply as an implied corollary to the accepted authority of parents to surrender their child to a new caretaker, not as a way for society to mediate the conflicting interests of adults in the care of a child.[338] Even as courts began to assert a larger role in supervising these transactions to ensure the basic welfare of the children, adoption continued to proceed upon the factual assumption that the child's biological parents either were dead or had waived any interest in custody. The first American adoption statutes, enacted in the mid-19th Century, thus provided for termination of the rights of biological parents as part of a regime that did not contemplate adoption over the objection of a biological parent.[339] Termination of rights of biological parents has remained an essential concomitant to adoption ever since, even as the concept of adoption has enlarged to include the possibility of adoption without the consent of living biological parents.

Moreover, it is important to understand that state legislatures first invented a narrow form of adoption, available only for children who, in effect, had already lost their biological parents, at a time when there were few people willing

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335. I consider these theories as a possible policy objection *infra* at Part IV.B.2.b.

336. *See* CLARK, *supra* note 10, § 20.2, at 850–51 (describing original Roman and American precedents for adoption). Indeed, some early American laws required that adoption be accomplished through "the execution of a deed...in all respects similar to that requisite to the transfer of property." Elinor Nims, *The Illinois Adoption Law and Its Administration* 10 (1928), *reprinted in* THE ORIGINS OF ADOPTION (David J. Rothman & Sheila M. Rothman eds., 1987).

337. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1086 (1979).

338. Historian Jamil Zainaldin, who traced the origins of American adoption law, has observed: "The proprietary parental right under the English common law had become quasi-contractual in America. If one might voluntarily relinquish his right explicitly by contract or implicitly by conduct, it followed that another might adopt the status of parent." *Id.* at 1085–86 (footnote omitted).

339. The 1851 Massachusetts adoption act, which served as the model for the first wave of adoption legislation in the United States, made adoption available only when the child's biological parents consented or were dead or missing. MASS. REV. STAT. ch. 324 (Supp. 1851). *See* Nims, *supra* note 336, at 11 (describing early adoption statutes in Massachusetts, Wisconsin, and Pennsylvania); Ida R. Parker, *"Fit and Proper"? A Study of Legal Adoption in Massachusetts* 7, 49–50 (1927), *reprinted in* THE ORIGINS OF ADOPTION, *supra* note 336; Zainaldin, *supra* note 337, at 1042–43 & n.9 (describing Massachusetts statute and its influence on legislation in other states).

to take on the role of adoptive parent.[340] Indeed, for most of the next 100 years after enactment of these statutes, the supply of children available for adoption far outstripped the supply of willing adoptive parents.[341] Thus, the original decision to create a quite modest form of adoption must be understood in light of the modesty of then-prevailing social interests in adoption and child welfare, and not necessarily as the expression of a considered judgment that a broader form of adoption, including one that could extend to children whose biological parents retained an interest in the children, was undesirable.

Accordingly, our long custom of terminating the rights of biological parents whose children are adopted provides no basis for objecting to the proposal advanced here. The reasons that first justified integrating termination of other parents' rights into the adoption law vanish when, as here, adoption is contemplated over the objection of a living parent. In that context, any valid grounds for objection must be sought not in legal history but in modern assessments of social policy.

b. Modern Justifications for Requiring a Termination of Rights

The prevailing modern justification for mandating the termination of all prior parent-child relationships in cases of adoption, even when those parents wish to remain involved in the lives of their children after the adoption, is that doing so will benefit the child. Some social scientists contend that obliterating the child's pre-adoptive family ties aids the child's integration into the adoptive family.[342] If prior parents remain on the scene after the adoption, it is supposed, the child might be confused and torn between conflicting loyalties to the biological and adoptive parents.

> The biggest risk of open adoption postulated by most adoption professionals is that it will interfere with the process of bonding between adoptive parents and child, which in turn will interfere with the adopted child's healthy development and adjustment.

340. *See* Burton Z. Sokoloff, *Antecedents of American Adoption*, 3 FUTURE OF CHILDREN 17, 22 (1993) (discussing very low interest in adoption among prospective adoptive parents prior to World War I).

341. *See id.* at 22–23 (demand for adoption by adoptive parents began to surpass supply of children for available for adoption in 1950s).

342. *See* JOSEPH GOLDSTEIN, ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 6–7, 35–39 (1979); Berry, *supra* note 225, at 129; A. Dean Byrd, *The Case for Confidential Adoption*, 46 PUB. WELFARE 20, 22–23 (1988). *Cf.* Garrison, *supra* note 186, at 446–54 (reviewing and criticizing these theories); Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 387–89 (1996). Courts and legislatures have embraced this rationale as well. *See* Miller v. Walker, 514 S.E.2d 22, 25 (Ga. 1999) (termination of ties with biological family promotes adopted "child's assimilation into the adoptive family" (quoting *In re* Estate of Best, 485 N.E.2d 1010, 1012 (N.Y. 1985))).

> Adoptees in confidential adoptions wrestle with the fantasy of 'ghost' parents, but shared information or direct contact with these parents may exacerbate rather than eliminate these fantasies.[343]

Indeed, at least one researcher contends "that a young child is not equipped to deal with the differing value systems of two sets of parents and may reject both value systems, increasing the risk of psychopathology."[344] It is largely on this basis that a number of courts and legislatures have rejected the concept of "open adoption," through which biological parents might consent to an adoption while retaining legally enforceable rights to visitation and other, non-custodial involvement in the lives of their children.[345] These concerns would have even greater force were the law to contemplate ordering open adoptions without the initial consent of all parties. In that context, plainly there would be greater danger of antagonism and, consequently, of conflicting demands upon the child's loyalties.[346] In addition, some courts have warned that a legal basis for forced,

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343. Berry, *supra* note 225, at 129 (footnotes omitted).

344. *Id.* (citing A. Dean Byrd, *The Case for Confidential Adoption*, 46 PUB. WELFARE 20 (1988)).

345. As the Ohio Supreme Court observed, in requiring the immediate severance of all ties between an adopted child and her biological relatives,

> the adoption statute seeks to transform the child's collection of relationships and, in effect, give the child a new identity. While this goal may not be fully attainable, particularly in the context of children who are not adopted immediately after birth, it must be pursued. Otherwise, children will become bewildered as adults battle for their time and affection....

