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## A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships

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# A TAXONOMY OF CHILDREN'S EXISTING RIGHTS IN STATE DECISION MAKING ABOUT THEIR RELATIONSHIPS

James G. Dwyer\*

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Children typically have numerous personal relationships, and those relationships play a large role in their social, psychological, emotional, and cognitive development. The state determines, to a significant extent, what those relationships are. It does so in part directly, by dictating who a child's legal parents will be and by declaring which particular persons — including legal parents, parent-like figures who are not legal parents, grandparents, siblings, and other relatives — will be allowed custody of or visitation with a child. It also does so indirectly, by conferring on particular private individuals — namely, those accorded the legal status of parent or guardian — legal authority to make decisions about a child's relationships with other persons and establishing the scope and standards for that authority.

This Article assesses the extent to which children today, as a matter of positive law, possess rights in connection with these numerous state decisions about their personal relationships. To accomplish that aim, the Article first establishes what it means to say that children have rights in connection with state decision making about their relationships and what indicia of such rights one might look for in the law. Part I therefore addresses preliminary, conceptual issues. It yields a test for determining when the law governing a particular state decision embodies a right of children and when it is morally significant whether the law accords a right to children. Because the law generally does not confer rights on children explicitly, the test looks principally for the degree to which the law imposes on the state a duty to protect or take into consideration children's interests. Part II then applies that test to the great variety of substantive legal rules through which the state structures children's relational lives, and develops a comprehensive picture of the legal relationship rights children possess in this country today. In a forthcoming book, I develop a normative account of what legal relationship rights children *should* have.

No simple characterization would accurately capture the current state of the law governing children's relationships. It is certainly not true that the law in this area "is all about what is best for the child," but neither is it true that the law entirely disregards the welfare of children. Not one of the many state decisions concerning children's relationships can plausibly be said to be governed by legal rules reflecting a total disregard for children's well-being, but neither can it plausibly be said that the rules governing any decision protect children's interests exclusively. Rather, the law governing every decision reflects a mix of concerns for the interests of children and adults. There are substantial differences among them as to the degree and type of protection afforded children, and this Article aims to provide a fairly comprehensive account of the complex reality of children's relationship rights in the United States today. One stark and remarkable fact that should be noted at the outset, however, is that in not one of the areas of law addressed in this Article have the courts in the U.S. attributed to children a constitutional right of any kind against

the state when the state assumes and exercises the awesome power of determining their intimate associations.

### I. FRAMING THE INQUIRY

Drawing a complete picture of children's relationship rights is no easy matter. First, the legal material one must cover is enormous. In part, this is because state action determining children's relationships takes many forms. The state both creates and terminates legal relationships, creating four possibilities for children's rights: a right to avoid a relationship in the first instance, a right to form a relationship, a right to continue in an existing relationship, and a right to get out of an existing relationship. In addition, so long as any legal relationship is in existence, the state can determine the extent to which the legal relationship will entail the opportunity to develop a social relationship (for example, the decision regarding child custody made during a divorce). And finally, children can have several types of relationships — not only a relationship with persons who parent them, but also relationships with non-parent adult relatives, siblings, friends, etc., and the state must decide whether to give legal recognition and protection to all those types of relationships.

The relevant legal material is enormous also because state action in this area rests upon law deriving from many sources. Family law is principally governed by state statutes, but state courts develop interpretations of the statutes and some relevant common law doctrines. In addition, state administrative agency regulations play an important role in many contexts. In establishing and applying rules, all state institutions — legislatures, courts, and administrative agencies — are constrained to some degree by federal statutes, federal agency regulations implementing federal statutes, and federal court decisions articulating constitutional rights. Thus, the search for children's rights must venture into state and federal repositories of law, including constitutional, statutory, judicial, and administrative.

Finally, the sheer diversity and flux in the relevant legal rules across the country makes the requisite research daunting. Because family law is principally state law, drawing a comprehensive picture of children's relationship rights in the United States entails examining the law of fifty states and the District of Columbia. There is significant variation among the states as to just about every aspect of family law at any given time. In addition, the family law portion of state codes is a favorite playground of legislators, because family law is so infused with social policy and moral belief. Thus, domestic relations laws are among the most frequently amended parts of state codes. Federal constitutional law, federal statutes, and uniform acts have some standardizing and stabilizing effects, but they are not sufficient to create confidence that a description of the law in any one jurisdiction is representative of the prevailing rule, nor that a description of the law ten, or even five, years ago

remains accurate today.<sup>1</sup>

The second basic obstacle to drawing a complete picture of children's relationship rights is a conceptual one. In contrast to the legal codes of several other countries and to legal texts of certain international organizations,<sup>2</sup> the law in the United States rarely speaks explicitly of children having rights in connection with their relationships. This is not because American law generally regards individual rights as inapposite to family life; the law speaks frequently and forcefully of parents' rights. The failure to speak of children's rights might therefore reflect an intention to withhold legal protection from children's interests in family relationships.<sup>3</sup> Alternatively, it might reflect a judgment that, although the law should protect children's interests in family relationships, a different terminology

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<sup>1</sup> Federal law is also far from static, and changes in federal law are often the impetus for changes in state law. See, for example, the discussion in this Article of termination of parental rights and of grandparent visitation. See *infra* notes 356–58, 396–443 and accompanying text. The highly dynamic nature of family law creates a great opportunity for student note writers to publish useful work. Unfortunately, in conducting research on this Article, I found that student authors today rarely do extensive primary research. The tendency is to focus on just one or a few jurisdictions, to rely on dated research by other authors, or to make assertions about the law throughout the country without providing support for the assertions.

<sup>2</sup> The Russian Family Code, for example, contains an entire chapter on “The Rights of Underaged Children,” which establishes, among other rights, the right to be nurtured in a family, the right to live with one's parents except when this is contrary to the child's interests, the right to defense against abuses by parents, and “the right to express his or her opinion when deciding any question in the family affecting the child's interests.” KODEKS ZAKONOV O BRAKE, SEMIE I OPEKE RF [FAMILY CODE OF THE RUSSIAN FEDERATION] arts. 54, 56, 57. The United Nations Convention on the Rights of the Child, Nov. 20, 1989, 28 I.L.M. 1448, ratified by every government other than the United States, accords to children a “right to know and be cared for by his or her parents,” *id.* art. 7; “the right of the child to preserve his or her . . . family relations as recognized by law,” *id.* art. 8; “the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests,” *id.* art. 9; “the right to maintain on a regular basis . . . personal relations and direct contacts with both parents” when the parents live in different countries, *id.* art. 10; “the right to express [his or her] views freely in all matters affecting the child,” *id.* art. 12; the right “to freedom of association,” *id.* art. 15; “the right to the protection of the law against . . . interference” with his or her privacy or family, *id.* art. 16.

<sup>3</sup> I do not believe it reflects a view on the part of legislators that children are incapable of possessing rights. Positive law does confer on children many other kinds of rights — for example, property rights, rights against physical harm, and rights in connection with education. I assume in this Article that the view that children cannot possess rights is incorrect, and I assume to be correct the “interest theory” of rights, under which rights protect persons' interests, as opposed to the “will theory” of rights, under which rights protect only choices. For an excellent treatment of the two theories, see generally MATTHEW H. KRAMER ET AL., *A DEBATE OVER RIGHTS: PHILOSOPHICAL ENQUIRIES* (1998).

or approach is appropriate for such protection.

With respect to terminology, the law often effectively accords rights to people without using the term "right." If a legal rule commands some result for the purpose of benefitting certain persons, it makes sense to say that the rule confers a right on those persons, at least so long as it gives them standing to enforce the rule.<sup>4</sup> For example, rules prohibiting stealing and providing for criminal and/or civil proceedings against a thief at the request of the victim amount to conferral on people of a right that others not steal from them. Lawmakers might believe, then, that directly dictating certain things about the relationships of children generally — for example, acknowledging that certain people should act as parents — adequately protects children's interests and is more apt than explicitly conferring "rights" on children. Or the law might require that, in individual cases, the choices or needs of a person at the center of a particular situation be controlling of legal outcomes, and yet the law might not say that such person has a "right" in the situation even though that is what the rule effectively gives them. Thus, a legal rule giving effect or consideration to the wishes of children, or requiring state actors who make individualized decisions to advance "children's welfare" or "the best interests of the child," could be said implicitly to confer rights on children. A complete account of children's relationship rights, therefore, requires identifying not only those legal rules that explicitly confer such rights, but also legal rules that afford a type and degree of protection to children's interests in relationships such that they implicitly confer such rights.

With respect to the approach, lawmakers might believe that according certain rights to certain adults protects children's interests sufficiently, because they assume a unity of interests between adult and child. To the extent that this belief is true, the absence of rights for children might not be morally significant.<sup>5</sup> As discussed

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<sup>4</sup> See D.N. Maccormick, *Rights in Legislation*, in *LAW, MORALITY AND SOCIETY* 189, 191–92 (P.M.S. Hacker & Joseph Raz eds., 1977).

<sup>5</sup> Even if adult rights entirely protected the interests of children in connection with some decisions, it would not necessarily follow that the failure to afford rights to children was entirely inconsequential. One might object to this state of affairs on grounds of conceptual neatness. Because we ordinarily attribute rights to the persons whose interests we aim to protect, rather than to any surrogate, then if lawmakers do in fact aim to protect the welfare of children, they should attribute rights to the children in order to avoid confusion. If the aim of lawmakers is not to protect children's welfare, so that any protection effectively enjoyed by children is merely coincidental, one might object that lawmakers have inflicted a moral harm on children by failing to accord children the respect they are due morally. One might also argue that there are larger societal ramifications to how we characterize legal protections of children's welfare and that these are morally and practically significant. On one side of the debate, one might think that speaking of children having rights would properly elevate their perceived standing in society, increasing the degree to which the public regards children as distinct persons with moral claims on adult members of society, rather than as property or appendages of their parents. Alternatively, one might believe that bad things would flow

below, it is in fact difficult conceptually to distinguish instances in which the law accords children an implicit right from instances in which the law accords children no right but this is not morally significant.

This Article aims to discern, then, through a review of existing law in numerous legal contexts, the extent to which the law explicitly or implicitly bestows rights on children in connection with state decision making about their relationships and the extent to which, in the absence of rights for children, children's welfare might be incidentally protected by conferral of rights on others. Conversely, the Article aims to identify areas where children's interests do not receive legal protection and state decision making is likely in some cases to disserve their interests. In those areas, the failure to confer rights would be morally significant. Stated in terms of the correlative duties, the Article aims to discern what duties toward children, if any, the state recognizes or imposes on itself when it exercises decision making power over their relational lives. Where the law does not reflect or impose a state duty owed to children, the analysis asks whether the absence of a legal duty to children can or is likely to result in a sacrifice of their welfare and is therefore morally significant.

This is no easy matter. One substantial difficulty lies in determining when legal rules embody implicit, rather than explicit, rights of children.<sup>6</sup> The philosophical literature is devoid of efforts to explicate the variety of forms that implicit interest-protecting rights might take. I am therefore compelled to develop my own test for identifying such rights and my own taxonomy of the forms they might take. With some rules, identifying implicit rights is a relatively straightforward matter. Rules directing that public or private actors making decisions about children's relationships on an individualized basis do so at least in part on the basis of the preferences or welfare of the children involved effectively bestow some sort of interest-protecting right on children.

However, a legislative rule dictating a particular state of affairs — for example, the general rule for maternity which makes the woman who gives birth to a child the legal mother — rather than commanding individualized decisions on the basis of choices or interests of minors, less clearly embodies an implicit right of children. If the legislature, in creating such a rule, did so solely because it believed that this would be best for children, and if it is in reality the case that what the rule prescribes is always or almost always best for children, then it would seem entirely consistent

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from explicitly treating minors as right-holders, perhaps because it would negatively affect the way minors are perceived; adult society might become less mindful of children's special needs and vulnerabilities, or children might become defiant and thus less susceptible to appropriate instruction and discipline.

<sup>6</sup> I use the term "implicit rights" to signify non-explicit rights, without meaning to suggest that lawmaking bodies intended to create rights. As noted below, I focus on the effects of a rule for children rather than on the intent of the rule-makers in identifying rights. This term seems preferable to "effective rights," which might be mistaken to mean rights that are effectual in practice.

with ordinary usage to say that the rule embodies a right of children. An example of this outside the relationship context might be a statute prohibiting torture of children; such a law could aptly be described as embodying an implicit right of children that others not torture them. But to arrive at such a conclusion about a legal rule, must it be true both that the legislature intended it to benefit children and that it in fact does so, or would it be sufficient that either of those is true, or is one essential and the other not? In any case, the determination would require extensive fact gathering. So this aspect of the analysis presents both conceptual and empirical difficulties — difficulties I cannot hope to overcome in this Article.

I will assume for the sake of analysis that the actual effect on children of legislative rules dictating particular states of affairs is more important than legislative intent in determining whether the rule embodies an implicit right of children. I will refer to legislative intent at times, though, as evidence of likely effects or as evidence of the moral assumptions motivating lawmakers. I do not undertake to demonstrate or document the actual effects of such rules, but rather just offer reasons at some points for speculating that a particular rule does or does not have certain effects for children.

Another complication arises from the fact that legal rules might only partially protect the interests of a group of persons. For example, whereas a legal rule governing one aspect of children's relationships might dictate that decision making be based exclusively on the interests of the children, a legal rule governing another aspect of children's relationships might prescribe a balancing of children's interests with the interests of others or might prescribe that children's interests be protected only to a certain extent — for example, that children be protected only from grievous harm. The former sort of rule is most plausibly characterized as embodying an implicit right of children, and in fact what might be termed an absolute right. But it also seems apt to characterize the latter sort of rule as embodying some sort of right for children.<sup>7</sup> I will characterize rules commanding that children's interests be given some weight but balanced against other interests as conferring a non-determinative right on children. And I will characterize as embodying a limited right rules that protect children's welfare only to some degree less than requiring that decisions serve their best interests.

Another type of rule providing less than complete protection for a group of persons is a rule dictating particular states of affairs that might be best for some members of the affected group but not others. For example, a rule that parental

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<sup>7</sup> Even if it is conceptually problematic to characterize such limited protection for children as conferring a right, it would still be useful in categorizing types of legal rules governing children's relationships to identify separately those rules that provide some protection of children's interests but not complete protection. The term "right" does no normative work in this Article, so substituting some other term for "limited right" or "qualified right" would not change the analysis.

rights be terminated whenever a parent is sentenced to five years or more in jail might be in the best interests of most children in that situation but contrary to the interests of a minority of such children. The failure of such a rule to serve the best interests of all effected children could occur for several reasons. It might fail because the rule protects an interest that some children have but others do not. In that case, the rule might be said to confer a right on some children but not others. It might fail because the rule protects an interest of children that is in fact served by the prescribed state of affairs in some circumstances but not in others. In that case, the rule might be said to confer an imperfectly-tailored right. It might fail because the rule protects only a subset of children's interests potentially affected by the prescribed state of affairs, and in some circumstances other interests not protected by the rule conflict with and exceed in importance the protected interests. In that case, the rule might be said to confer on children only a partial right, a right protecting less than all of their interests.

Lastly, it might occur because the rule principally protects rights of persons other than the children affected, and serves the welfare of children only incidentally and only insofar as they coincide with the interests or preferences of the other persons. In this last case, characterizing the rule might depend on whether children have standing to demand enforcement of the rule in circumstances where the rule would serve their interests. When children do not have standing, I will say the rule confers no right on them. When children do have standing, I will say the rule confers a subordinate right on them. It confers some sort of right because having standing to sue the state for enforcement suggests that the law reflects a duty the state owes to children themselves. But it is a subordinate right because the rule gives primacy in all cases to the interests or preferences of others, so that a conflict with the interests or choices of those others defeats any claim on the part of the child.

The differences among imperfectly tailored, partial, and subordinate rights turn on empirical facts. Absent extensive empirical investigation and analysis, it will thus be uncertain in some contexts which sort of right a legal rule dictating states of affairs creates. I will refer to these three types of rights collectively as "non-absolute state-of-affairs rights" in the analysis below, and will in some contexts bracket the question of which type is at work.

On the other hand, a legal rule prescribing states of affairs that are always in children's best interests could be said to confer an absolute right on children, just as legal rules that command individualized decision making based solely on a child's best interests. In theory, a legal rule commanding, for example, that a person who stands in a certain relation to a child be deemed one of the child's legal parents could create the best result for children in every case. In reality, though, the complexities of human relationships and situations make it unlikely that any rule dictating the same outcome in every case that presents a certain fact or subset of all

possible facts will perfectly serve any independent criterion such as the best interests of an affected party. A rule that some people think comes closest to reaching the best interests is the prevailing rule for maternity noted above, which automatically attaches legal motherhood to a woman who conceives and gives birth to a child. But it is not difficult to imagine situations in which even this rule does not yield the best outcome for a child.

The foregoing considerations and distinctions yield a rather complex taxonomy of rights. To facilitate understanding of the analysis to follow, I list here all the possibilities identified and provide a brief description of the type of legal rule creating each type of right.

*Explicit right* — a legal rule speaks of children possessing a certain right

*Implicit right* — a legal rule dictates states of affairs that serve the interests of children or commands that individualized decision making take into account the interests and/or preferences of children

*Absolute right* — a legal rule either requires individualized decision making *solely* on the basis of each child's best interests or preferences, or prescribes states of affairs that are *always* consistent with children's best interests<sup>8</sup>

*Non-determinative right* — a legal rule requires that a child's interests or preferences be given some weight in individualized decision making, but be balanced against interests or preferences of others

*Limited right* — a legal rule ensures only that a child's welfare does not fall below some level that is lower than "best interests" (e.g., a "no grievous harm" standard)

*Imperfectly-tailored right* — a legal rule prescribing states of affairs serves the interests of children in some circumstances but not in others

*Partial right* — a legal rule prescribing states of affairs protects one or more interests of children but not all that might be affected by application of the rule

*Subordinate right* — a legal rule prescribing states of affairs is primarily designed to protect rights of persons other than the affected child, but incidentally serves the best interests of children in some circumstances, and children have standing to enforce the rule in those circumstances

*Non-absolute state-of-affairs right* — a legal rule prescribing states of affairs creates an imperfectly-tailored, partial, or subordinate right for children

It might also be useful to summarize the situations in which I will deem children to have *no* rights: Children have no rights in connection with state decision making

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<sup>8</sup> No right of children in connection with relationships is absolute in the sense of overriding the preference of an adult not to have a social relationship with the child. When I use the term absolute right, that qualification is implicit, and what I mean is that the child's interests or preferences are completely determinative of whether he or she will have a legally recognized or protected relationship with another willing person.

about their personal relationships when the governing legal rule (a) does not state explicitly that children have a right of some sort in connection with the decision; (b) does not mandate that an individualized decision be made that gives at least some weight to the interests of the affected child; and (c) does not prescribe a state of affairs that is sometimes in the best interests of children and as to which a child would have standing, when the rule would promote his or her welfare, to demand enforcement of the rule. A failure to accord children any right, or a conferral on children of a right that is less than absolute, is morally significant at least in those contexts where the legal rules might, as a result, sacrifice the welfare of some children to a significant degree.

Before proceeding to apply this elaborate test to existing law, I should also note that, as anyone who has practiced law in this area knows, what happens in family law practice diverges from the written law with greater regularity than in many other areas of law. But the law on the books does shape and constrain real world practice, and with certain institutional reforms and with commitment of adequate resources, the practice of family law could be made to conform more closely to the law as written. In this Article, I focus on the written rules and their official application, as reflected in published legal texts, and therefore on what rights children officially possess. I mention departures from the rules in practice at times in passing, when it reveals something about the attitudes of those creating or implementing the official rules.

Lastly, I emphasize that my analysis in this Article is entirely descriptive. A conclusion that the law does not accord children any right or does not accord children a particularly strong right does not entail a determination that the law is morally defective. There might well be adequate moral justification for any such failure to confer rights on children, including justifications tied to the welfare of children generally — for example, concerns that attributing certain rights would worsen the situation of children on the whole in our society, perhaps because of the effects they would have on parental attitudes or on societal progress toward some ideal. Determining whether there is adequate justification will be the aim of other components of my larger project.

## II. THE LEGAL RULES GOVERNING STATE DECISIONS

As noted above, the state structures children's family lives by means of a wide array of legal rules. In numerous family law contexts, the state directly decides with whom a child will have a legal relationship, or which of a child's social relationships will receive legal protection. When the state creates legal relationships, or confers legal protection on social relationships, it enables the parties to the relationship to spend time with each other and thereby to form interpersonal bonds. It also sometimes enables the adult members of state-sanctioned adult-child relationships

to exclude from the child's life, entirely or to some lesser degree, other persons whose relationship with the child does not receive the same legal recognition and protection. Thus, when the state declines to create a legal relationship or to give legal protection to a social relationship, a social relationship might never come into being or, if already formed, might cease, regardless of the wishes or desires of the persons at issue.

In fact, the state plays a determinative role in the relational lives of every child from the moment of birth. By self-executing statutory or common law rules, all states confer legal parenthood at the time of birth upon the woman who gives birth to a child.<sup>9</sup> In most cases, the state also confers legal parenthood on the man most closely connected to the mother around the time of the birth — usually, her husband.<sup>10</sup> When there is dispute as to who the biological father is, or when the biological father is not married to the biological mother, a court typically must make an individualized decision as to who will be the legal father of a child and as to what opportunity, if any, the legal father will have to form a relationship with the child.<sup>11</sup> The state also directly creates new parent-child legal relationships on an individualized basis in adoption proceedings.<sup>12</sup>

In addition to establishing parent-child legal relationships in the first instance, the state regularly determines whether already-established parent-child legal relationships will continue at all or in the same form. In divorce actions, if both spouses are already-established legal parents of one or more children, the state decides whether both will remain in a "custodial" legal relationship with the children, or whether instead the children's relationship with one of the parents will be reduced to mere visitation, and if so, what the nature of that visitation will be.<sup>13</sup> The state makes the same kind of decision on an on-going basis in paternity cases, in which custody and visitation arrangements are frequently modified. In some circumstances, some states even authorize an award of custody to persons other than a child's legal parents.<sup>14</sup>

Moreover, the state sometimes suspends or severs established parent-child relationships. The state might suspend a social relationship temporarily by prohibiting a legal parent from having contact with a child during a period of parental "rehabilitation," after a finding of parental abuse or neglect.<sup>15</sup> In extreme cases, the state terminates the legal and social relationship with a parent permanently.<sup>16</sup> More routinely, the state terminates children's legal and/or social

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<sup>9</sup> See *infra* notes 28–33 and accompanying text.

<sup>10</sup> See *infra* notes 53–57 and accompanying text.

<sup>11</sup> See *infra* notes 58–62, 70–84 and accompanying text.

<sup>12</sup> See *infra* notes 86–176 and accompanying text.

<sup>13</sup> See *infra* notes 177–216, 230–52 and accompanying text.

<sup>14</sup> See *infra* notes 285–95 and accompanying text.

<sup>15</sup> See *infra* notes 297–302 and accompanying text.

<sup>16</sup> See *infra* notes 327–374 and accompanying text.

relationships with adults who are not legal parents but who have served in a parent-like role — for example, foster parents or non-parent blood relatives who have temporarily cared for a child — in order to establish or restore a relationship with a legal parent.<sup>17</sup>

There are also situations in which the state directly decides whether a child will maintain relationships with persons who do not occupy a parental role. When a state takes a child into custody because the parents' home is unsuitable, it disrupts and then directly controls the child's relationships with siblings, other relatives, and friends.<sup>18</sup> In addition, states allow non-parents in some circumstances to petition courts for orders of visitation with children who reside with their parents, and authorize courts to order visitation even over the parents' objection.<sup>19</sup> Those decisions can be determinative of whether a child is able to maintain a relationship with any non-parents who have been, or could become, important in the child's life.

For the most part, however, once the state has established a child's nuclear family — that is, who the child's one or two legal parents will be, those legal parents directly determine the remainder of a child's associations. Generally, a child's legal parents decide what friends the child has, which relatives — including grandparents, uncles and aunts, cousins, and even siblings — the child travels to visit or welcomes at home, and which other adults act in a care-taking role. With respect to those relationships, then, it might seem that the state plays no role. But it actually does.

First, the state determines that parental status belongs exclusively to one or two people; the state denies that status and its attendant protections to other adults, even though there might be others who have acted or would like to act in a parent-like role for the child.<sup>20</sup> Second, all the decisions those legal parents make about a child's relationships with non-parents are decisions the state empowers parents to make. Absent a decision by the state to confer that decision making power, parents would have no legal recourse against non-parents who inserted themselves into a child's life despite objections by the parents. Moreover, the state defines the scope of this parental power and the standards by which it must be exercised in order for parents to retain it. It does so even if the scope is limitless and there are no meaningful standards. Parental status is, in essence, a state-conferred monopoly over decision making about a child's relationships with persons outside the nuclear family.<sup>21</sup>

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<sup>17</sup> See *infra* notes 303–06, 312–18 and accompanying text.

<sup>18</sup> See *infra* notes 297–302, 379–81 and accompanying text.

<sup>19</sup> See *infra* notes 392–444 and accompanying text.

<sup>20</sup> See generally 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 (1984) (critiquing the law's rigid adherence to a conception of the nuclear family with one or two adults having exclusive parental status).

<sup>21</sup> One might say that it is a regulated monopoly, insofar as statutorily conferred judicial authority to order visitation with non-parents is viewed as a substantive limitation on parental

We usually are unaware of the state's role in these decisions about non-parental relationships, because there are no state actors visible when parents make the decisions and the power is so plenary and the limitations so slight or non-existent that parents generally need not think about legal restrictions or legal authorization when they make the decisions. But the state is responsible nonetheless. The state could in theory make all those decisions itself, pursuant to the same *parens patriae* power it exercises in making the direct decisions about children's relationships noted above, or it could impose significant standards of decision making on parents. That this might be undesirable does not obviate the fact that the state could do so but chooses otherwise. If we were to ask on behalf of a child, as is seldom done, "what gives my parents the power to decide that I may not play with Nathan (perhaps just because Nathan's parents are of a certain religion, race, or sexual orientation)?," the answer would be that the law, established by the state, gives parents that power. The state therefore bears some responsibility for the effects of those decisions. If I imagine the state bestowing on some other private individual unrestricted power to make decisions about *my* relationships, it is easy for me to see how the state would be implicated in that individual's exercise of that power. The same is true of the state's investing parents with child rearing powers.<sup>22</sup> The pertinent question, then, is *on what basis* the state decides that it will give parents this particular power to determine all of a child's other associations.

Below I articulate what the legal rules are in this country for each type of decision concerning children's relationships, as identified above. What the survey below makes clear is that, contrary to widespread belief, most decisions the state makes about children's relationships are not based on a "best interests of the child" standard or on any other standard or rule that is clearly intended to, or does in fact, serve as a proxy for robust rights of children. The legal rules governing most such decisions also, and sometimes primarily, give direct protection to the interests of individual adults and/or society as a whole. Even those decisions for which the sole governing legal standard is nominally what is best for the child are in many cases skewed by exceptions and qualifications that inject concern for parental and/or societal interests. And in every context, these other interests clearly can conflict with those of the children affected by the decisions, so the failure to confer absolute rights on children is morally significant in every context.

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power. Alternatively, one could say that the law creates a duopoly, with only parents and the courts having decision making authority and the courts' authority being effective only at the margins or in a narrow range of cases.

<sup>22</sup> See David D. Meyer, *Constitutional Pragmatism for a Changing American Family*, 32 RUTGERS L.J. 711, 722 (2001) ("When the state is asked to 'referee' such an internal family squabble, stacking the deck heavily in favor of a particular combatant does not seem calculated to *avoid* state interference so much as mandate its particular *substance*.").

*A. Direct Decisions By the State*

Among the many situations that I have grouped under the heading of direct decisions by the state, only two are even nominally governed in most American jurisdictions solely by a standard tied to the welfare of the child. One of those situations is approval of petitions for adoption.<sup>23</sup> The other is the custody decision as between two established legal parents, both of whom wish to have custody, in divorce and post-paternity custody proceedings.<sup>24</sup> In determining whether particular adults will become a child's first legal parents, the interests of the child are largely irrelevant.<sup>25</sup> In determining whether an established legal parent will be involuntarily removed from that role and his or her relationship with a child terminated, the child's best interests are sometimes a necessary, but never a sufficient, condition for action.<sup>26</sup> Even in the two situations nominally governed exclusively by a "best interests of the child" standard, adoption and custody disputes between legal parents, subsidiary rules inject considerations tied to the interests of parents or society as a whole rather than those of the children involved.<sup>27</sup>

The other side of the coin in this context is the rights of the adults involved to form a relationship with a child, to avoid such a relationship in the first place, and to end such a relationship once formed. With respect to adults having a right to form and maintain relationships that they desire with children, the rules vary from one context to another, and I consider below what they are in each type of case. What is striking, especially in contrast to any implicit rights of children in these various contexts, is that adults have an absolute right to end a social relationship with a child or to avoid having such a relationship in the first place. The law never forces any adult to spend any time with any child. An adult's situation is thus strikingly different from that of a child. Apart perhaps from approval of adoptive parents, in no context can children be said to have an absolute right to avoid or end a legal or social relationship with an adult. That a relationship is not in a child's best interests, or that a child does not want to have a relationship with a particular adult, is in all other contexts legally insufficient to preclude the relationship.

*1. Creating Legal Parents*

The state creates legal parent-child relationships in three ways. Pursuant to maternity rules, the state determines who a child's first legal mother will be. Pursuant to paternity rules, the state determines who a child's first legal father will

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<sup>23</sup> See *infra* notes 87–98 and accompanying text.

<sup>24</sup> See *infra* notes 177–86 and accompanying text.

<sup>25</sup> See *infra* notes 28–84 and accompanying text.

<sup>26</sup> See *infra* notes 330–65 and accompanying text.

<sup>27</sup> See *infra* notes 192–252 and accompanying text.

be. And pursuant to adoption law, the state substitutes other adults for one or both of the initial legal parents.

