

1996

Parents' Rights vs. Childrens' Interest: The Case of the Foster Child

Marsha Garrison

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>

 Part of the [Family Law Commons](#), [Juvenile Law Commons](#), [Other Law Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

22 N.Y.U. Rev. L. & Soc. Change 371 (1996)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

PARENTS' RIGHTS VS. CHILDREN'S INTERESTS: THE CASE OF THE FOSTER CHILD

MARSHA GARRISON*

Introduction	371
I. Parental Rights Termination in Context	374
A. The Evolution of the Modern Foster Care System.....	374
B. The Child's Need for Permanence: A Newly Discovered Problem Meets a Newly Available Solution.....	376
II. Termination vs. Preservation of Parental Contact: Which Serves Children's Interests?.....	377
A. Mechanisms for Ensuring Permanence: Adoption and Its Alternatives.....	377
B. Foster Care and Divorce: Are They Comparable?	379
C. Do Absent Parents Matter?	380
III. Why Has Adoption Been Preferred to Alternatives That Preserve the Parent-Child Relationship?	386
A. Termination vs. Preservation of Parental Contact: Practical Constraints and Confluent Adult Interests	386
B. The Cultural Symbolism of Adoption.....	387
IV. Adoption's Symbolic Benefits: Their Hidden Costs	390
A. Overestimation of the Benefits of Foster Care Alternatives.....	390
B. Categorical Decisionmaking that Ignores Children's Needs.....	391
C. Obscuring Benefits to the State Child Welfare System...	393
D. The Sacrifice of Children's Emotional Needs	394
Conclusion	396

INTRODUCTION

In recent years, advocates for children have often asserted that parental rights conflict with children's interests. Deference to parental rights, some have claimed, ensures that children are treated more like property than people.¹

* Professor of Law, Brooklyn Law School.

1. See, e.g., George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to Be Heard*, 27 FAM. L.Q. 365, 388 (1993) ("Children are literally 'repossessed' by their biological parents in the same manner as though they were property, capable of ownership, without independent human rights of their own."). A number of academic commentators have voiced similar concerns. See, e.g., ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 50 (1993) (discussing ways in which adoption

Children's advocates have not attacked parental rights with equal zeal in all contexts, however. The cases in which they have typically urged limitations on parental rights fall into two categories: One involves a conflict between a parent and a mature child;² the other involves a conflict between a parent and some other adult who has played a parent-like role in the child's life.³ In the latter group of cases — involving stepparents, lesbian coparents, and other long-term caregivers — advocates have not typically sought per se restrictions on parental rights; they have instead argued in favor of a functional definition of parentage that would extend parental status to adult care-givers without a biological or adoptive tie to the child.⁴

The Supreme Court has made tentative steps in the directions urged by children's advocates. The Court has required the States to ensure that parents do not overrule a mature minor's decision whether or not to bear a child,⁵ and has held that the fact of biological parentage is insufficient to

law subordinates children's interests to those of adults); Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293, 294 (1988) (criticizing the current legal regime for encouraging parental possessiveness); John J. Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633, 656 (1981) ("[I]t is clear that parental rights are all but absolute, even though they may conflict with the child's need for permanence."); Barbara Bennett Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992) (asserting that *Meyer and Pierce* constitutionalized a narrow patriarchal vision of the child as private property).

2. For representative examples of the literature on the rights of mature minors, see, e.g., FRANKLIN E. ZIMRING, *THE CHANGING LEGAL WORLD OF ADOLESCENCE* (1982); Hillary Rodham, *Children Under the Law*, 43 HARV. EDUC. REV. 487 (1973); Gary B. Melton, *Developmental Psychology and the Law: The State of the Art*, 22 J. FAM. L. 445 (1983-1984); Martha Minow, *Rights for the Next Generation: A Feminist Approach to Children's Rights*, 9 HARV. WOMEN'S L.J. 1 (1986); Elizabeth S. Scott, *Judgment and Reasoning in Adolescent Decisionmaking*, 37 VILL. L. REV. 1607 (1992).

3. The traditional rule, both in custody and visitation disputes, defers to the parent absent a showing of unfitness or abandonment. See, e.g., IRA M. ELLMAN, PAUL M. KURTZ, & KATHARINE T. BARTLETT, *FAMILY LAW: CASES, TEXT, PROBLEMS* 594-95 (2d ed. 1991) and cases cited therein.

4. See, e.g., Bartlett, *supra* note 1, at 314-15 (arguing in favor of custody decisionmaking based on an assessment of which connections between parent and child are most important); 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, 882 (1984) ("[T]he child's need for continuity in intimate relationships demands that the state provide the opportunity to maintain important familial relationships with more than one parent or set of parents."); Nancy D. 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) (proposing "expanding the definition of parenthood to include anyone who maintains a functional parental relationship with a child when a legally recognized parent created that relationship with the intent that the relationship be parental in nature"); Barbara Bennett Woodhouse, *Hatching the Egg: A Child-Centered Perspective on Parents' Rights*, 14 CARDOZO L. REV. 1747, 1758 (1993) (arguing in favor of a functional definition of fatherhood).

5. *Bellotti v. Baird*, 443 U.S. 622 (1979); *Hodgson v. Minnesota*, 497 U.S. 417 (1990).

establish a full claim to parental rights.⁶ Parenthood confers, in the Court's words, merely the

opportunity . . . to develop a relationship. . . If [the parent] grasps that opportunity and accepts some measure of responsibility for the child's future he may. . . 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.⁷

The perception that parents do make "uniquely valuable contributions" to their child's development has led children's advocates to favor retention of traditional parental prerogatives in most contexts other than that of the mature minor. The advocates have not sought more extensive state interference with parental decisionmaking in intact families⁸ nor greater restrictions on the rights of parents who divorce or separate.⁹ Indeed, the functional definition of parentage that the advocates have espoused would *extend* the number of adults who can claim parental prerogatives.

This article focuses on the case of the foster child. This is an interesting case because, in contrast to the general emphasis on relationship protection that has characterized advocacy on behalf of children, advocates have here argued in favor of faster and easier termination of the parent-child relationship.¹⁰ A comparison of the divorce and foster care literature illustrates the difference in approach: In divorce, the child's relationship with a noncustodial parent is almost invariably described as a positive factor in her development that should be encouraged and facilitated; termination of the parental relationship is approved only in extreme cases where

6. Most of the cases have dealt with the rights of unmarried fathers. See, e.g., *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Lehr v. Robertson*, 463 U.S. 248 (1983); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989).

7. *Lehr v. Robertson*, 463 U.S. at 262.

8. See, e.g., JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, *BEFORE THE BEST INTERESTS OF THE CHILD* 193-94 (1979) [hereinafter *BEFORE THE BEST INTERESTS*] (urging limitations on grounds for state intervention); Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 690-92 (1976) (same).

9. See Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 453 n.141 (1983) [hereinafter *Why Terminate?*] (listing sources criticizing restrictions on rights of noncustodial parents in divorce). For a noteworthy exception, see JOSEPH GOLDSTEIN, ANNA FREUD, & ALBERT J. SOLNIT, *BEYOND THE BEST INTERESTS OF THE CHILD* 39, 62 (2d ed. 1979) [hereinafter *BEYOND THE BEST INTERESTS*].

10. See *Why Terminate?*, *supra* note 9, at 447 & 450-51 (describing a number of model acts that would ease termination of parental rights). See also David J. Herring, *Inclusion of the Reasonable Efforts Requirement in Termination of Parental Rights Statutes: Punishing the Child for the Failures of the State Child Welfare System*, 54 U. PITT. L. REV. 139 (1992) (arguing that efforts to reunite foster children with natural parents punishes them); Russ, *supra* note 1, at 384-85 (urging lower standard of proof when termination proceeding is brought by child).

the parent threatens the child's health or safety. In foster care, however, the noncustodial parent is typically seen as a threat to the child's relationship with her foster parent or her opportunity to obtain adoptive parents; termination of parental rights is urged whenever the child's return home cannot be accomplished quickly.

The first part of the article analyzes whether the interests of foster children are genuinely different from those of children separated from a parent outside the foster care system, and whether a policy in favor of severance or preservation of the parent-child relationship best serves children's interests. It concludes that the interests of foster children are not so distinctive as to justify different legal principles and that the available evidence supports a policy in favor of preservation of the parent-child relationship for all children.

The second part of the article analyzes why — despite the evidence — children's advocates have tended to disfavor preservation of the parent-child relationship for foster children. It concludes that the preference results from state fiscal incentives, the desires of adoptive parents, and the symbolic benefits — legal rebirth and a fresh start — conferred on children by adoption. It also analyzes the hidden costs of that preference.

I.

PARENTAL RIGHTS TERMINATION IN CONTEXT

A. *The Evolution of the Modern Foster Care System*

The first basis for parental rights termination was poverty, pure and simple. Under the Elizabethan Poor Laws and their colonial counterparts, children whose parents could not support them were indentured as apprentices; the parents of indentured children lost custody and all related parental rights.¹¹

During the nineteenth century, poverty remained virtually synonymous with neglect and permanent separation of parent and child continued to serve as the preferred remedy for need.¹² But a new child protection movement increasingly focused on the child's interests as a basis for parent-child separation. The new child protection advocates urged separation

11. See, e.g., Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 889-902 (1975) (providing historical description of child welfare practices and their relationship to public assistance mechanisms); Jacobus ten Broek, *California's Dual System of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257, 291-98 (1964) (same); Mason D. Thomas, Jr., *Child Abuse and Neglect: Historical Overview, Legal Matrix, and Social Perspectives*, 50 N.C. L. REV. 293, 299 (1972) (tracing evolution of social attitudes and laws relating to child abuse and neglect).