In re Adoption of Ridenour, 574 N.E.2d 1055, 1062 (Ohio 1991). *See also* Huffman v. Grob, 218 Cal. Rptr. 659, 661 (1985); Petition of Dep't of Public Welfare To Dispense with Consent to Adoption, 419 N.E.2d 285, 287 & n.5 (Mass. 1981); *In re* Adoption of Francisco A., 866 P.2d 1175, 1188–89 (N.M. Ct. App. 1993) (Hartz, J., specially concurring); *In re* Catala, 395 N.Y.S.2d 863, 863 (N.Y. App. Div. 1977); Merkel v. Doe, 635 N.E.2d 70, 75 & n.8 (Ohio Ct. C.P. 1993). These concerns are not merely speculative. See *Groves v. Clark*, 982 P.2d 446, 450 (Mont. 1999) (slip opinion), where adoptive parents sought to terminate visits with a biological mother, pursuant to open-adoption agreement, on grounds that "visitation adversely affected [the child] in that afterward she would evidence insecurity about her adoption status, would be moody and difficult to discipline." The biological mother's expert witnesses "explained this as a normal occurrence." *Id.*

346. An illustration of this danger is provided by the recent case of a New York woman who was mistakenly impregnated with the fertilized egg of another couple during an in vitro procedure. The embryo mix-up was later discovered and the woman and her husband ultimately agreed to surrender custody of the baby to his genetic parents while retaining visitation rights. The agreement broke down, however, after the first visit, when the genetic parents objected to the birth mother continuing to identify herself to the child as "Mommy." *See* Jim Yardley, *Sharing Baby Proves Rough on 2 Mothers*, N.Y. TIMES, June 30, 1999, at B1 (quoting the lawyer for the genetic parents as saying, "[The birth mother] said things like, 'Come to Mommy' and, [sic] 'Your Mommy is here,'.... The child can only have one mother, and on that we're very adamant."). *See also In re* Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 13 (Ct. App. 1999) (in a case where would-be adoptive parents were appointed permanent guardians after biological father blocked adoption, "the trial court 'predicted that by appointing [Robin and Joanne] as Zachary's guardians, "I'm encouraging a continuing battle to fight over who's going to be the parents" and in fact

ongoing involvement of biological parents might deter prospective adoptive parents from considering adoption in the first instance, harming children by reducing the availability of adoption.[347]

These concerns are legitimate, but not forceful enough to justify rejecting the proposal advanced here. First, it bears mentioning that although mandatory severance of all prior parental relationships long has been considered an inextricable part of adoption in this country, the assumption is by no means universal. A number of European, Pacific, Latin American, and Native American cultures long have permitted a form of adoption in which adoptive parents gain custody and most parental rights while biological parents retain the social and legal status of parents along with certain rights of visitation and other involvement in the child's life.[348] The laws of some of these societies permit the parties to elect between "full" adoption, in which the child's biological family ties are severed, and "limited" or "weak" adoption, in which the child retains a legal relationship with her biological family.[349] In these cultures, a child may well simultaneously have two sets of parents, one adoptive and one biological, all of whom play well-defined roles in the child's upbringing. At the very least, that these cultures have integrated this arrangement into their law and social practice should give us pause in regarding the concept of co-existing adoptive and biological parents as unthinkable.

Second, although there is only fledgling and somewhat conflicting empirical evidence on point, there is reason to think that some of the concerns about open adoption may be overstated. To be sure, there is some evidence to support the claim that many children, adoptive parents, and biological parents benefit from traditional, confidential adoption.[350] At the same time, there is a

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several post-trial hearings have already been conducted on the issue of visitation.'").

347. *See Adoption of Ridenour*, 574 N.E.2d at 1063; *Adoption of Francisco A.*, 866 P.2d at 1189–90 (Hartz, J., specially concurring).

348. *See* Harry D. Krause, *Creation of Relationships of Kinship*, *in* IV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, 73, at 86–90 (Aleck Chloros ed., 1976) (surveying adoption laws of numerous countries); Garrison, *supra* note 186, at 445 n.105 (citing statutes providing for "open adoptions" in France, Spain, Germany, and Italy); Buchea v. United States, 154 F.3d 1114, 1116–17 (9th Cir. 1998) (noting that adoption under Alaskan Eskimo tribal custom, unlike Alaskan law, does not necessarily involve a termination of biological parents' rights); DuMarce v. Heminger, 20 Indian L. Rep. 6077, 6078 (N. Plains Intertribal Ct. App. 1992) (describing "*ecagwaya*," or traditional adoption within the Sisseton Wahpeton Sioux Tribe).

349. *See* Krause, *supra* note 348, at 87–88, 90 (describing the adoption laws of France, Italy, Spain, Argentina, and Bolivia); *DuMarce*, 20 Indian L. Rep. at 6078 (under tribal law, adoptive parents may seek either an "Anglo" adoption, requiring termination of the biological parents' rights, or Indian *ecagwaya* adoption, under which biological parents lose custody but not rights of visitation and communication).

350. In one study, adoption case workers reported that contact between adopted children and biological family members appeared to weaken the relationship between the children and their adoptive parents. *See* BARTH & BERRY, *supra* note 276, at 141, 151; Berry, *supra* note 225, at 133. Other studies suggest that termination of all contact may help birth-mothers come to terms more quickly and positively with their decision to relinquish custody and that continued contact may only prolong any grief over the decision. *See* Berry, *supra* note 225, at 131; Terril L. Blanton & Jeanne Deschner, *Biological Mothers' Grief:*

growing body of evidence favoring continued contacts with biological family members.[351] None of these studies purports to prove squarely that children either benefit from or are harmed by ongoing contact with non-custodial biological parents.[352] But the empirical evidence at the very least supports the conclusion that adopted children are not *invariably* harmed by continued contact with their biological parents and may even benefit in many circumstances.[353]

Third, and most important, the standard objections to open adoption, "possible interference by the birth family preventing the child from developing attachments to the adoptive parents; the creation of a general climate of insecurity; and the adoptive parents not feeling in control of the situation,"[354] simply have no force when the alternative is guardianship rather than traditional, "closed" adoption. Certainly, no empirical evidence suggests that children would be better off living with non-parent guardians than with adoptive parents. Even if additional research shows clearly that children are benefited by the traditional requirement that prior parental relationships be severed at the time of adoption, that research would not support rejecting open adoption in the context in which it is proposed here. The whole point of the proposal is to extend adoption to a class of custodial relationships for which adoption is currently unavailable.[355]

Under current law, these children are denied the benefits of adoption in order to preserve the non-custodial parental rights of their biological parents, not to spare the children from any confusion or conflicting loyalties. It is not easy to see how any confusion or loyalty conflicts would be enhanced by the legal

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The Postadoptive Experience in Open Versus Confidential Adoption, 69 CHILD WELFARE 525 (1990).

351. At least one study found a correlation between greater openness in adoption and a greater sense of security and "entitlement" on the part of adoptive parents. *See* Berry, *supra* note 225, at 131 (citing N. F. Belbas, *Staying In Touch: Empathy in Open Adoptions* (Smith College Sch. of Soc. Work 1986)). Another study concluded that adopted children who had a continuing relationship with their biological parents were better behaved and adjusted than those with no contact. *See id.* at 133. Research involving children in long-term foster care has yielded similar conclusions. *See* Garrison, *supra* note 186, at 461–63 (collecting studies).

352. *See* Berry, *supra* note 225, at 129–35 (discussing limitations in the existing empirical data and calling for additional research).

353. *See* TRISELIOTIS ET AL., *supra* note 221, at 89; Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 360–62 (1996) (describing recent studies by "researchers [who] have concluded not only that multiple bonds are characteristic of most children, but also that they are beneficial").