*a. Maternity*

The law of every state makes a woman who conceives and gives birth to a child automatically the legal mother in the first instance.<sup>28</sup> No further action on her part

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<sup>28</sup> In twenty-six states, this is explicit in a statutory provision. *See* ALA. CODE § 26-27-4 (2002); CAL. FAM. CODE § 7610 (West 1994); COLO. REV. STAT. ANN. § 19-4-401 (West 1999); DEL. CODE ANN. tit. 13, § 803 (2001); FLA. STAT. ANN. § 39.01 (West 2002); HAW. REV. STAT. ANN. § 584-3 (Michie 2002); IDAHO CODE § 16-2002 (Michie 2002); 750 ILL. COMP. STAT. ANN. 45/4 (West 1999); IND. CODE ANN. § 34-6-2-93 (Michie 2002); KAN. STAT. ANN. § 38-1113 (2001); ME. REV. STAT. ANN. tit. 22, § 2761 (West 2001); MINN. STAT. ANN. § 257.54 (West 1998); MO. ANN. STAT. § 210.819 (West 1996); MONT. CODE ANN. § 40-6-104 (2001); NEV. REV. STAT. ANN. 126.041 (Michie 2002); N.H. REV. STAT. ANN. § 168-B:2 (2002); N.J. STAT. ANN. § 9:17-38 (West 2002); N.M. STAT. ANN. § 40-11-4 (Michie 2002); N.D. CENT. CODE § 14-15.1-01 (2001); OHIO REV. CODE ANN. § 3111.02 (West 2002); OKLA. STAT. ANN. tit. 10, § 70 (West 2001); S.D. CODIFIED LAWS § 34-25-16.7 (Michie 2002); TEX. FAM. CODE ANN. § 160.201 (Vernon 2001); VA. CODE ANN. § 20-49.1 (Michie 2002); WASH. REV. CODE ANN. § 26.26.030 (West 1997); WYO. STAT. ANN. § 14-2-101 (Michie 1977). In the remainder of the states, there is no statute or judicial doctrine directly stating how legal motherhood arises, so one must infer from other statutory rules or judicial doctrines that the woman who gives birth to a child is the legal mother. In thirteen states, it is implicit in statutory rules directing what information should be recorded on legal documents, such as birth certificates. *See* IOWA CODE ANN. § 144.13 (West 2002); KY. REV. STAT. ANN. § 213.046 (Michie 2002); MD. CODE ANN., HEALTH-GEN. I § 4-208 (2002); MASS. GEN. LAWS ANN. ch. 46, § 1 (West 2002); MISS. CODE ANN. § 93-17-203 (2001); NEB. REV. STAT. ANN. § 71-640.01 (Michie 2002); N.C. GEN. STAT. § 130A-101 (2002); R.I. GEN. LAWS § 23-3-10 (2002); S.C. CODE ANN. § 61-19 (Law. Co-op. 2002); UTAH CODE ANN. § 26-2-5 (2002); W. VA. CODE ANN. § 64-32-6 (Michie 2002); WIS. STAT. ANN. § 9.14 (West 2002); OR. ADMIN. R. 333-011-0048 (2002). In three states, statutes relating to surrogate motherhood assume the legal mother is the woman who gives birth to the child. *See* ARK. CODE ANN. § 9-10-201 (Michie 2001); ARIZ. REV. STAT. ANN. § 25-218 (West 1999); N.Y. DOM. REL. LAW § 121 (Consol. 1999). In four states, it is implicit in laws relating to custody or guardianship of, or inheritance by, children born out-of-wedlock. *See* GA. CODE ANN. § 19-7-25 (2002) ("Only the mother of a child born out of wedlock is entitled to his custody, unless the father legitimates him . . ."); VT. STAT. ANN. tit. 14, § 2644 (2002) ("An unmarried woman who bears a child shall be guardian of such child until another is appointed."); PA. STAT. ANN. tit. 20, § 2107 (West 2002) ("For purposes of descent by, from and through a person born out of wedlock, he shall be considered the child of his mother . . ."); *see also* MD. CODE ANN., EST. & TRUSTS § 1-208 (2002). In three states, it is implicit in statutes requiring hospitals to distribute to birth mothers a pamphlet concerning the rights of natural parents. *See* ALASKA STAT. § 25.20.055 (Michie 2002); MICH. COMP. LAWS ANN. § 722.1006 (West 2002); TENN. CODE ANN. § 68-3-302 (2002). In Connecticut, adoption laws presuppose that legal parenthood arises only from biological parenthood or adoption. *See, e.g.,* CONN. GEN. STAT. ANN. § 45a-707, 45a-724 (West Supp. 2001); *see also*

or inquiry by the state is prerequisite to state conferral of legal parenthood upon her. Rarely does the legal system decide individual cases of maternity. This is in part because, in contrast to the biological father, the birth mother's identity is readily apparent at the time of birth and is typically made a matter of public record at that time.<sup>29</sup> It is also in part because the law reflects a strong bias in favor of biological parents, especially biological parents who have provided care to and formed a relationship with the child, and giving birth is assumed to be indicative of biological connection, past care, and an already formed relationship.<sup>30</sup>

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CONN. AGENCIES REGS. § 45a-728-2 (2002). In the final state, Louisiana, this rule can be inferred from a common law doctrine limiting tort actions in favor of the mother of an injured person to the woman who gave birth. *See Daigrepoint v. La. State Racing Comm'n*, 663 So. 2d 840 (La. Ct. App. 1995).

<sup>29</sup> *See* Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 617 (2002); *cf. In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289–90 (Ct. App. 1998) (“The obvious reason the Legislature did not include an explicit parallel statement on ‘maternity’ is that the issue almost never arises except for extraordinary cases involving artificial reproduction.”).

<sup>30</sup> Storrow, *supra* note 29, at 634–35; *see* Anne Reichman Schiff, *Solomonic Decisions in Egg Donation: Unscrambling the Conundrum of Legal Maternity*, 80 IOWA L. REV. 265, 274 (1995); *see also* *Caban v. Mohammed*, 441 U.S. 380, 397 (Stewart, J., dissenting) (“The mother carries and bears the child, and in this sense her parental relationship is clear.”); *id.* at 405 n.10 (Stevens, J., dissenting) (“[B]y virtue of the symbiotic relationship between mother and child during pregnancy and the initial contact between mother and child directly after birth a physical and psychological bond immediately develops between the two that is not then present between the infant and the father or any other person.”). In addition to the exceptions discussed below, there are rare cases in which women who are not biological parents have raised a child without any legal status, in a kind of informal adoption situation, and the state has ultimately conferred maternity solely on the basis of past care. *See, e.g., In re Karen C.*, 124 Cal. Rptr. 2d 677 (Ct. App. 2002) (holding that a woman was entitled to presumption of maternity to genetically unrelated child whom she had raised and held out as her own after the birth mother gave her the child and had her name entered on the child's birth certificate).

This automatic conferral of rights can thus be explained *in part* as reflecting an empirical assumption that a biological and gestational mother is likely to be a good caretaker of a child,<sup>31</sup> an assumption that might well be true in most cases, and that might suggest a legislative aim of protecting the interests of children. However, the fact that there is no legal mechanism for overcoming the legal presumption in favor of the birth mother, with the very limited exception in some states for surrogacy situations, where genetics and gestation are split between two women,<sup>32</sup> suggests that the rules cannot be fully explained on the basis of such an aim. As discussed below, the legal system is averse to denying legal motherhood even to women who are drug addicts and who poison their children with drugs before birth. There is clearly also an assumption of adult entitlement, grounded in a proprietary view of biological offspring and/or a belief that gestational labor should be rewarded. If legislators instead fashioned maternity rules with only the welfare of children in mind, they would certainly be more circumspect about which birth mothers receive legal parent status.

From the perspective of children's rights, therefore, maternity rules do not confer on newborn children an absolute right to form a mother-child relationship that is in their best interests. They do not mandate an individualized determination of who, among available persons and all things considered, would be the best parent for the child. Given the reality that the birth mother is, in a significant percentage of cases, not the best available person, and in some cases is not even a minimally adequate parent, maternity rules can at best be said to confer a weaker right. If children have standing to enforce maternity rules, which is unclear,<sup>33</sup> they might be

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<sup>31</sup> See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 665–66 (1972) (Burger, J., dissenting):

I believe that a State is fully justified in concluding, on the basis of common human experience, that the biological role of the mother in carrying and nursing an infant creates stronger bonds between her and the child than the bonds resulting from the male's often casual encounter. This view is reinforced by the observable fact that most unwed mothers exhibit a concern for their offspring either permanently or at least until they are safely placed for adoption, while unwed fathers rarely burden either the mother or the child with their attentions or loyalties. Centuries of human experience buttress this view of the realities of human conditions and suggest that unwed mothers of illegitimate children are generally more dependable protectors of their children than are unwed fathers.

<sup>32</sup> As discussed below, in cases of unfitness, the governing rules appear to confer legal parental status and then terminate it, rather than preventing investiture in the first instance. And when a woman who gives birth to a child *chooses* not to serve as parent, the legal proceeding she would undertake would be a relinquishment of parental rights rather than an action to prevent parental status from ever existing. See *infra* notes 326–29 and accompanying text.

<sup>33</sup> Very few states' laws contain explicit reference to actions to establish the mother-child relationship. See CAL. FAM. CODE § 7650 (West 1994); MASS. GEN. LAWS ANN. ch. 209C, § 21 (West 2002) ("Any interested party may bring an action to determine the existence of a mother and child relationship.").

said to have, at best, some type of non-absolute state-of-affairs right. Moreover, the latter right, if it exists, is likely entirely superfluous, because in any case where it is in the child's best interests that the woman who gives birth be deemed the legal mother, that woman would presumably be motivated to demand maternity herself and her right to that legal status would be sufficient to ensure enforcement of the rule. Thus, as a general matter, children have at best a subordinate right, and perhaps no right whatsoever (if they lack standing), in connection with state creation of legal mother-child relationships.

The one type of situation in which the legal system *has* decided individual cases of maternity involves surrogacy, in which a dispute arises between the birth mother and a woman who contracted with the birth mother. Court decisions addressing such conflicts generally have made the outcome turn either on contract rights or on adult rights predicated upon biology or gestation, not on what is best for the child.<sup>34</sup> In a majority of cases, the result has been to reject the terms of the contract and attribute legal motherhood to the birth mother and legal fatherhood to the contracting man (who is usually the biological father),<sup>35</sup> thereby bringing the child into the world with a fractured family. Decisions refusing to enforce such a contract on public policy grounds have rested in part on the interest of children generally in not being treated as commodities.<sup>36</sup> But the result is still to make the individual child's best interests irrelevant in selecting the woman who will be his or her legal mother.

Among courts that have upheld surrogacy contracts, some have noted, as an afterthought, that the parties who intended to be parents from the start might generally be the better persons to parent.<sup>37</sup> But such a belief clearly does not drive the decisions, which instead focus on the adults' contract rights. And it is doubtful (though no court has addressed the issue) that children conceived as the result of a surrogacy contract would be deemed to have standing to seek enforcement of the contract on that basis. Moreover, in the vast majority of surrogacy situations, where the arrangement does not end in conflict, and where state agencies are willing to

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<sup>34</sup> See generally Storrow, *supra* note 29; Ardis L. Campbell, Annotation, *Determination of the Status as Legal or Natural Parents in Contested Surrogacy Births*, 77 A.L.R.5th 567, § 2(a) (2000). If legal parent status is invested in the birth mother rather than in the contracting mother, courts decide custody between the birth mother and the biological father based on the best interests of the child. See Naomi Cahn, *Reframing Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 24 (1997). But regardless of the outcome of that decision, the conferral of legal parenthood on two people who hardly know each other has profound consequences for the child.

<sup>35</sup> See Campbell, *supra* note 34.

<sup>36</sup> See, e.g., *In re Baby M*, 537 A.2d 1227, 1242-43 (N.J. 1988).

<sup>37</sup> See, e.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293 (Ct. App. 1998) ("Fortunately, . . . intent to parent 'correlate[s] significantly' with a child's best interests.") (footnote omitted) (alteration in original).

take the steps necessary to make the contractual terms legally effective (for example, by approving the adoption of the child by the non-gestational mother), the state confers legal parent status solely on the basis of private (adult) choice. As discussed below, adoption nominally requires a finding that the child's welfare would be served thereby, but the inquiry is really whether being adopted by the petitioner would be better than being parentless, not whether the petitioner is the best available parent.

Another type of situation in which the legal system occasionally makes individualized decisions around the time of birth about who will be a child's mother involves pre-birth petitions for a declaration of unfitness. These include cases in which a pregnant woman previously has seriously harmed another child and the state believes she will do so again, and cases in which a pregnant woman has done something to harm her fetus, such as taking drugs.<sup>38</sup> In such cases, however, the state typically petitions for removal of the child and placement into state custody at the time of birth, with the intention (not very well realized) of attempting to rehabilitate the birth mother and ultimately handing the baby over to her.<sup>39</sup> In those cases, maternity vests at birth and the legal question is whether the mother's parental

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<sup>38</sup> See, e.g., *Dep't of Soc. Servs. v. Felicia B.*, 543 N.Y.S.2d 637 (Fam. Ct. 1989) (holding that a neglect petition against a mother could be based on mother's pre-birth conduct of using cocaine).

<sup>39</sup> See Ellen Marrus, *Crack Babies and the Constitution: Ruminations About Addicted Pregnant Women After Ferguson v. City of Charleston*, 47 VILL. L. REV. 299, 327-37 (2002); see also *In re Mathias B.*, 2001 WL 1217334 (Cal. Ct. App. Oct. 11, 2001) (upholding trial court order continuing paternal grandparents' guardianship of child over objection of biological mother and father who had been undergoing rehabilitation for the six-and-one-half years since the child's birth); *In re Stephen W.*, 271 Cal. Rptr. 319 (Ct. App. 1990) (holding that a newborn infant, testing positive for opiates at birth, is a dependent child of the court and should be placed with paternal grandparents pending mother's successful completion of a family rehabilitation course); *In re Adoption of Darla*, 778 N.E.2d 985, 986 (Mass. App. Ct., 2002) (upholding termination of mother's parental rights to infant taken at birth and placed into temporary state custody because her rights to several other children had been terminated); *In re Cruz*, 503 N.Y.S.2d 798 (App. Div. 1986) (overturning trial court's decision that "derivative neglect" petition as to newborn child should be dismissed because mother was unlikely to handcuff and beat the newborn child the way she had done to her older children); *In re Unborn Child*, 683 N.Y.S.2d 366 (Fam. Ct. 1998) (holding that mother's past cocaine use, coupled with her current cocaine use during pregnancy, placed her fetus in substantial risk of serious harm, supporting pre-birth petition for neglect brought on behalf of the fetus); Michelle Oberman, *Sex, Drugs, Pregnancy, and the Law: Rethinking the Problems of Pregnant Women Who Use Drugs*, 43 HASTINGS L.J. 505, 521 (1992) (describing the state's usual response to detection of drug use by pregnant women); *id.* at 539 (indicating that, given the circumstances in which many drug addicts live and the lack of affordable treatment programs, "there is little hope that [drug addicted women] will be able to take the steps toward recovery needed to stabilize their own lives, let alone regain custody").

rights will later be terminated, an issue discussed later in this Article. Thus, with respect to mother-child relationships, children actually do not have even the limited right that the state not place them initially into a legal parent-child relationship with someone who is presumptively unfit to parent. Children do not have a right that the state immediately select someone more qualified than a drug addict who poisoned them to occupy the role of parent.

The failure to accord rights to children in this context clearly is morally significant. As discussed below in connection with proceedings to terminate an established parent-child relationship, there is a wide range of situations in which it is better for a child not to have a particular biological parent as a legal parent even though that biological parent does not present the sort of serious physical danger typically required to terminate a legal parent-child relationship once it is established.<sup>40</sup> Yet even in the extreme cases, there is much resistance to denying birth mothers legal parenthood on the basis of their conduct during pregnancy. Some scholars have been critical of court decisions that they view as “punishing” women in some way for using drugs during pregnancy, on the grounds that such action violates the liberty or privacy of women and/or the equal protection rights of minority-race women, concerns implicitly treated as more important than the welfare of the child.<sup>41</sup> Indeed, there is vehement opposition even toward efforts to prevent

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<sup>40</sup> See *infra* notes 349–64 and accompanying text; cf. Richard Wertheimer, *Youth Who ‘Age Out’ of Foster Care: Troubled Lives, Troubling Prospects*, CHILDREN’S TRENDS RESEARCH BRIEF, Dec. 2002, at 5, available at <http://www.childtrends.org/PDF/FosterCareRB.pdf> (noting that the children at greatest risk of being abused or neglected are those “born to a young mother; living in poor, single-mother families; and living in unstable families including unrelated adults,” and those whose conception was unintended).

<sup>41</sup> See, e.g., DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION AND THE MEANING OF LIBERTY* (1997); David C. Brody & Heidee McMillin, *Combating Fetal Substance Abuse and Governmental Foolhardiness Through Collaborative Linkages, Therapeutic Jurisprudence and Common Sense: Helping Women Help Themselves*, 12 HASTINGS WOMEN’S L.J. 243 (2001) (arguing that civil sanctions or criminal punishments for pregnant substance abusers would give the fetus formal status, thereby placing the fetus in competition with the mother in the legal and medical arenas and so compromising the interests of pregnant women); Tara-Nicholle B. DeLouth, *Pregnant Drug Addicts as Child Abusers: A South Carolina Ruling*, 14 BERKELEY WOMEN’S L.J. 96 (1999) (arguing that the South Carolina Supreme Court’s holding punishing two women for drug use during pregnancy challenges a woman’s privacy interest in controlling reproductive decisions); Kary Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN’S L.J. 278 (1990) (arguing that criminalizing cocaine use during pregnancy to prevent possible harm to an unborn fetus would severely strain a woman’s right to bodily integrity); Oberman, *supra* note 39, at 508, 510–11, 526–36 (advocating for protection of women’s fundamental liberty and charging that laws protecting fetuses and children of drug addicted women violate the Equal Protection Clause); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999 (1999); Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right to Privacy*, 104 HARV. L. REV. 1419

drug-addicted women from reproducing in the first place.<sup>42</sup>

Conversely, women who give birth are free to decline motherhood. They can voluntarily relinquish their claim on the child to adoptive parents they select or to an adoption agency.<sup>43</sup> This process is technically one of terminating rights rather than preventing maternity from vesting in the first place. But the effect is to enable the genetic mother to avoid ever having to associate with, or assume responsibility for, the child after the child is born.

### *b. Paternity*

Unlike maternity, paternity has been the subject of substantial constitutional adjudication, and this has established boundaries of permissibility for state rules for attributing legal fatherhood. In a series of cases concerning the rights of unwed fathers, the United States Supreme Court gave constitutional significance to the genetic connection between a child and the man who impregnated the child's mother, making it a necessary condition for constitutional protection of a man's desire to occupy the role of legal parent. These cases addressed questions about when states *must* accord legal parenthood to men,<sup>44</sup> when they must preserve the established legal parenthood of men in the face of attempts by other men to adopt children,<sup>45</sup> and when they must give a man an opportunity to prove that he is the biological father so that he can invoke state statutory procedures for establishing legal parenthood.<sup>46</sup> Together, the Court's decisions stand for the proposition that, for a *constitutional* right to arise such that states must ensure a man the opportunity to seek parental status, a man must be the biological father of the child *and* must either have already formed some kind of relationship with a child *or* have made a

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(1991). Scholars, as well as medical and advocacy groups, also have opposed punitive measures against women who took drugs during pregnancy on the grounds that doing so deters drug-abusing pregnant women from seeking pre-natal and post-natal care. See Oberman, *supra* note 39, at 520–23; James R. Schueller, *The Use of Cocaine By Pregnant Women: Child Abuse or Choice?*, 25 J. LEGIS. 163, 171–74 (1999) (citing sources and criticizing this argument).

<sup>42</sup> See Dana Hirschenbaum, *When Crack is the Only Choice: The Effect of a Negative Right of Privacy on Drug-Addicted Women*, 15 BERKELEY WOMEN'S L.J. 327 (2000); Lisa Powell, Note, *Eugenics and Equality: Does the Constitution Allow Policies Designed to Discourage Reproduction Among Disfavored Groups?*, 20 YALE L. & POL'Y REV. 481 (2002); Cecilia M. Vega, *Sterilization Offer to Addicts Reopens Ethics Issue*, N.Y. TIMES, Jan. 6, 2003, at B1 (describing reactions to private organization's program of paying drug addicts two hundred dollars to be put on long-term birth control or to be sterilized).

<sup>43</sup> See *infra* notes 104–05, 326–29 and accompanying text.

<sup>44</sup> See *Stanley v. Illinois*, 405 U.S. 645 (1972).

<sup>45</sup> *Caban v. Mohammed*, 441 U.S. 380 (1979); *Quilloin v. Walcott*, 434 U.S. 246 (1978).

<sup>46</sup> *Lehr v. Robertson*, 463 U.S. 248 (1983).

significant effort to do so upon learning of the child's existence.<sup>47</sup>

Thus, as a constitutional matter, biology is a necessary but not sufficient condition for constitutional protection of a man's interest in a child; some prior demonstration of a desire to be a parent must be shown. However, the Court's opinions suggest that the requisite effort might be quite minimal. With respect to a newborn child, simply filing a paternity petition might be sufficient to invest one with a constitutional right.<sup>48</sup> And simply having laid claim to a child is a far cry from having shown that one's being a legal parent would be best for the child.<sup>49</sup>

The Court's doctrine is largely superfluous today, however, because the states, in their paternity laws, generally give even greater significance to biology and give biological fathers greater protection than the Court has required.<sup>50</sup> As discussed below, state statutes generally empower men to demand a genetic test and require

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<sup>47</sup> See David Meyer, *Family Ties: Solving The Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 758-69 (1999).

<sup>48</sup> See *Lehr*, 463 U.S. at 262:

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 . . . .

Note that although Jonathan Robertson lost in his quest to block the adoption of his biological offspring by another man, it was not because the Court concluded that he had never had any constitutionally protected interest in the child, but rather that the state had adequately protected that interest by creating multiple mechanisms by which Mr. Robertson could have established his paternity at an earlier time and thereby pursued a legal and social relationship with his child. See *id.* at 265 ("[T]he New York statutes adequately protected appellant's inchoate interest in establishing a relationship with Jessica . . . ."); *id.* at 262 ("Appellant has 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.").

<sup>49</sup> The waters of constitutional paternity rights became somewhat muddled by the Court's plurality decision in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), in which the Court upheld a California statute under which a man married to the mother of a child at the time of birth or conception automatically received legal fatherhood status, with no opportunity for challenge provided to any other men, not even the child's biological father, who also had formed a significant relationship with the child. Justice Scalia's plurality opinion stated that what gives rise to constitutional protection is not a man's biological connection to a child and efforts to form a relationship, but rather the existence of a family unit. *Id.* at 123-24. This was not, however, a view expressed by a majority of the Justices.

<sup>50</sup> See NANCY DOWD, *REDEFINING FATHERHOOD* 114 (2000) ("In contrast to the constitutional requirement of 'biology plus some further connection' in order to trigger constitutional protection of unwed fathers, state statutes have moved toward recognizing biology alone as the basis for fatherhood responsibilities and rights . . . ."). The principal exception to this phenomenon is a provision in every state's laws for sperm donation; when done through a licensed agency following prescribed procedures, the donor is excluded from legal parent status. See Storrow, *supra* note 29, at 623-24.

courts to confer legal parenthood on a man whom the tests show to be the biological father, even over the strenuous objection of a mother who has and will retain custody of the child. The man is not required to demonstrate any past efforts or preparedness to be a parent. As with mothers, a state's decision to make the biological connection determinative where a man seeks paternity might be based in part on an empirical assumption that a biological connection predisposes an adult to care for a child. But that decision must also rest in part on beliefs about the natural entitlement of adults to possess their genetic offspring.<sup>51</sup> Any assumed predisposition would, in a true assessment of what is best for the child, play only a partial, and arguably minor, role. There is much more to being a good parent than simply having a desire to be a parent, although that is certainly one prerequisite.

Paternity rules are more complicated than maternity rules, reflecting both the greater difficulty of identifying the biological father of a child and the absence of a presumption that biological fathers expend pre-birth child-care labor or are as predisposed as biological mothers to be nurturing.<sup>52</sup> Prior to the development of sophisticated genetic tests, states largely relied on presumptions of fatherhood, based on a man's circumstances — principally, whether he was married to the mother at the time of conception and/or birth, but also whether he took the mother and child into his home and "held out" the child as his biological offspring, or whether he acknowledged paternity in writing.<sup>53</sup> These presumptions were based principally on factual assumptions about who was most likely a child's biological father, because biological fathers, or at least married ones, were deemed to have a property right to the product of their reproductive labor and, to a lesser extent, also to bear responsibility for the costs of caring for the dependent child they participated in creating. The presumptions were also based in part on the interests of the state, namely, interests in promoting and preserving marriage and in assigning fatherhood to a man who was financially able to support the child so that the state would not be forced to do so.<sup>54</sup> And the marital presumption also reflected a goal of minimizing

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<sup>51</sup> See DOWD, *supra* note 50, at 4 ("The model of fatherhood embedded in the law is predominantly biological and economic within the marital framework. It accords with historic concepts of fathers as property holders in relation to their children.").

<sup>52</sup> Cf. *Caban v. Mohammed*, 441 U.S. 380, 397 (Stewart, J., dissenting) ("The mother carries and bears the child, and in this sense her parental relationship is clear. The validity of the father's parental claims must be gauged by other measures.").

<sup>53</sup> See Paula Roberts, *Biology and Beyond: The Case For Passage of the New Uniform Parentage Act*, 35 FAM. L.Q. 41, 45–46 (2001). The presumptions were generally rebuttable by evidence that the alleged father could not have had sex with the mother during the likely period of conception. See *id.*

<sup>54</sup> See *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 289 (Ct. App. 1998): [T]he Legislature has already made it perfectly clear that public policy (and, we might add, common sense) favors, whenever possible, the establishment of legal parenthood with the concomitant responsibility. Family Code section 7570, subdivision (a) states that "There is a compelling state interest in establishing

the number of children deemed illegitimate, an aim that might have been motivated in part by a concern for the well-being of individual children.<sup>55</sup>

Although today it is possible through genetic testing to establish with near-complete certainty who a child's biological father is,<sup>56</sup> such presumptions remain in the family codes or common law doctrines of most states.<sup>57</sup> This suggests that

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paternity for all children." The statute then goes on to elaborate why establishing paternity is a good thing: It means someone besides the taxpayers will be responsible for the child . . . .

*See also* Love v. Love, 959 P.2d 523, 527 n.2 (Nev. 1998) (stating that the state legislature's primary purpose in enacting statutory provision creating presumptions of paternity was to ensure that children are supported financially by parents rather than by the state); Fish v. Behers, 741 A.2d 721, 723 (Pa. 1999) (indicating that the policy underlying the marital presumption is the preservation of marriages); George L. Blum, Annotation, *Right of Illegitimate Child to Maintain Action to Determine Paternity*, 86 A.L.R.5th 637 § 2 (2001) ("Filiation statutes are generally considered to represent an exercise of the police power of the state, for the primary purposes of securing the support and education of an illegitimate child and of protecting society by preventing such a child from becoming a public charge."); Diane S. Kaplan, *Why Truth Is Not a Defense in Paternity Actions*, 10 TEX. J. WOMEN & L. 69, 75 (2000) ("Under the estoppel model [for upholding the marital presumption], the self-perceived role of the court is to protect the social institutions of marriage and families, in general, even when they no longer exist in fact . . . ."); *id.* at 70–71 (stating that the marital paternity presumption developed to protect the public fisc as well as to protect children from the adverse consequences of illegitimacy).

<sup>55</sup> *See* Michael H., 491 U.S. at 125 (plurality opinion of Justice Scalia) (citations omitted):

The primary policy rationale underlying the common law's severe restrictions on rebuttal of the [marital] presumption appears to have been an aversion to declaring children illegitimate, thereby depriving them of rights of inheritance and succession and likely making them wards of the state. A secondary policy concern was the interest in promoting the "peace and tranquillity of States and families," a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate.

*See also* Doe v. Doe, 52 P.3d 255, 261 (Haw. 2002) ("The fundamental purposes of [the state's paternity rules] are 'to provide substantive legal equality for all children regardless of the marital status of their parents' and to protect the rights and ensure the obligations of parents of children born out of wedlock.") (citation omitted); T.L. v. C.S., 975 P.2d 1065, 1068 (Wyo. 1999) ("The legislature's intent to insure children born during wedlock will not be considered illegitimate is expressed in the statutory presumption of paternity accorded to a man married to the mother at the time of the child's birth.").

<sup>56</sup> *See* DOWD, *supra* note 50, at 115–16.

<sup>57</sup> *See* ALA. CODE § 26-17-5 (2002); ALASKA STAT. § 25.20.050 (Michie 2002); ARIZ. REV. STAT. ANN. § 25-814 (West 2001); CAL. FAM. CODE § 7613 (West 1994); COLO. REV. STAT. § 19-4-105 (2002); DEL. CODE ANN. tit. 13, § 804 (2002); D.C. CODE ANN. § 16-2343 (2002); GA. CODE ANN. § 19-7-20 (2002); HAW. REV. STAT. § 584-4 (2002); 750 ILL. COMP. STAT. ANN. 45/5 (West 2002); IND. CODE ANN. § 31-14-7-1 (Michie 2002); KAN. STAT. ANN. § 38-1114 (2001); KY. REV. STAT. ANN. § 406.011 (Michie 2002); LA. CIV. CODE art. 185 (West 2002); MD. CODE ANN., FAM. LAW § 5-1027 (2002); MASS. GEN. LAWS ANN. ch.

paternity law still reflects legislative aims other than just identifying the biological progenitors of a child. However, it is generally the case that biological paternity trumps all other considerations. A man wishing to establish paternity who does not have a presumption in his favor may file a request for genetic testing.<sup>58</sup> If the request is made within a certain time after the birth of the child, which is shorter in many states in situations where another man is a presumed father,<sup>59</sup> courts order the

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209C, § 6 (West 2002); MINN. STAT. § 57.55 (2002); MO. REV. STAT. § 210.822 (2001); MONT. CODE ANN. § 40-6-105 (2002); NEV. REV. STAT. 126.051 (2002); N.J. STAT. ANN. § 9:17-43 (West 2002); N.M. STAT. ANN. § 40-11-5 (Michie 2002); N.Y. FAM. CT. ACT § 532 (McKinney 2002) (referring to "presumption of legitimacy"); N.D. CENT. CODE § 14-17-04 (2002); OHIO REV. CODE ANN. § 3111.03 (Anderson 2002); OKLA. STAT. tit. 10, § 2 (2002) (presumptions based on marriage, cohabitation, and holding out the child as one's biological offspring); OR. REV. STAT. § 109.070 (2001); 23 PA. CONS. STAT. § 5102 (2002); R.I. GEN. LAWS § 15-8-3 (2002); S.D. CODIFIED LAWS § 25-5-3 (Michie 2002); TENN. CODE ANN. § 36-2-304(a) (2002) (presumptions based on marriage, attempted marriage, and holding out); TEX. FAM. CODE ANN. § 160.204 (Vernon 2002); WASH. REV. CODE ANN. § 26.26.116 (West 2002); WIS. STAT. § 891.41 (2001); WYO. STAT. ANN. § 14-2-102 (Michie 2002). Two states have even created a new presumption in modern times, based on cohabitation around the time of conception. *See, e.g.*, NEV. REV. STAT. 126.051 (2002) ("A man is presumed to be the natural father of a child if: . . . (b) He and the child's natural mother were cohabiting for at least 6 months before the period of conception and continued to cohabit through the period of conception."); OKLA. STAT. ANN. tit. 10, § 2(A)(2) (2002). Cohabitation has in all states long been evidence of opportunity for sexual relations, in judicial inquiry into the probability that a man is the biological father of a child.

<sup>58</sup> *See, e.g.*, VA. CODE ANN. § 20-49.3 (Michie 2002) (requiring courts to order genetic tests in any case in which child support is at issue); *Langston v. Riffe*, 754 A.2d 389, 404 (Md. Ct. App. 2001) (holding that a man is entitled to blood or genetic tests to disprove his biological connection to the child and overturn a prior declaration of paternity).

<sup>59</sup> James Lockhart, *Cause of Action on Behalf of Child or Mother to Establish Paternity*, in 6 CAUSES OF ACTION 2D 1, § 14 (2003). A typical time limitation in the absence of any presumed father is very liberal — for example, three years after the offspring reaches the age of majority. *See, e.g.*, 410 ILL. COMP. STAT. ANN. 45/8(a)(1) (West 2002) (two years after majority); KAN. STAT. ANN. § 38-1115 (2001) (three years after majority); N.J. STAT. ANN. § 9:17-45 (West 2002) (five years after majority); N.M. STAT. ANN. § 40-11-23 (Michie 2002) (three years after majority); N.D. CENT. CODE § 14-17-06 (2001) (three years after majority where no presumption and no prior determination of paternity in favor of another man); OHIO REV. CODE ANN. § 3111.05 (Anderson 2002) (five years after turning eighteen); R.I. GEN. LAWS § 15-8-6 (2002) (four years after majority); TENN. CODE ANN. § 36-2-306 (2002) (three years after majority); TEX. FAM. CODE ANN. § 160.606 (Vernon 2002) (no time limit); WIS. STAT. § 893.88 (2001) (nineteen years after birth); WYO. STAT. ANN. § 14-2-105 (Michie 2002) (three years after majority). Many of these state provisions are the result of a 1984 federal law requiring states, as a condition for receipt of federal funds, to allow for establishment of paternity up to eighteen years after birth. 42 U.S.C. § 666(a)(5)(ii) (2000). The title of the law — the Child Support Enforcement Amendments — establishes that the purpose of the mandate was to extract financial support from fathers. Time limitations for rebutting presumptions can be shorter, because expiration of the time limit does not leave the

testing and base their paternity decision on the results. Significantly, today an action may be brought on behalf of a child to challenge a paternity presumption, or by a child's mother in the child's name, as well as by a putative father.<sup>60</sup>

However, certain presumptions may be challenged only in very limited circumstances. For example, a sworn acknowledgment by the mother and a putative father creates a presumption of paternity that is subject to challenge, after an initial sixty day revocation period, only on the basis of fraud, duress, or material mistake of fact.<sup>61</sup> In several states, a marital presumption is irrebuttable so long as the

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child without a father on whom the state can impose a support obligation. Thus, in several states, the time limitation for seeking to rebut certain presumptions of paternity is five years after birth or within a reasonable time after learning the facts that form the basis for the petition. *See, e.g.*, COLO. REV. STAT. § 19-4-107 (2002); N.D. CENT. CODE § 14-17-05(1)(b) (2001); WYO. STAT. ANN. § 14-2-105 (Michie 2002); *cf.* TEX. FAM. CODE ANN. § 160.607 (Vernon 2002) (challenge to presumption must be brought by child's fourth birthday); *id.* § 160.609 (challenge to acknowledgment of paternity must be brought within four years of execution of acknowledgment). Some states apply much more restrictive rules when the presumed father and the mother remain married after the birth of the child. *See, e.g.*, OKLA. STAT. tit. 10, § 3 (2003) ("If a child is born during the course of the marriage and is reared by the husband and wife as a member of their family without disputing the child's legitimacy for a period of at least two (2) years, the presumption cannot be disputed by anyone."); TENN. CODE ANN. § 36-2-306(b)(2)(A) (2002) (twelve-month limit on challenges to marital presumption where family remains intact). Others are more liberal. Ohio, for example, allows an action to be brought to establish paternity, regardless of whether another man is a presumed father, up to five years after the child reaches age eighteen. OHIO REV. CODE ANN. § 3111.05 (West 2002); *see also* 410 ILL. COMP. STAT. 45/8(a)(3)-(4) (2002) (two years after obtaining knowledge of relevant facts, but no later than the child's eighteenth birthday); MD. CODE ANN., FAM. LAW § 5-1006 (2002) (child's eighteenth birthday for all paternity actions).