12. See, e.g., Areen, *supra* note 11 (discussing nineteenth century child protection movement and the changes in child welfare practice that it instituted); *Why Terminate?*, *supra* note 9, at 435-40 (same). For original documents from the nineteenth century child protection movement, see 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY (Robert H. Bremner ed., 1971).

not to lower the state's public assistance outlay but, instead, to "rescue the child from . . . its contaminating surroundings and its faithless parents . . ."¹³

During the century since the child protection movement was born, child protective practice has altered in many respects. Poverty is no longer equated with neglect, and child welfare workers are expected to remedy parental inadequacy rather than summarily terminating parental rights.¹⁴ As a result of this shift in emphasis, foster care is now seen as a temporary placement, to be accompanied by social casework aimed at achieving parent-child reunification.¹⁵

Child protective practice moved away from the "rescue" philosophy for a variety of reasons. One was simply that many children could be returned to their parents safely and quickly. Because children referred to state child protection agencies still came almost exclusively from impoverished backgrounds,¹⁶ intervention often resulted from a temporary crisis — homelessness, for example — that did not mandate long-term placement.¹⁷ Longitudinal studies of foster children conducted during the 1960s and 70s, a period when reunification efforts were much less intensive than they are today, reported that a third to a half of children who entered foster care were returned home quite promptly.¹⁸ In these cases, child welfare officials perceived no need for termination of parental ties.

13. David Dudley Field, *The Child and the State*, THE FORUM I, 106-09 (1886), reprinted in part in 2 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY 205 (Robert H. Bremner ed., 1971). Field's appeal for child "rescue" focuses on the case of a five year old boy who resides in a nineteen-by-fifteen foot tenement room where his parents and their eight children "sleep, dress, wash, cook and eat."

He is a well-formed child, . . . and as he turns his bright eyes upon you . . . you see that he has quick intelligence. Altogether he is such a child as a father should look upon with pride and a true mother would press to her bosom. Yet the parents are miserably poor, the father half the time out of work, and the mother wan with the care of her family. This is not all. Father and mother both drink to excess, and each is intoxicated as often at least as Saturday night comes round. . . .

Id.

14. See, e.g., Marsha Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L.J. 1745, 1751-54 (1987) [hereinafter *Child Welfare Decisionmaking*] (describing transition in child welfare practice).

15. See, e.g., ALFRED KADUSHIN & JUDITH A. MARTIN, *CHILD WELFARE SERVICES* 344-45 (4th ed. 1988) (describing current child welfare philosophy).

16. A 1969 foster care survey found that 84% of all families requesting placement were from the two lowest socioeconomic groups. Martin Rein, Thomas E. Nutt, & Heather Weiss, *Foster Family Care: Myth and Reality*, in CHILDREN AND DECENT PEOPLE 24, 27-29 (Alvin L. Schorr ed., 1974). Children in foster care still come almost exclusively from impoverished circumstances. See KADUSHIN & MARTIN, *supra* note 15, at 357; *Child Welfare Decisionmaking*, *supra* note 14, at 1789 n.212.

17. See, e.g., KADUSHIN & MARTIN, *supra* note 15, at 358-62 (describing the factors that lead to foster care placement and their frequency).

18. See, e.g., ELIZABETH A. LAWDER, JOHN E. POULIN, & ROBERTA G. ANDREWS, 185 FOSTER CHILDREN FIVE YEARS AFTER PLACEMENT 16, tbl. 2 (Children's Aid Society of Pennsylvania, 1985) (finding that 56.2% of sample children admitted to foster care in 1978-79 were discharged within 1 year, 70% within 2 years); MARK F. TESTA & ROBERT M.

A second reason for the movement away from the rescue approach was a change in the "market" for children. With the advent of child labor laws around the turn of the century, state-paid foster care supplanted the earlier system of "boarding-out" in which the child was expected to earn his own keep. Adoption was not a realistic option for foster children during this period because adoptive parents preferred newborns rather than older children and the supply of newborn infants available for adoption greatly exceeded demand.¹⁹ Child welfare officials thus saw no benefits either to the child or the public from a policy in favor of parental rights termination; continued foster care placement, at exactly the same cost, would result in either event.

B. The Child's Need for Permanence: A Newly Discovered Problem Meets a Newly Available Solution

This consensus has shifted because the supply of newborn infants available for adoption has dramatically declined. With fewer adoptable infants, the adoption prospects of older foster children have markedly improved.²⁰ The changed adoption market has revived the appeal of the nineteenth century rescue philosophy and produced a new reform movement urging limitations on parental rights. These reform advocates have urged that efforts to reunify parent and child should be intensive but time-limited; if intensive efforts fail to permit reunification promptly, they advocate swift termination of parental rights in order to "free" the child for adoption.²¹

The appeal of this solution has been bolstered by psychological attachment, or bonding, theory. In its general form, attachment theory regards

GOERGE, POLICY AND RESOURCE FACTORS IN THE ACHIEVEMENT OF PERMANENCY FOR FOSTER CHILDREN IN ILLINOIS 57 (1988) (reporting that during 1976-86 median duration of Illinois foster care was one year); Shirley Jenkins, *Duration of Foster Care: Some Relevant Antecedent Variables*, 46 CHILD WELFARE 45 (1967) (finding that 54% of sample foster children left foster care within 3 months, 68% 1 year, and 75% 2 years). See also DAVID FANSHIEL & EUGENE B. SHINN, CHILDREN IN FOSTER CARE: A LONGITUDINAL INVESTIGATION 34, 116-21 (1978) (finding that 37% of sample foster children discharged from foster care within 2 years and 60% within 5 years; children discharged within 3 months excluded from study).

The primary outcome for foster children today is still reunification with family. Within a year after placement some one-quarter to one-third of children in foster care are reunited with family members; approximately one-half of children who leave the system will ultimately return to their parents' home or to that of other relatives. See KADUSHIN & MARTIN, *supra* note 15, at 417-19, tbls. 7-2, 7-3), 420-21 (summarizing reports).

19. See KADUSHIN & MARTIN, *supra* note 15, at 535-40 (describing changing adoption scene); *Why Terminate?*, *supra* note 9, at 443-44 (same).

20. See, e.g., KADUSHIN & MARTIN, *supra* note 15, at 606 (reporting that in 1970 a child over two was difficult to place for adoption, but that by 1980, white, nonhandicapped children up to seven or eight years were placed for adoption with "relatively little difficulty.>").

21. Some commentators have advocated termination after the child has been in foster care for a year or two; others have urged termination when he has developed ties to a foster parent. For a description of the various proposals, see *Why Terminate?*, *supra* note 9, at 447-53.

the making of emotional bonds as a basic feature of human nature; it thus emphasizes the powerful influence on human development of the child's first attachments, typically to his parents, as developmental models and precursors of life experience.²² Drawing on this theory, some prominent scholars have argued that separation from a parent figure is sufficiently damaging to a child's emotional development that, once an attachment is formed, it should be disrupted for only the gravest reasons.²³ These theoreticians have urged parental rights termination whenever the child forms an attachment to a foster parent.²⁴ Others, drawing on their conclusions, have argued in favor of prompt termination of parental rights, whether or not the child has formed a relationship with a foster parent who wants to keep her, in order to avoid the uncertainty and potential disruption of long-term foster care.²⁵

The modern movement to restrict parental rights thus seeks to avoid discontinuity in the child's relationships with parental figures and to ensure certainty in his placement status. Parental inadequacy is relevant to these aims because that inadequacy necessitated placement and prevents the child's immediate return home. But it is the child's need for an undisturbed parental relationship in a permanent home that provides the basis for proposals to sever the parent-child bond at the end of a time-limited period in foster care.

II.

TERMINATION VS. PRESERVATION OF PARENTAL CONTACT: WHICH SERVES CHILDREN'S INTERESTS?

A. *Mechanisms for Ensuring Permanence: Adoption and Its Alternatives*

Although current proposals to speed parental rights termination aim at providing permanence through adoptive placement, adoption is not the

22. For representative examples of the literature, see, e.g., CLINICAL IMPLICATIONS OF ATTACHMENT (Jay Belsky & Teresa M. Nezworski eds., 1988); JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT 1-38, 119-36 (1988) [hereinafter BOWLBY, A SECURE BASE]; JOHN BOWLBY, THE MAKING AND BREAKING OF AFFECTIONAL BONDS 1-25 (1979) [hereinafter BOWLBY, AFFECTIONAL BONDS]; THE PLACE OF ATTACHMENT IN HUMAN BEHAVIOR (Colin M. Parkes & Joan Stevenson-Hinde eds., 1982); Mary D. Salter Ainsworth, *Patterns of Infant-Mother Attachment: Antecedents and Effects on Development*, 61 BULL. N.Y. ACAD. MED. 771 (1985); Mary Main & Donna R. Weston, *The Quality of the Toddler's Relationship to Mother and to Father: Related to Conflict Behavior and the Readiness for Establishing New Relationships*, 52 CHILD DEV. 932, 939 (1981); Michael Rutter, *Resilience in the Face of Adversity: Protective Factors and Resistance to Psychiatric Disorder*, 147 BRIT. J. PSYCHIATRY 598 (1985).

23. BEYOND THE BEST INTERESTS, *supra* note 9, at 32-35; BEFORE THE BEST INTERESTS, *supra* note 8, at 3-14, 17-19, 193-95.

24. BEFORE THE BEST INTERESTS, *supra* note 8, at 188-89, 194-95 (requiring termination of parental rights at request of foster parent who continuously cared for child for two years).

25. See *Why Terminate?*, *supra* note 9, at 449-53 (describing several model standards taking this approach).

only method by which permanence could be achieved; the reform movement may have emerged contemporaneously with the changed adoption market, but its stated goals could be met without that alternative. Arrangements that permanently transfer custody of the child from the state to the foster parent, variously described as foster guardianship or "open" adoption,²⁶ would protect the child from removal to the same extent as a traditional adoptive placement.