354. TRISELIOTIS ET AL., *supra* note 221, at 74.

355. The paradigm case for this model of adoption is a child who is already living with non-parent custodians and whose biological parent or parents retain parental rights other than custody. *See supra* Part IV.A.2. Such a child already must confront the dangers of role confusion and conflicting loyalties attributed by some to open adoption. This child must divide her time, and perhaps her loyalties, between two sets of "parent-like" figures: the *non*-parent guardians with whom she lives and the non-custodial parents with whom she visits. Any risk of confusion to the child has already been incurred by the law's willingness to create this non-traditional family arrangement. *See, e.g.*, *In re* Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 13 (Ct. App. 1999) (anticipating guardian-parent conflicts).

transformation of the guardian into an adoptive parent.[356] To the contrary, confusion, loyalty conflicts, and erosion of the custodian's authority in child-rearing all would seem to be significantly exacerbated by the law's current insistence on relegating the child's custodian to the parental purgatory of guardianship, defining the central adult figure in the child's daily life as someone more than a transitory caregiver, but somehow less than a parent.[357]

Nor is the concern about deterring prospective adoptive parents valid in this context. Forcing open adoption upon adoptive parents might well discourage some from adopting, but forcing open adoption upon non-custodial biological parents certainly would provide no disincentive to the adoptive parents. When the alternative to open adoption is not confidential adoption but *guardianship*, the incentives plainly would favor the choice of adoption.[358]

Accordingly, the prevailing policy objections to open adoption hold little or no weight when open adoption is considered as an alternative to permanent guardianship. Any remaining objections to this proposal likely are cast as constitutional ones, namely that it would permit an undesirable and intolerable intrusion upon the rights of faultless biological parents. It is to those contentions that I now turn.

C. Striking the Constitutional Balance: The Rights of Biological Parents and the Permissibility of Non-Consensual Open Adoption

To be sure, the proposal for adoption set out in this Article would entail a significant intrusion upon the rights traditionally accorded biological parents. Under this proposal, the biological parent of a child could be compelled, through no fault of his or her own, to assume an indisputably subsidiary role in the child's life. The biological parent would remain legally recognized as a parent and would retain the rights to visit and communicate with the child. But the parent would lose custody, virtually all child-rearing authority, and all but the slimmest chance of ever regaining custody.[359] Moreover, the biological parent's role would be diminished in order to make way not merely for an alternative custody arrangement, but for new *parents* created by the adoption decree. Even accepting the claim that this form of open adoption would be of substantial benefit to children who identify non-parent custodians as their psychological parents, it

356. Professor Cahn, for instance, identifies as potential objections to "multiple parenthood" the "fear that it would complicate custody decision-making" and risk stigmatizing participants in such a non-traditional family form. *See* Cahn, *supra* note 203, at 54. Both of these concerns are legitimate but do not seem meaningfully stronger here than concerns with the alternative of permanent guardianship with parental visitation.

357. *See supra* Part III.B.2.

358. Indeed, if anything, expanding adoption in this way might correct an undesirable disincentive present in current law. Allowing non-parent custodians to adopt might encourage some who otherwise would refuse to incur the emotional risk of raising a child under the thinner protection of guardian status to continue as the child's custodian. Concededly, however, given how fiercely non-parent caregivers fought to retain even that status in cases like those involving Baby Jessica and Baby Richard, I frankly doubt that any additional legal incentive is needed in this regard.

359. *See supra* Part IV.A.2.

remains to demonstrate that it would be constitutional. Although the Supreme Court has held that the Constitution provides significant protection to the parent-child relationship, I contend that the burdens that open adoption would place upon that relationship are constitutionally tolerable in light of the substantial benefits adoption would provide to children.

1. Avoiding Two False Starts

At the outset, I wish to set aside two possible grounds upon which the constitutionality of this proposed model of adoption might be sustained. First, it might be contended that the proposal is constitutional, at least as applied to unwed fathers who have never established a relationship with their children, on the grounds that such fathers simply have no constitutional rights at stake in a desired, but nonexistent, relationship. It is true that Supreme Court cases have upheld the constitutional claims of only those unwed fathers who have succeeded in establishing a substantial emotional relationship with their children, and that the Court itself has yet to hold squarely that unwed fathers also have a constitutional interest in *seeking to establish* such a relationship.[360] If the numerous state supreme courts that have found such a constitutional interest are in error, then there plainly would be no obstacle to forcing such men to forgo custody and share their parental status with adoptive parents. Yet I ultimately regard this constitutional analysis as insufficient. As an initial matter, I wish to offer my adoption proposal as a solution even to those who are convinced of the premise that the Constitution protects a faultless father's "opportunity interest" in establishing a relationship with his child.[361] Moreover, the adoption law proposed here could have application beyond the context of unwed fathers who lack an established relationship with the child. The sort of non-exclusive adoption proposed here, for example, could be a desirable solution for cases where a biological mother initially gives defective consent to a traditional adoption,[362]

360. *See supra* Part II.B.

361. For example, even if the Supreme Court ruled that state laws categorically excluding thwarted unwed fathers from the adoption process violate no federal constitutional rights, it is quite possible that some state courts would construe their state constitutions more broadly. *See* S.G. v. C.S.G., 726 So. 2d 806, 809 (Fla. Dist. Ct. App. 1999) (noting, in upholding parent's constitutional claim to custody, that "'[t]he state constitutional right to privacy is much broader in scope, embraces more privacy interests, and extends more protection to those interests than its federal counterpart'" (quoting Von Eiff v. Von Eiff, [sic] 720 So. 2d 510, 514 (Fla. 1998))). In the wake of the Court's ruling in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding constitutionality of statute that denied unwed father of child born to married mother any opportunity to establish paternity), for instance, some states responded by finding broader protections for putative fathers in the due process or equal protection counterparts of their state constitutions. *See* Callender v. Skiles, 591 N.W.2d 182, 199–90 (Iowa 1999); *In re* J.W.T., 872 S.W.2d 189, 198 (Tex. 1994). *Cf.* R. McG. v. J.W., 615 P.2d 666, 672 (Colo. 1980) (pre-*Michael H.* case grounding rights in state constitution).

362. In February 1999, for example, a Kentucky trial judge ordered that a two-year-old boy be transferred from the custody of prospective adoptive parents to that of his biological parents after concluding that the biological parents should have been permitted to withdraw their consent to the adoption. Although the parents twice had signed documents

where a biological mother chooses to place her baby for adoption and deliberately thwarts the objections of a biological father who has established a relationship with the child,[363] or even where two sets of biological parents later discover that their babies were switched before leaving the hospital.[364] In all of these cases, it seems likely that the Supreme Court would recognize a constitutional interest on the part of the biological parents and yet if the child has been living with the prospective adoptive parents for an extended time there might be substantial benefits to the child from permitting some form of adoption to go forward. Thus, some broader demonstration of the constitutionality of this adoption proposal is appropriate, a demonstration that must go beyond simply narrowly construing the rights of unwed fathers.

A second possible approach to sustaining the adoption scheme proposed here is to argue that the children involved have some constitutional right of their own to develop a family relationship with their prospective adoptive parents, a right that might offset the constitutional claims of a biological parent.[365] This approach effectively would dilute the strength of the parents' constitutional claims, transforming the constitutional issue from a simple parent-against-state struggle to a three-way contest among parent, child, and state. Whatever its theoretical promise, however, the practical difficulty with this approach is that it has met with a hostile reception in the courts. State courts mostly, though not unanimously, have tossed aside similar arguments seeking to limit parents' rights by recognizing countervailing rights on the part of children.[366] More to the point,

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consenting to the adoption and termination of their parents rights, and those consents had become nominally "irrevocable" under Kentucky law, the court ultimately ruled their consent invalid because it was not sufficiently "informed." *See Judge Orders 2-Year-Old Back to Biological Parents*, CINC. ENQUIRER, Feb. 9, 1999, at A1. *See also, e.g.*, Sorentino v. Family & Children's Soc'y of Elizabeth, 367 A.2d 1168 (N.J. 1976) (invalidating adoption on grounds of mother's defective consent); Anonymous v. Anonymous, 439 N.Y.S.2d 255 (N.Y. Sup. Ct. 1981) (same).