<sup>60</sup> *See, e.g.*, CAL. FAM. CODE § 7630 (West 1994); COLO. REV. STAT. ANN. § 19-4-107 (2002); DEL. CODE ANN. tit. 13, § 805 (2002); HAW. REV. STAT. § 584-6(b) (2002); 750 ILL. COMP. STAT. ANN. 45/7(a) (West 2001); KAN. STAT. ANN. § 38-1115(e) (2003); MINN. STAT. § 257.57(1) (2003); MO. REV. STAT. 210.826(1) (2002); MONT. CODE ANN. § 40-6-107(1) (2002) (any interested party may bring action); NEV. REV. STAT. 126.071 (2002); N.M. STAT. ANN. § 40-11-7(a) (Michie 2002) (any interested party); N.D. CENT. CODE § 14-17-05(1) (2001); *see also* Lockhart, *supra* note 59, § 17.

<sup>61</sup> *See* ALA. CODE § 26-17-22 (2002); ALASKA STAT. § 25.20.050 (Michie 2003); ARIZ. REV. STAT. § 25-812(E) (2002); ARK. CODE ANN. § 9-10-115 (Michie 2002); COLO. REV. STAT. ANN. § 19-4-105(2) (2002); CONN. GEN. STAT. § 46b-172 (2002); DEL. CODE ANN. tit. 13, § 804(c) (2001); D.C. CODE ANN. § 16-909(c-1) (2002); FLA. STAT. ANN. § 742.10(4) (West 2002); GA. CODE ANN. § 19-7-46.1(c) (2002); HAW. REV. STAT. § 584-3.5 (2002); IDAHO CODE § 7-1106(2) (2002); 410 ILL. COMP. STAT. ANN. 535/12(7), 45/6(c) (West 2002); IND. CODE § 16-37-2-2.1(i) (2002); IOWA CODE § 600B.41A(3)(f) (2002); KAN. STAT. ANN. § 38-1115(e) (2002); LA. REV. STAT. ANN. § 9:392(a)(7) (West 2002); ME. REV. STAT. ANN. tit. 19-A, § 1616(1) (West 2002); MD. CODE ANN., FAM. LAW § 5-1028(d) (2002); MASS. GEN. LAWS ANN. ch. 209C, § 11(d) (West 2002); MINN. STAT. § 257.75(4) (2002); MISS. CODE ANN. § 41-57-23(3)(b) (2002); MO. REV. STAT. § 210.823(1) (2002); MONT. CODE ANN. § 40-6-105(5) (2002); NEB. REV. STAT. § 43-1409 (2002); NEV. REV. STAT.

relationship between the mother and presumed father remains intact, or the presumption is immune from challenge at any time by a man other than the presumed father.<sup>62</sup>

The factual predicates for some common paternity presumptions might generally pick out men who are likely to be committed to parenting or who are in a relatively good position to serve as co-parents with legal mothers. To that extent, the presumptions would tend to serve the interests of the children, though they might not do so in every case. For example, *all else being equal*, it is best for a child that her legal father (if there is to be a legal father at all, and only one) be the man married to her mother (for more effective co-parenting), or that he be a man who has previously demonstrated a commitment to caring for her or already formed a parent-like relationship with her. Where a child is in a stable family relationship with a mother and care-giving father figure, there is good reason to presume that allowing another man to insert himself into the child's life, and thereby also into the mother's life, solely on the grounds that he is the biological father, would be bad for the child.<sup>63</sup>

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126.053 (2002); N.H. REV. STAT. § 126:6-a(II-d), (II-e) (2002); N.J. STAT. ANN. § 9:17-41(b) (West 2002); N.M. STAT. ANN. § 40-11-5(A)(5) (Michie 2002); N.D. CENT. CODE § 14-19-10(1) (2002); OHIO REV. CODE ANN. §§ 3111.03(B), 3111.28 (Anderson 2002); OKLA. STAT. ANN. tit. 10, § 70 (West 2002); OR. REV. STAT. § 109.070(1)(e), (2) (2002); 23 PA. CONS. STAT. § 5103 (2002); R.I. GEN. LAWS § 15-8-3(a)(6) (2003); S.C. CODE ANN. § 20-7-958 (Law. Co-op. 2002); VA. CODE ANN. § 20-49.1 (Michie 2002); WYO. STAT. ANN. § 14-2-102(e) (Michie 2002). This type of provision is also the result of a federal mandate — in this case, the Personal Responsibility and Work Opportunity Reconciliation Act of 1993, 42 U.S.C. § 666 (2000).

<sup>62</sup> See, e.g., MASS. GEN. LAWS ANN. ch. 209C, § 5 (West 2002) (a marital presumption may not be challenged at all by a man who is not a presumed father by virtue of marriage to the child's mother); OR. REV. STAT. § 109.070(1)(a) (2002) ("The child of a wife cohabiting with her husband who was not impotent or sterile at the time of the conception of the child shall be conclusively presumed to be the child of her husband . . ."); *Strauser v. Stahr*, 726 A.2d 1052, 1054 (Pa. 1999) (rejecting challenge to marital presumption on grounds that "in one particular situation, no amount of evidence can overcome the presumption: where the family (mother, child, and husband/presumptive father) remains intact at the time that the husband's paternity is challenged, the presumption is irrebuttable"). In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (plurality opinion), the Supreme Court upheld against a substantive due process challenge a California law creating an irrebuttable marital presumption. The current California paternity statute takes a more moderate position. See CAL. FAM. CODE § 7540 (West 1994) (granting courts discretion to refuse request for genetic testing to rebut marital presumption).

<sup>63</sup> The now-classic text emphasizing the importance for children of a secure relationship with a primary parental figure, insulated from unwanted interference by more peripheral family members, is JOSEPH GOLDSTEIN ET AL., *BEFORE THE BEST INTERESTS OF THE CHILD* (1979). See especially *id.* at 31–35. For a presentation of more recent work on this issue, see Judith T. Younger, *Post-Divorce Visitation for Infants and Young Children — The Myths and the Psychological Unknowns*, 36 FAM. L.Q. 195, 198–204 (2002).

However, some paternity presumptions appear to serve not so much as predictors of who will be a good father for a child, but rather simply as indications of who is the biological father.<sup>64</sup> For example, in most states a strong presumption lies in favor of a man who, with the support or at least acquiescence of the mother, simply signs an acknowledgment of paternity, without regard to the relationship between the man and the mother or between the man and the child.<sup>65</sup> The presumption in favor of a man who "takes" a mother and child into "his home" generally arises only if the man also tells other people that he is the biological father.<sup>66</sup>

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<sup>64</sup> In at least two states, statutory paternity presumption rules state explicitly that what is being presumed is biological fatherhood, from which legal fatherhood necessarily follows. *See* MINN. STAT. ANN. § 257.55 (West 2002) ("A man is presumed to be the biological father of a child if . . ."); N.J. STAT. ANN. § 9:17-43 (West 2002). In many other states, the term "natural father" is used, which means biological father. *See* ALA. CODE § 26-17-5(a) (2002) ("A man is presumed to be the natural father of a child if any of the following apply . . ."); CAL. FAM. CODE § 7611 (West 1994); COLO. REV. STAT. ANN. § 19-4-105 (2002); HAW. REV. STAT. § 584-4 (2002); 750 ILL. COMP. STAT. ANN. 45/5 (West 2002); 2002 Mass. Adv. Legis. Serv. 210.822 (Law. Co-op.); MONT. CODE ANN. § 40-6-105 (2002); NEV. REV. STAT. 126.051 (2002); N.M. STAT. ANN. § 40-11-5 (Michie 1978); N.C. GEN. STAT. § 130A-101(f) (2002); N.D. CENT. CODE § 14-17-04 (2002); OHIO REV. CODE ANN. § 3111.03 (Anderson 2002); OKLA. STAT. ANN. tit. 10, § 2 (West 2002); R.I. GEN. LAWS § 15-8-3 (2003); WIS. STAT. ANN. §§ 891.405, 891.41 (West 2002); WYO. STAT. ANN. § 14-2-102 (Michie 2002); *see also In re Jerry P.*, 116 Cal. Rptr. 2d 123, 128 (Ct. App. 2002) ("A man who has been established to be the biological father is a 'natural father.'"). In addition, some courts have characterized the search for the biological father as the singular immediate aim of paternity laws, tied to an ultimate aim of tagging a financial support obligation on the man who caused the dependent child to come into being. *See, e.g., Smith v. Bumgarner*, 443 S.E.2d 744, 745 (N.C. Ct. App. 1994) ("The legislative purpose of an action under G.S. § 49-14 is to provide the basis or means of establishing the identity of the biological father so that the child's right to support may be enforced and the child will not become a public charge.").

<sup>65</sup> ALA. CODE § 26-17-5 (2002); ALASKA STAT. § 25.20.050 (Michie 2002); ARIZ. REV. STAT. § 25-814 (2001); CAL. FAM. CODE § 7576 (West 1994); COLO. REV. STAT. § 19-4-105 (2002); CONN. GEN. STAT. § 46b-172 (2001); DEL. CODE ANN. § 804 (2001); D.C. CODE ANN. § 16-909 (2002); FLA. STAT. ANN. § 742.10 (West 2002); HAW. REV. STAT. § 584-4 (2002); 750 ILL. COMP. STAT. ANN. 45/5 (West 2002); IND. CODE ANN. § 31-14-7-3 (Michie 2002); KAN. STAT. ANN. § 38-1114 (2001); KY. REV. STAT. ANN. § 213.046 (Michie 2002); MD. CODE ANN., FAM. LAW § 5-1028 (2002); MASS. GEN. LAWS ANN. ch. 209C, § 6 (West 2002); MINN. STAT. § 257.55(b)(1) (2002); MO. REV. STAT. § 210.822 (2001); MONT. CODE ANN., § 40-6-105 (2002); N.J. STAT. ANN. § 9:17-43 (2002); N.M. STAT. ANN. § 40-11-5 (Michie 2002); N.D. CENT. CODE, § 14-17-04 (2002); OHIO REV. CODE ANN. § 3111.03 (Anderson 2002); OKLA. STAT. tit. 10, § 70 (2003); OR. REV. STAT. § 109.070 (2001); R.I. GEN. LAWS § 15-8-3 (2002); TENN. CODE ANN. § 36-2-304 (2002); TEX. FAM. CODE § 160.201 (Vernon 2002); WIS. STAT. § 891.405 (2001); WYO. STAT. ANN. § 14-2-102 (Michie 2002).

<sup>66</sup> *See, e.g.,* ALA. CODE § 26-17-5 (2002); ARIZ. REV. STAT. § 25-814 (2001); CAL. FAM. CODE § 7611(d) (West 1994); DEL. CODE ANN. tit. 13, § 804(4) (2001); IND. CODE ANN.

In addition, one presumption that exists in most states appears to serve neither as a predictor of good fathering nor as an indication of who the biological father is. In a majority of states today, a paternity presumption lies in favor of a man who was married to the child's mother at the time of conception, even though the man is not married to the child's mother at the time of birth.<sup>67</sup> This scenario is likely to arise when the ex-husband is *not* the child's biological father, either because the mother was having an affair while living with the ex-husband, in which case the very cause of the marital dissolution might have been the wife's relationship with another man,<sup>68</sup> or because the couple was living apart for a significant time before becoming divorced and the mother was involved in another relationship. It usually will be the case that this presumption operates in situations where the presumed father is not in a positive, supportive relationship with the mother. It does create "legitimacy" for the child,<sup>69</sup> but that consideration is of little significance today, and the better explanation for its perseverance might be the opportunity it creates for married men to preserve their honor and enforce their sense of exclusive dominion over the bodies of their wives.

Moreover, the law generally does not permit anyone to attempt to rebut a legal

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§ 31-14-7-2 (2002); MASS. GEN. LAWS ANN. ch. 209C, § 6 (West 2002); MINN. STAT. § 257.55(d) (2002); MONT. CODE ANN., § 40-6-105(d) (2002); NEV. REV. STAT. 126.051(1)(d) (2002); N.J. STAT. ANN. § 9:17-43(a)(4) (West 2002); N.M. STAT. ANN. § 40-11-5 (Michie 2002); N.D. CENT. CODE § 14-17-04 (2002); OKLA. STAT. tit. 10, § 2 (2003); TENN. CODE ANN. § 36-2-304 (2002); WYO. STAT. ANN. § 14-2-102 (Michie 2002).

<sup>67</sup> See, e.g., ALA. CODE § 26-17-5 (2002); CAL. FAM. CODE § 7540 (West 1994); COLO. REV. STAT. § 19-4-105 (2002); DEL. CODE ANN. tit. 13, § 804(4) (2001); D.C. CODE ANN. § 16-909 (2002); GA. CODE ANN. § 19-7-20 (Michie 2002); HAW. REV. STAT. § 584-4 (2002); IND. CODE ANN. § 31-14-7-1 (Michie 2002); 750 ILL. COMP. STAT. ANN. 45/5 (West 2002); KAN. STAT. ANN. § 38-1114 (Michie 2001); KY. REV. STAT. ANN. § 406.011 (Michie 2002); MD. CODE ANN., FAM. LAW § 5-1027 (2002); MASS. GEN. LAWS ANN. ch. 209C, § 6 (West 2002); MINN. STAT. § 257.55 (2002); MO. REV. STAT. § 210.822 (2001); MONT. CODE ANN. § 40-6-105 (2002); NEV. REV. STAT. 126.051 (2002); N.J. STAT. ANN. § 9:17-43 (West 2002); N.M. STAT. ANN. § 40-11-5 (Michie 2002); N.D. CENT. CODE § 14-17-04 (2002); OHIO REV. CODE ANN. § 3111.03 (Anderson 2002); OKLA. STAT. tit. 10, § 2 (2003); OR. REV. STAT. § 109.070 (2001); R.I. GEN. LAWS § 15-8-3 (2002); S.D. CODIFIED LAWS § 25-5-3 (2002); TENN. CODE ANN. § 36-2-304 (2002); TEX. FAM. CODE § 160.204 (Vernon 2002); WASH. REV. CODE § 26.26.116 (2002); WIS. STAT. § 891.41 (2001); WYO. STAT. ANN. § 14-2-102 (Michie 2002).

<sup>68</sup> There also are cases in which the child is both conceived and born during a marriage, but the biological father is not the mother's husband, and revelation of that fact leads to divorce. See, e.g., *Richard B. v. Sandra B.*, 625 N.Y.S.2d 127 (App. Div. 1995) (holding that the ex-husband was estopped from denying his paternity of a child who was born during the marriage but conceived of in an adulterous affair, despite his suit for divorce on grounds of adultery); *Fish v. Behers*, 741 A.2d 721 (Pa. 1999).

<sup>69</sup> See Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 453 (2002).

presumption of paternity on the grounds that doing so would be in the best interests of the child. State statutes authorize paternity challenges on the grounds that some other man is actually the genetic father, but not on the grounds that some other man would be a better father (or a good second father).<sup>70</sup> For example, where a mother and her current boyfriend create a presumption by signing an acknowledgment of paternity, another man who has previously acted in a paternal role toward the child generally cannot, *on that basis*, overcome the presumption. If a challenge to the presumption is even allowed — and, as noted above, it might not be — he would have to show that he is the biological father.<sup>71</sup>

In addition, most states do not permit a man presumed to be a father on the basis of an acknowledgment to deny his own paternity after an initial sixty-day revocation period, unless he can show that his acknowledgment resulted from fraud, duress, or material mistake of fact.<sup>72</sup> In order to continue imposing a child support obligation on such a man, states disregard the man's claim that he is not the biological father and his expressed desire not to act as a parent. To some extent, this has also happened with men presumed to be a child's father by virtue of having been married to the child's mother; in some cases courts have, based on an estoppel rationale, forced the man to remain the legal father (though they do not force him to be a social parent).<sup>73</sup>

One exception in some states to the general rule that a presumption can be rebutted only by proof of biological parenthood is a provision for cases in which two or more presumptions arise. The provision, taken from the Uniform Parentage Act, states that "the presumption which on the facts is founded on the weightier considerations of policy and logic controls."<sup>74</sup> Some courts applying this rule have

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<sup>70</sup> See Lockhart, *supra* note 59, §§ 13, 25, 29; Donald M. Zupanec, Annotation, *Who May Dispute Presumption of Legitimacy of Child Conceived or Born During Wedlock*, 90 A.L.R.3d 1032 § 2 (1979) (stating that marital presumption generally may be rebutted "upon the presentation of proof sufficient to establish that the husband of the mother of the child is not the child's father").

<sup>71</sup> Cf. *Spaeth v. Warren*, 478 N.W.2d 319, 322 (Minn. Ct. App. 1991) (holding that a paternity action could proceed without a finding that the action would be in the best interests of the child, and stating that "the purpose of a paternity action . . . is to legally determine a biological parent of a child").

<sup>72</sup> See *supra* note 61.

<sup>73</sup> See, e.g., *In re Marriage of Christina L. & David Z.*, 2003 WL 103972, at \*2 (Cal. Ct. App. Jan. 13, 2003); *W. v. W.*, 728 A.2d 1076 (Conn. 1999); *White v. White*, 710 So. 2d 208 (Fla. Ct. App. 1998); *Pietros v. Pietros*, 638 A.2d 545, 547 (R.I. 1994); AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 128–29 (2002) [hereinafter A.L.I., PRINCIPLES] (citing cases); Leah M. Perkins, *Legal Report: Superior Court Vacates Order for Paternal Blood Test: Father Cannot Rescind Acknowledgment of Paternity*, LAW. J., Sept. 21, 2001, at 2 (discussing case law in Pennsylvania).

<sup>74</sup> MINN. STAT. § 257.55(2) (2002); see also ARIZ. REV. STAT. § 25-814 (2002); CAL. FAM. CODE § 7612(b) (West 1994); COLO. REV. STAT. § 19-4-105(2)(a) (2002); DEL. CODE

decided that it requires them to select between the two putative fathers *partly* on the basis of the child's best interests.<sup>75</sup> Other courts, however, have held that the interests of the child are irrelevant to the selection, and that the proper way to resolve such a conflict is on the basis of biological fatherhood, as revealed by genetic testing.<sup>76</sup> So only in a small minority of states would a paternity determination ever entail direct consideration of the child's interests.

Further, most states enable a man to rebut a paternity presumption in favor of himself or another man, or to garner legal paternity in the absence of a presumption, *solely* by refuting or demonstrating biological fatherhood, regardless of whether that is best for the child in a given case.<sup>77</sup> Thus, under the prevailing rules, it is neither

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ANN. tit. 13, § 804 (2002); HAW. REV. STAT. § 584-4 (b) (2002); KAN. STAT. ANN. § 38-1114 (2001); MO. REV. STAT. § 210.822 (2002); NEV. REV. STAT. 126.051 (2002); N.H. REV. STAT. § 168-B:3 (2002); N.J. STAT. ANN. § 9:17-43(b) (West 2002); N.M. STAT. ANN. § 40-11-5 (2002); N.D. CENT. CODE § 14-17-04(2) (2001); R.I. GEN. LAWS § 15-8-3(b) (2002); WYO. STAT. ANN. § 14-2-102 (Michie 2002).

<sup>75</sup> See, e.g., *In re Kiana A.*, 113 Cal. Rptr. 2d 669, 677-78 (Ct. App. 2001); *N.A.H. v. S.L.S.*, 9 P.3d 354 (Colo. 2000) (holding that the best interests of the child must be considered as part of the policy and logical analysis used to decide legal fatherhood in the face of competing presumptions of paternity); *State v. Thomas*, 584 N.W.2d 421, 424 (Minn. Ct. App. 1998) ("[W]hen choosing between two conflicting presumptions of paternity, in addition to considering the best interests of the child, district courts must weigh 'historic policy considerations on the importance of protecting the marriage relationship and the importance of blood relationships.'" (citation omitted); *In re Paternity of B.J.H.*, 573 N.W.2d 99, 102 (Minn. Ct. App. 1998) ("[A] child's best interests are *part* of the analysis for resolving conflicting paternity presumptions."); cf. *State ex rel. W. Va. Dep't of Health & Human Res. v. Michael George K.*, 531 S.E.2d 669, 677-78 (W. Va. 2000) (deciding between conflicting presumptions based on consideration of both the best interests of the child and fairness between the competing presumed fathers).

<sup>76</sup> See, e.g., *TL ex rel. TL v. CS*, 975 P.2d 1065, 1068-69 (Wyo. 1999) (holding that best interests of child is irrelevant to proceeding to rebut paternity presumption based on receiving a child into one's home and holding out the child as one's own); *Toft v. Nevada ex rel. Pimentel*, 671 A.2d 99, 109 (Md. Ct. App. 1996).

<sup>77</sup> See, e.g., CAL. FAM. CODE § 7541(a) (West 1994) (blood tests excluding man as biological father rebut marital presumption); COLO. REV. STAT. § 13-25-126(e) (2002); MD. CODE ANN., FAM. LAW § 5-1029(b) (2002) (requiring courts to order genetic tests if any party requests it); MINN. STAT. § 257.75(4)(a) (2002) ("If the results of the blood tests establish that the man who executed the recognition is not the father, the court shall vacate the recognition."); MONT. CODE ANN. § 40-6-105(3) (2002) ("[A] presumption . . . may be rebutted . . . by scientific evidence resulting from a blood test that excludes the person as the child's natural parent"); N.H. REV. STAT. § 522:4(a) (2002) ("If the court finds that the conclusion of all the experts, as disclosed by the evidence based upon the tests, is that the alleged father is not the parent of the child, the question of paternity shall be resolved accordingly."); N.J. STAT. ANN. §§ 9:17-43(b), 9:17-48(i) (West 2002); OHIO REV. CODE ANN. § 3111.03(B)(1) (Anderson 2002) ("A presumption that arises under this section can only be rebutted by clear and convincing evidence that includes the results of genetic testing . . ."); 23 PA. CONS. STAT. ANN. §§ 5103, 5104(f)-(g) (West 2002); R.I. GEN. LAWS

necessary *nor* sufficient for a man hoping to *acquire* legal parental status to show that making him a legal parent would be in a child's best interests, nor is it necessary for a person seeking to *extinguish* a presumption of legal fatherhood to show that the child would benefit. As long as the petition is filed within the statutory time limit, all that is needed to establish or refute paternity is a DNA test; all that matters is the biological connection. The child's welfare, or at least aspects of it other than any benefit arising from a biological connection with the man, is of no consequence. Yet, challenges to presumed paternity can have devastating consequences for a child if the presumed father has acted as a social parent to the child and the child has viewed him as his or her father for several years.

In the past fifteen years, various new modifications to the basic paternity rules have surfaced in several states, under which the child's welfare is said to be relevant, in one way or another, to the paternity determination. In a significant number of states, legislatures have established, or courts have held, that in the limited circumstances where a marital presumption lies in favor of one man, another man may not even proceed with a paternity suit unless he can show that it would be in the child's best interests to do so.<sup>78</sup> Courts in several states have also held,

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§§ 15-8-3(b), 15-8-11(e) (2002); *Doe v. Doe*, 52 P.3d 255, 265 (Haw. 2002) (stating that provisions concerning genetic testing do not permit the family court to consider whether such testing is in the best interests of the child before ordering it); *Langston v. Riffe*, 754 A.2d 389, 404-05 (Md. 2000) (finding that the state legislature consciously chose to make the interests of the child irrelevant to rebuttal of paternity presumptions on the basis of DNA tests); *Spaeth v. Warren*, 478 N.W.2d 319, 322 (Minn. Ct. App. 1991) (holding that paternity action could proceed without a finding that the action would be in the best interests of the child); *State ex rel. Dep't of Soc. Servs. v. Kobusch*, 908 S.W.2d 383 (Mo. Ct. App. 1995) (holding that presumption of paternity in favor of a mother's husband was rebutted by genetic test evidence of biological fatherhood in another man); *Richard W. v. Roberta Y.*, 629 N.Y.S.2d 512, 514 (App. Div. 1995) (holding that a man with marital presumption of paternity who had acted as father and wanted to continue to do so must be made a party to the paternity action, but stating that tests showing he was not the biological father would *per se* rebut the presumption and eviscerate his legal relationship with the child, noting that "the presumption should not be utilized to perpetuate a falsehood"); *Thompson v. Thompson*, 1995 WL 481480, at \*3-\*4 (Ohio Ct. App. Aug. 10, 1995); *T.L.*, 975 P.2d at 1068 ("[T]he best interests of the child standard [is] not relevant in an action purely to establish paternity.").

<sup>78</sup> *In re Marriage of Wendy M.*, 962 P.2d 130, 132 (Wash. Ct. App. 1998) ("[T]he 'best interests of the child standard' governs the determination of all petitions to disestablish paternity . . ."); see WIS. STAT. § 767.458(1m) (2002):

In an action to establish the paternity of a child who was born to a woman while she was married, where a man other than the woman's husband alleges that he, not the husband, is the child's father . . . . If the court . . . determines that a judicial determination of whether a man other than the husband is the father is not in the best interest of the child, no genetic tests may be ordered and the action shall be dismissed.

See also *Ban v. Quigley*, 812 P.2d 1014, 1018 (Ariz. Ct. App. 1990); Dep't of Health &

purportedly to protect the well-being of children, that both the presumed father himself and the mother are estopped from challenging the presumption if the man has served in the role of parent for a long time, though as noted above the only actual consequence of doing so might be to impose a support obligation on the man.<sup>79</sup> And in a few states, courts have held or stated in dictum that when genetic

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Rehab. Servs. v. Privette, 617 So. 2d 305 (Fla. 1993); *In re Marriage of Ross*, 783 P.2d 331 (Kan. 1989) (holding that a mother's petition to rebut a marital presumption in favor of her former husband, who had an ongoing relationship with the child, could not proceed before the court determined that the proceeding would be in best interests of the child); *In re Paternity of Adam*, 903 P.2d 207 (Mont. 1995); *C.R. v. J.G.*, 703 A.2d 385 (N.J. Super. Ct. Ch. Div. 1997); *cf.* *Stephenson v. Nastro ex rel. County of Maricopa*, 967 P.2d 616, 620–21 (Ariz. Ct. App. 1998) (holding that the *Quigley* rule does not apply where mother challenges marital presumption); *P.C. v. Dep't of Children & Families*, 805 So. 2d 1072 (Fla. Dist. Ct. App. 2002) (declining to extend *Privette* outside the context of marital presumption); *State ex rel. Secretary v. Miller*, 953 P.2d 245 (Kan. Ct. App. 1998) (declining to extend *Ross* to the context of children born out of wedlock); *Turner v. Whisted*, 607 A.2d 935, 939–40 (Md. 1992) (holding that a child's interests should be weighed along with the privacy interest of the mother and putative father's interest in establishing his claim to the child in determining whether genetic tests should be ordered). In one state, New York, statutory language ostensibly limits the opportunity to challenge a presumption, in order to serve the best interests of the child involved. *See* N.Y. FAM. CT. ACT § 532 (McKinney 2002) ("No [DNA] test shall be ordered . . . upon a written finding by the court that it is not in the best interests of the child on the basis of res judicata, equitable estoppel, or the presumption of legitimacy of a child born to a married woman."). Nevertheless, New York courts have based decisions whether to allow a challenge primarily on what is fair to the men involved, without making independent inquiry into the child's welfare. *See* *Richard W. v. Roberta Y.*, 658 N.Y.S.2d 506 (App. Div. 1997) (holding that Family Court should have rejected a man's request for blood tests to challenge a marital presumption, primarily because such a challenge would be unfair to the presumed father, who had acted in reliance on his belief that he was the father in the face of "silence and acquiescence" by the challenger, without conducting any independent investigation into what would be best for the child); *Lorie F. v. Raymond F.*, 657 N.Y.S.2d 235 (App. Div. 1997); *Queal v. Queal*, 579 N.Y.S.2d 527 (App. Div. 1992) (holding that an ex-husband was entitled to rebut marital presumption of paternity with DNA evidence, because it would be unfair to him not to allow it). In a few states, statutes authorize courts, upon finding that proceeding with a paternity suit would not be in a child's best interests, to recommend to the parties that the case be dismissed, but the petitioner is free to reject the recommendation and advance a biologically-based claim. *See, e.g.,* COLO. REV. STAT. § 19-4-114 (2002); HAW. REV. STAT. § 584-13 (2000); *cf.* *Doe v. Doe*, 52 P.3d 255, 265–66 (Haw. 2002) (holding that such a provision in the Hawaiian statutes does not empower courts to dismiss a paternity proceeding based on the best interests of the child where the petitioning party wishes to proceed with the action).

<sup>79</sup> *See, e.g.,* *Smith v. Odum*, No. 98-12744-9 (Ga. May 24, 2001), *cert. denied*, 536 U.S. 905 (2002) (rejecting petition to refute presumption of paternity based on new DNA evidence showing presumed father is not biological father of 10-year-old girl); *In re Paternity of Cheryl*, 746 N.E.2d 488, 495–96 (Mass. 2001); *Pietros v. Pietros*, 638 A.2d 545, 546–47 (R.I. 1994) (holding that a husband could not refute his paternity in a divorce proceeding where the mother and child had "relied to their detriment on [the husband's] assurances that he

testing is listed among the bases for creating a presumption, rather than being discussed separately as the way in which presumptions are rebutted (as is true in a handful of states), then the fact of biological fatherhood, as demonstrated by the genetic tests, is not automatically controlling, but rather must be weighed on policy grounds — including the welfare of the child — against any competing presumption arising in a given case (for example, from the mother's marriage to another man).<sup>80</sup>

The prevailing rules, however, dictate that the welfare of the child is irrelevant to individual determination of legal fatherhood. Therefore, to the extent any paternity rules can be said to reflect a right of children, the right must be a rather weak state-of-affairs right, arising from the limited coincidence between children's welfare and their being in a parent-child relationship with their biological father or a man picked out by a determinative presumption. It might be characterized as a *prima facie* right to have a parent-child relationship with a man who is likely to be (but might not be) the best available father. This right is easily overridden, if the presumed father is not the biological father, by the biological father asserting proprietary claims, by the presumed father opting out, or by the mother rejecting the presumed father. The latter two possibilities might be generally consistent with children's welfare (i.e., children might generally be better off not having a father who does not want to act as father or with whom the mother does not want to co-parent). But under any of these possibilities, rebutting a paternity presumption could be harmful to a child in a significant percentage of cases.