These alternatives to traditional adoption offer children the an equivalent level of emotional security; researchers have almost invariably reported that children's expectations of permanence are based on evidence of their caregiver's commitment and intentions, not legal labels.²⁷ But the alternatives do differ from traditional adoption in their effect on the parent-child relationship. Traditional adoption, which legally transfers the child from one family to another, requires complete severance of parental ties while these other alternatives preserve the child's membership in his biological family;²⁸ the biological parent loses custody, but not the right to continued visitation and contact.

26. The term "open adoption" was apparently coined by Baran, Pannor, and Sorosky in 1976. They defined an open adoption as one "in which the birth parents meet the adoptive parents [and] relinquish all legal, moral, and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child's whereabouts and welfare." Annette Baran, Reuben Pannor, & Arthur D. Sorosky, *Open Adoption*, 21 Soc. WORK 97 (1976). Open adoption has been employed in some European countries, see *Why Terminate?*, *supra* note 9, at 445 n.105, but most American states do not expressly authorize it. Open adoptions thus remain fairly uncommon in the United States. For descriptions of open adoptions, see KATHLEEN SILBER & PATRICIA M. DORNER, *CHILDREN OF OPEN ADOPTION AND THEIR FAMILIES* (1990).

27. See, e.g., DAVID FANSHEL, *COMPUTERIZED INFORMATION FOR CHILD WELFARE: FOSTER CHILDREN AND THEIR FOSTER PARENTS* 63 (1979) (indicating that the majority of a group of children who had been in the same foster home for an average of six years thought of their foster homes as their "real homes"); JANET LAHTI, KAREN GREEN, ARTHUR C. EMLER, JERRY ZADNY, QUENTIN D. CLARKSON, MARIE KUEHNEL, & JIM CASCIATO, *A FOLLOW-UP STUDY OF THE OREGON PROJECT 9.3* (1978) [hereinafter *OREGON PROJECT*] (concluding that sample foster children's sense of permanence was not necessarily related to the legal permanence of the placement); EUGENE A. WEINSTEIN, *THE SELF-IMAGE OF THE FOSTER CHILD* 35 (1960) (describing child's expectation of placement permanence as "highly realistic" and correlated with attitudes of caseworker and foster parents); Kathleen Ohman Proch, *Differences Between Foster Care and Adoption: Perceptions of Adopted Foster Children and Adoptive Foster Parents*, 61 CHILD WELFARE 259, 265 (1982) (indicating that only 8 of 29 former foster children could distinguish between foster care and adoption and that most of the 8 remembered living in other foster homes); John Triseliotis, *Growing Up in Foster Care and After*, in *NEW DEVELOPMENTS IN FOSTER CARE AND ADOPTION* 157 (John Triseliotis ed., 1980) (reporting that, over time, the foster child seems to become "indistinguishable from other members of the caretaking family"). But see John Triseliotis & Malcolm Hill, *Contrasting Adoption, Foster Care, and Residential Rearing*, in *THE PSYCHOLOGY OF ADOPTION* 112 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (reporting that children in long-term foster care experienced "an element of anxiety about the impermanency of their position as foster children").

28. An adoption decree generally "relieve[s] the natural parents of all parental rights and responsibilities, and . . . terminate[s] all legal relationships between the adopted individual and his relatives, including his natural parents, so that the adopted individual thereafter is a stranger to his former relatives for all purposes including inheritance . . ." REV. UNIF.

Proposals to speed termination of parental rights in order to ensure permanence through adoption thus cannot be described as a simple issue of children's best interests; other alternatives could ensure permanence that also preserve the parent-child relationship. Justification for a policy favoring adoption over those alternatives must be based on the evidence demonstrating that severance of parental ties better serves children's interests than does preservation.

B. Foster Care and Divorce: Are They Comparable?

With one notable exception,²⁹ children's advocates have favored severance of the parent-child relationship in foster care and preservation in divorce. But from the child's perspective, divorce and long-term foster care placement are not obviously different.³⁰ In both contexts, the child's relationship with a noncustodial parent is maintained through visitation and sporadic contact rather than a day-to-day relationship. In both contexts, the child has another parent, or parent-figure, who provides day-to-day care and to whom the child is likely to be deeply attached. In both contexts, the day-to-day parent and the noncustodial parent may cooperate or, alternatively, express hostility and compete for the child's love.

Parents whose children enter foster care are less likely to exhibit capable parenting than those who divorce,³¹ but the available evidence does not suggest that parental capacity affects the strength of the parent-child relationship. As John Bowlby, one of our foremost developmental psychologists, has put it, "[t]he attachment of children to parents who by all ordinary standards are very bad parents is a never-ceasing source of wonder to those who seek to help them."³²

ADOPTION ACT § 14(a)(1), 9 U.L.A. 44 (1988). In recent years, some states have enacted special provisions for adoptions by stepparents or other relatives which do not terminate inheritance rights. See, e.g., N.Y. DOM. REL. LAW § 117(1)(d) (McKinney 1988).

29. BEYOND THE BEST INTERESTS, *supra* note 9, at 62.

30. For a more detailed comparison, see *Why Terminate?*, *supra* note 9, at 455-57.

31. Inadequate parenting is not unique to foster care cases, however. One study of a sample middle-class divorce population reports that 15% of sampled divorced fathers suffered from a severe psychiatric illness, 40% of father-child relationships were "profoundly troubled," and 20% of sample children moderately or intensely feared their fathers. JUDITH S. WALLERSTEIN & JOAN BERLIN KELLY, *SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE* 253 (1980).

32. JOHN BOWLBY, *MATERNAL CARE AND MENTAL HEALTH* 120 (1952) [hereinafter BOWLBY, *MATERNAL CARE*] ("Even when they are with kindly foster-parents these children feel their roots to be in the homes where, perhaps, they have been neglected and ill-treated, and [they] keenly resent criticisms directed against their parents."). See also JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, *SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE* 234 (1989) ("Most children do not give up on their biological fathers, even if they are ne'er-do-wells who have abandoned them without a backward glance. . . [they] construct a credible image of the father they never knew from any scraps of information that they can collect and tend to idealize him in the process."); Sherwin S. Radin, *The Psychological Parent Concept in Contested Custody Cases*, 11 J. PSYCHIATRY & L. 503, 512-13 (1983) (stating that the psychological parent may be an unfit parent).

In sum, while foster care and divorce are clearly different and we lack research providing direct comparisons, there is much to suggest that, from the perspective of the child, these two situations present more similarities than differences. In each case, a parental attachment must be maintained through visitation rather than day-to-day contact.

C. *Do Absent Parents Matter?*

Joseph Goldstein, Anna Freud, and Albert Solnit, a distinguished group of coauthors who have served as the permanence movement's leading theoreticians, concur in this assessment. They stress the strength of children's attachment even to inadequate parents³³ and argue that divorce and foster care are sufficiently similar, from the child's perspective, so as to mandate consistent legal rules.³⁴ But, in contrast to what one would expect based on these premises, they urge legal standards that would terminate the visitation rights of a noncustodial parent in both the divorce and foster care context. The basis for this approach is the claim that children suffer "devastating consequences" from "maintaining contact with two psychological parents who are not in positive contact with each other . . . A 'visiting' or 'visited' parent has little chance to serve as a true object for love, trust, and identification, since this role is based on his being available on an uninterrupted day-to-day basis."³⁵

While Goldstein, Freud, and Solnit make this claim as a basis for proposed legal standards that would terminate the noncustodial parent's visitation rights in *both* divorce and foster care, children's advocates have used the argument selectively. None has publicly favored parental rights termination in divorce; most have used the claim to justify parental rights termination for foster children.

But while there is evidence to support a consistent approach for divorce and foster care, current psychological research fails to support the claim that custodial parents are the only ones who count.³⁶ Although a wealth of data, from diverse sources and theoretical schools, has confirmed the importance of the parent-child relationship as a determinant of the

33. BEFORE THE BEST INTERESTS, *supra* note 8, at 193-94 (describing limited grounds for state intervention).

34. BEYOND THE BEST INTERESTS, *supra* note 9, at 62 (proposing application of an identical standard "[w]hether the problem arises in separation, divorce, adoption, neglecting parent, foster care, or even juvenile delinquency proceedings"). Other things being equal, Goldstein, Freud, and Solnit would permit the court to award custody to the parent most willing to permit visitation. *Id.* at 118.

35. *Id.* at 38 ("Loyalty conflicts are common and normal under such conditions and may have devastating consequences by destroying the child's positive relationships to both parents.").

36. Researchers, studying both intact and separated families, have typically reported that high levels of conflict between parents are correlated with psychological problems in children. See *infra* note 50 and sources cited therein.

child's personality, resilience, and relationships with others,³⁷ that research has also established that children are capable of maintaining many emotional bonds simultaneously. The strength of a child's attachments is not subject to precise measurement, and a strong attachment with one parent figure does not mean that attachments to other parent figures are weak.³⁸

Decades of research have also established that a child's ties to his parents do not lose their importance simply as a result of separation or loss of day-to-day contact.³⁹ "The parent-child tie . . . can be greatly distorted [but it] is not to be expunged by mere physical separation."⁴⁰ Not even the substitution of a parent replacement, for example a stepparent, renders the absent parent unimportant. Judith Wallerstein, one of our best-known divorce researchers, reports that only one child in a sample of fifty-five children with stepfathers fully substituted stepfather for father; for the remainder of the children, she concluded, stepparents were less powerful determinants of emotional well-being than the absent biological parent.⁴¹

37. For representative examples of the literature, see, e.g., BOWLBY, A SECURE BASE, *supra* note 22, at 171-80; MARGARET S. MAHLER, FRED PINE & ANNI BERGMAN, THE PSYCHOLOGICAL BIRTH OF THE HUMAN INFANT (1975); SCIENTIFIC FOUNDATIONS OF DEVELOPMENTAL PSYCHIATRY (Michael C. Rutter ed., 1980); J. Glen H. Elder, Avshalom Caspi, & Geraldine Downey, *Problem Behavior and Family Relationships: Life Course and Intergenerational Themes*, in HUMAN DEVELOPMENT AND THE LIFE COURSE: MULTIDISCIPLINARY PERSPECTIVES 293 (Aage B. Sorensen, Franz E. Weinert, & Lonnie R. Sherrod eds., 1986); Seymour Epstein, *The Self-Concept: A Review and the Proposal of an Integrated Theory of Personality*, in PERSONALITY: BASIC ASPECTS AND CURRENT RESEARCH (Ervin Staub ed., 1980). See also *infra* notes 45-48 and sources cited therein.