363. *See In re* Application of S.R.S., 408 N.W.2d 272 (Neb. 1987).

364. The most famous such case involved Kimberly Mays, the Florida girl whose custodial family discovered, a decade after bringing her home from the hospital as an infant, that she had been mistakenly switched with another baby. *See* Twigg v. Mays, 543 So. 2d 241 (Fla. Ct. App. 1989). In 1998, the families of two 3-year-old girls in Virginia discovered that the girls had been switched as newborns at the hospital, giving rise to both tort suits and custody litigation. *See* Michael D. Shear, *Custody Battle Underway for Switched Baby*, WASH. POST, Nov. 13, 1998, at B3. At least a handful of other such cases have been documented in recent years, including two more in 1999. *See After Embryo Mix-Up, Genetic Parents Get Baby*, N.Y. TIMES, May 27, 1999, at B10; Jeremy Manier, *Parents Seeking Defense Against Switched Babies*, CHI. TRIB., Aug. 7, 1998; Tina Nguyen, *Mistakes Conceded in Newborn Mix-Up*, L.A. TIMES, Feb. 16, 1999.

365. *See* Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children To Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358 (1994); Suellyn Scharnecchia, *A Child's Right to Protection from Transfer Trauma in a Contested Adoption Case*, 2 DUKE J. GENDER L. & POL'Y 41 (1995).

366. *See In re* Clausen, 502 N.W.2d 649, 665–67 & n.44 (Mich. 1993); *In re* A.R.A., 919 P.2d 388, 391–92 (Mont. 1996); Wendy Anton Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 72–80 (1994) (discussing the analysis of the state courts in the Baby Jessica case); Hollinger,

the Supreme Court, although not foreclosing such an approach,[367] seems quite unlikely to embrace it anytime soon. The Court gave short shrift to similar constitutional claims on behalf of children in *Santosky v. Kramer*, *Wisconsin v. Yoder*, and *Smith v. Organization of Foster Families for Reform*.[368] In each case, litigants sought to overcome a constitutional claim of parents' rights by raising the independent constitutional interests of the children involved. In each case, however, the Court answered the argument with the sanguine insistence that the children must be presumed to share the parents' interests in preserving ties.[369] In *Smith* in particular, the Court expressed reluctance to recognize a substantial

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supra note 136, at 37. California is an important exception. An appellate court there recently accepted the argument that a child whose adoption was blocked by a faultless biological father had a fundamental constitutional liberty interest in remaining in the custody of the couple who had sought to adopt him. *See In re* Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 17 (Ct. App. 1999). The court held, moreover, that the child's constitutional right to continue the pre-adoptive placement prevailed over the biological father's constitutional interest in obtaining custody. *Id.* The court, of course, had no occasion to consider whether the child's constitutional rights might support an *adoption* along the lines proposed here.

367. On several occasions, the Court has recognized clearly that children do have their own fundamental constitutional rights, *see, e.g.*, Reno v. Flores, 507 U.S. 292, 315–16 (1993) (O'Connor, J., concurring); Hodgson v. Minnesota, 497 U.S. 417, 434–35 (1990); *In re* Gault, 387 U.S. 1, 13 (1967), although it remains pointedly unclear whether the Constitution protects those rights on equal terms with the fundamental rights of adults. *See also* Carl E. Schneider, *State-Interest Analysis in Fourteenth Amendment "Privacy" Law: An Essay on The Constitutionalization of Social Issues*, 51 L. & CONT. PROB. 79, 85 (1988) (noting that "the Court has particularly struggled to find a state-interest standard...[in] cases involving nonstandard right-holders like minors and prisoners"). *Compare* Hutchins v. District of Columbia, No. 96-7239, 1999 WL 397429, at *7 (D.C. Cir. June 18, 1999) (en banc) (concluding that minors' fundamental rights are entitled to a lesser degree of protection), *and id.* at *28–29 (Rogers, J., concurring in part and dissenting in part) (reaching same conclusion), *with id.* at *35 (Tatel, J., dissenting) (concluding that minors' fundamental rights should be protected by strict scrutiny).

368. Santosky v. Kramer, 455 U.S. 745, 760–61 (1982); Wisconsin v. Yoder, 406 U.S. 205 (1972); Smith v. Organization of Foster Families for Reform, 431 U.S. 816 (1977).

369. In *Santosky*, for example, the Court held that the Constitution requires heightened proof of parental misconduct before the government may terminate parental rights. To the argument that the child's own constitutional interests might be compromised by making it more difficult for the state to move against an abusive or neglectful parent, the Court blithely reassured that "until the State proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of the relationship. Thus, at the factfinding, the interests of the child and his natural parents coincide to favor use of error-reducing procedures." *Santosky*, 455 U.S at 760–61 (footnote omitted). *See also id.* at 754 n.7; *Clausen*, 502 N.W.2d at 666 ("The mutual rights of the parent and child come into conflict only when there is a showing of parental unfitness.").

In *Yoder*, the Court upheld the right of Amish parents to keep their teenaged children out of the public schools, leaving Justice Douglas to complain in dissent that the Court had ignored the potentially independent constitutional interests of the children by presuming a harmony of interests between child and parent. *See* 406 U.S. at 241–42 (Douglas, J., dissenting in part). *Cf. id.* at 237 (Stewart, J., concurring) (answering Justice Douglas by contending that the record showed no divergence of interests between parent and child).

liberty interest on the part of foster parents in the preservation of their relationship with foster children on the ground that such an interest would intrude upon the constitutional rights of "natural" parents in a relationship with the child.[370] While the Court did acknowledge the relevance of the children's own independent interests in the matter, and the propriety of hearing from both foster and biological parents concerning what the children's interests might be,[371] the Court's frank reluctance to recognize independent constitutional rights that might dilute the rights of parents is portentous.[372]

Moreover, Justice Scalia's more recent opinions for the Court in *Reno v. Flores*,[373] and for a plurality in *Michael H. v. Gerald D.*,[374] come close to knocking the legs out from under this constitutional argument, at least as it would be applied in this context. In *Flores*, the Court held that alien children in the custody of the Immigration and Naturalization Service did not have a fundamental constitutional right to be released to the custody of a non-relative caretaker merely because that outcome would be in the children's best interests.[375] In rejecting the constitutional claim, Justice Scalia for the Court almost mocked the suggestion that children might have a constitutional right to have the government act in their best interests when making decisions about their custody.[376] So long as a state provides a child with a "decent and humane" custodial environment, Justice Scalia wrote, and guardianship is indisputably that, the child has no constitutional claim to a "better" one even if it is readily available.[377]

Justice Scalia was even more dismissive in explaining for the plurality in *Michael H.* why a child had no "due process right to maintain filial relationships with both Michael [her mother's extramarital lover and her biological father] and Gerald," her mother's husband, with whom the child lived and the man legally presumed to be her father.[378] Such a claim "merits little discussion," Justice Scalia wrote, "for, whatever the merits of the guardian ad litem's belief that such an arrangement can be of great psychological benefit to a child, the claim that a State *must* recognize multiple fatherhood has no support in the history or traditions of this country."[379]

Accordingly, I make here only the more modest claim that a state *may* recognize multiple fatherhood (or motherhood), consistent with the Court's traditional doctrinal regard for parents' rights in the rearing of their children.