Even in states that have retained statutory presumptions, in a large portion of cases, perhaps a majority of those involving unwed mothers, no presumption will

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would provide them emotional and financial support" and stating "that the Family Court should employ the doctrine of equitable estoppel to serve the needs and interests of the child," though because the husband asserted "that he had no intention of reestablishing contact and providing the child with further love and affection," the only supposed benefit to the child of maintaining the husband's paternity was to impose a support obligation on him); *id.* at 547 n.1 (citing other cases); *Pettinato v. Pettinato*, 582 A.2d 909 (R.I. 1990) (holding that the estoppel doctrine prevents a mother from challenging her husband's presumption for the first time in divorce proceeding); *In re Marriage of Ross*, 783 P.2d 331 (Kan. 1989) (barring a mother from challenging the paternity of her ex-husband because it would be contrary to the best interests of the child); *cf.* Theresa Glennon, *Expendable Children: Defining Belonging in a Broken World*, 8 DUKE J. GENDER L. & POL'Y, 269, 275-77 (2001) (stating that most states have rejected or severely limited application of equitable estoppel to paternity challenges). *But cf.* *Fish v. Behers*, 741 A.2d 721, 723 (Pa. 1999) (stating that "the doctrine of estoppel in paternity actions is aimed at 'achieving fairness as between the parents'").

<sup>80</sup> See *N.A.H. v. S.L.S.*, 9 P.3d 354, 362 (Colo. 2000); *Doe*, 52 P.3d at 262 ("[T]he genetic testing presumption is not more important than the other presumptions; it is one of several that must be considered in light of the fundamental purpose of chapter 584."); *Witso v. Overby*, 627 N.W.2d 63, 69 (Minn. Jun 7, 2001); *Love v. Love*, 959 P.2d 523, 527 n.2 (Nev. 1998).

operate. In those cases, courts base paternity determinations solely on evidence of biological fatherhood.<sup>81</sup> A large percentage of these cases involve unintended pregnancy, so attribution of fatherhood does not rest on any assumption about a man's desire to parent. Indeed, the law has gone to extreme lengths to impose child support obligations on biological fathers regardless of any intention on their part; paternity has been imposed over the strenuous objection of men who were deceived by the mother about the possibility of impregnation and even of men who were raped by the mother.<sup>82</sup> State laws generally empower courts, at the behest of persons *other than* the biological father — i.e., mothers and state agency officials — to *impose* paternity on men who do not want to be a child's parent. Not only does this shackle a child legally to someone uninterested in acting as a parent, but it also precludes other men from becoming the legal father, absent a proceeding to terminate the biological father's status.

Moreover, in a large percentage of unwed parent cases, the biological father has no ongoing relationship with the mother. Children often result from very transitory interactions between the biological parents. In many cases, paternity suits initiated by the state, for the sole purpose of extracting financial support from the man so that the state need not provide for the child, have the result of subjecting the mother to

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<sup>81</sup> See Lockhart, *supra* note 59, §§ 4–8; See, e.g., N.J. STAT. ANN. § 9:17-43(d) (West 2002) (“In the absence of a presumption, the court shall decide whether the parent and child relationship exists, based upon a preponderance of the evidence.”); *id.* § 9:17-48 (providing for blood tests to establish paternity).

<sup>82</sup> See, e.g., *S.F. v. State ex rel. T.M.*, 695 So. 2d 1186 (Ala. Civ. App. 1996) (involving a mother who had sex with the biological father while he was unconscious from excessive alcohol consumption); *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273 (Kan. 1993) (imposing paternity on biological father who was victim of statutory rape); *State v. Frisard*, 694 So. 2d 1032 (La. Ct. App. 1997) (involving a mother, who was a nurse, who performed oral sex on a patient using a condom and then secretly injected herself with semen from the condom); *Beard v. Skipper*, 451 N.W.2d 614 (Mich. Ct. App. 1990); *Murphy v. Myers*, 560 N.W. 2d 752 (Minn. Ct. App. 1997) (involving a mother who had claimed to have undergone sterilization surgery); *Jevning v. Cichos*, 499 N.W.2d 515 (Minn. Ct. App. 1993) (involving a father who was the victim of statutory rape); *Welzenbach v. Powers*, 660 A.2d 1133, 1136 (N.H. 1995) (involving a mother who had assured the father that she was using birth control); *Wallis v. Smith*, 22 P.3d 682 (N.M. Ct. App. 2001); *L. Pamela P. v. Frank S.*, 449 N.E.2d 713 (N.Y. 1983) (rejecting constitutional challenge to imposition of paternity and support obligation where mother deliberately misrepresented her use of contraception); *Smith v. Price*, 328 S.E.2d 811 (N.C. Ct. App. 1985) (involving a deceived father); *Linda D. v. Fritz C.*, 687 P.2d 223 (Wash. Ct. App. 1984). Men also have successfully *sought* paternity, of course, in situations where they had not originally intended to become a father. This has been true even in cases involving informal sperm donation, including cases where a lesbian couple has enlisted a man's assistance in impregnating one of them so that the two women can raise a child as a couple. The man participated in the impregnation with an intent not to become a father to the child, yet is able to claim parenthood later because the sperm donation did not adhere to established procedures. See Storrow, *supra* note 29, at 628–29.

harassment by a former partner, thereby indirectly harming the child.<sup>83</sup> In addition, the mother might since have brought another man into the child's life, and the child might have formed a bond with that man that is important to the child's psychological and emotional well-being, all before the filing of a petition to establish the biological father's paternity. Yet the law often thrusts biological fathers into the role of legal parent in such situations, giving them rights and powers they might decide to use to try to sever the bond between the child and the mother's partner, out of spite or selfishness. With liberal time limits for initiating a paternity action, a child's family relationships could be thrown into turmoil many years after birth by a biological father returning to claim his child or a mother wishing, or forced by the state welfare office, to extract child support from the biological father.

In states that no longer rely on presumptions, paternity rules generally provide simply that legal fatherhood is established conclusively by proof of biological fatherhood, using genetic tests and/or other biological and sociological evidence, or by a sworn acknowledgment by the mother and the man claiming or charged with parenthood.<sup>84</sup> These rules share with the presumption-laden rules an emphasis on the fact of procreation or on a man's having laid claim to a child. Whatever connection or correlation there might be between those facts and the welfare of the child is certainly imperfect or incomplete.

In sum, as with maternity rules, legal rules for establishing legal fatherhood clearly do not conform to a model of absolute children's rights. The statutes make no explicit mention of children having any rights in connection with the determination of who, if anyone, their legal father will be. And although the statutory rules are to some small extent consistent with reasonable assumptions about who is likely to be a minimally adequate parent for a child, they by no means ensure that a man given parental status is the best available father for a child. The rules appear driven more by assumptions about the proprietary rights and financial obligations of men arising from the act of procreation than by concern for what is

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<sup>83</sup> Many states' statutes do provide that state officials may not seek to establish paternity or order genetic tests when doing so would be demonstrably contrary to the best interests of the child and/or that mothers need not cooperate with state officials in establishing paternity if they can show that doing so might put them in danger. *See, e.g.*, ALASKA STAT. § 25.27.040(b) (Michie 2002) ("The agency may not attempt to establish paternity in any case involving incest or forcible rape, when legal proceedings for adoption are pending, or when it would not be in the best interests of the children or the state."); COLO. REV. STAT. § 46b-168a(c) (2002) (requiring that social service agency must excuse mothers on welfare from general requirement of cooperation in cases of domestic violence); GA. CODE ANN. § 19-11-13 (Michie 2002) (noting that agency should not pursue paternity action if it finds this would be contrary to the best interests of the child).

<sup>84</sup> *See, e.g.*, MISS. CODE ANN. §§ 93-9-9, 93-9-21 (2001); NEB. REV. STAT. §§ 43-1409, 43-1415 (2002); N.C. GEN. STAT. § 49-14 (2002); OKLA. STAT. ANN. tit. 10, § 70 (West 2002); S.C. CODE ANN. §§ 20-7-956, 20-7-958 (Law. Co-op. Supp. 2001); VA. CODE ANN. §§ 20-49.1, 20-49.2, 20-49.3, 20-49.4 (Michie 2002).

conducive to children's welfare. Paternity rules at best confer on children a non-absolute state-of-affairs right — namely, a subordinate right enabling them to enforce the paternity rules in the subset of cases in which it is in their best interests to have as a legal parent their biological father or the man whom the laws make a presumed father on some other basis. And this very weak right in relation to paternity is largely superfluous, because it presumably will be in a child's interests to have the man picked out by the laws be his or her father only if that man wants to be a parent and asserts his own rights. Thus, in a significant range of cases, the law thrusts children into parent-child relationships with both men and women even when that is not best for the children, because those men and women are deemed entitled to occupy a parental role and/or because the state wants to extract financial support from them.

The maternity and paternity decisions are not determinative of what *social* relationship a person who is made a legal parent will have with a child. However, as discussed below, the decisions do generally result in exclusion of other adults as legal mothers and fathers and thus as persons who can enlist the state's help in establishing or maintaining a relationship with a child. As to the adults whom the state places in a parental role, when they are not living with each other, courts typically must decide whether one or both will enjoy custody of the child. Courts must determine whether the legally established mother and the legally established father will have joint or shared custody of the child, or whether instead one will have sole or primary custody and the other visitation with the child. Courts generally make that determination based on the same rules that apply in divorce proceedings, which are discussed below in subpart 2.<sup>85</sup>

### *c. Adoption*

A final way in which the state creates legal parent-child relationships is the adoption process. Adoption makes an adult the legal parent of a child to the same extent as a "natural" parent who is a legal parent.<sup>86</sup> Significantly, in this context,

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<sup>85</sup> See, e.g., *Hall v. Hall*, 589 N.E.2d 553, 555 (Ill. App. Ct. 1991); *In re H.B.*, 747 So. 2d 144, 146 (La. Ct. App. 1999) ("Where both natural parents seek custody of an illegitimate child, the custody award is determined according to the articles on custody incident to divorce."). Some states impose a threshold requirement of fitness and involvement for an unwed father to petition for custody, and after that threshold is met, those states apply the custody standard applicable in divorce cases. See, e.g., ALA. CODE § 9-10-113(c) (2002).

<sup>86</sup> JOAN HEIFETZ HOLLINGER, *ADOPTION LAW AND PRACTICE* §§ 1.01[1], [2][c] (2002); Mark Strasser, *Courts, Legislatures, and Second-Parent Adoptions: On Judicial Deference, Specious Reasoning, and the Best Interests of the Child*, 66 TENN. L. REV. 1019, 1021–22 (1999); See, e.g., CAL. FAM. CODE § 8616 (West 1994) ("After adoption, the adopted child and the adoptive parents shall sustain towards each other the legal relationship of parent and child and have all the rights and are subject to all the duties of that relationship."); N.Y. DOM.

where adults seeking a relationship with a child come with no "natural rights" arising from a biological connection, the law in some respects approximates a model of absolute rights for children. It does not do so by speaking explicitly of children having rights, but rather by applying a best interests standard to individualized decision making.

This is true only at the final stage of the process, though, when a court approves the adoptive parents and finalizes the adoption. Once children are freed for adoption and appear in court with prospective adoptive parents who have been chosen by the biological parents or by an adoption agency, courts grant or deny the adoption petition based on the "best interests" of the child being adopted.<sup>87</sup> In sharp contrast to rules relating to biological parents, state adoption statutes typically set forth a list of criteria in terms of which agencies and courts are to judge the worthiness of the applicants for parenthood.<sup>88</sup> Some of the more common factors are: the physical

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REL. LAW § 114 (Consol. Supp. 2003) (stating that "the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parents"); VA. CODE ANN. § 63.2-1215 (Michie 2002).

<sup>87</sup> HOLLINGER, *supra* note 86, §§ 1.01[2][b], 1.05[2][a]; *See, e.g.*, ALA. CODE § 26-10A-25(b)(6) (1992); CAL. FAM. CODE § 8612 (West 1994); DEL. CODE ANN. tit. 13, § 915 (1999); IND. CODE ANN. § 31-19-11-1(a)(1) (Michie 1997 & Supp. 2002); ME. REV. STAT. ANN. tit. 18-A, § 9-308(a)(5) (West 1998); MINN. STAT. ANN. § 259.29(1) (West 1998 & Supp. 2002); NEB. REV. STAT. § 43-109(1) (1998 & Supp. 2000); N.J. STAT. ANN. § 9:3-37 (West 1993 & Supp. 2001); UTAH CODE ANN. § 78-30-9 (1996 & Supp. 2001); VA. CODE ANN. §§ 63.2-1213, 63.2-1235 (Michie 2002).

<sup>88</sup> *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 9-308(b) (West 2002):

In determining the best interests of the adoptee, the court shall consider and evaluate the following factors . . . : [t]he love, affection and other emotional ties existing between the adoptee and the adopting person . . . ; [t]he capacity and disposition of the adopting person . . . to educate and give the adoptee love, affection and guidance and to meet the needs of the adoptee . . . ; and [t]he capacity and disposition of the adopting person . . . to provide the adoptee with food, clothing and other material needs.

Michigan statutes define best interests in the following manner:

[T]he sum total of the following factors to be considered . . . : [t]he love, affection, and other emotional ties existing between the adopting individual . . . and the adoptee . . . , [t]he capacity and disposition of the adopting individual . . . to give the adoptee love, affection, and guidance . . . , [t]he capacity and disposition of the adopting individual . . . to provide the adoptee with food, clothing, education, permanence, [and] medical care . . . , [t]he permanence as a family unit of the proposed adoptive home . . . , [t]he moral fitness of the adopting individual . . . , [t]he mental and physical health of the adopting individual.

MICH. COMP. LAWS ANN. § 710.22(f) (West 2002); *see also* MONT. CODE ANN. § 42-4-201 (2001) (citing age, marital status, and religious beliefs of adopting parents, as well as preferences of the birth parents, as factors to be considered when determining the best interest of the child).

environment of the home;<sup>89</sup> the applicants' parenting skills or ability and inclination to meet the needs of a child;<sup>90</sup> the applicants' mental and physical condition,<sup>91</sup> moral fitness,<sup>92</sup> financial condition,<sup>93</sup> and marital status;<sup>94</sup> and any affection or attachment already developed between the child and the applicants (e.g., if the adult applicants are members of the child's extended family or have served as foster parents).<sup>95</sup> Somewhat less commonly, state statutes direct agencies to consider the applicants' ability to comprehend and appreciate the child's cultural heritage,<sup>96</sup> their motivation to adopt,<sup>97</sup> and their philosophy of child rearing.<sup>98</sup> Ostensibly, then, children have an absolute right with respect to assignment to new parents when the biological parents' claims on them terminate; the state's placement of them must be in their "best interests." As discussed below, however, in application the rules do not in most instances really ensure for a child the best set of available parents.

One explicit qualification to the best interests standard that applies to all types of adoption is the power nearly every state accords to children over a certain age, varying from ten to fourteen, to veto particular adoptive parents, regardless of whether adoption by them would be in the child's interests.<sup>99</sup> Because an adolescent adoptee's consent is a prerequisite to finalizing adoption, a judicial finding that adoption would be in the adolescent's best interests is a necessary but not sufficient

<sup>89</sup> D.C. CODE ANN. § 16-307(b)(1)(C) (2001); LA. CHILD. CODE ANN. art. 1177(B)(5) (West 1995).

<sup>90</sup> CONN. GEN. STAT. ANN. § 45a-726 (b) (West Supp. 2002); ME. REV. STAT. ANN. tit. 18-A, § 9-308(b)(2), (3) (West 2002); MINN. STAT. ANN. § 259.41(2)(a)(3) (West 2003); MONT. CODE ANN. § 42-3-203(1)(c) (2001); N.M. STAT. ANN. § 32A-5-31(a)(5) (Michie 2002); 23 PA. CONS. STAT. ANN. § 2530(b)(2) (West 2001); S.C. CODE ANN. § 20-7-1740(A)(1)(b) (Law. Co-op. 2002).

<sup>91</sup> MICH. COMP. LAWS ANN. § 710.23f(5)(c) (West 2002); VA. CODE ANN. § 63.2-1231(i) (Michie 2002).

<sup>92</sup> ARIZ. REV. STAT. ANN. § 8-105(E)(3) (West 2002); NEV. REV. STAT. ANN. 127.2805 (Michie 2001).

<sup>93</sup> GA. CODE ANN. § 19-8-3(a)(4) (1999); KY. REV. STAT. ANN. § 199.510(1)(b) (Michie 1998).

<sup>94</sup> MICH. COMP. LAWS ANN. § 710.23f(5)(b) (West 2002); N.Y. DOM. REL. LAW § 115-d(1)(d)(i) (Consol. Supp. 2003).

<sup>95</sup> See, e.g., ILL. ADMIN. CODE tit. 89, § 309.160(b)(3) (2001); ME. REV. STAT. ANN. tit. 18-A, § 9-308(b)(1) (West 2002); MICH. COMP. LAWS ANN. § 710.22(f)(i) (West 2002).

<sup>96</sup> See, e.g., CAL. FAM. CODE § 8709 (West Supp. 2003); MONT. CODE ANN. § 42-3-203(1)(e) (2001); WASH. REV. CODE § 26.33.045 (1997).

<sup>97</sup> See, e.g., FLA. STAT. ANN. ch. 63.112(1)(i) (West 2003); N.C. GEN. STAT. § 48-3-303(c)(6) (2001).

<sup>98</sup> See, e.g., IOWA ADMIN. CODE r. 441-108.9(5)(c)(6) (2001); N.J. ADMIN. CODE tit. 10, § 121A-5.6(f)(5) (2001).

<sup>99</sup> See NATIONAL SURVEY OF STATE LAWS 340-49 (Richard A. Leiter ed., 4th ed. 2002); See, e.g., ALASKA STAT. § 25.23.125(a) (Michie 2002); MICH. COMP. LAWS ANN. § 710.22(f)(ix) (West 2002); N.J. STAT. ANN. § 9:3-49 (West 2002).

condition for approving the adoption. This does not diminish children's rights but rather transforms them from solely interest-protecting rights to a combination of interest-protecting and choice-protecting rights. Adolescents have a choice-protecting right against the state forcing them into a parent-child relationship with adoptive parents whom they do not want.

Apart from the ultimate standard for finalizing the adoption, the prevailing rules governing adoption vary significantly from one type of adoption to another. At the most basic level, adoption practice can be divided into two categories. Roughly half of all adoptions are "new family" adoptions, in which a child acquires an entirely new set of legal parents,<sup>100</sup> and roughly half of adoptions are step-parent adoptions, in which one existing legal parent remains a parent and his or her spouse or domestic partner, who is not already the child's legal parent, becomes such.<sup>101</sup>

#### i. New family adoption

New family adoptions can be further divided into "parental placement adoptions" and "agency adoptions."<sup>102</sup> The former are adoptions in which biological parents identify certain individuals to become adoptive parents and relinquish their parental rights to those individuals specifically and directly. In most states, independent adoption facilitators arrange many of the parental placement adoptions.<sup>103</sup> The latter are adoptions in which an adoption agency, which can be public or private, has taken custody of a child freed for adoption by involuntary termination or voluntary relinquishment of the biological parents' rights, and has matched adult applicants for adoption with the child. Many agency adoptions of newborns are actually indirect parental placement adoptions; biological parents relinquish custody to an agency but make the selection among the applicants for adoption that the agency has approved.<sup>104</sup>

A large portion of adoptions thus results from birth parents voluntarily relinquishing their children, either directly to new parents they select or to an agency. One might suppose that a biological parent who signs a relinquishment or "entrustment" is unprepared herself to be a good caregiver for a child, or at least much less prepared than adoptive parents who go through the process described below. Relinquishing parents presumably have made that judgment about

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<sup>100</sup> See ADAM PERTMAN, *ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA* 36 (2000); VA. COMM'N ON YOUTH, *STUDY OF ADOPTION LAWS*, S. DOC. NO. 15, at 16 (2000).

<sup>101</sup> See PERTMAN, *supra* note 100, at 36; VA. COMM'N ON YOUTH, *supra* note 100, at 16.

<sup>102</sup> For a fuller description of the various types of adoption described here, see HOLLINGER, *supra* note 86, § 1.05[3].

<sup>103</sup> See LEE VARON, *ADOPTING ON YOUR OWN: THE COMPLETE GUIDE TO ADOPTING AS A SINGLE PARENT* 184-85 (2000).

<sup>104</sup> See *id.* at 178-82.

themselves — perhaps because they are immature, their lives are very unsettled, and/or they do not have a social support system. And they presumably have not made the psychological and material preparations expectant parents ordinarily make and are at best ambivalent about receiving the child into their homes. Yet birth parents in some states are legally entitled, for weeks or months after signing a relinquishment, to revoke the relinquishment for any reason whatsoever and thereby recover their status as legal parents.<sup>105</sup> Thus, children in those states have no right against being placed and kept in a legal parent-child relationship with biological parents even when those persons are manifestly unprepared to act as parents, at least so long as the state cannot show them to be abjectly unfit. The biological parents' rights trump the interests of the children in these situations.<sup>106</sup>

With respect to all new family adoptions, state laws require a home study of potential adoptive parents, entailing visits to the home, interviews, and written submissions, before courts can make them legal parents.<sup>107</sup> Pennsylvania law, for example, requires "an investigation of the home environment, family life, parenting skills, age, physical and mental health, social, cultural and religious background, facilities and resources of the adoptive parents and their ability to manage their resources."<sup>108</sup> The law in most states also requires adoptive parents to go through

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<sup>105</sup> See 2 AM. JUR. 2D *Adoption* § 104 (2002); See, e.g., VA. CODE ANN. §§ 63.2-1223, 63.2-1234 (Michie 2002). The period is typically longer where the biological parent claims duress, coercion, or fraud. See *id.* The majority position, though, appears to be that a relinquishment may be revoked only upon a showing that this would be in the child's best interests.

<sup>106</sup> This could be a situation in which the rules operate better for children on the whole, even though they disserve the interests of children in many individual cases. It might be that a revocation period makes many more biological parents who are unprepared to be parents willing to sign a consent to adoption, even though the vast majority ultimately do not revoke. But that is entirely speculative, absent a valid comparative study of surrender rates for such parents under a revocation regime and a no-revocation regime.

<sup>107</sup> See, e.g., ARIZ. REV. STAT. ANN. § 8-105 (West 2002) (requiring prospective adoptive parents to undergo an investigation in order to be certified by the court as acceptable to adopt children); COLO. REV. STAT. § 19-5-207(2) (2002) ("In all petitions for adoption . . . , the court shall require a written home study report . . . ."); GA. COMP. R. & REGS. r. 290-9-2-.06(3) (2001); MASS. GEN. LAWS ANN. ch. 210, § 5A (1998) ("Upon the filing of a petition for adoption of a child . . . , notice shall be given to the department of social services which shall make appropriate inquiry . . . to determine whether the petitioners and their home are suitable for the proper rearing of the child."); 13 MO. CODE REGS. ANN. § 40-73.080(4)(D) (2002); N.H. REV. STAT. ANN. § 170 B:14 (2001) ("Before the petition is heard, . . . an investigation shall be made . . . for the purpose of ascertaining whether the adoptive home is a suitable home for the child and whether the proposed adoption is in the best interest of the child."); UTAH ADMIN. CODE 501-7-8 (B)(1) (2002); VA. CODE ANN. §§ 63.2-1208, 63.2-1231 (Michie 2002); cf. *Crockett v. McCray*, 560 S.E.2d 920 (Va. 2002) (vacating adoption because of failure to comply with home visit requirement).

<sup>108</sup> 23 PA. CONS. STAT. ANN. § 2530 (West 2001).

a probationary period — for example, six months after initially receiving the child into their home, with additional visits by adoption agency workers during that period — before the court can finally vest parental rights in them.<sup>109</sup> Agency regulations typically go beyond such statutory requirements, dictating investigation of applicants' attributes in substantial detail and requiring applicants to receive instruction in parenting.<sup>110</sup> Georgia's administrative code, for example, requires that the state's child placing agency include in the home study:

2. Motivation to adopt and the family members' attitude(s) toward childlessness;
3. Description of each family member, to include: . . .
  - (ii) Physical description;
  - (iii) Family background and history;
  - (iv) Current relationships with immediate and extended family members;
  - (v) Education;
  - (vi) Social involvements; and
  - (vii) Personal characteristics, such as personality, and interests and hobbies.
4. Evaluation of marriage and family life: . . .
  - (ii) History and assessment of marital relationship;
  - (iii) Family patterns; and
  - (iv) Previous marriages (verification of divorces, if applicable).
5. Evaluation of parenting practices:
  - (i) Description of parenting knowledge, attitudes, and skills;
  - (ii) Discipline practices;
  - (iii) Child rearing practices;
  - (iv) Experience with children.
6. Evaluation of physical and mental health:
  - (i) Summary of health history and condition of each family member;
  - (ii) Documentation of a physical examination of the adoptive parent applicants . . . ;
  - (iii) . . . [G]eneral health status of other members of the prospective

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<sup>109</sup> See NATIONAL SURVEY OF STATE LAWS, *supra* note 99, at 340–49; see, e.g., GA. COMP. R. & REGS. r. 290-9-2-.06(7) (2001) (“The Agency caseworker shall make at least two home visits after the placement of the child and prior to the filing of the petition for adoption.”); MO. CODE REGS. ANN. tit. 13, § 40-73.080(6)(B) (2002); UTAH ADMIN. CODE 501-7-7 (K) (2002) (requiring at least three supervisory visits before finalization of adoption).

<sup>110</sup> See, e.g., ALA. ADMIN. CODE r. 660-5-22-.03 (2002); MICH. ADMIN. CODE r. 400.12605 (2003); MO. CODE REGS. ANN. tit. 13, § 40-73.080(4)(D)(3) (2002); UTAH ADMIN. CODE 501-7-8(C) (2002).

- adoptive family . . . ; and
- (iv) An informal assessment of the emotional and mental health of each member of the prospective adoptive family.
7. Evaluation of the understanding of and adjustment to adoptive parenting:
- (i) The understanding of adoption and how adoption will be handled with the child;
- (ii) Attitude toward birth parents;
- (iii) Understanding of how adoptive parenting is different from biological parenting;
- (iv) Attitude toward rearing a child biologically not their own;
- (v) Understanding of the possibility of inherited traits and the influence of genetics vs. environment;
- (vi) Expectations of the adopted child, including intellectual and physical achievement;
- (vii) Understanding of loss in adoption;
- (viii) Attitudes of other children residing in the home and extended family members toward adoption;
- (ix) The support network in place for the adoptive family . . .
8. Evaluation of the prospective adoptive parents' finances and occupation:
- (i) Employment history of family members;
- (ii) Combined annual income;
- (iii) Ability to provide financially for the family . . .
9. A description of the home and community:
- (i) Description of the neighborhood;
- (ii) Physical standards of the home, including space, and water supply and sewage disposal systems which, if other than public systems, have been approved by appropriate authorities;
- (iii) A statement to verify that any domestic pets owned or residing with the family have been inoculated against rabies as required by law;
- (iv) A statement verifying that all firearms owned and in the home are locked away from children;
- (v) A statement verifying that if a swimming pool is present at the home, it is fenced with a locked gate to prevent unsupervised access and that it meets all applicable community ordinances;
- (vi) A statement that smoke alarms are present and functioning on each level in the home;
- (vii) Verification that gas heaters are vented to avoid fire and health hazards, with any unvented fuel-fired heaters equipped with

- oxygen depletion safety shut-off systems;
- (viii) Assessment of community resources, including accessibility of schools, religious institutions, recreation, and medical facilities.
- 10. Results of the criminal records check on prospective adoptive parents as currently required by law.
- 11. A minimum of three character references:
  - (i) At least one reference must be from an extended family member not residing with the prospective adoptive family, and
  - (ii) If a prospective adoptive parent has worked with children in the past five (5) years, a reference must be obtained from the former employer(s) for that work experience.<sup>111</sup>

This qualification and probation process is strikingly different from the state's approach to conferring legal parent status on biological parents, which entails no pre-qualification process or post-placement review but rather accepts all comers and sends new parents off on their own without monitoring.<sup>112</sup>

Parental placement adoptions ostensibly are governed by the same ultimate substantive rule as agency adoptions — that is, that the court must find that the adoption is in the child's best interests.<sup>113</sup> However, statutes generally limit the ability of other persons to intervene to seek adoption of the child themselves — for example, grandparents who have provided substantial care for the child.<sup>114</sup> So the state's involvement is limited to saying yea or nay to the persons chosen by the biological parents. This suggests that rules governing parental placement adoptions do not really prescribe individualized decision making but rather a particular state

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<sup>111</sup> GA. COMP. R. & REGS. r. 290-9-2-.06(3)(d)(2) to (11) (2001).

<sup>112</sup> Cf. *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 291 (Ct. App. 1998) ("Parents are not screened for the procreation of their *own* children; they are screened for the adoption of *other* people's children.").

<sup>113</sup> See, e.g., *In re Adoption of M.J.S.*, 44 S.W.3d 41, 50 (Tenn. Ct. App. 2000) (quoting TENN. CODE ANN. § 36-1-120(a)(13) (1996)):

Although a biological parent has the right to make the initial choice of his or her child's adoptive parent, the biological parent's right to choose the child's adoptive parent is not absolute. In filing an adoption petition, the prospective adoptive parent must allege, *inter alia*, that the petitioner is a fit person 'to have the care and custody of the child and that it is in the best interest of the child for this adoption to occur.' In its final order of adoption, the trial court must find '[t]hat the adoption is for the best interest of the child.' Thus, the biological parent's choice of an adoptive parent is always subject to the trial court's determination that the proposed adoption is in the child's best interests.

<sup>114</sup> See, e.g., *M.J.S.*, 44 S.W.3d at 52–53 (denying grandparents standing to intervene in a parental placement adoption proceeding to seek to adopt themselves and compete with the person chosen by the mother).

of affairs — that is, adoption by the person chosen by the biological parent — and that the rules confer on children only the limited right against placement with a substitute parent who falls below whatever minimum standard the agency performing the home study, or the court that ultimately approves the adoption, applies in such cases. At least one court has articulated an operating assumption that biological parents are entitled to choose their replacements.<sup>115</sup>

With agency adoptions, the state ostensibly is selecting parents itself for a child, from among some number of applicants. The state does so in part directly, when its own social service agencies place children who have been freed for adoption by legal proceedings to terminate involuntarily the rights of a child's initial parents. In those cases, the state child protective agency will have searched for adoptive parents, often looking first to foster parents with whom it has placed the child during the child protective legal proceedings.<sup>116</sup> The state also connects children with adoptive parents indirectly by authorizing private adoption agencies to solicit and screen applicants for adoptive parenthood.<sup>117</sup> This might be viewed as the state contracting out part of its function of reassigning children whose original parents are unwilling or unable to care for them. Private agencies generally handle infants whom biological parents have voluntarily relinquished for adoption.

When adoption agencies themselves do the match making, they can make a greater effort than with parental placement adoptions to assign children to parents who are well suited to raising them, in light of the unique characteristics of the adults and the children. The law confers substantial discretion on adoption agencies in qualifying applicants for adoption and in choosing from among the minimally qualified adult applicants those whom they will recommend for adoption of a particular child. When an agency brings a match to court, the judge's role is, again, really limited to a yea or nay decision on those people. In theory, agencies can make the process thoroughly competitive and always select from among the approved applicants those they deem *most* qualified to adopt a particular child, taking into account the unique needs and other characteristics of each child and the unique abilities and other characteristics of each adult applicant. If agencies do that, the practice might be said to conform to a model of absolute rights for children. The agencies could be said to be making for each child a choice that is truly in his or her

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<sup>115</sup> See, e.g., *id.* at 54 (holding that “the Mother had the right to choose the child’s adoptive parent”); *cf.* *Suboh v. Dist. Attorney’s Office*, 298 F.3d 81, 92 (1st Cir. 2002) (“One of [plaintiff’s] rights as a mother was the right to choose a proxy custodian for [her child] following her arrest.”).

<sup>116</sup> As noted above, some state statutes direct adoption agencies to consider in their qualification process any existing relationship between the applicants for adoption and the child. See *supra* note 95; see also *infra* notes 319–24 and accompanying text (discussing foster care).

<sup>117</sup> See, e.g., *Wilder v. Bernstein*, 848 F.2d 1338, 1341 (2d Cir. 1988) (noting that, in New York City, ninety percent of foster children are placed through private agencies).

*best* interests.

It is difficult to determine, however, the actual practices of private adoption agencies. Some might select from among those who qualify in large part on a first-come, first-served basis, putting parents who pass the minimum threshold on a waiting list and matching them with a child when they reach the front of the line. To the extent that this approach, rather than a comparative approach, is taken, adoption practice would effectively confer on children only the limited right that the state not place them in a parent-child relationship with adults who fall below some minimum threshold. A first-come/first-served approach undoubtedly would make the agencies' work easier, and they might view it as fairer to their adult customers, most of whom are people unable to become parents by procreation, a process that does not entail any qualification process.