38. See, e.g., MICHAEL C. RUTTER, MATERNAL DEPRIVATION REASSESSED 141-42 (2d ed. 1981) (reviewing research and reporting that "[a]ll studies have shown that most children develop multiple attachments" and noting that multiple attachments tend to have similar functions although different levels of intensity); Everett Waters & Donna M. Noyes, *Psychological Parenting vs. Attachment Theory: The Child's Best Interests and the Risks in Doing the Right Things for the Wrong Reasons*, 12 N.Y.U. REV. L. & SOC. CHANGE 505, 509, 513-14 (1983-1984) (describing the "ease with which new attachment relationships can form in infancy and early childhood" and the fact that "multiple attachments are the rule rather than the exception"); Main & Weston, *supra* note 22 at 932 (describing variable patterns of attachment between young children and their fathers and mothers).

39. For descriptions of the research findings, see RUTTER, *supra* note 38; Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 563-72 (1983-1984); *Child Welfare Decisionmaking*, *supra* note 14, at 1777-86; *Why Terminate?*, *supra* note 9, at 455-60; Waters & Noyes, *supra* note 38. See also Penny Ruff Johnson, Carol Yoken, & Ron Voss, *Family Foster Care Placement: The Child's Perspective*, 74 CHILD WELFARE 959, 963, 967 (1995) (reporting that all but 3 of 95 children aged 11-14 who had been in foster care for between 6 months and 2 years indicated that they missed their families and that 56% reported "they miss their parents most of the time").

40. BOWLBY, MATERNAL CARE, *supra* note 32, at 114. See also WALLERSTEIN & BLAKESLEE, *supra* note 32, at 234 ("Children do not dismiss . . . [a parent] just because there has been a divorce. . . [That parent remains] a part of the child's emotional life, a factor in the child's self-esteem, self-image, aspirations, and relationships with the opposite sex.").

41. WALLERSTEIN & BLAKESLEE, *supra* note 32, at 234, 246-50. Most of the sample children nonetheless described their relationships with stepfathers positively. Wallerstein reports that 90% of the younger children in the study felt that their lives had been enhanced

An absent parent remains important to the child because the parental relationship is a primary source of the child's identity and self-esteem.⁴² As one foster child poignantly put it, "if your mother doesn't love you, who will?"⁴³ The parent also represents the child's history and his unique biological inheritance. Even children adopted at birth often wish to learn about their biological parents; some go to extraordinary lengths to obtain information about their origins, family history, and the reasons for their relinquishment.⁴⁴

Rather than resolving the child's relationship with a parent from whom the child is separated, loss of contact thus has the potential consequence of making such a resolution far more difficult. Parental absence may enhance the child's tendency toward self-blame or exaggeration; the child may idealize the absent parent, blame herself for disruption in the relationship, or exaggerate the parent's flaws.⁴⁵ Such extreme responses impede the child's ability to effectively mourn her loss and maintain her self-esteem.⁴⁶ Loss of contact may also inhibit the child's ability to form a realistic assessment of her situation and current, realistic relationships.⁴⁷

by their stepfathers and two-thirds felt able to love step-fathers and fathers at the same time. *Id.* at 247.

42. See, e.g., STANLEY COOPERSMITH, *THE ANTECEDENTS OF SELF-ESTEEM* (1967) (analyzing relationship between parental attitudes and practices and their children's self-esteem); Ner Littner, *The Importance of Natural Parents to the Child in Placement*, 54 *CHILD WELFARE* 175, 178-81 (1975) (discussing advantages to foster children of contacts with natural parents); Patricia G. Morisey, *Continuum of Parent-Child Relationship in Foster Care, in FOSTER CARE IN QUESTION: A NATIONAL REASSESSMENT BY TWENTY-ONE EXPERTS* 148 (Helen D. Stone ed., 1970) (discussing theoretical basis for maintaining foster child's relationship with parents).

43. Katherine G. Levine, *The Placed Child Examines the Quality of Parental Care*, 67 *CHILD WELFARE* 301, 306 (1988).

44. See DAVID M. BRODZINSKY, MARSHALL D. SCHECHTER, & ROBIN M. HENIG, *BEING ADOPTED: THE LIFELONG SEARCH FOR SELF* 71-82, 101-10 (1992) (reporting that even a child adopted at birth feels a sense of loss for the biological family); Marshall D. Schechter & Doris Bertocci, *The Meaning of the Search, in THE PSYCHOLOGY OF ADOPTION* 62 (David M. Brodzinsky & Marshall D. Schechter eds., 1990) (reporting that adopted persons search for essential connections to their past).

45. For both case histories and theoretical perspectives, see, e.g., BOWLBY, *MATERNAL CARE*, *supra* note 32, at 124-25; Beatrice L. Garrett, *Developing the Conviction in the Foster Child that He Is Worthwhile, in FOSTER CARE IN QUESTION*, *supra* note 42, at 16, 22; Levine, *supra* note 43, at 304-06; Littner, *supra* note 42, at 178-81; Ellen R. Rest & Kenneth W. Watson, *Growing Up in Foster Care*, 63 *CHILD WELFARE* 291, 298-304 (1984); Jonathan M. Stein & André P. Derdeyn, *The Child in Group Foster Care*, 19 *AM. ACAD. CHILD PSYCHIATRY* 90, 92-93 (1980). See also WALLERSTEIN & KELLY, *supra* note 31, at 218, 256 (describing similar tendencies among children of divorce); Elinor B. Rosenberg & Thomas M. Horner, *Birthparent Romances and Identity Formation in Adopted Children*, 61 *AM. J. ORTHOPSYCHIATRY* 70 (1991) (describing similar issues in development of adopted children).

46. See ERNA FURMAN, *A CHILD'S PARENT DIES: STUDIES IN CHILDHOOD BEREAVEMENT* 46-48 (1974) (concluding that healthy mourning following a loss through separation poses particular difficulties for children, which are worsened by making the separation total); see also Levine, *supra* note 43, at 302-08; Littner, *supra* note 42, at 178-79; Stein & Derdeyn, *supra* note 45, at 92-93.

47. See, e.g., Levine, *supra* note 43, at 306-08 (describing case studies of foster children whose unresolved feelings of loyalty to parents impeded development of relationships with

I do not mean to suggest that biological parents are the only influence upon their child's personal development or the only sources of her identity and self-esteem. Psychological research has confirmed, again and again, that it is the quality of the child's care over time that is the most important determinant of well-being.⁴⁸ But that research has also confirmed that absent parents remain important to their children. It has confirmed the healing effects of continued parental contact. It has confirmed that our efforts to deny the power of an absent parent only hinder the child's ability to effectively mourn her loss.

Visitation with a noncustodial parent is not, of course, invariably beneficial to children. Foster children placed as infants who have never experienced more than sporadic office visits with their biological parents may not profit significantly from continued contact.⁴⁹ Some abusive parents pose real risks to their child's physical safety; some mentally ill parents may be incapable of meaningful interaction. Exposure to serious conflict between parents — in an intact or separated family — has also been found to pose risks to a child's emotional development.⁵⁰ But there is no reason to

foster families); Stein & Derdeyn, *supra* note 45, at 92-93 (reporting that foster parents and caseworker were often viewed by the foster child as persecutors who had stolen her from loving parents, and that this situation more likely to arise when visitation was disallowed or limited).

48. See, e.g., BOWLBY, *A SECURE BASE*, *supra* note 22, at 171-72 (summarizing research and concluding that "it is necessary to think of each personality as moving through life along some developmental pathway, with the particular pathway followed always being determined by the interaction of the personality as it has so far developed and the environment in which it is then finding itself"); RUTTER, *supra* note 38, at 72-73, 109-113, 124-25 (summarizing research and concluding that "[a]ltogether the results strongly suggest that it is the quality of relationships which matter"); *Child Welfare Decisionmaking*, *supra* note 14, at 1778-80 (summarizing and describing research); see also Antonia T. Bifulco, George W. Brown, & Tirril D. Harris, *Childhood Loss of Parent, Lack of Adequate Parental Care and Adult Depression: A Replication*, 12 J. AFFECTIVE DISORDERS 115 (1987) (summarizing study tracing connections between adult depression and childhood experience).