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370. *See Smith*, 431 U.S. at 846.

371. *See id.* at 841 n.44.

372. *See generally* Fitzgerald, *supra* note 366, at 67 (contending that *Santosky* and *Smith* reflect that "our law's focus on parental and state interests obliterates the child's and casts the child not only as a nonparty, but also a non-entity").

373. 507 U.S. 292 (1993).

374. 491 U.S. 110 (1989).

375. *See Flores*, 507 U.S. at 302–06.

376. *See id.* at 303–05.

377. *Id.*

378. *Michael H.*, 491 U.S. at 130.

379. *Id.* at 130–31 (emphasis added).

2. Parents' Rights — Fundamental and Otherwise

The Supreme Court has stated often and broadly that a parent has a "fundamental liberty interest" in "'the companionship, care, custody, and management of his or her child.'"[380] Modern due process and equal protection doctrine, of course, provides that any state action that significantly impinges upon a fundamental right must be subjected to strict scrutiny, requiring the state to prove that its interference with the right is narrowly tailored to achieve a compelling state interest.[381] That might seem to suggest that any proposal for non-consensual, open adoption, involving as it does a significant interference with a parent's relationship with his or her child, would need to survive strict scrutiny. Yet, the Court's family-privacy cases leave considerable doubt about whether strict scrutiny is in fact the appropriate constitutional test for the sort of adoption law proposed here.[382]

The truth is that the Court has *not* subjected to strict scrutiny every governmental action that significantly impairs a parent's relationship with or authority over his or her children. In the rare cases where the Court actually has used the familiar language of strict scrutiny, as in *Wisconsin v. Yoder*,[383] it sometimes has turned out that the choice of scrutiny was driven by considerations apart from the rights of parents.[384] Far more often, the Court avoids the terminology of strict scrutiny altogether and applies what amounts to a more free-form inquiry into the essential "reasonableness" of the government action, calibrating the level of scrutiny in each case to match the particular degree of intrusion upon the parent's interests.[385] Thus, in a broad range of cases involving quite substantial intrusions upon parents' choices concerning the education or upbringing of their children, the Court has sustained the governmental action without applying anything like strict scrutiny.[386]

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380. Santosky v. Kramer, 455 U.S. 745, 758–59 (1982) (quoting Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981)). *See also id.* at 753.

381. *See generally* 2 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.7 (2d ed. 1992); 3 *id.* § 18.3.

382. *See* Schneider, *supra* note 367, at 82–86 (noting the Court's inconsistency in describing the applicable standard of review in its "family privacy" cases).

383. 406 U.S. 205 (1972).

384. In *Yoder*, for instance, the Court hinted strongly that strict scrutiny was required because the mandatory schooling law burdened the free exercise rights of the Amish. *See id.* at 218. Although the Court also acknowledged the Constitution's solicitude for parents' rights, it ultimately grounded its application of strict scrutiny in the First Amendment. *See id.* at 233 ("[W]hen the interests of parenthood *are combined with a free exercise claim* of the nature revealed by this record, more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement *under the First Amendment.*") (emphasis added). *See also* Employment Div. v. Smith, 494 U.S. 872, 881 & n.1 (1990) (suggesting that strict scrutiny was justified in *Yoder* only because that case presented a unique combination of free exercise and substantive due process interests).

385. For a more complete articulation of this thesis in the broader context of the Constitution's protection of family privacy, see David D. Meyer, *The Paradox of Family Privacy*, 53 VAND. L. REV. (forthcoming March 2000).

386. *See* Runyon v. McCrary, 427 U.S. 160, 178 (1976) (state action dismantling

By contrast, with the usual exception of *Yoder*,[387] the cases in which the Court has been most aggressive in its scrutiny have each involved state action that threatened not merely to interfere with a parent's decisions concerning child-rearing, or even custody, but to extinguish the parent's very relationship with his or her child. *Santosky v. Kramer*[388] addressed the burden of proof needed to terminate parental rights; *M.L.B. v. S.L.J.*[389] concerned the ability of indigent parents to appeal an order terminating parental rights; and the Court's unwed-father cases dealt either with adoption decrees that would have extinguished their parental rights[390] or state-law presumptions of unfitness that would have yielded the same result.[391] In many of these cases, moreover, the Court specifically emphasized the catastrophic magnitude of the state's intrusion on the parent-child relationship in explaining the higher degree of protection afforded by the Constitution. This comes out quite clearly in *Santosky*, in which the Court decided that the Constitution requires "clear and convincing" evidence of the grounds for termination of parental rights because of the incomparable "severity" of the parent's loss.[392]

Likewise, in *Lassiter v. Department of Social Services of Durham County*[393] and *M.L.B. v. S.L.J.*,[394] the Court also underscored the "unique kind of deprivation" involved in a proceeding to terminate parental rights, pointing out that "[t]he object of the proceeding is 'not simply to infringe upon [the parent's]

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a form of private education desired by parents); Baker v. Owen, 423 U.S. 907 (1975), *affirming* 395 F. Supp. 294 (M.D.N.C. 1975) (state action subjecting children to corporal punishment against the wishes of parents); Prince v. Massachusetts, 321 U.S. 158 (1944) (state action prohibiting parents or guardians from enlisting the aid of their children in street-corner proselytizing); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (state action requiring the inoculation of children over the objection of their parents). Indeed, reviewing many of the Court's cases dealing with parents' child-rearing authority, Professor Robert Burt theorized that the Court accords some form of heightened constitutional protection to parental authority only when the Court happens to agree with the parents' particular child-rearing decisions. *See* Robert A. Burt, *The Constitution of the Family*, 1979 SUP. CT. REV. 329, 340 ("This is the thread that can be traced into a coherent pattern among the votes of the conservative bloc Justices...—that a specific, authoritarian style of parenting rather than the status of parent itself warrants constitutional deference.").

387. 406 U.S. 205 (1972).

388. 455 U.S. 745 (1982).

389. 519 U.S. 102 (1996).

390. *See* Lehr v. Robertson, 463 U.S. 248 (1983); Caban v. Mohammed, 441 U.S. 380 (1979); Quilloin v. Walcott, 434 U.S. 246 (1978). *Cf.* Armstrong v. Manzo, 380 U.S. 545 (1965) (divorced father).

391. *See* Stanley v. Illinois, 405 U.S. 645 (1972). It was likewise the prospect of a complete destruction of the relationship between a child and her biological father that led the dissenting Justices in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), to advocate heightened constitutional scrutiny of a state-law presumption of paternity favoring husbands of married mothers. *See id.* at 163 (White, J., dissenting); *id.* at 151 (Brennan, J., dissenting).

392. *Santosky*, 455 U.S. at 765–66. *See also id.* at 759 (emphasizing that a decree terminating parental rights is "*final* and irrevocable" (emphasis in original)).

393. 452 U.S. 18 (1981).