Public adoption agencies might be likely to use a comparative or individualized approach to placement. The formal regulations governing these agencies in some states explicitly require the agencies to choose the adoptive parents best suited to meet the needs of an individual child, without regard to how long applicants have been waiting for a placement.<sup>118</sup> In addition, most of the children that state adoption agencies place are children with special needs, which can be of many different kinds and which can present great challenges for parents.<sup>119</sup> State social services workers

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<sup>118</sup> See, e.g., ALA. ADMIN. CODE r. 660-5-22-.03(10)(a) (2002) ("Adoptive parents are selected on the basis of their capacity to meet the needs of a particular child rather than the length of time they have waited for a placement."); 922 KY. ADMIN. REGS. 1:030 (2001) ("Placement of children shall be based upon the needs of individual children available for adoption and the ability of the adoptive applicants to meet these needs. . . . The approval of applicants for adoption shall not guarantee the placement of a child with the applicants.").

<sup>119</sup> See, e.g., FLA. ADMIN. CODE ANN. r. 65C-16.002(1) (2003):

The department's adoption staff must devote its efforts to facilitating the adoption of special needs children in care who need adoptive homes. All expectant mothers wishing to place their unborn children for adoption and parents seeking to release their non-special needs children for adoption will be referred to private agencies for placement planning.

Children might be characterized as "special needs" children in the adoption context because they are older, have mental or physical handicaps, or have severe psychological, emotional, or behavioral problems. A problem related to placement of these children is that agencies traditionally have sealed adopted children's files and attempted to treat children as if they were reborn. Troy D. Farmer, *Protecting the Rights of Hard to Place Children in Adoptions*, 72 IND. L.J. 1165, 1167 (1997). Such a practice is slowly being abandoned, because it creates difficulties when parents realize they are not prepared to deal with issues of which they were unaware when they initially adopted a child. *Id.* at 1168. Most state statutes today require the disclosure to the prospective parents of pertinent health information regarding the child. See, e.g., COLO. REV. STAT. § 19-5-207(2)(c), (d) (2001); IOWA CODE ANN. § 600.8(1)(c) (West 2001); WASH. REV. CODE ANN. § 36.33.350 (West 1997). Ideally, such requirements would also address other relevant considerations, including any history of psychological, physical, or sexual abuse. Such disclosure would facilitate the diagnosis and treatment of such

are likely to have witnessed adoptions that fell apart because the parents could not handle the challenges, and so are likely to be motivated to match each child with adoptive parents whose unique abilities are best suited to caring for that particular child. They do not want children returned because of a bad match. In addition, prospective adoptive parents who approach a public adoption agency would know that the agency generally places special needs children, and so would also be motivated to ensure that they are well suited to dealing with a particular child's unique needs. No one wants an adoption with a high risk of failure. Many adoptions through public agencies involve foster parents or relative caregivers adopting children with whom they already have a familial relationship. In those cases, the state will have screened the applicants initially for service as foster parents or relative caregivers,<sup>120</sup> though perhaps not very rigorously in the case of relatives, and will have supervised their care of the child for a significant period. In most jurisdictions, the state also requires foster parents to go through a home study and probation process for adoption, though the investigation might be less thorough than it is with other applicants.<sup>121</sup>

Both private and public adoption agencies, however, have operated on the basis of certain substantive criteria that weaken the child-centered nature of the adoption process. Some of these criteria exclude certain categories of persons from adopting altogether, whereas other criteria make it difficult or impossible for particular children to be adopted by particular applicants. And it is doubtful that the use made of these criteria is fully consistent with the best interests of children waiting to be adopted.

One consideration that excludes a class of people from adopting altogether is sexual orientation. The law in some states explicitly or implicitly prohibits adoption by homosexual couples.<sup>122</sup> The effect of such laws is to preclude courts from

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children, but most importantly, it would avoid placement with parents who are unable or unwilling to deal with such difficulties.

<sup>120</sup> See *In re Wesley R.*, 2002 WL 31890764, at \*4 (N.Y. Fam. Ct. Dec. 13, 2002); UTAH ADMIN. CODE 501-7-5 (D) (2002); MARTIN GUGGENHEIM ET AL., *THE RIGHTS OF FAMILIES: THE AUTHORITATIVE ACLU GUIDE TO THE RIGHTS OF FAMILY MEMBERS TODAY* 157-58 (1996).

<sup>121</sup> See *infra* note 323.

<sup>122</sup> Florida expressly prohibits homosexuals from adopting children, whether as individuals who are in partnership with an existing legal parent or as couples. See FLA. STAT. ANN. ch. 63.042(3) (West 1997); *Lofton v. Kearney*, 157 F. Supp. 2d 1372 (S.D. Fla. 2001); *Cox v. Fla. Dep't of Health & Rehab. Servs.*, 656 So. 2d 902 (Fla. 1995). Mississippi law also provides that no homosexual couples may adopt. MISS. CODE ANN. § 93-17-3(2) (Supp. 2001). Utah's adoption statute states that the best interests of a child do not include being adopted by a sexually cohabiting couple that is not legally married. UTAH CODE ANN. § 78-30-9(3) (Supp. 2001). At least one state's adoption law simply provides that courts may consider adoptive parents' sexual orientation. CONN. GEN. STAT. ANN. § 45a-726a (West Supp. 2001). Determining in how many states homosexual couples are implicitly excluded

effecting an adoption of a child by a homosexual couple even if, on the facts of a particular case, that would be better for the child than the available alternatives.<sup>123</sup> Undoubtedly, some lawmakers sincerely believe that it is always bad for a child to be raised by people who are homosexual, so much so that even children who are in foster care and who will have no other opportunity for adoption would be better off remaining in foster care. But the evidence of how children turn out after being raised by homosexual parents does not support such an absolutist position, even on its own terms. Most children raised by homosexual parents become happy, healthy adults who are good citizens and who are very thankful that they did not spend their entire youth bouncing around in foster care.<sup>124</sup> And from a perspective that does not presuppose that being raised by homosexual parents is necessarily worse for a child than all alternatives, it would be difficult to explain a blanket prohibition on such adoptions except as a means of furthering an ideological agenda, an aim implicitly treated as more important than the welfare of the children who might have benefitted from the adoption.

On the other hand, some scholars, and likely some judges and agency workers as well, are motivated by the contrary aim of advancing the social standing of people who are homosexual to rule out altogether consideration of sexual orientation in state decision making about parental status.<sup>125</sup> This, too, can result in sacrificing or

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from adoption is difficult, because the law in any given state might depend on its courts' interpretation of ambiguous statutory language and some states' courts have not yet resolved the issue.

Courts in some states have allowed adoptions by persons who are homosexual when the best interest of the child was otherwise shown. *See In re M.M.D.*, 662 A.2d 837, 859 (D.C. 1995); *In re Petition of K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of Two Children*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re B.L.V.B.*, 628 A.2d 1271 (Vt. 1993). At least three states explicitly prohibit denial of an application solely on the basis of the potential adoptive parents' sexual orientation. *See* MD. REGS. CODE tit. 7, § 05.03.09(A)(2) (2001); N.J. ADMIN. CODE tit. 10, § 121C-4.1(c) (2001); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.16(h)(2) (2001). Vermont statutes authorize adoption by the "partner" of a legal parent, without reference to sexual orientation. VT. STAT. ANN. tit. 15A, § 1-102(b) (2002).

<sup>123</sup> *See, e.g., In re Angel Lace M.*, 516 N.W.2d 678, 681 (Wis. 1994) (refusing to grant petition for adoption by mother's lesbian partner, even though the trial court had found that the adoption would be in the child's best interests, stating that "the fact that an adoption — or any other action affecting a child — is in the child's best interests, by itself, does not authorize a court to grant the adoption").

<sup>124</sup> For a discussion of the studies that have been done on children of gay and lesbian parents, see Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253.

<sup>125</sup> *See, e.g., Ball & Pea, supra* note 124; Michael Wald, *Child Custody and Sexual Orientation*, in *DEBATING CHILDREN'S LIVES: CURRENT CONTROVERSIES ON CHILDREN AND ADOLESCENTS* 46, 48 (Mary Ann Mason & Eileen Gambrill eds., 1994) (arguing against consideration of a parent's homosexuality in custody decision making, in part, on the

overlooking the welfare of children in making adoption decisions. Judges and adoption agency workers eager to cast aside societal prejudice against homosexuals might focus more on the right of homosexual partners to adopt than on the well-being of the child. They might unduly discount, for example, legitimate concerns about the social stigmatization that could befall a child as a result of having gay parents.<sup>126</sup> This phenomenon might be inconsequential where decision makers take a first-come, first-served approach, because it seems implausible to say that such concerns themselves make homosexual parents fall below the threshold of minimal qualification. But to the extent decision makers make comparative judgments among available adoptive parents, they would be compromising the best interests of the child ideal by ignoring a possible adverse consequence for the child.

Another consideration that serves to exclude a class of people from at least some types of adoption is religious belief. Although no law explicitly precludes non-religious people, or people who belong to a particular faith, from adopting, the law in a number of states directs adoption agencies to take into account the religious faith or background of applicants for adoption in their investigation of the applicants, and the language in some statutes and agency regulations could be read to exclude non-religious persons from adoption.<sup>127</sup> Though the intention of most

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grounds that "public policy should be designed to combat discrimination, not to give it credence," and that doing so "would contradict our society's commitment to cultural, intellectual, political, and religious diversity").

<sup>126</sup> Cf. *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985) (finding impermissible the use of real or imagined stigma as a reason for denying custody to a parent in divorce-related proceedings). Lynn Wardle charges legal academics with agenda-driven blindness to the potential negative effects on children of having gay parents. See Lynn D. Wardle, *Fighting with Phantoms: A Reply to Warring with Wardle*, 1998 U. ILL. L. REV. 629; Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833. For accounts of the personal experience of children of gay or lesbian parents, see MARTHA KIRKPATRICK, MD, CLINICAL IMPLICATIONS OF LESBIAN MOTHER STUDIES 209 (1987); KAREN GAIL LEWIS, CHILDREN OF LESBIANS: THEIR POINT OF VIEW 198-99 (1980).

<sup>127</sup> See, e.g., ALA. ADMIN. CODE r. 660-5-22-.03(6)(j) (2002) ("Applications may be accepted from persons of any religious faith. Children should have parents who can give them an opportunity for spiritual and ethical development."); ARIZ. REV. STAT. § 8-105(E)(4) (2002) (directing adoption agency to consider the "religious background of the applicant" in investigating the fitness of applicants for adoption); 922 KY. ADMIN. REGS. 1:030(9) (2001) ("The approved applicants shall be able to present the adoptive child with appropriate opportunities for religious, spiritual, or ethical development."); MONT. CODE ANN. § 42-4-201(1) (2002) ("In determining the best interests of the child, the following factors with regard to a prospective adoptive parent may be considered: . . . (c) religion, as it relates to the ability to provide the child with an opportunity for religious or spiritual and ethical development"); N.J. STAT. ANN. § 9:3-40 (West 2002) (prohibiting discrimination against applicants for adoption on the basis of religion, but providing that applicants' religion "may be considered in determining whether the best interests of a child would be served by a particular placement for adoption"); N.Y. DOM. REL. LAW §§ 115-a(3), 116(3) (Consol.

legislatures writing this factor in the adoption statutes might have been to match children with adoptive parents of the same faith as the biological parents, agencies and courts could interpret this as giving an advantage to religious applicants or even as establishing a faith prerequisite to adopting.

Moreover, the largest private adoption network in this country, Catholic Charities, in some locations has a religious faith requirement.<sup>128</sup> Indeed, some Catholic Charities agencies require specifically that applicants for adoption be Christian.<sup>129</sup> And in some less populated areas of the country, the Catholic Charities agency is the only private adoption agency available.<sup>130</sup> Thus, a certain class of persons is effectively unavailable as parents for certain children — those whose biological parents relinquish their custody to a Catholic Charities agency or some other private agency with religiously exclusionary policies — even though they might be the best available parents for those children. The states' use of these agencies is of questionable constitutionality,<sup>131</sup> in addition to detracting from the

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Supp. 2003) (requiring agency investigation of applicants for adoption to include the religious "circumstances" of the applicants); 23 PA. CONS. STAT. ANN. § 2530(B)(2) (West 2002); 40 TEX. ADMIN. CODE § 700.1502(2)(J) (West 2002) ("There are no specific religious requirements. Applicants are evaluated based on: (i) Their willingness to respect and encourage a child's religious affiliation; (ii) Their willingness to provide a child opportunity for religious, spiritual, and ethical development."). *But see* UTAH ADMIN. CODE 501-7-8(C)(2)(g) (2002) ("Lack of religious affiliation or of a religious faith should not be a bar to consideration of any applicant to meet the specific needs of a child.").

<sup>128</sup> HOLLINGER, *supra* note 86, § 7.03[2][a]; *See, e.g.*, Catholic Soc. Servs. of Montgomery, Services for Adoptive Parents, at [http://www.cssalabama.org/services\\_for\\_adoptive\\_parents.htm](http://www.cssalabama.org/services_for_adoptive_parents.htm) (Alabama); Catholic Soc. Servs., Catholic Adoptions, at <http://www.dol-louisiana.org/css.html> (Louisiana). On the other hand, in some locations, Catholic Charities agencies or affiliates have a policy of not discriminating on the basis of religious belief. *See, e.g.*, Catholic Soc. Servs., Inc., Adoption: Basic Requirements, at [http://www.cssatlanta.com/PPA/Pregnancy\\_Adoptions\\_ParentingServices.htm](http://www.cssatlanta.com/PPA/Pregnancy_Adoptions_ParentingServices.htm) (Georgia); Adoption Option Comm., Inc., Minnesota Adoption Agencies: Catholic Charities/Seton, at [http://www.aoci.org/pages/ag\\_cath.html](http://www.aoci.org/pages/ag_cath.html) (Minnesota). At least one state prohibits private adoption agencies from discriminating on the basis of religion when qualifying adoptive parents. *See* N.J. ADMIN. CODE tit. 10, § 121A-1.7(a) (2003) ("No certified adoption agency shall discriminate with regard to the provision of any adoption-related services on the basis of . . . religion . . . with regard to the selection of adoptive parents for any child."). *But see* UTAH ADMIN. CODE 501-7-6(G)(3) (2002) ("Agencies under religious auspices may choose to establish policies and practices that are consistent with their particular religious faith.").

<sup>129</sup> *See supra* note 128 (citing websites).

<sup>130</sup> This is true, for example, in much of Wyoming.

<sup>131</sup> *See Wilder v. Bernstein*, 848 F.2d 1338 (2d Cir. 1988) (upholding settlement of a lawsuit against the state, charging that private foster care agencies contracted by the state discriminated on the basis of religion); *Scott v. Family Ministries*, 135 Cal. Rptr. 430 (Ct. App. 1976) (holding that state statutes authorizing private agencies to place children with adoptive parents must be read to preclude disqualification of applicants on grounds of religious belief).

best interests ideal. Religious favoritism that detracts from the best interests ideal is also evident in provisions in some states prohibiting courts and agencies from discriminating against applicants for adoption on the ground that they would not secure medical care for a child if the child became sick or injured, provided the reason for such neglect would be religious opposition to medical care.<sup>132</sup>

Other substantive considerations in adoption placement do not categorically exclude applicants from any type of adoption but rather exclude them from consideration for particular children or simply disfavor them in placement of particular children. One such consideration that has been the subject of long-standing controversy is race. Although prohibition of interracial adoptions was once common, courts came to view it as unconstitutional, violating the Equal Protection Clause of the Fourteenth Amendment,<sup>133</sup> and Congress in the 1990s passed the Multiethnic Placement Act, requiring states, as a condition for receiving certain federal funds, to eliminate race-matching in adoption placement.<sup>134</sup>

Some observers believe that many public and private adoption agencies today nevertheless follow an unofficial policy of what might be called "categorical" race-matching — that is, applying a very strong presumption against trans-racial placement — because beliefs about community ownership of children or about the unnaturalness of mixed-race family relationships are deeply entrenched.<sup>135</sup> Such a policy might not present a great problem for children if the number of minority children needing homes matched the number of qualified minority applicants

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<sup>132</sup> See, e.g., 23 PA. CONS. STAT. ANN. § 2725 (West 2002); WIS. STAT. § 48.82 (4) (2002) ("No person may be denied the benefits of this subchapter because of a religious belief in the use of spiritual means through prayer for healing.").

<sup>133</sup> See *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 547 F.2d 835 (5th Cir. 1977); *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972); *In re Gomez*, 424 S.W.2d 656 (Tex. Civ. App. 1967).

<sup>134</sup> Multiethnic Adoption Act, 42 U.S.C. § 1996b (1994 & Supp. 1999); see ELIZABETH BARTHOLET, *NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 123–33 (1999) (describing the history of race-matching's legality). There is some disagreement about whether the Act precludes only a complete ban on transracial adoption, or any consideration of race whatsoever, or something in between. See BARTHOLET, *supra*, at 133–37.

<sup>135</sup> See BARTHOLET, *supra* note 134, at 124–25, 133–140; *id.* at 135 (noting "the profound commitment that many in the system have to the notion that children belong with their racial and ethnic group," explaining why "[r]esistance to the [Multi-Ethnic Placement Act] mandate is the order of the day"); DAVID T. DAULTON, *ADOPTION PROCEDURES AND FORMS: A GUIDE FOR VIRGINIA LAWYERS* 9–10 (2d ed. 2000); HOLLINGER, *supra* note 86, § 3.02[1][b]; RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD* 33 (2d ed. 2002); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 880–82 (1998); Jennifer Swize, Note, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interests of Adopted Children*, 88 VA. L. REV. 1079, 1079–80 (2002) (describing a case illustrating systemic opposition to transracial adoption).

wanting to adopt children,<sup>136</sup> but the reality is said to be that there are many more minority-race children awaiting adoption than there are minority-race adults who apply for adoption and who meet the official qualification standards of adoption agencies.<sup>137</sup> An unofficial race-matching policy could leave some minority children in institutional or foster care, or result in their being placed with unqualified same-race parents,<sup>138</sup> either of which is generally believed to be worse for them than being adopted by people of another race who are good parents.<sup>139</sup>

The official prevailing rule, however, is that courts and adoption agencies may treat race *per se* as simply a factor in approving adoptive parents. No state statutes today require that a child be placed *only* with adoptive parents of the same race. Many states' statutes and/or agency regulations do, however, make the race of the child and the adoptive parents a legitimate consideration in the process of finding suitable parents for a child.<sup>140</sup> A common articulation of the rule in statutes or

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<sup>136</sup> See SIMON & ALTSTEIN, *supra* note 135, at 31–32:

Very few, if any, responsible organizations or individuals support transracial adoption as a placement of first choice. Were there sufficient black families for all black children, Hispanic families for Hispanic children, Asian families for Asian children, and so forth, there probably would be no need for transracial adoption. . . . Most, if not all, who see transracial adoption as a viable arrangement see it only when a child's options are less permanent types of placements, such as foster care or group homes.

<sup>137</sup> See MADELYN FREUNDLICH, *ADOPTION AND ETHICS: THE ROLE OF RACE, CULTURE, AND NATIONAL ORIGIN IN ADOPTION* 19–20 (2000).

<sup>138</sup> There is debate about the extent to which this is true. Freundlich, for example, contends that it is true only to a small degree with respect to African-American children, because not many white applicants for adoption want to adopt the African-American children who are available for adoption. FREUNDLICH, *supra* note 137, at 21–29.

<sup>139</sup> See BARTHOLET, *supra* note 134, at 126–27 (discussing studies on the welfare of children following transracial adoption and the well-being of children experiencing long delays in adoptive placement); *id.* at 136 (explaining that some states' child welfare agencies apply lower (or no) standards for qualifying minority-race applicants for adoption in order to further unofficial race-matching policies, with the result that “[c]hildren have been placed with parents previously found guilty of serious felonies, including physical and sexual abuse”); Margaret F. Brinig, *Moving Toward a First-Best World: Minnesota's Position on Multiethnic Adoption*, 28 WM. MITCHELL L. REV. 553, 588–89 (2001) (discussing research showing greater depression of children in kin foster care relative to adopted children); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 72–73 (1990) (discussing evidence of harm to children from delays in adoption placement). For an overview of the arguments of both proponents and opponents of race matching, see Banks, *supra* note 135, at 879.

<sup>140</sup> For instance, Alabama's regulations set forth the following directive:

Race or national origin will not be used as a single or exclusive criterion in the placement of children for adoption. The categorical denial of placements based on race or national origin is hereby prohibited. The consideration of race or national origin of the child or prospective parents will be used as one relevant

administrative regulations dictates that courts and agencies may not deny or delay placement of a child on the basis of the race of the child and of available parents.<sup>141</sup> This actually suggests a somewhat stronger use of race than merely treating it as one factor among many. It would appear to allow agencies to favor adoption applicants of the same race as the child if some are immediately available, regardless of how those applicants compare on other measures to other applicants.

Whether use of race simply as a factor is consistent with children's welfare is much debated. Professor Elizabeth Bartholet criticizes laws and policies making

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factor in placements only if doing so is in the best interest of the child.

ALA. ADMIN. CODE r. 660-5-22-.03(6)(m) (2002); *see also* COLO. REV. STAT. § 19-5-206(3) (2001); CONN. GEN. STAT. ANN. § 45a-726b (West Supp. 2001); GA. COMP. R. & REGS. r. 290-9-2-.06(6)(a) (2001) ("The Agency shall consider a child's racial, cultural, ethnic, and religious heritage and preserve them to the extent possible without jeopardizing the child's right for placement and care."); N.J. STAT. ANN. § 9:3-40 (West 2003) (stating that "an approved agency shall not discriminate with regard to the selection of adoptive parents for any child on the basis of . . . race . . . provided, however, that these factors may be considered in determining whether the best interests of a child would be served by a particular placement for adoption"); MICH. ADMIN. CODE r. 400.6520 (2000); MO. CODE REGS. ANN. tit. 13, § 40-73.080(5)(D) (2002) ("A child placing agency shall make reasonable efforts to place in an adoptive home of similar racial or cultural background in compliance with the Multi-Ethnic Placement Act."); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(d)(2) (2002) ("Race, color or national origin of the child or the adoptive parent may be considered only where it can be demonstrated to relate to the specific needs of an individual child."); 22 VA. ADMIN. CODE § 40-220-20(5) (West 2001); *see also* BARTHOLET, *supra* note 134, at 136-37 (describing state agency interpretations of the federal mandate as allowing for consideration of race as a factor in adoption placement). *But see* OR. ADMIN. R. 413-070-0027(2) (2002) (stating that adoption agencies may not "use race, color or national origin to screen or assess prospective foster or adoptive applicants"). Bartholet contends that the history and language of the Multiethnic Placement Act suggest a Congressional intent to prohibit even this. *See* BARTHOLET, *supra* note 134, at 130-33. Several courts have approved of this practice, however. *See, e.g., In re Adoption/Guardianship No. 2633*, 646 A.2d 1036, 1048 (Md. Ct. Spec. App. 1994); *In re Adoption of A.S.H.*, 674 A.2d, 698, 701 (Pa. Super. Ct. 1996); *In re Infant Child J.*, 994 P.2d 279, 283 (Wash. Ct. App. 2000). The U.S. Department of Health and Human Services also has interpreted the Multiethnic Placement Act as allowing for race to be considered as a factor, provided it is used only as necessary to make an individualized assessment of a child's best interests. *See* Policy Guidance on the Use of Race, Color or National Origin as Considerations in Adoption and Foster Care Placements, 60 Fed. Reg. 20,272 (Apr. 25, 1995).

<sup>141</sup> HOLLINGER, *supra* note 86, § 3.06[4]; *See, e.g.,* ARIZ. REV. STAT. § 8-105.01(A) (2003) (requiring simply that consideration of race not delay placement); ARK. CODE ANN. § 9-9-102(b) (Michie 2002) (same); CAL. FAM. CODE § 8708(b) (West Supp. 2003); COLO. REV. STAT. ANN. § 19-5-206(3) (2002); CONN. GEN. STAT. ANN. §§ 45a-726, 45a-726b (2003); ME. REV. STAT. ANN. tit. 18-A, § 9-308 (West 2002); MINN. STAT. ANN. § 259.57 (West 2003); MO. REV. STAT. § 453.005 (2002); TEX. FAM. CODE §§ 162.015(a), 162.308 (Vernon 2003); WASH. REV. CODE § 26.33.045 (2003); N.J. ADMIN. CODE tit. 10, § 121A-1.7(c) (2003); UTAH ADMIN. CODE 501-7-4(A)(3) (2002).

race a factor, principally on the grounds that, in practice, agency workers will apply the rule improperly, making a race match an absolute requirement rather than simply one consideration.<sup>142</sup> She also notes the absence of evidence that children adopted by parents of another race are “injured” thereby,<sup>143</sup> but injured is not quite the same as “are less well off to some degree than they might otherwise be,” which would seem a better standard for deciding whether something should be a factor.<sup>144</sup> Another sort of argument against consideration of race is that it reinforces race-based thinking and a view that children belong to a racial group, both of which our society should be moving away from. But basing decisions about the lives of individual children on broad social agendas would mark a departure from a children’s rights model of state decision making.<sup>145</sup>

Arguments in favor of considering race rely in part on its role as a proxy for other relevant considerations, such as a potential parent’s ability to understand and deal with the child’s likely experience of race in our society or a potential parent’s ability and inclination to connect a child to the cultural heritage of people of his or her race.<sup>146</sup> To that extent, these arguments are unpersuasive, because agencies and courts can inquire directly into those other considerations. In fact, statutes and administrative regulations in many states direct adoption agencies to consider these things in their investigation of applicants for adoption.<sup>147</sup> But such arguments also rely on consequences for children that are inextricably linked to the respective races

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<sup>142</sup> See BARTHOLET, *supra* note 134, at 130–31.

<sup>143</sup> *Id.* at 127.

<sup>144</sup> One author suggests that Bartholet and other proponents of transracial adoption are not really concerned solely about the welfare of children, but rather are as concerned, if not more concerned, about the interests of adults in forming families however they choose. See FREUNDLICH, *supra* note 137, at 13.

<sup>145</sup> Of course, today’s children will share in the diffuse societal benefit of progress away from social ills like racism. But the concept of a right does not encompass enjoyment of diffuse benefits in common with the multitudes. See Maccormick, *supra* note 4, at 205 (stating as an essential feature of rights that they “concern the enjoyment of goods by individuals separately, not simply as members of a collectivity enjoying a diffuse common benefit in which all participate in indistinguishable and unassignable shares”). That shared benefit might *justify* a failure to accord children a stronger right, but it does not belie the claim that the failure exists.

<sup>146</sup> See Brinig & Nock, *supra* note 69, at 458; Barbara Bennett Woodhouse, “Are You My Mother?”: *Conceptualizing Children’s Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL’Y 107 (1995).

<sup>147</sup> See, e.g., CAL. FAM. CODE § 8709 (West Supp. 2003); MO. CODE REGS. ANN. tit. 13, § 40-73.080(4)(D)(3)(C)(XII) (2002); MONT. CODE ANN. § 42-3-203(1)(e) (2001); UTAH ADMIN. CODE 501-7-8 (B)(2)(d) (2002); WASH. REV. CODE § 26.33.045 (2003). *But see* BARTHOLET, *supra* note 134, at 134–35 (cautioning that agency workers use a “cultural competence” consideration in adoption placement as a covert strategy for effecting categorical race matching, tending to find that only parents of the same race have the requisite cultural competence).

of parent and child, including a child's sense of belonging to a family and community, whether outsiders view the parent-child relationship as "normal," and a parent's ability to bond with a child.<sup>148</sup> Although these consequences might not be so substantial as to warrant categorical race matching and might be overstated by some proponents of race matching, it is implausible to contend that they are non-existent or so trivial that they should not be considered at all.<sup>149</sup> Thus, the prevailing formal rule today regarding race in adoption, under which race is treated as a relevant, but non-determinative, consideration, appears consistent with an absolute rights model.

There is one exception to the rule established by the Multiethnic Placement Act that more clearly marks a departure from an absolute children's rights model. Congress separately enacted in 1978, and exempted from the ambit of MEPA, the Indian Child Welfare Act (ICWA). One aspect of the ICWA is to confer on Native American tribes jurisdiction over child protective and adoption proceedings involving children of tribe members<sup>150</sup> as a response to a history of forced assimilation and racism in the states' application of child welfare laws to families within tribes.<sup>151</sup> There is nothing in this conferral of jurisdiction inherently inconsistent with a children's rights model of decision making, though the Act contemplates that tribes will apply different standards of acceptable parenting.<sup>152</sup>

However, the ICWA also grants Native American tribes special substantive group rights over children of members by creating "powerful preferences for placing children with extended family, or within their own tribe, or within the Native American Community," even against the wishes of a child's natural parents to place the child with adoptive parents outside the tribe.<sup>153</sup> Thus, rather than requiring

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<sup>148</sup> See HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 48-51 (2002) (arguing that good social work practice would entail giving some consideration, but not determinative weight, to the race of adoptive parents and child); JUDITH S. MODELL, *A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION* 5-8 (2002) (discussing the importance to adoptive families historically of looking like a "natural" family). I do not mean to suggest here that children always suffer on these counts in transracial adoptions. Rather, I am suggesting simply an increased probability of some difficulty in these respects in transracial adoptions.

<sup>149</sup> See SANDRA PARR, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* (2000) (reporting results of ethnographic study of African-American and multiracial adoptees raised by white adoptive parents); Brinig & Nock, *supra* note 69, at 468.

<sup>150</sup> See 25 U.S.C. §§ 1903(1), 1911 (2000).

<sup>151</sup> See 25 U.S.C. § 1901(4)-(5) (2000); see also FREUNDLICH, *supra* note 137, at 57-61.

<sup>152</sup> See 25 U.S.C. § 1901(5) (noting that "the States . . . have often failed to recognize . . . the cultural and social standards prevailing in Indian communities and families").

<sup>153</sup> BARTHOLET, *supra* note 134, at 125. The actual language of the Act provides that "[i]n any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families."

decision makers just to give appropriate consideration to the benefits (and costs) of remaining within a tribal community, the Act effectively requires that children remain within their parents' tribe unless no tribe members are willing to take the children. The Act does this pursuant to Congress's "responsibility for the protection and preservation of Indian tribes and their resources"<sup>154</sup> on the assumption that children of tribe members are a tribal "resource."<sup>155</sup> These tribal rights, insofar as they prevent agencies and courts from placing children with the best available adoptive parents, reduce the rights and sacrifice the welfare of individual children awaiting adoption, and appear to have caused children to remain in foster care rather than being adopted.<sup>156</sup> ICWA also diminishes the ability of states to terminate the parental rights of Native Americans in the first place, making it less likely that abused or neglected children will be adopted at all.<sup>157</sup> Thus, one subgroup of children — the offspring of Native American tribe members — has lesser rights than other children in connection with creation of new parent-child relationships through

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25 U.S.C. § 1915(a) (2000). The Act adds that "[t]he standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties." 25 U.S.C. § 1915(d) (2000). Bureau of Indian Affairs regulations explain the "good cause" exception thus:

For purposes of . . . adoptive placement, a determination of good cause not to follow the order of preference set out above shall be based on one or more of the following considerations:

(i) The request of the biological parents or the child when the child is of sufficient age.

(ii) The extraordinary physical or emotional needs of the child as established by testimony of a qualified expert witness.

(iii) The unavailability of suitable families for placement after a diligent search has been completed for families meeting the preference criteria.

Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,594 (1979). Thus, in the absence of "extraordinary" need on the part of the child, the child's placement turns on the whim of adults — either the wishes of the biological parents (persons unwilling or unfit to care for the child) or the wishes of other adult tribe members (to take the child or not). Courts applying this provision engage in an explicit balancing of the child's welfare against the interest of a tribe in retaining its resources. *See, e.g., In re Baby Boy Doe*, 902 P.2d 477, 487 (Idaho 1995).

<sup>154</sup> 25 U.S.C. § 1901(2) (2000). This provision goes on to hint obliquely at a child welfare aim, noting that "the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe." The dual purpose of the Act is also reflected in 25 U.S.C. § 1902 (2000) (declaring "the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families").

<sup>155</sup> *Id.* § 1901(3) (stating that "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

<sup>156</sup> *See* BARTHOLET, *supra* note 134, at 125.