49. The same applies, of course, to children whose parents divorced while they were infants.

50. See, e.g., WALLERSTEIN & KELLY, *supra* note 31, at 49, 70-71 (reporting that children experience loyalty conflict and unhappiness as a result of parental discord); Jay Belsky, Lise Youngblade, Michael Rovine, & Brenda Volling, *Patterns of Marital Change and Parent-Child Interaction*, 53 J. MARRIAGE & FAM. 487 (1991) (reporting that the quality of father-child relationship is frequently correlated with the quality of the father-mother relationship); E. Mavis Hetherington, Martha Cox, & Roger Cox, *Play and Social Interaction in Children Following Divorce*, 35 J. SOC. ISSUES 26 (1979); Janet R. Johnston, *Children's Adjustment in Sole Custody Compared to Joint Custody Families and Principles for Custody Decision Making*, 33 FAM. & CONCILIATION CTS. REV. 415, 420-21 (1995) (reviewing research and concluding that "ongoing and unresolved conflict between divorced parents has detrimental effects on children, especially boys" and that in these cases substantial amounts of access to both parents is associated with poorer adjustment); James L. Peterson & Nicholas Zill, *Marital Disruption, Parent-Child Relationships, and Behavior Problems in Children*, 48 J. MARRIAGE & FAM. 295 (1986) (discussing correlations between parent's post-divorce relationship and children's behavior); Marsha Kline, Janet R. Johnston, & Jeanne M. Tschann, *The Long Shadow of Marital Conflict: A Model of Children's Postdivorce Adjustment*, 53 J. MARRIAGE & FAM. 297 (1991) (discussing negative effects of parental conflict on children's postdivorce adjustment). *But see* Joseph M. Healy, Janet E.

suppose that serious conflict between biological and foster (or adoptive) parent is more likely than between divorced parents. Nor are most parents of foster children abusive or incapable of interaction.

Given the importance and nonexclusivity of parental attachments, the endurance of those attachments without day-to-day contact or adequate parenting, and the negative effects of prolonged loss of contact, it is not surprising that researchers studying both children of divorce and foster care have typically reported benefits from parental visitation,⁵¹ no researcher, comparing children who have retained contact with a noncustodial parent and those who have not, has reported that the visited children are worse off. While we do not yet know the extent to which the benefits of parental contact persist into adulthood⁵² and divorce researchers have less consistently reported clear advantages from parental visitation than have their counterparts studying foster children,⁵³ the research supports current divorce laws which deny the custodial parent the right both to unilaterally curtail visitation and to "discard" the noncustodial parent when a stepparent becomes available.⁵⁴ It could and, one would think, should

Malley & Abigail J. Stewart, *Children and Their Fathers After Parental Separation*, 60 AM. J. ORTHOPSYCHIATRY 531 (1990) (reporting that frequent visits with noncustodial father were linked to fewer child behavior problems when level of conflict between parents was high).

51. For recent reviews of the divorce research, see, e.g., Andrew J. Cherlin, Frank F. Furstenberg Jr., P. Lindsay Chase-Landsdale, Kathleen E. Kiernan, Philip K. Robins, Donna R. Morrison, & Julien O. Teitler, *Longitudinal Studies of Effects of Divorce on Children in Great Britain and the United States*, 252 SCIENCE 1386 (1991) [hereinafter *Longitudinal Studies*]; Joan B. Kelly, *Current Research on Children's Post-Divorce Adjustment: No Simple Answers*, 31 FAM. & CONCILIATION CTS. REV. 29 (1993). For a description of the foster care research, see *Why Terminate?*, *supra* note 9, at 461-69 (summarizing reports).

52. See FRANK F. FURSTENBERG & ANDREW J. CHERLIN, *DIVIDED FAMILIES: WHAT HAPPENS TO CHILDREN WHEN PARENTS PART* 72-73 (1991) (reporting, based on National Survey of Children (NSC) data, that among a sample of young adults who had experienced divorce as children, those "who had retained stable, close ties to their fathers were neither more nor less successful than those who had had low or inconsistent levels of contact and intimacy with their fathers"); TRUDY FESTINGER, *NO ONE EVER ASKED US . . . A POSTSCRIPT TO FOSTER CARE* 95-96 (1983) (finding that in sample of young adult former foster children discharged from family homes, contact with relatives generally had no impact on "their view of themselves and their lives" at time of interview in young adulthood while, for those discharged from group care, contact with kin was associated with "more positive appraisal of themselves and their lives"); ROSALIE B. ZIMMERMAN, *FOSTER CARE IN RETROSPECT* 91 (1982) (finding, in study of adult subjects who had been in foster care, that those who had been in long-term care were more frequently represented in adequately functioning group if visited by parents; in total group of former foster children, frequent parental visiting was associated with low adult functioning but "these were the youngsters who for the most part were returned to the custody of the natural parents, and it is that fact rather than the visiting itself that is thought to be truly associated with outcome").

53. See, e.g., FURSTENBERG & CHERLIN, *supra* note 52, at 72-73; Kelly, *supra* note 51, at 37-41; *Longitudinal Studies*, *supra* note 51.

54. Denial of visitation after divorce is extremely rare. In one sample of 426 divorce decrees only nine failed to grant visitation. W.P.C. Phear, J.C. Beck, B.B. Hauser, S.C. Clark, & R.A. Whitney, *An Empirical Study of Custody Agreements: Joint Versus Sole Legal Custody*, 11 J. PSYCHIATRY & L. 419, 428 (1983). For descriptions of the legal standards governing parental visitation rights after divorce, see, e.g., Steven L. Novinson, *Post-Divorce Visitation: Untying the Triangular Knot*, 1983 U. ILL. L. REV. 121. Visitation rights

support a similar approach in foster care:⁵⁵ As adoption alternatives can resolve the problem of placement impermanence while preserving the benefits of parental visitation, this option would appear to be preferable to traditional adoption. This approach would have the added advantage of conformity with legal practice in divorce, the most common source of family disruption.⁵⁶ And when foster parents are unwilling to adopt, this approach may even offer more permanence; if the child must leave beloved foster parents, the "permanent" home she has been offered exposes her to yet another loss, another period of being on trial, another potential rejection.⁵⁷

When I wrote on this issue in greater detail a decade ago to urge that foster guardianship or "open" adoption should become the norm for children in long-term foster care,⁵⁸ the evidence on the advantages of preserving the parental relationship was sufficiently strong that I believed these

survive the custodial parent's remarriage and, in most states, are not contingent upon payment of child support obligations. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS* 731-32, 812 (2d ed. 1988). The child's interest in continued visitation may even serve as a basis for denying the custodial parent the right to move. For descriptions and criticisms of various state standards governing relocation, see, e.g., Katherine C. Sheehan, *Post-divorce Child Custody and Family Relocation*, 9 HARV. WOMEN'S L.J. 135 (1986); Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757 (1985).

55. One pair of experts, after reviewing the evidence on parental visitation following divorce, note that

despite the mixed evidence, the idea that continuing contact with fathers makes a difference to a child's psychological well-being is so plausible and so seemingly grounded in theories of child development that one is reluctant to discount it . . . We remain convinced that when parents are able to cooperate in childrearing after a divorce and when fathers are able to maintain an active and supportive role, children will be better off in the long run . . .

FURSTENBERG & CHERLIN, *supra* note 52, at 73.

56. Divorce standards are also typically applied where a nonparent obtains custody outside the foster care system. For descriptions of case law and statutes governing parent/third party custody and visitation disputes, see, e.g., Robert J. Levy, *Rights and Responsibilities for Extended Family Members?* 27 FAM. L.Q. 191 (1993); Richard S. Victor, Michael A. Robbins, & Scott Bassett, *Statutory Review of Third-Party Rights Regarding Custody, Visitation, and Support*, 25 FAM. L. Q. 19 (1991); Lucy S. McGough & Lawrence M. Shindell, *Coming of Age: The Best Interests of the Child Standard in Parent-Third Party Custody Disputes*, 27 EMORY L.J. 209 (1978).

57. See James A. Rosenthal, *Outcomes of Adoption of Children with Special Needs*, 3 THE FUTURE OF CHILDREN 77, 78-84 (1993) (reporting that, as special needs adoptions increased during the 1970s and 80s, so did rate of disruption; studies report highly disparate findings on disruption rates, ranging from 2% to 53%). See also Richard P. Barth & Marianne Berry, *Outcomes of Child Welfare Services under Permanency Planning*, 61 SOC. SERV. REV. 71, 76 (1987) (reporting that increased efforts to place former foster children produced increased disruption rate and noting disparate rates of disruption).

The open adoption approach might also facilitate the provision of follow-up services to the child and family. Commentators have noted that "serious difficulties have arisen because of the lack of sufficient follow-up services offered by . . . the adoption agency . . . Even when families have adopted disturbed or handicapped children, it has been assumed that good parenting would, for the most part, overcome any trauma the child has undergone . . . This has proven illusory for many families." KADUSHIN & MARTIN, *supra* note 15, at 636.

58. *Why Terminate?*, *supra* note 9.

alternatives would indeed become far more popular. The use of these options has, in fact, increased. But, in contrast to what one would expect from an analysis of foster children's needs and interests, adoption remains the preferred alternative.⁵⁹ The final question I wish to address is why.

III.

WHY HAS ADOPTION BEEN PREFERRED TO ALTERNATIVES THAT PRESERVE THE PARENT-CHILD RELATIONSHIP?

A. *Termination vs. Preservation of Parental Contact: Practical Constraints and Confluent Adult Interests*

One reason for preferring adoption over continued foster care is their comparative cost. Foster care is expensive. If the child is adopted by parents who can afford to pay his keep, he costs the state nothing, and even subsidized adoption is cheaper than foster care.⁶⁰ But while the savings that adoption can achieve have undoubtedly contributed to its popularity, both open adoption and foster guardianship could achieve these same results.

Traditional adoption is a widely recognized legal concept while open adoption and foster guardianship are new approaches, with less certain procedures and results.⁶¹ This fact may bear some responsibility for the preference accorded traditional adoption, but guardianship is a well developed concept outside the foster care context and open adoption has been routinely employed in many European countries.⁶²

A more important reason why traditional adoption has been preferred to its alternatives, I suspect, is its greater appeal to prospective adoptive parents. While the diminished supply of adoptable infants has indeed expanded the adoption market so that many previously unadoptable children

59. A preference for adoption over guardianship or long-term foster care is now mandated by the federal Adoption Assistance and Child Welfare Act of 1980. See 42 U.S.C. §§ 670-671 (1994). The Adoption Assistance and Child Welfare Act does not specify whether traditional adoption should be preferred to open adoption.