394. 519 U.S. 102 (1996).

interest,'...'but to end it.'"[395] It was the unparalleled "gravity of the sanction" involved, the Court explained, that justified special constitutional protection.[396] In so holding, the Court distinguished less drastic forms of state intervention, such as orders merely depriving a parent of custody. In *M.L.B.*, for instance, the Court cited Justice Blackmun's earlier observation that proceedings to terminate parental rights are "[u]nlike other custody proceedings" in that the former "leaves the parent with no right to visit or communicate with the child."[397] Although once again dutifully reciting the *Stanley* mantra that parents have "'an important interest'" in "the companionship, care, custody, and management" of their children,[398] the right that the Court expressly ranked as "fundamental" was the more particularized "'interest of parents in *their relationship with their children.*'"[399]

The unmistakable implication of these cases is that parents are entitled to a lesser degree of constitutional protection against state intrusion in the parent-child relationship that falls short of extinguishment. This, of course, does not mean that the Constitution is indifferent to lesser forms of state intrusion. The Court has, for example, applied something resembling strict scrutiny to a city zoning law that threatened a grandmother's custody of her grandson.[400] And lower federal and state courts similarly have applied heightened scrutiny to state action depriving a parent of custody.[401] And there can be no doubt that this nation's "deeply rooted" traditions concerning the family, the traditions that often have provided the

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395. *Id.* at 118 (quoting Lassiter v. Department of Soc. Serv., 452 U.S. 18, 27 (1981)).

396. *Id.* at 117–19. That special constitutional protection took the form in *M.L.B.* of a right of indigent parents to a waiver of costs usually required for the filing of an appeal, and in *Lassiter* to the qualified right of indigent parents to the assistance of counsel, although only in some cases.

397. *Id.* at 118 (quoting Lassiter v. Department of Soc. Serv., 452 U.S. 18, 39 (1981) (Blackmun, J., dissenting)).

398. *Id.* at 118 (quoting Lassiter v. Department of Soc. Serv., 452 U.S. 18, 27 (1981)).

399. *Id.* at 119 (quoting Santosky v. Kramer, 455 U.S. 745, 774 (1982) (Rehnquist, J., dissenting) (emphasis added)).

400. *See Moore v. City of East Cleveland*, 431 U.S. 494 (1977). I say *resembling* strict scrutiny because the plurality in that case, as in other "family privacy" cases, *see* Zablocki v. Redhail, 434 U.S. 374 (1978), seemed consciously to avoid the usual language of "compelling interests" and "narrowly tailoring" in describing its review. *See also* 431 U.S. at 499 ("when the government intrudes on choices concerning family living arrangements, this Court must examine carefully the importance of the governmental interests advanced and the extent to which they are served by the challenged regulation.").

401. *See* Fowler v. Robinson, No. 94-CV-836, 1996 WL 67994, at *12 (N.D.N.Y. Feb. 15, 1996) (collecting cases recognizing that the constitutional "right to family integrity is...implicated when state officials improperly deprive parents of custody"); *In re* Guardianship of Williams, 869 P.2d 661, 665 (Kan. 1994) ("child custody is a fundamental right of a parent"); *In re* A.R.A., 919 P.2d 388, 391 (Mont. 1996); *In re* Askew, 993 S.W.2d 1 (Tenn. 1999); *In re* M.W., 970 P.2d 284 (Utah Ct. App. 1998), *cert. granted*, 982 P.2d 87 (Utah 1999).

boundaries for the Constitution's implicit protection of "family privacy,"[402] includes a widely shared consensus that government should be sharply constrained in its ability to deprive a parent of custody. So, while a parent's interest in custody plainly falls within the scope of family privacy, the protection afforded by the Constitution to parents' rights appears to take the form of a sliding scale, requiring aggressive scrutiny of action that would destroy the relationship but applying more deferential forms of review to action that imposes lesser burdens on parental child-rearing authority. Certainly, the Court has yet to apply true strict scrutiny to state action that merely interferes with parental authority or custody without threatening the continuity of the parent-child relationship itself.[403]

Accordingly, although the loss of custody without a termination of parental rights is a very substantial intrusion upon the parent-child relationship, lower courts have scrutinized state action resulting in a loss of custody less rigorously than state action terminating parental rights. They have held, for instance, that when a state acts to deprive a parent of temporary custody on grounds of dependency or suspected abuse or neglect, it need prove the grounds for intervention only by a preponderance of evidence rather than the clear and convincing standard required in termination proceedings.[404] Whereas most courts think it unconstitutional to terminate parental rights upon a bare "best interests" finding,[405] some courts hold that a parent may be denied custody on that standard.[406] Likewise, no court has held that the Constitution requires a

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402. *See Moore*, 431 U.S. at 501, 504; *Zablocki*, 434 U.S. at 396 (Powell, J., concurring in the judgment).

403. *But cf.* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLITICS § 10.2.2, at 648 (1997) (concluding, based on *Santosky*, that "[t]he Supreme Court has recognized that parents have a fundamental right to custody of their children," and that deprivations of custody must therefore pass strict scrutiny).

404. *See* Mallory v. Mallory, 539 A.2d 995, 997–98 (Conn. 1988); *In re* Linda C., 451 N.Y.S.2d 268, 271–72 (N.Y. App. Div. 1982); Wright v. Arlington County Dep't of Soc. Serv., 388 S.E.2d 477, 478 (Va. Ct. App. 1990); *In re* Dependency of F.S., 913 P.2d 844, 845–47 (Wash. Ct. App. 1996). Indeed, some courts apply the preponderance standard even in cases terminating a non-custodial parent's visitation rights, although such an order is arguably tantamount to a termination of parental rights. *See In re* Marriage of Marshall, 663 N.E.2d 1113, 1118 (Ill. App. Ct. 1996); Stewart v. Stewart, 521 N.E.2d 956 (Ind. Ct. App. 1988); *In re* Adoption/Guardianship No. 87A262, 590 A.2d 165, 169 (Md. 1990). *But see In re* J.A., 962 P.2d 173, 184 (Alaska 1998) (holding that state may terminate visitation completely only upon clear and convincing proof, but may restrict visitation on proof by a preponderance of the evidence); *In re* A.C., 643 So. 2d 743, 748–50 (La. 1994) (termination of visitation rights on less than clear and convincing proof of parental misconduct is unconstitutional); Mullen v. Phelps, 647 A.2d 714, 724 (Vt. 1994) (same). The United States Supreme Court recently denied *certiorari* in a case in which the petitioner contended that it was unconstitutional for the state to appoint permanent guardians for a child based on a mere preponderance of evidence showing parental unfitness. *In re* Guardianship of Josephine, 705 N.E.2d 1177 (Mass. App. Ct. 1998), *review denied*, 707 N.E.2d 1078 (Mass. 1999), *cert. denied sub nom.* R.F. v. A.C., 119 S. Ct. 2396 (1999). *See also* 25 Fam. L. Rep. (BNA) 1315 (May 11, 1999) (listing questions presented by petition for *certiorari*).

405. *See supra* note 158 and accompanying text.