<sup>157</sup> *See id.*

adoption.

A related issue arises from statutory provisions creating a presumption in favor of placing a child with any willing relatives for foster care and adoption purposes.<sup>158</sup> Under federal directive, states operate on the basis of a preference for kinship care in selecting foster parents for children removed from abusive or neglectful parents,<sup>159</sup> and most states also favor relatives in adoption placements in some way — for example, by directing adoption agencies to consider a pre-existing relationship between a child and applicants for adoption<sup>160</sup> and by waiving the home study requirement when applicants for adoption are related to the child.<sup>161</sup> As a result, roughly one-third of all foster care placements are with relatives, with minority-race children being placed with relatives to a much higher degree than are white children.<sup>162</sup> In addition, many children who have been parented by unrelated foster parents for several years have that relationship severed despite the desire of the foster parents to adopt them, because relatives step forward when the biological parents' rights are terminated, contending that the child should be adopted by kin.<sup>163</sup>

Children might derive several benefits from being placed with relatives when their original parents are unable to care for them — for example, the antecedent sense of being part of the same family, the comfort of appearing to outsiders to be part of a "normal" (i.e., genetically related) rather than adoptive family, the likelihood of an existing relationship, and the greater potential for continued interaction with biological parents.<sup>164</sup> It is not obvious, though, that these benefits

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<sup>158</sup> HOLLINGER, *supra* note 86, § 3.02; *see, e.g.*, ARK. CODE ANN. § 9-9-102(a) (Michie 2002); CAL. FAM. CODE § 8710 (West Supp. 2001); FLA. ADMIN. CODE ANN. r. 65C-16.002(2) (2003) (stating that, "except where a child's needs cannot be adequately and safely served, relatives are the placement of choice"); MINN. STAT. ANN. § 259.29(2) (West 1998 & Supp. 2002); *see also* BARTHOLET, *supra* note 134, at 137 (explaining that kinship care became a surrogate for race matching after race matching was prohibited); Barbara Bennett Woodhouse, *Children's Rights: The Destruction and Promise of Family*, 1993 B.Y.U. L. REV. 497, 502-03 (1993) (discussing relative placement preferences in foster care).

<sup>159</sup> *See* BARTHOLET, *supra* note 134, at 90.

<sup>160</sup> *See id.*

<sup>161</sup> *See, e.g.*, ALA. CODE § 26-10A-28(2) (1992); ARIZ. REV. STAT. ANN. § 8-105(P)(1) (West 2001); ARK. CODE ANN. § 9-9-212(c) (Michie 2002); COLO. REV. STAT. ANN. § 19-5-206(2)(b) (2002); FLA. STAT. ANN. § 63.112(3) (West 2002); IOWA CODE ANN. § 600.8(12) (West 2001); LA. CHILD. CODE ANN. art. 1171 (West 1995); MINN. STAT. ANN. § 259.41(b) (West 1998 & Supp. 2002); N.M. STAT. ANN. § 32A-5-14(C) (Michie 2001); N.D. CENT. CODE § 14-15-11(5) (1997 & Supp. 2001); S.C. CODE ANN. § 20-7-1820(a) (Law. Co-op. Supp. 2001); VA. CODE ANN. §§ 63.2-1210, 63.2-1231 (Michie 2002); *see also* FREUNDLICH, *supra* note 137, at 34.

<sup>162</sup> *See* FREUNDLICH, *supra* note 137, at 31-32.

<sup>163</sup> *See id.* at 34-35 (discussing cases); HOLLINGER, *supra* note 86, § 3.02[1][b].

<sup>164</sup> *See In re D.L.*, 486 N.W.2d 375, 377 (Minn. 1992) (holding that adoption by relatives "is presumptively in a child's best interests"); FREUNDLICH, *supra* note 137, at 32; MODELL, *supra* note 148, at 7 (discussing the benefits for an adopted child of looking like his or her

are typically so great as to support a strong presumption in favor of relatives, rather than making the family relationship simply one factor among many in the evaluation. And there seems no reason to assume simply from the fact that a person is a blood relative of a child's parent that that person is well prepared to care for a child and provide a good home, such that a home study is not in order. In fact, it seems more plausible to assume the opposite — that is, that relatives of abusive or neglectful parents are, on average, *worse* candidates for adoption than other people, given that family dysfunction tends to be inherited.<sup>165</sup> Professor Bartholet writes:

Continuity with the past and ongoing relationships with the extended family, including the birth parents, are often the *opposite* of what the child needs. Many parents who abuse and neglect their children suffered similar forms of maltreatment as children. Many parents caught up in destructive patterns of substance abuse are the children of alcoholics and drug addicts. . . . Maltreatment commonly occurs as part of a pattern of family dysfunction carried from one generation on to the next, in a community characterized by poverty, unemployment, drugs, violence, and despair. The extended kinship group has to be seen as a high-risk group for parenting purposes. . . . [Yet] under such preference policies social workers are unlikely to screen kin out unless there are obvious manifestations of gross unfitness.<sup>166</sup>

In the not uncommon case in which the child to be adopted has no emotional attachment to the relatives or the relatives are not particularly willing or qualified applicants,<sup>167</sup> an unrelated set of potential adoptive parents would likely be better for the child. The strong preference for relatives in adoption statutes appears to reflect at least in part a view that children are in some sense owned by their biological kin, subject to inheritance rules like other property, and/or a view that the state can disclaim responsibility for any harm that befalls a child if it simply moves the child

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adoptive parents); Brinig & Nock, *supra* note 69, at 461 n.47, 463–64, 467 (reporting results of study showing that African-American children do as well in kin foster care as they do in the care of biological or adoptive parents).

<sup>165</sup> See BARTHOLET, *supra* note 134, at 89–93 (discussing the dangers of placing abused and neglected children with relatives for foster care or adoption).

<sup>166</sup> *Id.* at 90–91; see also FREUNDLICH, *supra* note 137, at 53 (noting that “[s]tudies have consistently shown that entry into foster care is closely associated with poverty, inadequate housing and parental substance abuse”); Gabrielle A. Paupeck, Note, *When Grandma Becomes Mom: The Liberty Interests of Kinship Foster Parents*, 70 *FORDHAM L. REV.* 527, 533 (2001) (discussing the greater difficulty of monitoring kin foster care and the fact that a large percentage of kin caregivers have a very large number of children in their household).

<sup>167</sup> Bartholet notes that roughly half of relative foster parents are drafted by social services agencies, with the inducement of a government stipend, rather than volunteering. BARTHOLET, *supra* note 134, at 92.

to another "family member."

In many states, adoption laws also contain some sort of religion-matching provision, requiring that, if possible, children be placed with parents of the same religious belief as the biological parents,<sup>168</sup> or more modestly, that adoption agencies consider the religious background of the child in making adoption placements<sup>169</sup> or honor wishes of biological parents that a child be placed with adoptive parents of the same religion.<sup>170</sup> The first two of these ways of injecting religious considerations into the decision might be the most difficult to justify in child welfare terms. It would be implausible to argue that an infant loses anything by entering into a family with beliefs about religion different from those of his or her parents,<sup>171</sup>

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<sup>168</sup> HOLLINGER, *supra* note 86, § 3.06[3]; *see, e.g.*, N.Y. CONST. art. VI, § 32; 750 ILL. COMP. STAT. ANN. 50/15 (West 2002) ("The court in entering a judgment of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child."); N.Y. SOC. SERV. LAW § 373; N.Y. DOM. REL. LAW § 113(3); 23 PA. CONS. STAT. § 2725 (West 2001); MD. REGS. CODE tit. 7, § 05.03.15(B)(2) (2001).

<sup>169</sup> *See, e.g.*, CAL. FAM. CODE § 8709 (West Supp. 2001) ("The child's religious background may also be considered in determining an appropriate placement."); MD. CODE ANN., FAM. LAW § 5-316 (2002):

In passing on a petition for adoption, a court . . . [m]ay consider the religious background, training, and beliefs of the natural parents, the prospective adoptive parents, and the child to be adopted, but may make a decision without considering the religious background, training, or beliefs of these individuals if the court finds that the child does not have sufficient religious background, training, or beliefs to be factors in the adoption.

*See also* R.I. GEN. LAWS § 15-7-13 (2000) (stating that the agency has discretion to match children with adoptive parents of same religious background in order to serve a child's best interests). Utah characterizes this as a right of the child. *See* UTAH ADMIN. CODE 501-7-6(G)(2) (2002) ("Children who have already established some identification with a particular religious faith of their own shall have the right to have such identification respected in any adoptive placement. Efforts shall be made to place the child within that religious faith.").

<sup>170</sup> *See, e.g.*, MINN. STAT. ANN. § 259.29 (West 1998 & Supp. 2002):

If the child's birth parent or parents express a preference for placing the child in an adoptive home of the same or a similar religious background to that of the birth parent or parents, the agency shall place the child with a family that meets the birth parent's religious preference.

*See also* ARIZ. REV. STAT. ANN. § 9-9-102(c) (West 2001); ARK. CODE ANN. § 9-9-102(c) (Michie 2002); DEL. CODE ANN. tit. 13, § 911(a) (1999); KY. REV. STAT. ANN. § 199.471 (Michie 1998); MASS. GEN. LAWS ANN. ch. 210, § 5B (West 1998); MONT. CODE ANN. 42-4-201(1)(c) (2001); R.I. GEN. LAWS § 15-7-13 (2000).

<sup>171</sup> *Cf. Zummo v. Zummo*, 574 A.2d 1130, 1149 (Pa. Super. Ct. 1990) ("[C]ourts only recognize a *legally* cognizable religious identity when . . . the child has reached sufficient maturity and intellectual development . . . . [C]hildren twelve or older are generally considered mature enough to assert a religious identity, while children eight and under are not.").

and older children who are adopted usually have not spent much time with their biological parents in the years preceding the adoption. In addition, provisions entitling adolescents to veto any adoption should make a provision for religion matching at best superfluous; if the adolescent would find it too disruptive to live with new parents who have different beliefs about religion, he or she can decline to be adopted by persons of other faiths.

There is a child-centered reason to honor the preferences of biological parents in some circumstances — namely, where termination of their rights is occurring voluntarily and they might otherwise refuse to relinquish the child for adoption. But this concern does not exist where parental rights are terminated involuntarily, and even in cases of voluntary relinquishment, many parents might not care about the religion of the adoptive parents. Yet the statutes require the agency to attempt to match by religion and encourage agencies to ask parents if they want a religious match. An ideal statute might, instead of creating a religion-matching requirement, or even making religious belief a mandatory consideration, simply provide that religious matching *may* be undertaken *if and when* a biological parent voluntarily relinquishing parental rights, or the child to be adopted, spontaneously insists on it. The law could also provide that adoption agencies and courts may consider the religion of prospective adoptive parents as one factor, if and only if it is relevant to some state-recognized aspect of a child's well-being — for example, a need for continuity in belief formation, schooling, or community involvement. Existing religious matching provisions go far beyond what the interests of children warrant, and so represent a departure from a strictly child-centered approach.

## ii. Step-parent adoption

When an existing legal parent chooses a second parent for his or her child by marrying and supporting the adoption petition of another adult, state review of the petitioner is generally slight or non-existent. Statutes in many states exempt step-parent adoptions from the home study process and or the probationary period, at least when there is no objection by a biological parent whose rights would be terminated by the adoption.<sup>172</sup> This likely reflects in part an assumption that an existing parent would not choose as a second parent for his or her child (or as a spouse) someone who would not make at least a minimally adequate parent. It might also reflect recognition that, absent a report of the spouse's abusing the child, the child will live in the household with that spouse anyway.

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<sup>172</sup> HOLLINGER, *supra* note 86, §§ 1.05, 2.10[3][d]; *see, e.g.*, VA. CODE ANN. §§ 63.2-1210; 63.2-1241 (Michie 2002); *see also In re Baby M*, 537 A.2d 1227, 1243 (N.J. 1988) (noting that New Jersey's adoption statutes "make certain procedural allowances when stepparents are involved").

However, it would be unrealistic to assume that all parents always make the best, or even good, choices in selecting a new partner for themselves and a new parent for their children. And the transformation of a step-parent from merely a co-habitant to a legal parent has significant consequences for a child — in particular, in terms of who might have custody of the child should the initial parent and new parent divorce or if the initial parent should die. Yet in working this transformation, the state affords little or no protection to the child's welfare. Step-parent adoption rules effectively afford children only the limited right against being placed in a legal relationship with a manifestly unfit parent. It is not difficult to imagine circumstances in which the failure of the law to afford children a stronger right ultimately has adverse consequences for them.

On the other hand, in one type of situation — namely, that involving gay or lesbian couples — courts have been inclined to deny adoption by a legal parent's "spouse" for reasons other than the welfare of the child. Many same-sex couples plan to have a child together, with the idea that one will be the biological parent of the child and the other will adopt the child after birth. Other couples form after one member of the couple already is the legal parent of a child, and the parent's partner assumes a co-parenting role. The law governing these situations is in flux, but it was written with new spouses in mind,<sup>173</sup> and it appears that at this point a majority of courts that have addressed the issue have read the law narrowly and formalistically to categorically exclude same-sex partners from step-parent adoption.<sup>174</sup> In those jurisdictions, children have no right to form a legal parent-child relationship with a person who is serving on a daily and long-term basis as a social parent, in spite of the many benefits that this might have for the child.<sup>175</sup> A few courts, though, have interpreted the adoption statutes more flexibly and found a way to approve the adoptions.<sup>176</sup>

In sum, adoption laws in some respects approximate a children's rights model much more closely than do maternity and paternity laws, but do not do so

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<sup>173</sup> Specifically, adoption laws generally provide that adoption of a child by someone other than an existing parent's spouse works as a termination of the existing parent's rights with respect to the child. See Michael T. Morley et al., *Developments in Law and Policy: Emerging Issues in Family Law*, 21 YALE L. & POL'Y REV. 169, 200 (2003).

<sup>174</sup> See *id.* at 200–01 (citing *In re Adoption of Luke*, 640 N.W.2d 374, 382–83 (Neb. 2002), *Sharon S. v. Sup. Ct.*, 93 Cal. App. 4th 218, 221 (2001), *In re Adoption of Baby Z*, 724 A.2d 1035, 1057 (Conn. 1999), *In re Adoption of Jane Doe*, 719 N.E.2d 1071, 1072 (Ohio Ct. App. 1998), *In re T.K.J.*, 931 P.2d 488, 492 (Colo. Ct. App. 1996), and *In re Angel Lace M.*, 516 N.W.2d 678, 683 n.8 (Wis. 1994)).

<sup>175</sup> See Strasser, *supra* note 86, at 1029–30 (listing the financial, emotional, and psychological benefits that a second-parent adoption offers to children in these situations).

<sup>176</sup> See Morley et al., *supra* note 173, at 201–02 (citing *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002), and *In re Hart*, 806 A.2d 1179, 1182 (Del. Fam. Ct. 2001)); see also HOLLINGER, *supra* note 86, § 3.06[6] (citing decisions in Vermont, Massachusetts, the District of Columbia, Illinois, and New Jersey).

completely. On the surface, adoption laws require a judicial determination with respect to every sort of adoption that it will serve the “best interests” of the child before a court enters a final decree of adoption, and a “best interests” requirement can be viewed as a proxy for an absolute right of children. Adoption laws also confer on older children a choice-based right to avoid a family relationship with particular adults. In practice, though, adoption agencies arrange and courts approve many adoptions that appear simply better for the children than their current situation, requiring only that the adoptive parents satisfy some minimum standard, rather than insisting that each child be matched with the best readily available set of parents. To the extent that agencies do perfunctory assessments of petitioners selected by the biological parents or match applicants on a first-come/first-served basis, they appear to sacrifice the welfare of children to some degree and reduce the children’s right to a limited right. In the context of step-parent adoptions, there is in reality not even an assurance that the adoption will improve the child’s life, but rather a rubber-stamping of whatever choices the existing legal parent makes.

In addition, the law governing adoption falls short of creating an absolute right for children even on the surface, insofar as it categorically excludes potential parents on the basis of sexual orientation or religious belief (or lack thereof), creates express or implied presumptions that children will be placed with parents of the same race or with any willing relative, and/or requires matching by religion, for reasons other than ensuring the best adoption placement for children. This transforms the children’s right into a non-determinative or partial right.

## 2. Creating and Maintaining Social Parent-Child Relationships

It does not necessarily follow from the fact that one is a child’s legal parent that one will have a social parental relationship with the child, or that, if one does have such a relationship, it will be one of primary care-taking. In the first place, an adult’s having a legal right to form or maintain a relationship with a child does not entail a legal obligation to do so; parents are legally free to avoid contact with their children. Most legal parents, of course, do desire a social relationship with their children, but in some situations the state prevents them from having as much opportunity to interact with and care for their children as they would like. When two legal parents who are not living together disagree over the nature of the social relationship each should have with the child, and when one of them petitions a court to resolve the disagreement, the state steps in to dictate the relationships between each parent and the child. In addition, the state sometimes is asked to give legal protection to social relationships between a child and an adult who is not a legal parent but who has operated in a parental role — for example, grandparents, step-parents, and foster parents.

*a. Custody disputes between legal parents*

Under statutory authority and direction in every state, courts decide individual custody disputes between legal parents in both divorce actions and paternity proceedings (i.e., with unmarried parents). It often is said that “the best interests of the child” is *the* governing standard in custody cases throughout the country, but that is actually not true. There are several ways in which the child’s welfare competes with the interests of adults — in the basic governing standard, in preferences for particular structural arrangements of custody; and in the specific substantive considerations included or excluded by statutes and courts.

*i. The basic standard*

In a few states, the statutory custody rules do not even refer to the interests or welfare of the child at issue. For example, West Virginia recently adopted the American Law Institute’s proposed “approximation” rule for physical custody, which does not set forth any substantive standard for individualized decision making but rather dictates a certain state of affairs. This rule, which might soon be adopted by many other states, creates a strong presumption that “the court shall allocate custodial responsibility so that the proportion of custodial time the child spends with each parent approximates the proportion of time each parent spent performing caretaking functions for the child prior to the parents’ separation.”<sup>177</sup> It resembles the primary caretaker rule that West Virginia and some other states have applied in the past, which is discussed at some length below.

To the extent that the approximation rule yields outcomes consistent with children’s best interests, and a child’s representative has standing to insist on enforcement of the rule, it confers some sort of state-of-affairs right on children. But the rule itself contemplates that approximation will not always yield the best outcome for children, by providing that courts should take a different approach where approximation would be “manifestly harmful to the child.”<sup>178</sup> This suggests

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<sup>177</sup> W. VA. CODE ANN. § 48-9-206(a) (Michie 2002). The West Virginia statute does direct courts to arrange custody in accordance with an individualized assessment of a child’s well-being where there is no history of caretaking, as when the child is a newborn. *Id.* § 48-9-206(c).

<sup>178</sup> *Id.* § 48-9-206(c). The difference between a harm standard and a best interests standard is murky. Courts and commentators assume there to be a difference but generally do not articulate what it is. One could define “harm” in such a way as to make the standards identical — namely, by defining it to include being deprived of a potential benefit as well as having one’s well-being diminished to any degree relative to the status quo. In applying a harm standard, though, courts generally limit its meaning to being made worse off than one now is and also require a somewhat substantial loss of well-being. They do not view it as “harm” that a child would be only a little worse off than at present.

that there can be cases in which the state orders children's relationships with their parents in a way that is not in the children's best interests; the rule allows this so long as the arrangement is not "manifestly harmful." The right conferred on children is therefore a non-absolute state-of-affairs right.

Alabama's custody statute also makes no reference to children's welfare. It reads in pertinent part: "Upon granting a divorce, the court may give the custody and education of the children of the marriage to either father or mother, as may seem right and proper, having regard to the moral character and prudence of the parents and the age and sex of the children."<sup>179</sup> Alabama courts have interpreted this provision, however, as requiring that "[i]n determining which parent should have custody, the paramount consideration is the health, safety, and well-being of the child."<sup>180</sup> The term "paramount consideration" suggests that something other than the child's well-being could be relevant, but of secondary importance. They have also said, confusingly, that "parental rights are important" to an inquiry into the welfare of the child.<sup>181</sup>

In a number of other states, the custody statutes themselves declare that the interests of children are to be the "primary" or "paramount" consideration, rather than the sole consideration. They then either mention some other, vague considerations, such as "the welfare of the family" or "the welfare of the community," or leave unstated what other considerations might be permissible.<sup>182</sup> If courts did in fact make children's interests paramount, this should mean that other interests come into play only when children's welfare would be equally well served by more than one arrangement. Children would therefore have an absolute right with respect to custody in these jurisdictions even though others' interests can play some role.

In several additional jurisdictions, the term "primary" is not used, but statutes instead just list a few considerations for custody decision making, including the best interests or welfare of the child.<sup>183</sup> And in a few jurisdictions, custody statutes

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<sup>179</sup> ALA. CODE § 30-3-1 (2002). Alabama courts repeatedly have stated that trial courts have very broad discretion in interpreting this provision, and they generally engage in only perfunctory reviews of trial court custody decisions. *See, e.g.,* P.M.L. v. D.T.P., 631 So. 2d 1042 (Ala. Civ. App. 1993); *Dobbins v. Dobbins*, 602 So. 2d 900 (Ala. Civ. App. 1992); *see also* WASH. REV. CODE § 26.09.187(3)(a) (2003) ("The court shall make residential provisions for each child which encourage each parent to maintain a loving, stable, and nurturing relationship with the child, consistent with the child's developmental level and the family's social and economic circumstances.").

<sup>180</sup> *Williams v. Williams*, 602 So. 2d 425, 425 (Ala. Civ. App. 1992).

<sup>181</sup> *Wambles v. Coppage*, 333 So. 2d 829, 835 (Ala. Civ. App. 1976).

<sup>182</sup> *See, e.g.,* D.C. CODE ANN. § 16-914(a)(3) (2002); OR. REV. STAT. § 107.137 (2001); TEX. FAM. CODE § 153.002 (Vernon 2003); VA. CODE ANN. § 20-124.2(B) (Michie 2002). The D.C. statute makes "the benefit to the parents" a factor in determining what is in the best interests of the child. D.C. CODE ANN. § 16-914(a)(3)(Q) (2002).

<sup>183</sup> *See, e.g.,* IOWA CODE § 598.41(1)(a) (2003) (stating the ultimate objective of

provide simply that the child's interests are to be taken into account, without mentioning other relevant considerations.<sup>184</sup> On the face of the statutes in these two categories of jurisdictions, the implicit right of children is apparently just to have their interests count along with the interests of other persons, particularly parents, and/or interests of society as a whole. It is therefore a non-determinative right.

In thirty-five states, however, custody statutes or common law doctrines explicitly and unambiguously make the best interests or welfare of the child the sole consideration,<sup>185</sup> and so nominally confer on children an absolute right in connection

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"continuing physical and emotional contact with both parents," limited by what is "reasonable," by what is in "the best interests of the child," and by the potential for contact with a parent causing harm); N.J. STAT. ANN. § 9:2-4 (West 2003) (directing courts to arrange residential time within a joint custody framework in accordance with "the needs of the parents and the child," authorizing courts to award joint custody, sole custody, or "[a]ny other custody arrangement as the court may determine to be in the best interests of the child," and directing courts to accept an agreement by parents as to custody unless it is not in the child's best interests); N.Y. DOM. REL. LAW § 240(1)(a) (McKinney 2003) (providing that courts in divorce cases "shall enter orders for custody and support as, in the court's discretion, justice requires, having regard to the circumstances of the case and of the respective parties and to the best interests of the child"); UTAH CODE ANN. § 30-3-10(1)(a) (2002) ("In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties."); *see also* S.C. CODE ANN. § 20-3-160 (Law. Co-op. Supp. 2001):

In any action for divorce from the bonds of matrimony the court may at any stage of the cause, or from time to time after final judgment, make such orders touching the care, custody and maintenance of the children of the marriage . . . as from the circumstances of the parties and the nature of the case and the best spiritual as well as other interests of the children may be fit, equitable and just.

<sup>184</sup> *See, e.g.,* MINN. STAT. ANN. § 518.17(3) (West 2003) ("In determining custody, the court shall consider the best interests of each child . . ."); OKLA. STAT. ANN. tit. 43, § 112 (West 2002) (providing that, in making a custody award, the court "shall consider what appears to be in the best interests of the child"); 23 PA. CONS. STAT. ANN. § 5303(A)(1) (West 2002) (courts shall consider the preferences of the child and other factors impacting the child's well-being); *see also* OHIO REV. CODE ANN. § 3109.04(B)(1) (Anderson 2002):

When making the allocation of the parental rights and responsibilities for the care of the children under this section in an original proceeding or in any proceeding for modification of a prior order of the court making the allocation, the court shall take into account that which would be in the best interest of the children.

<sup>185</sup> *See* ALASKA STAT. § 25.24.150(c), (d) (Michie 2002); ARIZ. REV. STAT. § 25-403 (2002); ARK. CODE ANN. § 9-13-101 (Michie 2002); CAL. FAM. CODE §§ 3020, 3040 (West 2003); DEL. CODE ANN. tit. 13, § 722 (2002); FLA. STAT. ANN. § 61.13(2)(b)(1) (West 2003); GA. CODE ANN. § 19-9-3(a)(2) (2002); HAW. REV. STAT. § 571-46(1) (2003); IDAHO CODE § 32-717(1)(A) (Michie 2002); 750 ILL. COMP. STAT. ANN. 5/602(a) (West 2002); IND. CODE § 31-17-2-8 (2002); KAN. STAT. ANN. § 60-1610(a)(3) (2001); KY. REV. STAT. ANN. § 403.270(2) (Michie 2002); LA. CIV. CODE ANN. art. 131 (West 2003); ME. REV. STAT. ANN. tit. 19-A, § 1653(3) (West 2002); MASS. GEN. LAWS ANN. ch. 208, § 31 (West 1998)

with their custodial arrangement as between legal parents. Colorado law actually speaks of the custody decision as a matter of children's rights — namely, a “right to have such determinations based upon the best interests of the child.”<sup>186</sup> This unusual emphasis on the welfare of children in the prevailing rule is explainable as a reaction to the otherwise unresolvable conflict of rights between two adults. Where the rights of parents cancel each other, the law falls back on the welfare of children as a tie-breaker.

The great majority of custody arrangements following divorce arise by agreement of the parents, as the courts and lawyers increasingly encourage divorcing couples to work out an arrangement themselves, using mediation if necessary, to avoid the many costs of litigating the issue.<sup>187</sup> However, even when parents reach an agreement on custody, a judge or magistrate is supposed to approve the agreement only upon determining independently that the agreement is not inconsistent with the substantive standard that applies when the court dictates a custody arrangement. In practice, judges do not scrutinize custody settlements very rigorously, but on the surface of the law, even parental decisions about custody should comport with the best interests of the child in the states where that standard

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(stating that “the happiness and welfare of the children shall determine their custody”); *id.* ch. 209C, § 10 (describing the best interests of children born out of wedlock); MICH. COMP. LAWS ANN. § 722.25(1) (West 2002); MISS. CODE ANN. § 93-5-24(1) (2003); MO. REV. STAT. § 452.375(2) (2002); MONT. CODE ANN. § 40-4-212(1) (2002); NEB. REV. STAT. § 42-364(1) (2003); NEV. REV. STAT. 125.480(1) (2002) (“In determining custody of a minor child . . . , the sole consideration of the court is the best interest of the child.”); N.H. REV. STAT. ANN. § 458:17(I) (2002) (requiring each court to make an award of custody “as shall be most conducive to their benefit”); N.M. STAT. ANN. § 40-4-9(A) (Michie 2002); N.C. GEN. STAT. § 50-13.2(a) (2002); N.D. CENT. CODE § 14-09-06.1 (2002); WYO. STAT. ANN. § 20-2-201(a) (Michie 2002); *Boswell v. Boswell*, 721 A.2d 662, 669 (Md. 1998); *Andreozzi v. Andreozzi*, 813 A.2d 78, 82 (R.I. 2003). Somewhat ambiguously, a few states’ statutes direct courts to “be guided by the best interests of the child” in making custody determinations. See CONN. GEN. STAT. ANN. § 46b-56 (West Supp. 2001); S.D. CODIFIED LAWS § 25-4-45 (Michie 2002) (“In awarding the custody of a child, the court shall be guided by consideration of what appears to be for the best interests of the child in respect to the child’s temporal and mental and moral welfare.”); TENN. CODE ANN. § 36-6-106(a) (2002); VT. STAT. ANN. tit. 15, § 665 (2003); WIS. STAT. § 767.24 (4)–(6) (2002):

The court shall set a placement schedule that allows the child to have regularly occurring, meaningful periods of physical placement with each parent. . . . In determining legal custody and periods of physical placement, the court shall consider all facts relevant to the best interest of the child. . . . If legal custody or physical placement is contested, the court shall state in writing why its findings relating to legal custody or physical placement are in the best interest of the child.

<sup>186</sup> COLO. REV. STAT. § 14-10-123.4 (2002).

<sup>187</sup> See Katharine T. Bartlett, *U.S. Custody Law and Trends in the Context of the ALI Principles of the Law of Family Dissolution*, 10 VA. J. SOC. POL’Y & L. 5, 6–15 (2002).

governs.

ii. Preference for joint custody

Many states' custody rules contain provisions relating to the formal structure of custody that appear driven by a mixture of concerns for children and for adults. In the late 1970s and early 1980s, joint custody became the solution of the day for contentious divorces.<sup>188</sup> Many states added provisions to their custody laws creating a presumption in favor of joint physical and/or legal custody, or stating a policy in favor of joint custody, or just requiring that courts explicitly consider joint custody.<sup>189</sup> More recently there has been a retreat, with some states removing or explicitly disavowing joint custody presumptions, or even precluding joint custody in the absence of agreement, and courts in other states exercising their discretion to reduce the number of cases in which they order joint custody.<sup>190</sup> The retreat reflects a growing perception that "true" joint custody, whether physical or legal, though it *can* be beneficial to children, often is not in a child's best interests, particularly when it is involuntarily imposed on parents and/or when there is a high degree of conflict between the parents.<sup>191</sup>

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<sup>188</sup> See ELEANOR MACCOBY & ROBERT MNOOKIN, *DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY* 107 (1992) (reporting that, in the late 1980s, seventy-nine percent of divorced couples in two California counties had joint legal custody); MARY ANN MASON, *THE EQUALITY TRAP* 79–80 (1988); Elizabeth Scott & Andre Derdeyn, *Rethinking Joint Custody*, 45 OHIO ST. L.J. 455, 455–57, 469 (1984).

<sup>189</sup> See A.L.I., *PRINCIPLES*, *supra* note 73, at 211–12; JUNE CARBONE, *FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW* 182 (2000); MASON, *supra* note 188, at 79–80; Scott & Derdeyn, *supra* note 188, at 456–57, 469, 471–74.

<sup>190</sup> See A.L.I., *PRINCIPLES*, *supra* note 73, at 211–12; *see, e.g.*, ARIZ. REV. STAT. § 25-403(B) (2002) ("In awarding child custody, the court may order sole custody or joint custody. This section does not create a presumption in favor of one custody arrangement over another."); CAL. FAM. CODE § 3040(b) (West 2002) ("This section establishes neither a preference nor a presumption for or against joint legal custody, joint physical custody, or sole custody, but allows the court and the family the widest discretion to choose a parenting plan that is in the best interest of the child."); 750 ILL. COMP. STAT. ANN. 5/602(c) (West 2002) ("There shall be no presumption in favor of or against joint custody."); OKLA. STAT. ANN. tit. 43, § 112(C)(2) (West 2002); OR. REV. STAT. § 107.169(3) (2001) ("The court shall not order joint custody, unless both parents agree to the terms and conditions of the order."); VT. STAT. ANN. tit. 15, § 665 (2002) (stating that where parents do not agree "to divide or share parental rights and responsibilities," the court must award primary or sole custody to one parent); WASH. REV. CODE § 26.09.187(3)(b) (2003) (requiring courts to make certain findings before they may "order that a child frequently alternate his or her residence between the households of the parents for brief and substantially equal intervals of time"); *Thronson v. Thronson*, 810 P.2d 428, 432 (Utah Ct. App. 1991) (noting that the state legislature recently amended the custody statute to remove presumption in favor of joint custody).