60. See Irving Schulman & Richard E. Behrman, *Adoption: Overview and Major Recommendations*, 3 THE FUTURE OF CHILDREN 8 (1993) (comparing foster care rate and adoption subsidy rate in several states and concluding that "in virtually all states the adoption subsidy rate is significantly lower than the foster care rate for the same child"). The foster care rate does not take into account the administrative expenses of foster care and thus underestimates the cost differential. See also MAYOR'S COMM'N FOR THE FOSTER CARE OF CHILDREN, CITY OF NEW YORK, CHILD WELFARE AT A CROSSROADS: RETHINKING, REDIRECTING, REINVESTING 65 (1993) [hereinafter CHILD WELFARE AT A CROSSROADS] (estimating one year savings to New York City from 2,443 foster child adoptions in 1992-93 of \$18 million).

61. Because an open adoption preserves the opportunity for continued contact and visitation, there may be litigation over visitation enforcement that would not occur in a traditional adoption. For a detailed discussion of how open adoption laws might be structured to reduce such litigation maximally, see *Why Terminate?*, *supra* note 9, at 479-81, 496.

62. See *Why Terminate?*, *supra* note 9, at 445 n.105 (listing countries offering open adoptions).

are now in demand, former foster children (typically older, nonwhite, often with special needs)⁶³ are still not the easiest of children to place. Although the pool of potential adoptive parents has diversified over the last decade, many still seek to adopt because of infertility⁶⁴ and prefer a child who is unencumbered with another family.

The comparative costs of adoption vs. foster care, the altered adoption market, and the interests of prospective adoptive parents undoubtedly have an interactive effect. Most of the adoptive parents who might save the state money want a child that is exclusively their own. Termination of parental rights followed by adoption thus meets both the fiscal needs of the state and the desires of a well-organized and sympathetic adult interest group.

B. *The Cultural Symbolism of Adoption*

In addition to serving confluent state and adult interests, adoption offers powerful symbolic benefits to children. An adoption order provides a legal rebirth — complete with a new name and identity — into a new family.⁶⁵ The child who is adopted is thus legally reincarnated. Because adoption symbolically grants the child the good parents and good life she previously lacked, that legal reincarnation has a redemptive quality not unlike a baptismal or conversion experience.

The symbolic benefits conferred by adoption are magnified by the stigma attached to foster care status. Foster care is a form of public assistance that denotes family failure and entails ongoing state supervision.⁶⁶ The parents of children in foster care placement are almost invariably from the bottom of the socioeconomic ladder,⁶⁷ while adoptive parents are typically middle-class,⁶⁸ intact, two-parent families are almost as common among adoptive parents as they are rare among those whose children go into placement.⁶⁹ Adoption thus offers a permanent improvement in socioeconomic status in a socially preferred family structure.

63. See, e.g., Kathy S. Stolley, *Statistics on Adoption in the United States*, 3 *THE FUTURE OF CHILDREN* 26, 34 (1993) (reporting that in 1988 median age of children awaiting adoptive placement was 8.3 years, 39.1% were black, 63.5% had one or more special needs, and almost 55% had been waiting two or more years to be placed for adoption).

64. For a description of the current pool of adoptive parents, see Judith K. McKenzie, *Adoption of Children with Special Needs*, 3 *THE FUTURE OF CHILDREN* 62, 70-72 (1993).

65. Traditionally adoption severs all legal relationships between the child and his biological relatives. See *supra* note 28 and accompanying text.

66. Foster children sometimes report embarrassment and other negative feelings associated with their foster care status. See Rest & Watson, *supra* note 45, at 299-304; Triseliotis & Hill, *supra* note 27, at 113-16.

67. See *supra* note 16 and accompanying text.

68. See, e.g., Stolley, *supra* note 63, at 38 (stating that unrelated adoptions occur more frequently among whites and those of higher socioeconomic status).

69. See, e.g., *id.* at 37 (indicating that "almost all adopting parents are married at the time of the adoption" but noting increased tendency of single parents to adopt during 1980s).

The redemption that adoption confers upon the child is also dependent upon the severance of ties with her biological parents; rebirth necessitates the death of past identity and familial bonds. This aspect of adoption symbolism is readily apparent in popular press accounts of the case of Gregory K., the much-publicized foster child who sought to "divorce" his mother so that he could be adopted by his foster parents:⁷⁰ "When the ruling was handed down, the boy once known as Gregory K. jumped from his seat, [and] hugged his new mother . . . At last the boy . . . could start to put his difficult past behind him," *People* magazine recounts.⁷¹

The "fresh start" offered by adoption may even confer psychological benefits on older foster children like Gregory K. who have the capacity to distinguish the legal consequences of adoption and foster care and who have coped with separation and loss by rejecting their biological parents. While most researchers have reported that foster children's perceptions of permanence and level of well-being are not tied to their placement status,⁷² some have reported that adoption nonetheless conveys psychic benefits. These researchers found that

[a]lthough the children felt confident of their foster parents' love, they were conscious that their full family membership was

70. *Kingsley v. Kingsley*, 623 So.2d 780 (Fla. Dist. Ct. App. 1993). Because Gregory K. was an older child, his case also raises the issue of a mature minor's decisionmaking prerogatives.

71. Bill Hewitt, *The Home of His Choice: "Divorcing" His Birth Mother, Gregory K., Changes His Name and His Family*, *PEOPLE*, Oct. 12, 1992, at 57. The trial judge similarly emphasized Gregory's altered identity. According to news accounts, after approving the adoption, the judge declared, "Gregory, you're the son of Mr. and Mrs. Russ at this moment." Charles Jaco, *Gregory K. Wins a Landmark Case*, (Cable News Network, Sept. 25, 1992).

72. See OREGON PROJECT, *supra* note 27, at 9.3 (finding that whether child was in legally permanent placement, adoption, returned home, or legally temporary foster care made "very little difference in his level of adjustment and health at the time of the interview"); Edith Fein, Anthony N. Maluccio, V. Jane Hamilton & Darryl E. Ward, *After Foster Care: Outcomes of Permanency Planning for Children*, 62 *CHILD WELFARE* 485, 508-12 (1983) (finding that placement status—returned to family, adoption, or permanent foster home—was not significantly correlated with family adjustment, emotional/developmental function, child behavior, or school functioning after 12 to 16 months). *But see* Triseliotis & Hill, *supra* note 27, at 107 (claiming that "those growing up adopted, even if placed when older, appear in adulthood to have a stronger sense of self and to function more adequately at the personal, social, and economic level compared with those who were formerly fostered"). One study by Michael Bohman & Sören Sigvardsson, *Outcomes in Adoption, in THE PSYCHOLOGY OF ADOPTION*, *supra* note 44, at 93, 104-06, is extremely difficult to characterize because of the researchers' failure to control for socioeconomic status and adoptive parent preparation. The researchers found that "Group I" children (adopted at birth into families of "fairly good and stable social and economic standing" who had been "thoroughly prepared for their role as new parents") were, at age 15, at no greater risk of school failure and maladjustment than a peer control group, while "Group II" children (placed in infancy, with the tacit understanding that adoption was the goal of placement, with foster parents lacking "the higher status of the adoptive parents" and "who were not specially prepared for their task as nonbiological parents") demonstrated greater risk of school failure and maladjustment than peer control group; 70% of Group II children were adopted by foster parents before age 7).

brought into question in the eyes of outsiders by their different names and by experiences they had to undergo which other children did not. Therefore, they saw adoption as bringing about some immediate tangible gains such as not having to undergo medicals or receive social work visits . . . [and] not having to explain to friends and teachers why they had a different surname from that of their adoptive parents . . . The adoption order was [also] a symbolic act creating a deep, satisfying psychological feeling for them . . . 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."⁷³

Gregory K. thus took not only the surname of his adoptive family but a new first name as well; by becoming Shawn Russ, he emphasized both his break with an unhappy past and his dream of a new and better future.⁷⁴

It is natural that children's advocates should wish to confer these benefits — a sense of belonging, the right to feel part of the family, a symbolic rebirth into a happier, more secure life — upon deprived children.⁷⁵ It is these intangible, and generally unexamined, aspects of adoption that have, in my view, ensured its appeal.⁷⁶

73. Triseliotis & Hill, *supra* note 27, at 114.

74. A name change marks "an important breach . . . between the individual and his old world." ERVING GOFFMAN, *STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY* 58 (1963). Researchers have reported that foster children experience discomfort at having a surname different than that of their foster parents. See Triseliotis & Hill, *supra* note 27, at 114 (reporting that sample children adopted by long-term foster parents indicated that "[t]he main benefit [of the adoption] was the relief of not having to explain to friends and teachers why they had a different surname from that of their adoptive parents.").

75. Some adult adoptees describe the same sense of embarrassment about their adoptive status that foster children relate, however. See Katherine A. Kowal & Karen M. Schilling, *Adoption Through the Eyes of Adult Adoptees*, 55 AM. J. ORTHOPSYCHIATRY 354, 358 (1985) (finding that 17% of sample adults who had been adopted as infants were embarrassed or felt uncomfortable about the fact of adoption; 25% reported feeling worried or insecure about being adopted).

76. Professor Elizabeth Bartholet has recently written at length about "the stigma surrounding adoption [which] constitutes part of the social conditioning to which we are all subject from birth onward . . ." BARTHOLET, *supra* note 1, at 164-86. I agree with Professor Bartholet that infertility is stigmatized in American culture and that adoption is thus "set up as a choice of last resort . . . for the infertile." *Id.* at 165. But I believe she exaggerates the extent to which adoption is the subject of "universal denigration." *Id.* While the infertile adoptive parent is sometimes pitied as having settled for a less preferred procreative alternative, the adoptive parent who already has biological children is admired for his or her generosity. More importantly, public sentiment almost always favors adoptive parents over biological parents in cases in which the two are pitted against each other; the DeBoers - Schmidt litigation (*In re Clausen*, 502 N.W.2d 649 (Mich. 1993)) and the case of Gregory K. are but two recent examples of this preference. Bartholet recognizes that biological parents who give up their children (or who have failed to care for them) are invariably viewed with contempt, but neglects this overwhelming public preference for adoptive over biological parents.