406. *See* Tailor v. Becker, 708 A.2d 626, 628 (Del. 1998) (upholding constitutionality of statute that mandated use of a "best interests" standard in custody

presumption in favor of shared physical custody of children following divorce. If state interference with a parent's desire for custody of his or her children could be justified only under the rigors of true strict scrutiny, then joint custody, encompassing both an equal division of physical custody and decision-making authority, would seemingly be constitutionally required. Although the divorce would make it impossible for both parents to retain the full custody each enjoyed while married, shared physical custody on an equal basis with joint decision-making authority would minimize the loss to each parent while accommodating their mutual constitutional claims to custody.[407] Yet no court has taken such a constitutional claim seriously.[408] Instead, the most that a divorcing parent is constitutionally entitled to, in the view of most courts, is the opportunity to visit and communicate with the child, in other words, the opportunity to have a *relationship* with the child, not necessarily to have custody, or to participate in basic decisions concerning the child's welfare or upbringing.[409] Thus, the practice of courts in divorce and custody cases around the country reflects an understanding that the degree of constitutional scrutiny appropriate for state intrusions upon the parent-child relationship must be tailored to the particular degree of intrusion. State action interfering with custody and child-rearing authority, yet not threatening the continued existence of the parent-child bond itself, is in fact tested under something much closer to intermediate scrutiny. The

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dispute between a non-custodial parent and a custodial step-parent); Watkins v. Nelson, 729 A.2d 484, 496–97 (N.J. Super. Ct. App. Div. 1999) (upholding award of custody to non-parents on a "best interests" standard; distinguishing *Santosky* and *Stanley* on the ground that "[t]here is no reason to use the unfitness test here, where there is no attempt or intention to terminate the biological parent's relationship with the child"). *But see* S.G. v. C.S.G., 726 So. 2d 806, 809–11 (Fla. Dist. Ct. App. 1999) (same holding under state constitution); *Askew*, 993 S.W.2d at 1, 4 (parent may not constitutionally be denied custody in favor of non-parent without proof of unfitness or substantial harm to child).

407. Several commentators have endorsed this view. *See* Ellen Canacakos, *Joint Custody as a Fundamental Right*, *in* JOINT CUSTODY AND SHARED PARENTING 223, 226 (Jay Folberg ed., 1984); *Developments in the Law – The Constitution and the Family*, 93 HARV. L. REV. 1156, 1329 (1980); Holly L. Robinson, *Joint Custody: Constitutional Imperatives*, 54 U. CIN. L. REV. 27 (1985).

408. Indeed, the only courts to have considered such a claim have rejected it almost out of hand. *See* Jacobs v. Jacobs, 507 A.2d 596, 598–99 (Me. 1986); Pournaras v. Pournaras, No. 46259, 1983 WL 2784, at *2–3 (Ohio Ct. App. Nov. 17, 1983). *Cf.* Bancroft v. Bancroft, 578 A.2d 114, 118 (Vt. 1990) (court need not decide squarely whether father had a constitutional right to seek joint custody over mother's objection because facts justified denying joint custody in any event). The *Pournaras* court explained: "We do agree with appellant that the *relationship* between a parent and a child is a fundamental right protected by the United States Constitution. We disagree, however, that *joint custody* is necessarily a fundamental right." *Pournaras*, 1983 WL 2784, at *3 (emphasis added) (citations omitted). The court went on to sustain the constitutionality of an Ohio law that made a court's authority to award joint custody contingent upon the consent of both parents under a mere rationality review. *See id.* at *3.

409. *See In re* Marriage of Charnogorsky, 707 N.E.2d 79, 87–88 (Ill. App. Ct. 1998) (non-custodial parent had no constitutional right to seek to change child's surname).

reason for the state's intrusion must be important, though perhaps not quite "compelling," and the means chosen must substantially serve that goal.[410]

The involuntary open-adoption plan proposed here readily could be justified under such a standard. The public interest served by the plan, safeguarding the welfare of children, is indisputably important; indeed, the Supreme Court repeatedly has identified it as "compelling" or of "the highest order."[411] Therefore, the only real question is whether the adoption plan sufficiently advances that goal to justify the admitted incursion on parents' rights. As I have tried to demonstrate, the benefits to children from conferring greater security and full familial legitimacy on their relationship with their custodial caregivers would be substantial.[412] The largest intrusion upon the rights of parents contemplated by the proposal, the loss of custody, is plainly justified by the need to avoid inflicting upon children the traumatic dislocation that occurred in the Baby Richard and Baby Jessica cases. The state's compelling interest in child welfare is advanced very substantially by a measure that enables children to avoid the obvious and serious psychological harm associated with a forcible relocation from long-term caregivers to the home of virtual strangers.[413] It is on this basis that

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410. *See generally* 3 ROTUNDA & NOWAK, *supra* note 381, § 18.3, at 16–19 (discussing Court's use of intermediate scrutiny).

411. *See, e.g.*, Denver Area Educ. Telecomm. Consortium, Inc. v. FCC, 518 U.S. 727, 747, 754 (1996) (plurality opinion) ("protection of children is a 'compelling interest'"); New Jersey v. T.L.O., 469 U.S. 325, 350 (1985) (concurring opinion) (state has compelling interest in "the education and training of young people"); Palmore v. Sidoti, 466 U.S. 429, 433 (1984) ("The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years.... The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 607 (1982) (state's "interest – safeguarding the physical and psychological well-being of a minor – is a compelling one").

412. *See supra* Part IV.B.1.

413. *See In re* Guardianship of Zachary H., 86 Cal. Rptr. 2d 7, 13 (Ct. App. 1999) (reviewing expert testimony concerning "life-long permanent damage to the child" and upholding constitutionality of award of custody to permanent guardians); Tailor v. Becker, 708 A.2d 626, 628 (Del. 1998) (upholding constitutionality of statute that permitted a custodial stepparent to retain custody against the claim of a fit non-custodial parent on basis of child's "best interests"). The Michigan trial judge in the Baby Jessica case summarized the evidence concerning the psychological impact of such a change of custody: "We had different degrees of testimony from the experts. All the way from permanent, serious damage, she would never recover from, down to the child would recover in time. But every expert testified that there would be *serious traumatic injury to the child at this time.*" *In re* Clausen, 502 N.W.2d 649, 669 (Mich. 1993) (Levin, J., dissenting) (emphasis added) (quoting trial court's unpublished opinion). The substantiality and durability of this harm is borne out in the burgeoning literature on attachment theory. *See supra* notes 210–14 and accompanying text. As one commentator recently summarized:

> Briefly stated, attachment theory notes that the child's attachment to his or her primary caretaker provides the basis for the child's developing sense of trust, self-reliance, and competence. Disruption of the child's attachment to the primary caregiver has been shown to be "psychologically traumatic and damaging, particularly in the pre-school years, but throughout childhood." Early childhood loss of the attached

permanent guardianship arrangements in the wake of failed adoptions, such as those provided for by recent legislative enactments,[414] are constitutional.[415] The increment of further intrusion on parental rights entailed in open adoption, including sharing parental status with the child's custodians and diminished opportunities to seek a change of custody, are, in turn, justified by the substantial incremental psychological and social benefits to children from gaining membership in a secure, fully normalized, and socially legitimated *family*.[416]

Moreover, in balancing the loss to a biological parent against these benefits to children, it must be remembered that the biological parent under this proposal retains the most important and essential rights of a parent: the right to know one's child and to be known by one's child, to be involved in the child's life, and to play a meaningful role in influencing the child's upbringing. These are the privileges and responsibilities that legislatures and courts have identified as "the core values of parenthood,"[417] and, arguably, what the Supreme Court has identified as the essence of what it means to "act as a [parent]" toward one's children.[418] Indeed, it is the sum and substance of the parent-child relationship enjoyed by thousands upon thousands of divorced or never-married non-custodial parents in this country. By exercising his residual legal rights of "personal contact,"[419] including visitation and other forms of communication, the non-custodial biological parent can demonstrate his love and affection for the child, express his dreams and values, and share in the child's experiences and maturation. Through caring interaction and moral example, the non-custodial parent inevitably will influence the child's own development and values, even without the benefit of a legal entitlement to "direct" the child's upbringing. Thus,

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> caregiver has been associated with behavioral and psychiatric problems throughout childhood and later in life, including, in some cases, depression, suicidal tendencies, and a "chronic inability to form meaningful relationships."