<sup>191</sup> See CARBONE, *supra* note 189, at 188 (discussing the retreat from joint custody

In a significant minority of states, though, the law still reflects a preference for joint physical and/or legal custody.<sup>192</sup> One court has even characterized joint

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presumptions); Robert F. Kelly & Shawn L. Ward, *Social Science Research and The American Law Institute's Approximation Rule*, 40 FAM. CT. REV. 350 (2002) (discussing empirical studies of the effects of joint custody arrangements on children). Studies in California and Wisconsin found, ironically, that joint custody was ordered more often in highly contested custody cases than in cases where the parents settled the issue relatively early in the process. CARBONE, *supra* note 189, at 187–88. In practice, however, what is called “joint” physical custody is not necessarily equal time in two households. The term can describe any shared custodial arrangement, even one that looks no different from a standard sole custody with visitation for the non-custodial parent arrangement. *See id.* at 184–85. Some commentators contend that in many cases joint custody results in the secondary caretaker being ordered to pay less support than he otherwise would but not assuming more parenting responsibility. *See* June Carbone, *Child Custody and the Best Interest of Children — A Review of FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES*, 29 FAM. L.Q. 721, 734 n. 61 (1995) (book review). On the other hand, joint custody appears to have increased the rate of compliance with support orders. *See* CARBONE, *supra* note 189, at 186.

<sup>192</sup> *See* A.L.I., PRINCIPLES, *supra* note 73, at 211. In some jurisdictions, there is an explicit statutory presumption. *See, e.g.*, D.C. CODE ANN. § 16-914 (2002) (“There shall be a rebuttable presumption that joint custody is in the best interest of the child or children . . .”); FLA. STAT. ANN. § 61.13(2)(b)(2) (West 2003) (“The court shall order that the parental responsibility for a minor child be shared by both parents unless the court finds that shared parental responsibility would be detrimental to the child.”); IOWA CODE § 598.41(2)(b) (2002) (requiring courts to award joint custody on the application of either parent, absent clear and convincing evidence that this would be unreasonable and would not be in the child’s best interests); MO. REV. STAT. § 452.375(5) (2002) (directing courts to consider, in order, a list of items — and listing joint custody first); MINN. STAT. § 518.17 (2003) (rebuttable presumption in favor of joint legal custody); NEV. REV. STAT. 125.480(3)(a) (2002) (stating that if the court does not award joint custody, it must set forth reasons); N.H. REV. STAT. ANN. § 458:17(II) (2002); N.M. STAT. ANN. § 40-4-9.1(A) (Michie 2002) (“There shall be a presumption that joint custody is in the best interests of a child . . .”); WIS. STAT. § 767.24(2)(am) (2002) (“The court shall presume that joint legal custody is in the best interest of the child.”); *see also* LA. CIV. CODE ANN. art. 132 (West 2003):

In the absence of agreement, or if the agreement is not in the best interest of the child, the court shall award custody to the parents jointly; however, if custody in one parent is shown by clear and convincing evidence to serve the best interest of the child, the court shall award custody to that parent.

In some states, there is an explicit statutory presumption that joint custody is in a child’s best interests where the parties have agreed to it. *See* CAL. FAM. CODE § 3080 (West 2002); CONN. GEN. STAT. § 46b-56a (2002) (setting forth the presumption, and also authorizing courts to order the parents into conciliation to explore joint custody where they have not agreed to it in advance). In the state of Washington, a presumption is implicit in a statutory provision directing that sole custody be awarded only upon making certain findings. WASH. REV. CODE § 26.09.187 (2003). Massachusetts appears to be of two minds on this issue, with a custody rule stating that “[t]here shall be no presumption either in favor of or against shared legal or physical custody” but also requiring parents each to submit a plan for “shared

custody, or at least consideration of it, as a right of children. In *In re A.R.B.*, the Georgia Court of Appeals stated:

Although the dispute is symbolized by a “versus” which signifies two adverse parties at opposite poles of a line, there is in fact a third party whose interests and rights make of the line a triangle. That person, the child who is not an official party to the lawsuit but whose well-being is in the eye of the controversy, has a right to shared parenting when both are equally suited to provide it. Inherent in the express public policy [in the statutory amendment authorizing joint custody] is a recognition of the child’s right to equal access and opportunity with both parents, the right to be guided and nurtured by both parents, the right to have major decisions made by the application of both parents’ wisdom, judgment and experience. The child does not forfeit these rights when the parents divorce. Whether a parent forfeits his or her portion of the relationship or any part of it, or is incapable of performance, must be determined by the factfinder.<sup>193</sup>

How could joint custody not be best for a child with two good parents? With respect to physical custody, although it is true that many children benefit from spending a lot of time, and perhaps roughly equal time, with two parents, many developmental psychologists believe that most children whose parents divorce are better off having one primary residence and one primary custodian that form the core of their life, with the other parent playing a substantial, but somewhat secondary, role.<sup>194</sup> It can be very difficult for a child to live equally in two households.<sup>195</sup> It can work sufficiently well under certain circumstances — for

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custody” if either of them requests it. MASS. GEN. LAWS ANN. 208 § 31 (West 2003).

<sup>193</sup> 433 S.E.2d 411, 414 (Ga. Ct. App. 1993).

<sup>194</sup> For a summary of the arguments on each side of the issue, see generally Stephanie N. Barnes, *Strengthening the Father-Child Relationship Through a Joint Custody Presumption*, 35 WILLAMETTE L. REV. 601 (1999); Zeynep Biringen et al., *Commentary on Warshak’s “Blanket Restrictions: Overnight Contact Between Parents and Young Children,”* 40 FAM. CT. REV. 204, 205–06 (2002); William C. Smith, *Dads Want Their Day*, 89 A.B.A. J. 38, 42 (2003).

<sup>195</sup> See, e.g., *Meneou v. Meneou*, 503 N.E.2d 902 (Ind. Ct. App. 1987) (upholding the modification of a joint custody arrangement based on strain on the children from being transferred between houses); *In re Marriage of Weidner*, 338 N.W.2d 351 (Iowa 1983); *Bolick v. Bolick*, 376 S.E.2d 785, 786 (S.C. Ct. App. 1989) (citations omitted):

Ordinarily, it is not conducive to the best interest and welfare of a child for it to be shifted and shuttled back and forth as such an arrangement is likely to cause confusion, interfere with the proper training of the child and make the child the basis of many quarrels between its custodians. The best interest and welfare of the child demands that divided custody be avoided if at all possible and such will

example, when the parents live close to each other after divorce and are on good terms, and the child is very adaptable. Nevertheless, many courts have ordered a roughly equal division of custodial time even in cases where those circumstances do not exist.<sup>196</sup>

Serious and intractable problems arise with joint legal custody as well. Although children can benefit from their parents' cooperating in decision making about their lives, joint legal custody often produces bitter disputes between the parents, which can be quite detrimental to the children.<sup>197</sup> In addition, if and when such disputes end up in court, judges are at a loss to figure out how they can preserve equal authority among parents without having them return to court whenever they disagree.<sup>198</sup> Many scholars and some legislatures and courts therefore take the position that joint legal custody is rarely a good idea unless both parents desire it.<sup>199</sup> Nevertheless, courts impose it in many cases where the parties do not agree to it.<sup>200</sup>

Why did joint custody become so popular in the first place? In part it did so because many people believed that it would generally be good for children.<sup>201</sup> They

not be approved except under exceptional circumstances.

<sup>196</sup> CARBONE, *supra* note 189, at 187–88; *See, e.g.,* Quinn v. Quinn, 622 P.2d 230, 233 (Mont. 1981) (remanding for reconsideration of joint custody arrangement, because “with the parents living a distance apart, the joint custody arrangement appears only to be fostering antagonism between [the parents] and instability in the children’s home environment”); Reavis v. Reavis, 955 P.2d 428 (Wyo. 1998) (overturning a trial court decision ordering change of physical custody every year).

<sup>197</sup> *See* MASON, *supra* note 188, at 83; Daniel A. Krauss & Bruce D. Sales, *Legal Standards, Expertise, and Experts in the Resolution of Contested Child Custody Cases*, 6 PSYCHOL. PUB. POL’Y & L. 843 (2000); Scott & Derdeyn, *supra* note 188, at 488–92.

<sup>198</sup> *See* Ann Laquer Estin, *Family Governance in the Age of Divorce*, 1998 UTAH L. REV. 211, 230–32 (1998); Bird v. Starkey, 914 P.2d 1246 (Alaska 1996) (parents with joint legal custody could not agree on which kindergarten their child would attend); Sotnick v. Sotnick, 650 So. 2d 157 (Fla. Dist. Ct. App. 1995); *In re Marriage of Debenham*, 896 P.2d 1098, (Kan. Ct. App. 1995); Lombardo v. Lombardo, 507 N.W.2d 788 (Mich. Ct. App. 1993) (parents disagreed about whether to enroll child in program for talented and gifted students).

<sup>199</sup> *See, e.g.,* Scott & Derdeyn, *supra* note 188, at 493–95; Jana B. Singer & William L. Reynolds, *A Dissent on Joint Custody*, 47 MD. L. REV. 497, 518 (1988).

<sup>200</sup> *Cf.* Taylor v. Taylor, 508 A.2d 964 (Md. 1986) (rejecting the position that joint legal custody should be awarded only when the parties agree to it); Shepherd v. Metcalf, 794 S.W.2d 348, 351 (Tenn. 1990) (overturning trial court award of joint legal custody, stating that “joint legal custody and its necessarily implied sharing of parental responsibility for decisions regarding care, abode, education, health, and other matters of general welfare of the child is not appropriate between parents separated by 1,000 miles and a bitterly fought custody dispute”).

<sup>201</sup> *See* MASON, *supra* note 188, at 82; Scott & Derdeyn, *supra* note 188, at 469–70.

reacted to statistics about father drop out,<sup>202</sup> viewing joint custody as a way to keep non-custodial fathers involved in children's lives, which in turn was assumed to be good for children.<sup>203</sup> In part, though, legislators were responding to political pressure from fathers' rights groups, which sprang up in many places in reaction to a perception that courts were biased against men in custody decision making.<sup>204</sup> So some of the focus, at least, was on fairness between the adults. In addition, many judges initially were receptive to the trend in favor of joint custody because it seemed to make their jobs easier. At the time of a divorce, they were not forced to decide between parents; they could split the baby by giving partial victory to both parents, with the legislature's blessing.<sup>205</sup> Judges' solicitude for parents and their desire to relieve themselves of responsibility thereby caused them to make custody decisions based at least in part on interests other than those of the children. This might be viewed as transforming the right conferred on children by custody laws in some states from an absolute right to either a non-determinative right in individualized decision making or to a non-absolute state-of-affairs right.

The prevailing formal rule today, however, simply directs courts to award joint custody when the facts — in particular, the willingness of the parents — support a finding that it is in the best interests of the child but does not direct courts to act on

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<sup>202</sup> See Naomi R. Cahn, *Civil Images of Battered Women: The Impact of Domestic Violence on Child Custody Decisions*, 44 VAND. L. REV. 1041, 1059–61 (1991).

<sup>203</sup> See CARBONE, *supra* note 189, at 183–84; Scott & Derdeyn, *supra* note 188, at 469–70; Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401, 2450 (1995). On the competing arguments for and against the truth of this proposition, see CARBONE, *supra* note 189, at 42–47. Some feminists believed that joint custody would also improve the lives of women, by encouraging men take equal responsibility for the care of children after divorce. See Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727, 768 (1988).

<sup>204</sup> See CARBONE, *supra* note 189, at 183–84; MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 171–73 (1994); Martha L. Fineman & Anne Opie, *The Uses of Social Science Data in Legal Policymaking: Custody Determinations at Divorce*, 1987 WIS. L. REV. 107, 116–18; Elizabeth S. Scott, *Pluralism, Parental Preference, and Child Custody*, 80 CAL. L. REV. 615, 615–16 (1992); Smith, *supra* note 194. There were also some scholars at the time who advanced arguments for joint custody based on parental rights rather than or in addition to arguments based on children's welfare. See Scott & Derdeyn, *supra* note 188, at 481–83.

<sup>205</sup> *In re Marriage of Littlefield*, 940 P.2d 1362, 1369 (Wash. 1997) (“[O]rders which provide for alternating residence of the child for substantially equal intervals can result when the parties or the courts are searching for facile avoidance of child care disputes.”); CARBONE, *supra* note 189, at 187; MASON, *supra* note 188, at 81; Scott & Derdeyn, *supra* note 188, at 469; Singer & Reynolds, *supra* note 199, at 515 (relating the observation of a judge that “[j]oint custody is an appealing concept. It permits the court to escape an agonizing choice, to keep from wounding the self-esteem of either parent and to avoid the appearance of discrimination between the sexes.”).

the basis of a presumption in favor of it.<sup>206</sup> This rule appears entirely consistent with children having an absolute right in connection with custody decision making.

iii. Substantive considerations included

Most states' statutes provide a list of specific factors that courts are to consider in determining custody, and even in jurisdictions where the only specified standard of decision is the best interests of the child, one or more of these factors might reflect considerations that are not clearly or always related to the child's best interests. Some custody factors arguably reflect at least in part an aim of furthering interests of one or both parents. I say "arguably" because it is not explicit, and reasonable persons could perceive things differently.

More relevant for my purposes is whether some factors *can* operate in some circumstances inconsistently with children's interests. On the surface, all factors should be interpreted consistently with the basic standard set forth in the statutes before the list of factors, so in states that make the best interests of the child the only standard, the law on the books conforms to an absolute right of children model, absent inclusion of a factor that cannot be so interpreted. The pertinent question in those jurisdictions would therefore be whether children's rights are fully realized in practice. In states that include considerations other than the child's welfare in the basic standard, though, such as fairness between the parents or the welfare of the community, the law even on the surface allows judges to use the multi-factor analysis to advance the interests of others and to balance those interests against those of children in some uncertain way.

Among the specific factors relevant to the best interests determination in most states today is the preference of the child.<sup>207</sup> This marks a departure from a long history of largely ignoring the wishes of children in custody decisions.<sup>208</sup> In at least one state, the preference of an older child — typically, fourteen or older — is determinative,<sup>209</sup> just as in adoptions. More commonly, though, statutes direct courts simply to consider the preference of children whom the court deems "of sufficient age and maturity" or capable of forming "intelligent preference," but they

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<sup>206</sup> See *supra* note 190; see also GA. CODE ANN. § 19-9-3(a)(5) (2002) ("Joint custody . . . may be considered . . .").

<sup>207</sup> See NATIONAL SURVEY OF STATE LAWS, *supra* note 99, at 392–93; Ellen Marrus, "Where Have You Been, Fran?" *The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 994 (1999).

<sup>208</sup> See Elizabeth S. Scott et al., *Children's Preferences in Adjudicated Custody Decisions*, 22 GA. L. REV. 1035, 1035 (1988).

<sup>209</sup> See, e.g., GA. CODE ANN. § 19-9-3(a)(4) (2002); see also Scott et al., *supra* note 208, at 1052 (noting that even in the absence of a statutory directive to that effect, judges in practice give great weight to the custody preference of adolescents).

do not instruct the court what weight to give any preference at any particular age.<sup>210</sup> Most courts apply a sliding scale to children's wishes, giving very little weight to any expressed preferences of very young children, and progressively more weight with each incremental increase in age and/or maturity.<sup>211</sup> But in most jurisdictions, at no age is a minor's preference regarding custody determinative in and of itself; even with adolescents, courts will make an independent determination of what is best for the child and might simply apply a presumption in favor of the child's wishes.<sup>212</sup> Children capable of expressing preferences therefore possess a non-determinative choice-protecting right in addition to the interest-protecting right effectively conferred by the ultimate standard of decision making.

Perhaps the most hotly debated custody consideration has been the "primary caretaker" factor that most states' laws contain in one form or another. In the early 1980s, it appeared that an explicit and strong primary caretaker presumption would become common, replacing the earlier, gender-based presumptions — that is, the paternal custody presumption that prevailed early in our nation's history and the maternal custody presumption that supplanted the paternal presumption during the

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<sup>210</sup> See, e.g., CAL. FAM. CODE § 3042 (West 2003) ("If a child is of sufficient age and capacity to reason so as to form an intelligent preference as to custody, the court shall consider and give due weight to the wishes of the child in making an order granting or modifying custody."); MINN. STAT. § 518.17(1) (2003) (stating that factors relevant to a determination of the child's best interests include "the reasonable preference of the child, if the court deems the child to be of sufficient age to express preference"); NEV. REV. STAT. 125.480(4) (2002); S.D. CODIFIED LAWS § 25-4-45 (Michie 2002) ("If the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining [custody]."); VA. CODE ANN. § 20-124.3(8) (Michie 2002).

<sup>211</sup> See, e.g., IND. CODE ANN. § 31-17-2-8(3) (Michie 2002) (stating that greater consideration should be given to the wishes of a child aged fourteen or older); TENN. CODE ANN. § 36-6-106(a)(7) (2002) ("The preferences of older children should normally be given greater weight than those of younger children.").

<sup>212</sup> See, e.g., OKLA. STAT. tit. 43, § 113(B)(2) (2003) ("[I]f the child is of a sufficient age to form an intelligent preference and the court does not follow the expression of preference of the child as to custody, or limits of visitation, the court shall make specific findings of fact supporting such action if requested by either party."); N.M. STAT. ANN. § 40-4-9(B) (Michie 2002) (requiring courts merely to consider wishes of offspring fourteen years of age or older); UTAH CODE ANN. § 30-3-10(c) (2002):

The court may inquire of the children and take into consideration the children's desires regarding future custody or parent-time schedules, but the expressed desires are not controlling and the court may determine the children's custody or parent-time otherwise. The desires of a child 16 years of age or older shall be given added weight, but is not the single controlling factor.

See also *Fuerstenberg v. Fuerstenberg*, 591 N.W.2d 798, 809 (S.D. 1999) ("We think it is especially important to give attention to the needs and wishes of children either approaching or in adolescence. Of course, the final decision remains in the hands of the court, but the child's concerns deserve consideration.").

nineteenth century and prevailed well into the latter half of the twentieth century.<sup>213</sup> A few state courts held that custody should be awarded at divorce to the parent who had been the primary caretaker, absent a finding that that parent was unfit.<sup>214</sup> But there was later a general retreat from the explicit presumption, and the predominant approach today is ostensibly to treat it as simply a factor in the best interests custody analysis.<sup>215</sup> In some states, though, statutes or court holdings explicitly treat this

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<sup>213</sup> See *Devine v. Devine*, 398 So. 2d 686 (Ala. 1981) (discussing the history of the “tender years” presumption, under which mothers were deemed, unless they were unfit, entitled to custody of young children, and holding that the presumption constituted unconstitutional gender discrimination); Fineman & Opie, *supra* note 204, at 111–12. More recently, Professor Elizabeth Scott proposed and, as noted above, the American Law Institute adopted the concept of “approximation,” under which courts would strive to effect a “parenting plan” that divides the child’s time between parents in a way that resembles the arrangement the parents had before their relationship deteriorated. See Scott, *supra* note 204; A.L.I., PRINCIPLES, *supra* note 73, § 2.08. In contrast, the primary caretaker factor/preference/presumption awarded sole custody to the parent who “won” the contest to show the greatest sacrifice for the child in the past. Scott, *supra* note 204, at 629. It is not clear, though, that this approximation approach differs significantly from the primary caretaker contest. Even under the primary caretaker rubric, courts have had discretion to order joint custody or to award the secondary parent an amount of custodial time, under the heading of “visitation,” ranging from very little to very much, and thereby to approximate the pre-divorce division of parenting time. An approximation approach differs principally in ordering courts to approximate the pre-divorce division of parenting time, thereby giving courts less discretion in fashioning a custodial arrangement. And the approximation approach suffers from the same weaknesses as the primary caretaker approach discussed below — namely, an emphasis on quantity rather than quality, a failure to account for the changes in schedule and living situation that many parents experience post-divorce, and a backward-looking perspective likely to encourage judges to use custody decisions to reward parents rather than to establish the best future arrangement for the child.

<sup>214</sup> See, e.g., *Pikula v. Pikula*, 374 N.W.2d 705, 711–12 (Minn. 1985) (announcing that a state statute that did not specifically refer to a “primary parent” nevertheless expressed a “mandate that, when the evidence indicates that both parents would be suitable custodians, the intimacy of the relationship between the primary parent and the child should not be disrupted . . . absent a showing that that parent is unfit to be the custodian”); *Garska v. McCoy*, 278 S.E.2d 357, 362 (W. Va. 1981); see also *In re Maxwell*, 456 N.E.2d 1218, 1222 (Ohio 1982) (holding that “the factor of who is the primary caretaker . . . is a factor which must be given strong consideration”); *Commonwealth ex rel. Jordan*, 448 A.2d 1113, 1115 (Pa. Super. Ct. 1982) (holding that “where two natural parents are both fit, and the child is of tender years, the trial court must give positive consideration to the parent who has been the primary caretaker”); *Van Dyke v. Van Dyke*, 618 P.2d 465 (Or. Ct. App. 1980) (awarding custody to mother based on “the child’s young age and the fact that the mother was the primary parent of the child,” without mentioning an unfitness standard).

<sup>215</sup> See, e.g., MINN. STAT. § 518.17(1)(3) (2003); VA. CODE ANN. § 20-124.3(5) (Michie 2002) (listing as a custody factor the “role which each parent has played . . . in the upbringing and care of the child”); W. VA. CODE ANN. § 48-11-201 (Michie 2002); *In re Marriage of Kunkel*, 555 N.W.2d 250, 253 (Iowa Ct. App. 1996); *Kjelland v. Kjelland*, 609

factor as something close to a presumption.<sup>216</sup>

Many scholars defend the primary caretaker consideration at least partly on child-centered grounds — namely, that the parent who has in the past provided the most care is likely to be the best custodian for the child in the future. This is said to be true in part because that parent has greater experience and in part because of the importance for children of protecting their emotional bond with that parent.<sup>217</sup> It is also claimed that awarding custody to the past primary caretaker affords children the greatest possible stability or continuity during and after their parents' divorce.<sup>218</sup> But no scholar claims that these things are true in every case, and some defend a presumption in favor of the primary caretaker as an entitlement of — in the nature of a reward or compensation for — the parent who has sacrificed the most time in the past for direct care of the child.<sup>219</sup> And some judges appear to interpret

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N.W.2d 100 (N.D. 2000); *Zepeda v. Zepeda*, 632 N.W.2d 48 (S.D. 2001).

<sup>216</sup> See A.L.I., *PRINCIPLES*, *supra* note 73, at 212–13; see also OR. REV. STAT. § 107.137(e) (2001) (stating that the court shall consider as a “factor,” the “preference for the primary caregiver of the child, if the caregiver is deemed fit by the court”); WASH. REV. CODE § 26.09.187(3)(a) (2003) (stating that a factor including “whether a parent has taken greater responsibility for performing parenting functions relating to the daily needs of the child” “shall be given the greatest weight”); *Milum v. Milum*, 894 S.W.2d 611, 613 (Ark. Ct. App. 1995) (finding no error in custody award based principally on mother's having been primary caretaker); *Rice v. Rice*, 517 S.E.2d 220, 223 (S.C. Ct. App. 1999) (upholding custody award to mother on the grounds that “[t]he evidence in the record clearly establishes that the Mother has been the primary caretaker of the children during their young lives and that she is more than fit to have custody of the children”); *Thomas v. Thomas*, 987 P.2d 603, 607 (Utah Ct. App. 1999) (quoting *Davis v. Davis*, 749 P.2d 647, 648 (Utah 1996)) (“[C]onsiderable weight should be given to which parent has been the child's primary caregiver.”). Sometimes courts do so even while disavowing that there is a presumption. See, e.g., *Hubbell v. Hubbell*, 702 A.2d 129, 131 (Vt. 1997) (stating that the primary caretaker “criterion should be given great weight unless the primary custodian is unfit, but it does not create a presumption that the primary caretaker should be awarded custody”). Many scholars continue to support a primary caretaker presumption. See A.L.I., *PRINCIPLES*, *supra* note 73, at 214.

<sup>217</sup> See, e.g., Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 52; Fineman, *supra* note 203, at 771; Jane C. Murphy, *Legal Images of Motherhood: Conflicting Definitions of Welfare “Reform,” Family, and Criminal Law*, 83 CORNELL L. REV. 688, 765 (1998); Nancy D. Polikoff, *Why Are Mothers Losing: A Brief Analysis of Criteria Used in Child Custody Determinations*, 14 WOMEN'S RTS. L. REP. 175, 177–78, 182–83 (1992); see also David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 527–38 (1984) (rehearsing and critiquing these arguments).

<sup>218</sup> See, e.g., A.L.I. *PRINCIPLES*, *supra* note 73, at 181; see also *Pikula*, 374 N.W.2d at 712, 713.

<sup>219</sup> See, e.g., Karen Czapanskiy, *Interdependencies, Families, and Children*, 39 SANTA CLARA L. REV. 957, 973 (1999) (defending an “approximation” approach on this basis, stating that “giving the lead caregiver a legal privilege identifies his or her caregiving work

the presumption that way.<sup>220</sup> Others defend it on grounds of “parental autonomy,” asserting that a less constraining custody rule would invite judges to evaluate the soundness of different approaches to parenting, which the defenders view as inappropriate.<sup>221</sup> I will not attempt here a sustained analysis of the primary caretaker rule, or of the similar “approximation” principle promoted by the ALI, under which courts would divide post-divorce parenting time in such a way as to approximate the share of parenting time each spouse took on during the marriage. I simply will offer a few of the reasons for expecting such a rule to produce results that are not in the child’s best interests in a significant percentage of cases.

First, the child-centered premise on which a primary caretaker rule is sometimes said to rest — that is, that the person who provided the most care in the past will be the best custodian in the future — might be false in a significant percentage of cases. “Most care in the past” is quantitative, and the person who has provided the most care in the past might have been perfunctory or simply not very good at it, or that

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as something important and worthy of reward”); Fineman, *supra* note 203, at 769 (asserting that imposing a shared parenting ideal on divorcing parents results in “furthering the interests of noncaretaking fathers over the objections and, in many instances, against the interests of caretaking mothers” and is therefore an “unjust result”); *id.* at 773 (asserting that the primary caretaker rule “may currently operate to the advantage of mothers, but, if we value nurturing behavior, then rewarding those who nurture seems only fair,” and that “[t]he system should reward demonstrated care and concern for children”); A.L.I., PRINCIPLES, *supra* note 73, at 187 (“An investment in caretaking yields a greater allocation of responsibility for the child in the event of divorce, much as an investment in the labor market generally yields other types of advantages for the working parent.”).

<sup>220</sup> See, e.g., *Burchard v. Garay*, 724 P.2d 486, 494 (Cal. 1986) (Bird, J., concurring) (“Typically, it is the mother who provides most day-to-day care, whether or not she works outside the home. A presumption which ignores this fact is likely to lead to erroneous and unfair decisions.”) (citation omitted); *Pikula*, 374 N.W.2d at 712–13 (suggesting that a primary caretaker presumption should be given to a parent who has given up career opportunities, in order to give her more leverage in negotiating a property settlement):

A parent who has remained at home throughout a marriage to raise the children will often have sacrificed economic and educational opportunities in order to perform that role, and he or she will likely be in greater need of economic support upon dissolution of a marriage. A spouse in that position has only one issue available to “concede” in the division of marital assets: custody of the children.

<sup>221</sup> See, e.g., A.L.I., PRINCIPLES, *supra* note 73, at 182; Czapanskiy, *supra* note 219, at 975. Czapanskiy voices the common view that parents are in a better position than a divorce court to determine what is best for the child, *id.*, but she assumes without argument that courts should defer to the judgment or choices that parents made while the marriage was intact about their lives in an intact family, rather than to the parents’ views at the time of divorce about what the custodial arrangement should be for the child when the family is not intact. Of course, those views are necessarily divergent in contested custody cases, but that fact does not itself make it sensible to look to choices made for and under very different circumstances.

person might not have bonded well with the child despite spending a lot of time with the child.<sup>222</sup> Moreover, insofar as the relevance of past care lies in its signaling of commitment to the welfare of the child, what counts as caretaking becomes highly contestable. Proponents of a primary caretaker rule typically assume that not working outside the home constitutes a greater sacrifice for children than does working outside the home to generate income for the family, but they provide no argument for that view, and it is not self-evidently true.

What is perhaps most significant, however, and what is generally overlooked or ignored by proponents of the primary caretaker rule or the approximation approach, is the fact that, in a large portion of cases, the parents' respective availability for direct child care changes dramatically immediately before (it is sometimes a trigger of marital difficulties), during, or after divorce. In particular, homemaker spouses today typically must return to work outside the home after divorce; divorce law today strongly disfavors long-term alimony.<sup>223</sup> In many cases, former homemakers choose to pursue higher education before or at the same time as returning to paid employment, sometimes in very demanding professional degree programs, and often in locations far from where the children have been living.<sup>224</sup> All of this makes quite dubious an assumption that assigning primary custody in the future to the person who was the primary caretaker in the past will provide much stability for a child, particularly so in the very cases in which the primary caretaker presumption or factor is likely to do the most work: those involving "traditional" couples.

On the other side, the parent who was not the primary caretaker in the past might now have more time to devote to the children. Being laid off or forced into part-time status might have been one of the stresses that led to divorce. Or that parent, concerned about the effects of the divorce on the children — including any effect from a homemaker spouse having much less time for the children in the future — and/or fearing the loss of his relationship with his children, might adjust his work schedule to spend more time with them.<sup>225</sup> The relative time available to

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<sup>222</sup> See Kelly & Ward, *supra* note 191, at 363 ("[T]he assumption of a strong relationship between the amount of caretaking functions and the development of secure attachments remains to be tested."); D. Kelly Weisberg, *Professional Women and the Professionalization of Motherhood: Marcia Clark's Double Bind*, 6 HASTINGS WOMEN'S L.J. 295, 313 (1995) ("The quantity of time that a parent has available to spend with a child neither dictates the quality of that interaction nor guarantees that the available time will, in fact, be spent with the child."); cf. *Seymour v. Seymour*, 433 A.2d 1005, 1008 (Conn. 1980) ("[A] court has an independent responsibility to assure itself of the suitability of the parent to whom the child is primarily attached.").

<sup>223</sup> See JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 299 (2d ed. 2001).

<sup>224</sup> See, e.g., *In re Marriage of Tresnak*, 297 N.W.2d 109 (Iowa 1980); *Ireland v. Smith*, 547 N.W.2d 686 (Mich. 1996); *Rowe v. Franklin*, 663 N.E.2d 955 (Ohio Ct. App. 1995); *Watt v. Watt*, 971 P.2d 608 (Wyo. 1999) (mother enrolled in pharmacy school).

<sup>225</sup> Some scholars point to (quite dated) evidence that non-custodial fathers' devotion to children wanes substantially as time goes by after divorce, evidence relating to the amount

each parent after divorce might therefore be quite different from what it was before divorce. Yet, as discussed below, some courts have indicated an unwillingness even to consider such changes in the parents' lives in making the custody decision.

Finally, children's needs change as they grow older, and in most intact families there is some shifting of caretaking from one parent to the other in reaction to the children's changing needs and in reaction to the parents' career choices.<sup>226</sup> A quite common pattern in intact families is for mothers to stop working before the birth and to have much more interaction than fathers at the outset of a child's life, and then for fathers to become gradually more involved as the child stops nursing, becomes more mobile and active, and goes through the process of identity formation, and as the mother returns to work outside the home. To the extent that this pattern tracks changes in children's needs, a backward-looking approach to custody that freezes

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of time they spend visiting their children. *See, e.g.,* DOWD, *supra* note 50, at 3, 60–62. These scholars infer from this evidence that many men's expressions of interest at the time of divorce are not matched by a genuine willingness to arrange their lives around their relationships with their children. It would be helpful to know whether this phenomenon reflects something about being male or something about being a non-custodial parent or both. There also is (dated) evidence that in over twenty percent of post-divorce families, custodial parents fail to comply with the visitation provisions of the divorce decree. *See, e.g.,* Jessica Pearson & Nancy Thoennes, *The Denial of Visitation Rights: A Preliminary Look at Its Incidence, Correlates, Antecedents and Consequences*, 10 LAW & POL'Y 363 (1988). In addition, at least one study has shown that the great majority of custodial mothers relocate within the first four years after divorce. *See* Mary Jo Bane & Robert Weiss, *Alone Together: The World of Single-Parent Families*, AM. DEMOGRAPHICS, May 1980, at 11–12. That study is also quite dated, but the phenomenon is likely only to have increased since it was done. One might also take note of the fact that attitudes regarding the role of fathers in children's lives have changed significantly in the twenty-five years since the research on father drop-out was done. I am not aware of any studies showing a diminution of devotion among fathers who are awarded primary custody, or any showing that there is not a pattern of diminished visitation with non-custodial mothers. Some lawyers also perceive that parents who were not the primary caretakers during marriage seek more time with their children at the time of divorce or after in part to reduce their child support obligation. *See, e.g.,* Smith, *supra* note 194, at 42. But the financial incentive to seek more custodial time operates on both parents; a past primary caretaker who gets primary custody is likely to receive more child support than one who shares joint custody with the other parent.