IV.

ADOPTION'S SYMBOLIC BENEFITS: THEIR HIDDEN COSTS

Because the symbolic benefits of adoption have been largely intuited, their cost and consequences have been largely ignored. Indeed, children's advocates have not even noted that these symbolic benefits derive from the same notion of parental rights as property-like entitlements that they ordinarily wish to disavow. After adoption, the child *belongs* to a new set of parents, who have the right to curtail his contacts with his former family. The state of belonging implies emotional certainty; but it also implies ownership.⁷⁷ The current preference for adoption over alternatives that preserve the parental relationship thus serves to preserve and replicate the same rigid, exclusive definition of parentage that children's advocates have elsewhere disfavored. The symbolic benefits conferred on foster children through adoption also impose on them costs that are real and substantial.

A. *Overestimation of the Benefits of Foster Care Alternatives*

The symbolic benefits conferred by adoption are, first of all, inextricably linked with a negative depiction of foster care. It is difficult to find a contemporary discussion of both foster care and adoption in which foster care is not described as a state of "limbo." While many of these discussions employ the word limbo to connote a state of impermanence or uncertainty, the choice of words underscores the symbolic contrast between adoptive and foster care status. Limbo in its original meaning did not mean impermanence; it was the borderland of Hell, an abode of souls barred from Heaven by circumstances such as lack of baptism. The implication is clear: Adoption promises salvation; foster care ensures suffering.

This denigration of foster care is unwarranted and has contributed to overestimation of the benefits to be obtained from current foster care alternatives.⁷⁸ Placement prevention and rapid family reunification are now, along with adoption, widely perceived as apart of a comprehensive strategy for remedying the foster care "problem." But while it is undeniably true that foster care agencies are beset with problems, researchers have repeatedly found that most foster children are not harmed by placement and that many children benefit.⁷⁹ Moreover, the multiple, long-standing difficulties of families at risk of foster care placement typically cannot be ameliorated

77. For more detailed exploration of the ambiguity inherent in cultural conceptions of belonging, see Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Wanting of Belonging*, 1991 B.Y.U. L. Rev. 1, 31-42.

78. For similar views, see, e.g., Barth & Berry, *supra* note 57, at 85 (describing foster care as "the recent whipping boy of child welfare services"); Sheila B. Kamerman & Alfred J. Kahn, *The Problems Facing Social Services*, 12 CHILDREN & YOUTH SERVICES REV. 1, 11 (1990) ("[An] unnecessary consequence of the . . . [Adoption Assistance and Child Welfare Act of 1980] has been to denigrate foster care of all types.").

79. See *Child Welfare Decisionmaking*, *supra* note 14, at 1781-85 (summarizing research reports on children in foster care and young adults who grew up in foster placements).

without services that are intensive, long-term, and expensive. But the preventive and reunification services available today are generally meager, brief, and cheap.⁸⁰

The result has been a cure that is arguably worse than the problem. Researchers have reported that as many as four out of ten foster children who are discharged to their parents simply wind up in foster care again,⁸¹ more children may thus experience unplanned reunification than experience unplanned, long-term care.⁸² Researchers have also noted that a large percentage of children whose families receive preventive services are subjected to continuing neglect and abuse.⁸³

Recognition of the fact that existing prevention and reunification programs more often serve the state's fiscal interests than they do the interests of children has been slow to develop. The linked symbolism of adoption and foster care is an important reason why.

B. *Categorical Decisionmaking that Ignores Children's Needs*

The intuited, but unexamined, symbolism of adoption has also contributed to rigid categorical thinking that ignores the complex realities of foster care today. Consider, for example, the case of Shamell and Eugene J.,⁸⁴ who were placed, at the ages of approximately twelve and thirteen, in the foster home of their paternal aunt. The children's father visited them three

80. See Barth & Berry, *supra* note 57, at 83 ("preplacement services are often inappropriately brief, given the tenacity of family problems and high reabuse rates. . . . Other evidence . . . indicates that services to children who have been reunified are often inadequate and end prematurely."). See also LISBETH B. SCHORR, *WITHIN OUR REACH: BREAKING THE CYCLE OF DISADVANTAGE* 175-78, 284-90 (1988) (reviewing successful programs to help seriously disadvantaged families and concluding that effective programs must be comprehensive, flexible, intensive, and will likely be more costly than traditional services).

81. TRUDY FESTINGER, *RETURNING TO CARE: DISCHARGE AND REENTRY IN FOSTER CARE 1-2* (1994) (surveying reports). See also Elaine Walton, Mark W. Fraser, Robert E. Lewis, Peter J. Pecora, & Wendel K. Walton, *In-Home Family-Focused Reunification: An Experimental Study*, 72 *CHILD WELFARE* 473, 474 (1993) (reporting that between 20% and 40% of foster children reunited with parents will return to care).

82. See, e.g., TESTA & GOERGE, *supra* note 18, at 58-59 (reporting that in late 1970s 40% of sample Illinois foster children who were reunified with family members returned to foster care, and concluding that "the framers of [the Child Welfare and Adoption Assistance Act of 1980] . . . may have been fundamentally mistaken about what the nature of the foster care problem was. Instead of foster-care drift, our analysis suggests it may have been the absence of planning and control in the reunification process").

83. See, e.g., MICHAEL S. WALD, J.M. CARLSMITH, P.M. LEIDERMAN WITH CAROLE SMITH & RITA DESALES FRENCH, *PROTECTING ABUSED AND NEGLECTED CHILDREN* 88-89 (1988) (reporting that two-thirds of sample children whose families received intensive in-home services were subject to continuing neglect or abuse); MARY ANN JONES, *A SECOND CHANCE FOR FAMILIES—FIVE YEARS LATER: FOLLOW-UP OF A PROGRAM TO PREVENT FOSTER CARE* 86, 95 (1985) (reporting that substantiated child maltreatment reports were made in one-quarter of sample cases in which families received intensive in-home services to avert foster care); Desmond K. Runyon & Carolyn L. Gould, *Foster Care for Child Maltreatment: Impact on Delinquent Behavior*, 75 *PEDIATRICS* 562, 564 (1985) (finding that 25% of abused children who received in-home services were reabused).

84. *In re Shamell J.*, 609 N.Y.S.2d 185 (App. Div. 1994).

or four times a month and sometimes attended school functions, but made it clear to the foster care agency that he was unprepared to assume custody.⁸⁵ After twenty months, the child welfare agency commenced an action to terminate the father's parental rights. The trial judge refused to terminate in these circumstances, describing the agency action as "a farce" that would serve the primary purpose of absolving the father from child support responsibilities.⁸⁶ But the appellate court cited standard, boilerplate sentiments in favor of adoptive placement and approved the termination petition:

All children should have stability in their lives . . . [T]hey should know the security of being wanted, loved, and cared for by adoptive parents . . . The "fraud" of the father should not be visited upon his sons by condemning them to the limbo of permanent foster care and depriving them of any opportunity for a permanent home.⁸⁷

While the appellate court claims that it is "the situation of the children" that governs its decision,⁸⁸ it is hard to see how. Shamell and Eugene, by now sixteen and seventeen years of age, would continue to live with their aunt and see their father *no matter what decision the court made*. They would be altogether mystified, I would guess, to learn that the court's order freed them from "the limbo of permanent foster care" and offered them "the security of being wanted, loved, and cared for." Their aunt would be equally surprised to learn that the piece of paper constituting the termination order affected the quality of her love and stability of her care. Their father was undoubtedly chuckling all the way to the bank.

It is impossible to imagine the court making similar pronouncements if the children's father had asked his sister to take care of the children outside the foster care system, or if the sister were his former wife. These analogies are far more pertinent to Eugene and Shamell's case than is the "foster care limbo" the court describes, but abstractions, permanence and adoption, determine the result. And while the case of Shamell and Eugene is perhaps extreme, the tendency of adoption's abstract symbolism to impede recognition of messy, individual realities is all too common.

85. *Id.* at 185-86.

86. *Id.* at 188. The judge noted that

This case involves money. . . [The father] intends to continue to see them regularly . . . What he doesn't want to do is have to support his children . . . The children live with his sister. He has absolutely no incentive to contribute to the support of his children, and if there is a subsidized adoption in this case. . . he's going to continue to do exactly as he's been doing. . . [I]t's a farce.

Id. at 188-89.

87. *Id.* at 187.

88. *Id.* at 188.

C. Obscuring Benefits to the State Child Welfare System

The symbolic benefits conferred on foster children by adoption have also obscured the very tangible benefits that this solution offers to state child welfare systems. Reconsider the case of Shammell and Eugene. A decade ago, Shamell and Eugene's aunt would not have been a foster parent but, instead, a welfare recipient receiving benefits under the AFDC program; although the poor families served by the child welfare system have often relied on relatives for assistance with child rearing,⁸⁹ until recently family members who filled in for parents were not classified as foster parents. Although they were often (like the parents themselves) sufficiently poor to qualify for public assistance,⁹⁰ they were denied the larger payments available for children in foster care.⁹¹ Under these earlier rules, Shamell, Eugene, and aunt would have been on AFDC, their father a "deadbeat dad," and child support collection the state's paramount goal.

As a result of lawsuits⁹² and a substantial escalation in the foster care caseload,⁹³ traditional practice has shifted rapidly over the past decade. Although "kinship" foster care is still employed sparingly in some jurisdictions, in some states with large urban foster care populations relative placements now constitute approximately 40% of the total foster care caseload.⁹⁴ Under the new kinship foster care rules, Shamell, Eugene, and aunt receive (more) funds from the AFDC-FC program and permanence through adoption is the state's paramount goal.