Alexandra Dylan Lowe, *Parents and Strangers: The Uniform Adoption Act Revisits the Parental Rights Doctrine*, 30 FAM. L.Q. 379, 412 (1996) (footnotes and citations omitted). *See also* James G. O'Keefe, *The Need To Consider Children's Rights in Biological Parent vs. Third Party Custody Disputes*, 67 CHI.-KENT L. REV. 1077, 1100–03 (1991); Scharnecchia, *supra* note 365, at 41–42 & nn.5 & 8 (quoting affidavits of psychiatrist and psychologist stating that child subject to such a custody transfer will suffer lasting psychological injury). *But cf.* Chambers, *supra* note 311 at 533 & n.208 (citing some research to the contrary).

414. *See supra* notes 184–85 and accompanying text.

415. *See, e.g., Zachary H.*, 86 Cal. Rptr. 2d at 19.

416. *See supra* Part III.B.2.

417. *See In re* Adoption by G.P.B., 733 A.2d 1181, 1186 (N.J. 1999).

418. *Lehr*, 463 U.S. at 261 (quoting Caban v. Mohammed, 441 U.S. 380, 389 & n.7 (1979)). In *Lehr*, the Court explained:

> When an unwed father demonstrates a full commitment to the responsibilities of parenthood by "[coming] forward to participate in the rearing of his child," his interest in personal contact with his child acquires substantial protection under the Due Process Clause. At that point it may be said that he "[acts] as a father toward his children."

Id. (citations omitted).

419. *Lehr*, 463 U.S. at 261.

the non-custodial parent under this adoption plan retains the ability to share in "'the emotional attachments that derive from the intimacy of daily association'" and to play a role in the child's instruction, and it is this irreducible core of the family relationship that society and individuals alike regard as most important.[420]

V. CONCLUSION

In the storm of public opinion that swirled around the broken adoptions in the Baby Jessica and Baby Richard cases, there seemed to be no shortage of culprits. To some, the villains were the judges who had ordered the children taken from their adoptive homes and turned over to genetic parents the children did not know, judges who were thought to be extravagantly cruel or even "inhuman."[421] To others, blame lay squarely with some set of parents, either biological or adoptive, who were said to have clung "selfishly" to the children instead of gracefully receding from the children's lives.[422] Regardless of the proper assignment of blame, agonized onlookers were soothingly reassured that the cases were the product of bizarre factual circumstances never likely to be repeated and, thus, any lingering concern for the children involved could safely be set aside.[423] In truth, however, not one of these characterizations was quite right.

Courts regularly, if infrequently, order the transfer of children from seemingly settled adoptive placements to the custody of biological parents who are largely or entirely unknown to the children.[424] And, overwhelmingly, the judges and parents who populate these controversies have not been heartless or disdainful of the consequences for the children involved. The parents, on all sides, have earnestly believed they were acting on behalf of children in real peril, and the judges typically have gone to pains to insist that their decisions transferring custody were the only ones allowed by the law. Ultimately, the largest blame for these tragedies lies not with these individual actors, who mostly struggled to do the best they could for the children within the confines of an unwieldy legal regime they only dimly comprehended. Rather, it lies with a society that has clung to a legal regime built almost reflexively around notions of parental fault and entitlement and that is unable to comprehend the possibility of more than one set of caring, deserving parents.[425] What is needed, then, is not legal reform aimed at thwarting a particular villain, the selfish parent or the callous judge, but reform

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420. The Court observed in *Lehr*: "[T]he importance of the familial relationship, to the individuals involved and to the society, stems from the emotional attachments that derive from the intimacy of daily association, and from the role it plays in 'promot[ing] a way of life' through the instruction of children...." *Id.* (quoting Smith v. Organization of Foster Families for Equal. & Reform, 431 U.S. 816, 844 (1977)).

421. *See* Bob Greene, *A Time for Bravery*, CHI. TRIB., May 31, 1995 (Tempo), at 1; *Tempers Heat Up in Adoption Case*, N.O. TIMES-PICAYUNE, July 14, 1994, at A3.

422. *See* Cahn, *supra* note 203, at 49 n.192; Gorenberg, *supra* note 4, at 178; Eileen Factor, *System Failed Baby Richard Long Ago*, CHI. TRIB., May 14, 1995 (op-ed article).

423. *See supra* note 4 and accompanying text.

424. *See supra* note 5.

425. *See* Barbara Bennett Woodhouse, *Of Babies, Bonding, and Burning Buildings: Discerning Parenthood in Irrational Action*, 81 VA. L. REV. 2493, 2515 (1995).

that thinks sensitively about the needs of children and creatively about how those needs might be met more fully.

In the years since the wrenching hand-offs of Jessica and Richard, the legislatures of many states have responded by giving judges new options. On one front, they have empowered judges to terminate the parental rights of more biological parents in order to clear the way for adoption.[426] On another, they have provided for a "fallback" form of custody where hoped-for adoptions fail, authorizing judges to award long-term custody to putative adoptive parents as guardians, while denying them the possibility of becoming true *parents* to the child in the eyes of the law.[427] The resort to long-term guardianship as a solution in these cases is not surprising. There has been surging interest in long-term guardianship as an alternative to parental custody or adoption in the context of abuse and neglect law as well.[428] Indeed, some have been so enamored with permanent guardianship that they have advanced it as a wholesale substitute for adoption in virtually all circumstances.[429]

These responses have not gone as far as possible, however, to advance the interests of children in cases where traditional adoption has failed. Despite recent expansions of the grounds for terminating parental rights, some biological parents still will be able to disrupt settled adoptive placements.[430] In those cases, guardianship may prevent a traumatic transfer of custody, but it is not a panacea. Much of the research into child development and psychology that justifies avoiding a transfer of custody in these cases also justifies going further and solidifying the children's relationship with their custodial caretakers in a way that is possible only through adoption.[431] Because it presumably would be impossible to terminate the rights of both biological parents—that is the reason why traditional adoption is not thought desirable or possible in these cases to begin with—a new model of adoption is required, one in which an adoption decree would create new custodial parents for the child without disregarding the parents who gave the child life. By fully legitimizing the familial status of the child and her caregivers and by giving their relationship the law's fullest measure of security, this model of adoption would promote their ability to develop the deepest sort of family bonds, to their great mutual benefit. At the same time, by ensuring that one or both biological parents can continue to play a meaningful role in the child's life, this model of adoption would be sufficiently sensitive to the rights of biological parents to satisfy the Constitution. Until the law, through such an innovation, confers upon these children the blessings of a fully validated *family*, society cannot rightfully claim to be doing all that it can on behalf of children.

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426. *See supra* Part III.A.

427. *See supra* Part III.B.

428. *See* Garrison, *supra* note 186, at 42-.; Goldhill, *supra* note 278, at 302–05; Schwartz, *supra* note 186, at 443.

429. *See* Bartholet, *supra* note 238, at 10.

430. *See supra* Part III.A.3.

431. *See supra* Part III.B.