89. See, e.g., NEW YORK CITY MAYOR'S COMMISSION FOR THE FOSTER CARE OF CHILDREN, FAMILY ASSETS: KINSHIP FOSTER CARE IN NEW YORK CITY 37-38 (1993) [hereinafter MAYOR'S COMMISSION REPORT] (describing studies demonstrating link between poverty and extended family networks and traditional use of extended family networks in Latino and African-American culture).

90. See *id.* at 37 (reporting that approximately half of kinship foster mothers live close to or beneath the established poverty line); Timothy J. Gebel, *Kinship Care and Nonrelative Family Foster Care: Comparing Caregiver Attributes and Attitudes*, 75 CHILD WELFARE 5, 6-8, 10-11 (1996) (summarizing research on attributes of kinship foster parents and reporting that sample kinship caregivers had significantly lower levels of income and education than regular foster parents).

91. See Eugene M. Lewit, *Children in Foster Care*, 3 THE FUTURE OF CHILDREN 192, 198 (1993) (reporting that in some states kinship foster parents are paid less than others).

92. In *Miller v. Youakim*, 440 U.S. 125 (1979), the U.S. Supreme Court ruled that Federal law mandated the same level of foster care reimbursement to children in kinship foster homes as in nonrelated placements. The rapid expansion of New York City's kinship foster care population resulted from a settlement reached with the plaintiffs in *Eugene F. v. Gross*, Index No. 1125/86, Sup. Ct. N.Y. Co., in which the City's failure to furnish foster care benefits and services to court-placed children residing in relatives' homes was challenged.

93. By one estimate, the foster care population increased 53% between 1987 and 1992. McKenzie, *supra* note 64, at 63 (citing data from American Public Welfare Association). The rapid caseload escalation taxed existing foster parent resources, making placements with relatives a more desirable alternative.

94. In California in 1991, 43% of all foster care placements were with relatives; more than half of African-American children were placed with relatives. Lewit, *supra* note 91, at 195, 198 (citing data from California's Little Hoover Commission). In New York in 1991, 40% of all children in foster care were in kinship care. MAYOR'S COMMISSION REPORT, *supra* note 89, at 25.

Both the past and current goals of child welfare practice serve the state's fiscal interests. But neither goal benefits Eugene and Shamell. The mythology of adoption as the great, good thing has inhibited acknowledgement of the fiscal benefits adoption confers on the state, and which typically drive the termination petition process.⁹⁵

D. *The Sacrifice of Children's Emotional Needs*

Adoption's powerful symbolism not only obscures the very real benefits that this solution confers on the taxpayer, but it imposes direct costs on the children we intend to help. The positive future symbolized by an adoption order inexorably darkens the past and stigmatizes both the child's former parents and identity. Her acceptance of a new family implies abandonment of her biological family and the death of her old self; Shawn Russ, post-adoption, was no longer Gregory K. Many older foster children cannot face a such a loss,⁹⁶ and even those who are willing to do so pay a heavy price: The past can be buried, but it cannot be erased.⁹⁷ The attempt to wipe away the past may also cause more harm than good; thus even Gregory K.'s adoptive mother stressed the advantages to him of a continued relationship with his biological mother: "I think it would be good for [Gregory and his biological mother] . . . if they could have some kind of relationship someday . . ." Mrs. Russ told reporters, "I think then he could work through his anger."⁹⁸ The price of adoption's symbolic benefits is neglect of the child's real emotional needs.

This is not a trade-off that we consider advantageous for children outside the foster care system. Goldstein, Freud, and Solnit's proposal that custodial parents should have complete control over visitation rights after divorce has not been taken up by a single child advocate, despite the fact that it derives from exactly the same notions of bonding and parental exclusivity that have motivated many to urge easier termination of parental

95. For a discussion of how the foster care system negatively affects the child's security in parental support, see Wendy A. Fitzgerald, *Maturity, Difference, and Mystery: Children's Perspectives and the Law*, 36 ARIZ. L. REV. 11, 46-51 (1994) (concluding that "[c]hildren born to poor families soon learn they have no entitlement to support from their parents, but instead are subject to continual state supervision and resettlement, like refugees, among foster homes.").

96. See, e.g., Malcolm Bush & Andrew C. Gordon, *The Case for Involving Children in Child Welfare Decisions*, 27 SOC. WORK 309, 310 (1982) (reporting that 50% of sample foster children judged unlikely to return home did not wish to be adopted; most were older and cited preservation of ties with biological family as basis for disinclination); CHILD WELFARE AT A CROSSROADS, *supra* note 60, at 70 ("When asked outright, 'Do you want to be adopted?' it is understandable that so many teens answer 'No.'").

97. John Bowlby perhaps has put it best: "[Children] are not slates from which the past can be rubbed off with a duster or sponge, but human beings who carry their previous experiences with them and whose behavior in the present is profoundly affected by what has gone before." BOWLBY, *MATERNAL CARE*, *supra* note 32, at 113-14.

98. Hewitt, *supra* note 71, at 58.

rights.⁹⁹ The tendency of children's advocates has, instead, been to support yet a broader range of visitation rights — for stepparents, grandparents — in order to preserve the child's existing relationships.¹⁰⁰

Divorce law today potentially affects all children while child welfare law is reserved for those who are poor. The result is a class-based divide — in advocacy, theory, and law — that assumes real differences in children's pain based essentially on the receipt of public benefits.¹⁰¹ We have expected poor children, and only poor children, to gratefully sacrifice their past lives in order to obtain the benefits it suits us to provide.¹⁰² In the process, we have further stigmatized the lives of the children for whom foster placement will be inevitable, and subjected many of them to the further impermanence of "revolving door" care.

But the emotional lives of poor children are not different from those of the more fortunate. Their parents are equally significant. Their need for evidence of parental love and for opportunities for reconciliation are just as great. For most, loving foster or adoptive parents will not, any more than stepparents, erase the ties that bind parent and child.

In an ideal world, we would recognize that the emotional needs of foster children and children of divorce are similar, and utilize equivalent rules that protect the parent-child relationship and deny visitation only when it is detrimental to the child. It is altogether possible, of course, that we cannot offer foster children what is ideal. Fiscal constraints and the demands of potential adoptive parents are realities that make it difficult to fully meet foster children's needs. But if we cannot offer these children what is best, we do them no favor by refusing to admit it.

With that refusal, we also sacrifice the possibility of doing better. A decade ago I believed that, with adequate safeguards against interference by biological parents and adequate information on the child's need for continued contact, legal standards that emphasized the preservation of the

99. It has, instead, been extensively criticized. For examples, see, e.g., *Why Terminate?*, *supra* note 9, at 453 n.141 (listing sources).

100. For descriptions of statutory and case law on the custody and visitation rights of stepparents, see, e.g., David Chambers, *Stepparents, Biologic Parents, and the Law's Perception of "Family" After Divorce*, in *DIVORCE REFORM AT THE CROSSROADS* 102 (Stephen D. Sugarman & Herma H. Kay eds., 1990); Margaret M. Mahoney, *Support and Custody Aspects of the Stepparent-Child Relationship*, 70 *CORNELL L. REV.* 38 (1984); Levy, *supra* note 56. For descriptions of statutory and case law on grandparents' visitation rights, see, e.g., Annotation, *Grandparents' Visitation Rights*, 90 *A.L.R.* 3d 222 (1979 & Supp. 1993); Catherine Bostock, *Does the Expansion of Grandparent Visitation Rights Promote the Best Interests of the Child? A Survey of Grandparent Visitation Laws in the Fifty States*, 27 *COLUM. J.L. & SOC. PROBS.* 319 (1994).

101. See generally Martha Minow, *Forward: Justice Engendered*, 101 *HARV. L. REV.* 10, 11 (1987) (criticizing "use [of] categories like gender, race, ethnicity, and class to presume real differences in people's pain").

102. For a description of two cases exemplifying class-based differences in judicial analysis of parental and family visitation rights, see Karen Czapanskiy, *Babies, Parents, and Grandparents: A Story in Two Cases*, 1 *J. GENDER & L.* 85, 109-12 (1993).

child's ties with the biological family would not seriously affect the number of individuals willing to become permanent parent substitutes for former foster children.¹⁰³ Although the rapid expansion of the foster care population in recent years challenges that assessment,¹⁰⁴ I remain unconvinced that we cannot improve our efforts to meet *both* the child's need for a stable loving home and the maintenance of his earlier family ties.

CONCLUSION

In sum, I believe that today's preference for adoption over other forms of permanent placement that would preserve the parent-child relationship derives from a complex interrelationship of factors: Adoption is a well-accepted legal category that effects a clear change in status. It offers monetary benefits as compared to foster care and better satisfies the desires of adoptive parents to have their own child. Adoption also offers a potent positive symbolism that confers rebirth and offers a fresh start with a new identity.

But the symbolic benefits conferred on foster children through adoption have been purchased at a very considerable price and have obscured the very real benefits conferred on both the state and adult adoptive parents. The denigration of foster care contributes to the widespread acceptance of cheap foster care alternatives that subject children to more risks than they prevent and to rigid, abstract decisionmaking that ignores the realities of many foster children's lives. Obtaining the symbolic benefits of adoption also requires the sacrifice of children's real emotional needs, a tragic choice that we do not impose on the more privileged children outside the foster care system. Perhaps we can do no better, but certainly we should not congratulate ourselves that the current approach represents what is best. It is preferable to make tragic choices consciously than to pretend that there is no tragedy and no choice.

103. See *Why Terminate*, *supra* note 9, at 480-82.

104. See *supra* note 93 and accompanying text.