<sup>226</sup> *See* Chambers, *supra* note 217, at 533–35; *cf. King v. King*, 333 A.2d 135 (R.I. 1975) (holding that an increase in a boy's age from eight to twelve in and of itself constituted a change of circumstances justifying reconsideration of a custody arrangement); *Fuerstenberg v. Fuerstenberg*, 591 N.W.2d 798, 809 (S.D. 1999):

Identifying the primary caretaker becomes less important as the child grows older and more independent. A maturing child will probably need more guidance and discipline than the nurturing required in younger years. A person who was the primary caretaker during the child's early youth may still be the best person to care for the older child, but this is not universally true, because different parenting skills are required.

a particular arrangement in time could forestall the healthy evolution of a child's relationships with his or her parents.

Of course, a presumption is just a presumption, and a factor is just a factor. In most states, a court could decide against the presumption or discount the factor based on the counter-considerations adduced above if the best interests of the child appear to require it.<sup>227</sup> Many state statutes in fact include among the factors judges are to consider in deciding custody: the respective parenting abilities of the parents; the emotional bond between parent and child; the amount of time each parent will have for the child in the future; the degree to which the child is settled in a routine and in a web of community relationships and activities; and the developmental needs of the child.<sup>228</sup> But this just raises the question of why the law contains this proxy primary caretaker consideration, encouraging judges presumptively to perpetuate the arrangement the parents settled on when the family was intact and the parents were fully supporting each other, rather than inquiring directly in the first instance into the concerns that the proxy imperfectly tracks. Proxies often come to be seen as independent values and so sometimes control outcomes even when the values for which they are proxies do not actually dictate the outcome most consistent with the basis standard. Imagine, for example, if legislators included in state custody laws

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<sup>227</sup> See, e.g., *Schumm v. Schumm*, 510 N.W.2d 13 (Minn. Ct. App. 1993) (holding that although the primary caretaker factor is a significant factor, it does not create a presumption excluding consideration of other factors).

<sup>228</sup> See, e.g., IDAHO CODE § 32-717 (Michie 2002) (listing as custody factors: "(c) The interaction and interrelationship of the child with his or her parent or parents . . . (d) The child's adjustment to his or her home, school, and community; (e) The character and circumstances of all individuals involved; [and] (f) The need to promote continuity and stability in the life of the child"); MINN. STAT. § 518.17 (2002) (listing as custody factors: "(3) the child's primary caretaker; (4) the intimacy of the relationship between each parent and the child; . . . [and] (7) the length of time the child has lived in a stable, satisfactory environment and the desirability of maintaining continuity"); MONT. CODE ANN. § 40-4-212(1) (2002) (listing as custody factors: "(c) the interaction and interrelationship of the child with the child's parent or parents . . . ; (d) the child's adjustment to home, school, and community; . . . (h) continuity and stability of care; (i) developmental needs of the child"); WIS. STAT. § 767.24(5) (2002). Wisconsin lists as factors for assigning parenting responsibility:

(c) The interaction and interrelationship of the child with his or her parent or parents . . . [;] (cm) The amount and quality of time that each parent has spent with the child in the past, any necessary changes to the parents' custodial roles and any reasonable life-style changes that a parent proposes to make to be able to spend time with the child in the future[;] (d) The child's adjustment to the home, school, religion and community[;] (dm) The age of the child and the child's developmental and educational needs at different ages[; and] . . . (em) The need for regularly occurring and meaningful periods of physical placement to provide predictability and stability for the child.

*Id.*

a presumption in favor of the parent who was the higher income earner, based on an assumption that income earning capacity correlates positively with intelligence and an assumption that intelligence correlates positively with parenting ability. Judges might come to attribute independent value to having a higher income, something many scholars believe should not be accorded independent value.<sup>229</sup>

In sum, a primary caretaker presumption is at best an imperfect proxy, a shortcut that cuts against children's welfare in a significant portion of cases. It therefore represents a departure from a model of absolute right for children, making child custody rules embody instead, depending on how one looks at it, either a non-determinative right (if it amounts to balancing the interests of children against the interests of adults in individualized decision making) or a non-absolute state-of-affairs right (if it amounts to prescribing in a broad range of cases a certain outcome that is not always what is best for the child). If it is the latter, then it might be viewed as an imperfectly-tailored right, serving the overall interests of children in some cases but not all. Or it might be viewed as a partial right, insofar as it elevates above all other interests whichever of a child's interests are served by continuing to spend more time with the past primary caretaker than with his or her other parent. Or it might be viewed as a subordinate right, if what the presumption amounts to is a reward for the parent who is viewed to have sacrificed more for the child, based on a highly contestable view of what counts as sacrifice.

Another area in which some judges have used the custody decision to "reward" parents is religious practice. Though no state's statute authorizes it explicitly, some courts have favored the parent that the judge thought would provide a more religious upbringing, or an upbringing in a religion to which the judge was more sympathetic.<sup>230</sup> To the extent that attention to religion is incidental to genuine concern for some aspect of children's temporal well-being, and courts give the effects on temporal well-being the same weight they would in a non-religious context, this is consistent with the best interests standard and an absolute rights model. But to the extent that judges are advancing an ideological or religious agenda by favoring or disfavoring a parent of a particular faith because of agreement or disagreement with the doctrine, they compromise the welfare and diminish the rights of children (that is, from a secular perspective). And many courts appear to treat religious upbringing *per se* as a basis for favoring one parent over another.<sup>231</sup>

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<sup>229</sup> See, e.g., Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, 343 (1997) (arguing that any disparity in income or wealth between parents should not influence custody decisions, because courts can use child support and alimony awards to ensure the child does not suffer as a result of the primary custodian having lesser resources).

<sup>230</sup> See Jennifer Ann Drobac, Note, *For the Sake of the Children: Court Consideration of Religion in Child Custody Cases*, 50 STAN. L. REV. 1609 (1998).

<sup>231</sup> See George L. Blum, Annotation, *Religion as a Factor in Visitation Cases*, 95 A.L.R. 5th 533, § 5 (2002); See, e.g., *Crowson v. Crowson*, 742 So. 2d 107, 112 (La. Ct. App. 1999)

Courts have at times also sought to *punish* parents for conduct or ways of life deemed immoral, even in the absence of a showing that the conduct or way of life harmed the child. For example, in the past many courts applied a *per se* rule that homosexuality rendered a parent unfit to have custody of a child, or at least less fit than a heterosexual parent. It also was common to take adultery by either parent into account in making a custody award at divorce. Today, however, the prevailing rule applies a "nexus test," under which a parent's homosexuality or partnership with a person of the same sex, and the parent's behavior related to that partnership, or a parent's extramarital affair or post-divorce heterosexual intimate relationship, are relevant to a custody decision if — but only insofar as — they have already adversely affected the child's well-being or likely will adversely affect the child in the future.<sup>232</sup> Under this rule, presumably, an otherwise superior parent could not be denied custody because of his homosexuality *per se* or his being in a gay relationship *per se*, but a court could count against awarding custody to that parent

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(upholding award of custody based in large part on fact that father "provided the most, if not only, exposure to church and religion").

<sup>232</sup> See Robin Cheryl Miller, Annotation, *Restrictions on Parent's Child Visitation Rights Based on Parent's Sexual Conduct*, 99 A.L.R. 5th 475 (2002); see, e.g., 750 ILL. COMP. STAT. ANN. 5/602(b) (West 2002) ("The court shall not consider conduct of a present or proposed custodian that does not affect his relationship to the child."); S.D. CODIFIED LAWS § 25-4-45.1 (Michie 2002) ("Fault shall not be taken into account with regard to the awarding of property or the awarding of child custody, except as it may be relevant to the acquisition of property during the marriage or to the fitness of either parent in awarding the custody of children."); *In re R.E.W.*, 471 S.E.2d 6 (Ga. Ct. App. 1996); *Pryor v. Pryor*, 714 N.E.2d 743 (Ind. Ct. App. 1999) (overturning trial court decision transferring custody to father based on mother's same-sex relationship because there was no evidence of any sexual activity in the presence of the child); *D.H. v. J.H.*, 418 N.E.2d 286 (Ind. Ct. App. 1981) (holding that homosexuality, standing alone, is not grounds for denial of custody; there must be evidence showing that sexual misconduct had an adverse effect upon welfare of children); *Doe v. Doe*, 452 N.E.2d 293, 296 (Mass. App. Ct. 1983) (holding that the trial court properly excluded consideration of mother's sexual orientation in awarding joint custody because there was no evidence that it had adversely affected the child in any way, but indicating that custody could be reconsidered if any adverse effect developed); *J.A.D. v. F.J.D.*, 978 S.W.2d 336, 339 (Mo. 1998) ("A homosexual parent is not *ipso facto* unfit for custody of his or her child, and no reported Missouri case has held otherwise. It is not error, however, to consider the impact of homosexual or heterosexual misconduct upon the children in making a custody determination."); *Arnold v. Arnold*, 734 N.E.2d 837 (Ohio Ct. App. 1999) (upholding the trial court's refusal to consider evidence of ex-wife's extra-marital affair, where ex-husband could not show any effect of the affair on the child's well-being); *Shirley v. Shirley*, 536 S.E.2d 427, 432 (S.C. Ct. App. 2000) ("The morality of a parent is a proper consideration in determining child custody but it is limited in its force to what relevancy it has, either directly or indirectly, to the welfare of the child."); *Thomas v. Thomas*, 987 P.2d 603, 607 (Utah Ct. App. 1999). Courts are somewhat less protective of same-sex relationships than they are of heterosexual relationships, however, with many willing to presume that exposure to a parent's gay or lesbian relationship will be harmful to a child. See Miller, *supra*, § 5.

any social stigmatization or other adverse consequence of the parent's sexual orientation.<sup>233</sup>

The prevailing rule today for treatment of sexual activity and sexual orientation is therefore consistent with an exclusive focus on children's welfare. In application, though, some judges surely are tempted to manipulate the rule to whatever end their ideological viewpoint inclines them. Some have assumed, for example, that merely being exposed to a homosexual lifestyle adversely affects a child because they believe homosexuality to be immoral.<sup>234</sup>

#### iv. Substantive considerations excluded

Finally, and most strikingly, there are statutory provisions and judicial doctrines that explicitly *exclude* certain considerations in awarding custody, even though they are relevant to children's welfare, on the grounds that they conflict with rights of parents and/or broader societal aims, aims that courts might deem constitutionally mandatory. The clearest example relates to interracial marriage, which implicates the interest of children in being accepted by peers and other members of a community, but also the right of adults to freedom in choosing intimate partners and the societal aim of overcoming racial discrimination and bigotry.

The Supreme Court held in 1984, in *Palmore v. Sidoti*,<sup>235</sup> that state courts may not even take into account in a custody determination the adverse effects that racial prejudice might have on a child. In that case, a state trial court had awarded custody of a child in a post-divorce dispute to the child's father, in part because the mother,

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<sup>233</sup> See, e.g., *Maradie v. Maradie*, 680 So. 2d 538, 543 (Fla. Dist. Ct. App. 1996); *J.P. v. P.W.*, 772 S.W.2d 786, 792–94 (Mo. Ct. App. 1989) (holding to this effect and discussing decisions of courts in other states that have held the same); *Pulliam v. Smith*, 501 S.E.2d 898, 904 (N.C. 1998); *Bottoms v. Bottoms*, 457 S.E.2d 102, 108 (Va. 1995); (“[L]iving daily under conditions stemming from active lesbianism practiced in the home may impose a burden upon a child by reason of the ‘social condemnation’ attached to such an arrangement, which will inevitably afflict the child’s relationships with its ‘peers and with the community at large.’”) (quoting *Roe v. Roe*, 324 S.E.2d 691, 694 (Va. 1985)). A similar rule is applied to heterosexual non-marital sexual relationships. See, e.g., *Linda R. v. Richard E.*, 561 N.Y.S.2d 29, 31 (App. Div. 1990) (“In a custody dispute, the sexual behavior of a litigant is relevant, if, and to the extent, the children are thereby affected.”); *Rowe v. Franklin*, 663 N.E.2d 955, 957 (Ohio Ct. App. 1995).

<sup>234</sup> See, e.g., *Ex parte H.H.*, 830 So. 2d 21 (Ala. 2002) (upholding custody award to father rather than to lesbian mother). In *Ex parte H.H.*, the Alabama Supreme Court stated that: Homosexual behavior is a ground for divorce, an act of sexual misconduct punishable as a crime in Alabama, a crime against nature, an inherent evil, and an act so heinous that it defies one’s ability to describe it. That is enough under the law to allow a court to consider such activity harmful to a child.

*Id.* at 37; cf. *Hertzler v. Hertzler*, 908 P.2d 946 (Wyo. 1995) (affirming a trial court decision based upon similar sentiments).

<sup>235</sup> 466 U.S. 429 (1984).

who was white, had married an African-American man. The trial court anticipated that at that time in Virginia the child would suffer from the stigmatization attached to interracial marriages.<sup>236</sup> Peers would likely ridicule and ostracize the child, and adults might also act with hostility toward the child, out of disgust at his mother's intimate relationship.

The Supreme Court did not find that the state court had overestimated the importance of that consideration for the child as an empirical matter. Rather, the Court held that state courts simply may not consider such effects from bigotry in the local community in making custody decisions, because to do so would involve the state in giving effect to the bigotry.<sup>237</sup> The liberty interests of parents and the societal aim of eradicating racial prejudice trumped the welfare of children. The Court concluded that the Constitution compelled that result. Thus, although a state domestic relations court is ostensibly acting in a *parens patriae* role in making child custody decisions, charged by state statute to effect the result that is in the child's best interests, the Supreme Court has dictated that in certain cases the court must switch hats and assume a police power role, using the life of an individual child to advance the cause of racial equality.

Scholarly opinion is generally in favor of extending the core rationale of *Palmore* — that the state should not give effect to bigotry — to other custody issues, particularly to post-divorce same-sex relationships.<sup>238</sup> Courts in at least two states have in fact held that custody decisions may in no way take into account adverse effects on a child arising from peer or community condemnation of homosexuality or stigmatizing of the child, though they may permissibly take into account "direct effects" from conduct related to sexual orientation.<sup>239</sup> Some judges appear to downplay or ignore evidence of adverse effects on a child out of overriding sympathy for the cause of social equality for gays and lesbians.<sup>240</sup>

Another consideration that is excluded to some degree, but not completely, is any religious practice of parents that might be harmful to a child. Snake handling is paradigmatic of religious practices that could cause a child physical harm.

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<sup>236</sup> *Id.* at 431.

<sup>237</sup> *Id.* at 433–34.

<sup>238</sup> See, e.g., Mark Strasser, *Fit to Be Tied: On Custody, Discretion, and Sexual Orientation*, 46 AM. U. L. REV. 841, 884–85 (1997); Wald, *supra* note 125, at 50 ("[P]romoting children's well-being is not the only interest at stake in custody disputes. There is at least one other principle that is of equal or greater importance. Courts should not legitimate societal prejudices that are based on a person's race, religion, or sexual orientation.").

<sup>239</sup> See *Jacoby v. Jacoby*, 763 So. 2d 410, 413 (Fla. Dist. Ct. App. 2000) (applying the rationale of *Palmore v. Sidoti*, discussed *supra* notes 235–37 and accompanying text); *S.N.E. v. R.L.B.*, 699 P.2d 875, 879 (Alaska 1985).

<sup>240</sup> See, e.g., *Piatt v. Piatt*, 499 S.E.2d 567 (Va. Ct. App. 1998) (Annunziata, J., dissenting) (ignoring evidence that a mother's exploration of lesbian orientation was causing the breakdown of mother's relationship with child's grandparents and greatly preoccupying her).

Religious instruction that involves denigrating other religions and their adherents is an example of a practice that could cause a child psychological harm, particularly if one of the child's parents belongs to one of the denigrated faiths. Many courts have been reluctant to hold any religious activities or decisions against a parent in custody-decision making, out of deference to the supposed free exercise rights of parents.<sup>241</sup> The prevailing rule today is that basing a custody award on religious bias is impermissible, but that courts may take into account religious practices or religiously motivated parenting choices *if* and to the extent they are proven already to have harmed the child or to present a substantial threat of harm to the child.<sup>242</sup> Thus, courts will not assume a likelihood of harm, will not consider a possibility of harm if it does not rise to the "substantial threat" level, and will not consider adverse effects that do not amount to "harm," which courts generally interpret to mean a significant worsening of the child's condition or situation. This treats religious practice and religiously motivated decisions somewhat differently from parental behaviors and decisions that are not tied to religious exercise or some other fundamental liberty interest. In other contexts, courts freely make assessments of all the costs and benefits likely to flow from each parent's behavior or approach to parenting. For example, courts take into account that a parent smokes tobacco without requiring that the other parent prove that her child has been or will be harmed by the smoking.<sup>243</sup> The rationale for the different treatment is the perceived constitutional necessity or moral appropriateness of protecting the parent's right to freedom of religion.<sup>244</sup> Somewhat related to exclusion of religious practice is a provision in some states' custody statutes prohibiting courts from taking into

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<sup>241</sup> See *Zummo v. Zummo*, 574 A.2d 1130, 1154-55 (Pa. Super. Ct. 1990):

The vast majority of courts . . . have concluded that each parent must be free to provide religious exposure and instruction, as that parent sees fit . . . unless the challenged beliefs or conduct of the parent are demonstrated to present a substantial threat of present or future, physical or emotional harm to the child.

<sup>242</sup> See *Drobac*, *supra* note 230, 1631-40 (1998) (stating that, in the absence of evidence of harm to the child, any judicial consideration of religious views violates the Establishment Clause); See, e.g., *Jakab v. Jakab*, 664 A.2d 261, 265 (Vt. 1995) ("[R]eligious practices may be considered in custody and visitation decisions if they 'have a direct and immediate negative impact on the physical and mental health of the child.'" (quoting *Varnum v. Varnum*, 586 A.2d 1107, 1111 (Vt. 1990))). The ALI endorses a version of this position that is particularly solicitous of parental interest in religious freedom. The ALI's custody principles state that courts determining custody should not consider "the religious practices of a parent . . . except to the minimum degree necessary to protect the child from severe and almost certain harm." A.L.I., PRINCIPLES, *supra* note 73, § 2.12(1)(c).

<sup>243</sup> See Harriet Dinegar Milks, Annotation, *Smoking as Factor in Child Custody and Visitation Cases*, 36 A.L.R.5th 377 (1996).

<sup>244</sup> See, e.g., *Pater v. Pater*, 588 N.E.2d 794, 799-800, 800, n.6 (Ohio 1992) (holding that religious beliefs and practices not directly endangering the child's physical or mental health cannot be used as grounds to deny custody).

account whether one parent would home school a child instead of sending the child to a regular school.<sup>245</sup>

Lastly, an issue of much contention in the realm of custody is what should be done when a custodial parent substantially increases her career-related commitments or makes plans to relocate far away from the non-custodial parent. There are many such cases involving custodial mothers who, at the time of or soon after divorce, take a new job and/or enter an academic program, sometimes needing to move far from the child's current home. Before a proposed move, the child usually lives near not only the non-custodial parent, but also extended family members, friends, and a school that he or she has attended for years, and has an established routine of extra-curricular activities. The move will substantially disrupt the child's life. In addition, the custodial parent usually will have substantial new career-related demands on her time in the new location, making it very difficult for her to help the children adjust to their new environment.

Yet many appellate courts have held that trial courts should not even treat a custodial mother's increase in work commitments or relocation as relevant considerations at the time of an initial custody determination or as a "change in circumstances" that can serve as a basis for *considering* a modification of custody.<sup>246</sup>

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<sup>245</sup> See, e.g., MO. REV. STAT. § 452.375(2) (2002); OKLA. STAT. tit. 43, § 112(C)(4) (2002).

<sup>246</sup> See, e.g., *Burchard v. Garay*, 724 P.2d 486, 493-96 (Cal. 1986) (Bird, J., concurring) (offering a manifesto of women's rights in the context of a child custody decision); *Ofchus v. Isom*, 521 S.E.2d 871, 873 (Ga. Ct. App. 1999) (holding that modification of custody may not be based on mother's relocation; father must show either that the mother "is no longer able or suited to retain custody" or that conditions in the mother's home have deteriorated); *Wilson v. Messinger*, 840 S.W.2d 203, 204 (Ky. 1992) (holding that a mother's relocation cannot support a modification request; father must show mother's custody "endangers seriously [the child's] physical, mental, or emotional health"); *Rosenthal v. Maney*, 745 N.E.2d 350, 354 (Mass. 2001) ("[A] request for modification of custody is distinct from a request to relocate and must be based on a material and substantial change in circumstances other than the move."); *Eaches v. Eaches*, No. 8-97-05, 1997 WL 366825, at \*3 (Ohio Ct. App. July 3, 1997) (overruling trial court decision to consider whether it would be best for the child to have custody transferred to father where mother planned to move from Ohio to Florida); *In re Marriage of Duckett*, 905 P.2d 1170 (Or. Ct. App. 1995); *Fossum v. Fossum*, 545 N.W.2d 828 (S.D. 1996); *Brennan v. Brennan*, 685 A.2d 1104, 1105-06, (Vt. 1996) (overturning a custody decision that was based principally on the father's ability to spend more time with the child than the working mother); *Watt v. Watt*, 971 P.2d 608, 616-17 (Wyo. 1999) ("The custodial parent's right to move with the children is constitutionally protected, and a court may not order a change in custody based upon that circumstance alone."); see also *Fitzsimmons v. Fitzsimmons*, 722 P.2d 671, 675-76 (N.M. Ct. App. 1986):

We acknowledge that wife is required to utilize the services of babysitters and day-care centers while husband is able to rely on his own parents to care for the children during their periods in Grants. The availability of such loving grandparents is certainly a plus factor which the court can appropriately

Basing a decision on relocation and increased work commitments would amount to punishing the mother for pursuing a career, which would be contrary to the aim of promoting social equality for women, an aim implicitly treated as more important than the child's well-being.<sup>247</sup> It also would infringe upon adults' constitutional right to travel, which is understood to include a right to change their residence.<sup>248</sup> Sympathy for working mothers also appears to underlie judicial unwillingness to count in favor of a custody award to a father his remarriage and the availability of his new wife to care for the child, or the fact that he lives with or near his parents and that they can help care for the child.<sup>249</sup>

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consider. However, the absence of maternal grandparents in Albuquerque and the corresponding need to utilize paid child-care arrangements, will not serve to deprive an otherwise good parent of shared physical custody.

*Cf. Henry v. Henry*, 326 N.W.2d 497 (Mich. Ct. App. 1982) (holding that the best interests test does not apply to relocation cases); *In re Marriage of Littlefield*, 940 P.2d 1362, 1370 (Wash. 1997) (holding that it was improper for the trial court to place a geographical limitation on the residence of the custodial parent, and stating that such a limitation is justified only upon a showing of "more than the normal distress suffered by a child because of travel, infrequent contact of a parent, or other hardships which predictably result from a dissolution of marriage") (superseded by WASH. REV. CODE § 26.09.405-.560 (2002) (creating rebuttable presumption that relocation is permissible)). For arguments that these decisions are not based on what is best for the child, see generally Richard A. Warshak, *Social Science and Children's Best Interests in Relocation Cases: Burgess Revisited*, 34 FAM. L.Q. 83 (2000); Edwin J. Terry et al., *Relocation: Moving Forward or Moving Backward?*, 31 TEX. TECH. L. REV. 983 (2000).

<sup>247</sup> Many courts cite simply the mother's protected liberty to live wherever she chooses, failing to recognize that what is in question is not the mother's right to choose where she lives, but her power to move the child away from the place the child has been living. *See, e.g., Rice v. Rice*, 517 S.E.2d 220, 222-23 (S.C. Ct. App. 1999).

<sup>248</sup> *See, e.g., Watt v. Watt*, 971 P.2d 608, 610 (Wyo. 1999).

<sup>249</sup> *See, e.g., West v. West*, 21 P.3d 838, 842 (Alaska 2001):

We agree with the well-reasoned decisions of other courts concluding that the presumed advantages of a two-parent household ordinarily should not determine an award of custody. . . . Such an assumption unfairly forces divorcing spouses to choose between parenthood and livelihood; and it is likely to disproportionately deprive women of custody, since statistics indicate that divorced men are more likely to remarry a spouse who does not work outside the home.

*See also Burchard*, 724 P.2d at 488 (holding that the mother's reliance on daycare and the availability of the father's new wife to watch the child every day were not suitable bases for a custody order); *Ireland v. Smith*, 547 N.W.2d 686 (Mich. 1996); *Wellman v. Dutch*, 604 N.Y.S.2d 381, 383 (App. Div. 1993) (holding that it was improper for the family court to base its custody decision in part on fact that the mother dropped the child off at daycare at 5:45 every morning for nine to thirteen hours, even though awarding custody to the father would allow the child to stay home all day with the father's spouse and the child's step-siblings, because this "has the impermissible effect of depriving respondent, an unmarried working mother, of her equal right to custody"); *Gerber v. Gerber*, 487 A.2d 413, 416 (Pa.

Many family law scholars support this approach of excluding certain considerations that might prejudice working women.<sup>250</sup> On the other hand, courts in a substantial number of states ostensibly are open to considering the effects on a child of such changes in the parents' lives.<sup>251</sup> In relocation cases in particular, though, many judges appear to disregard or discount any effects on a child that counsel against permitting a custodial mother to move away from a non-custodial father and rarely interfere with a mother's decision to relocate the child.<sup>252</sup>

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Super. Ct. 1985) ("[A] parent's work schedule may not deprive that parent of custody if suitable arrangements are made for the child's care in his or her absence."); *Brennan*, 685 A.2d at 1105-06 (holding that it was improper for trial court to base custody decision in part on fact that father and his girlfriend had more time for the child than the working mother); *Spear v. Spear*, 506 S.E.2d 820 (W. Va. 1998) (overturning the finding of a family law master, affirmed by circuit court, that the father was primary caretaker because "the family law master credited to the [father] those tasks that were performed by the [father's] family members or employees" during a six-month period when father was unusually busy with his work). *But see* *Davis v. Davis*, 702 N.E.2d 1227 (Ohio Ct. App. 1997) (holding that it was proper for the trial court to base award of custody to a mother on the basis of her living with her parents and their assistance in caring for the child).

At least one court has been willing to apply this adult-centered rule in a gender-neutral manner. *See In re Marriage of Loyd*, 131 Cal. Rptr. 2d 80 (Ct. App. 2003) (holding that it was improper for the trial court, in changing primary physical custody from father to mother, to take into account that the remarried mother stayed at home while the father worked full-time and placed children in daycare).

<sup>250</sup> *See, e.g.,* *Becker*, *supra* note 217, at 52; Arthur B. LaFrance, *Child Custody and Relocation: A Constitutional Perspective*, 34 U. LOUISVILLE J. FAM. L. 1, 13-14, 122 (1995-96); *Murphy*, *supra* note 217, at 697-98; *Polikoff*, *supra* note 217, at 179-82.

<sup>251</sup> *See, e.g.,* *Schaaf v. Schaaf*, No. 224182, 2000 WL 33403306, at \*2 (Mich. Ct. App. Oct. 31, 2000) (per curiam) (upholding trial court decision transferring custody to father based in part on finding that "the extended daycare was not working well and had a negative impact on the child"); *Ireland v. Smith*, 547 N.W.2d 686, 691 (Mich. 1996) (holding that courts may consider a custodial parent's increased work or academic demands and need to place the child in daycare, at least when "a parent's unwise choices in this regard would reflect poorly on the parent's judgment"); *Rowe v. Franklin*, 663 N.E.2d 955 (Ohio Ct. App. 1995); *Rice v. Rice*, 517 S.E.2d 220 (S.C. Ct. App. 1999); *cf. KAN. STAT. ANN. § 60-1620(c)* (2002) (stating that courts shall consider a relocation as a change of circumstances warranting reconsideration of the custody arrangement); *MO. REV. STAT. § 452.377(9)* (2002) (requiring a custodial parent who wishes to move to prove "that the proposed relocation is made in good faith and is in the best interest of the child"); *OKLA. STAT. ANN. tit. 43, § 112.3(J)* (West 2002). It is difficult to identify the prevailing rule or practice on this issue, because it is generally a matter of evolving judicial doctrine rather than settled by statutory language.

<sup>252</sup> *See, e.g., In re S.E.P. v. Petry*, 35 S.W.3d 862, 869 (Mo. Ct. App. 2001) (finding that relocation from Missouri to Florida would be in the child's best interests, even though "the move to Florida will decrease the frequency with which Father will be able to see the children and will impose increased burdens associated with traveling a great distance upon the parties and the children," because the mother and her new husband would have \$15,000

The point of this discussion of exceptions to the child welfare focus of custody law is not that it is wrong for courts to protect the interests of women in pursuing careers, to refuse to give effect to homophobia or racism, to make parents feel better after the trauma of divorce, or to reward parents for past sacrifices. Such a normative conclusion would have to rest on an extensive and complex analysis. The point, rather, is simply that courts *are* using custody decisions to do those things. Although in most jurisdictions the sole over-arching statutory standard for deciding custody is the best interests of the child, other aims slip in, aims that serve the interests of people other than the children involved. To the extent that this occurs, even the rules for custody decisions — the rules generally regarded as paradigmatic of child-centered family law rules — fail to conform to a model giving an absolute right to children. To the extent that legislatures or courts engage in a balancing of adults' interests and children's interests, or entirely exclude from consideration some interests of children, the child's right becomes non-determinative or partial. And when courts categorically refuse to consider, as a basis for modifying a custody arrangement, a change in circumstances that dramatically affects the relationships in a child's life, they eviscerate the child's right altogether in those situations.

Finally, it bears repeating that the law does not force any adult to take custody of a child. A parent in a divorce or paternity action who does not want custody of a child can simply decline. Thus, adults have in this context an absolute right to avoid a particular parent-child relationship — a right that, as discussed further in the next section, children do not have.

*b. Visitation with a legal parent*

When courts in paternity or divorce cases order that one legal parent have primary physical custody of the child, the other parent typically will ask the court to order visitation with the child. It often is said that the best interests standard controls visitation decisions, but that is only partly true. The law generally requires that courts order at least *some* visitation, however restricted, absent a showing that

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more in annual income and would live in a nice house); *cf.* TENN. CODE ANN. § 36-6-108 (2002) (stating that primary custodians may move with the child absent a showing by the non-custodial parent that relocation would cause the child "serious harm" or that the primary custodian is acting vindictively or with no reasonable purpose); Paula M. Raines, *Joint Custody and the Right to Travel: Legal and Psychological Implications*, 24 J. FAM. L. 625, 626 (1985/1986) ("[I]n light of current psychological research, moving children away from one parent, after a successful joint custody arrangement has been instituted, is rarely in a child's best interest"). There are some cases, though, in which courts have refused custodial parents permission to move a child, because this would inhibit the child's relationship with the non-custodial parent. *See, e.g.,* Nentwick v. Nentwick, 1998 WL 78663 (Ohio Ct. App. Feb. 18, 1998) (upholding a trial court denial of custodial mother's request to modify father's visitation to facilitate her moving to Georgia).

any visitation with the non-custodial parent would seriously endanger the child's welfare.<sup>253</sup> Washington state statutes provide, for example, that "[a] parent not granted custody of the child is entitled to reasonable visitation," while allowing that visitation may be "limited" where the non-custodial parent

has engaged in any of the following conduct: (i) Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions; (ii) physical, sexual, or a pattern of emotional abuse of a child; (iii) a history of acts of domestic violence . . .

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<sup>253</sup> See, e.g., ARIZ. REV. STAT. § 25-408(A) (2002):

A parent who is not granted custody of the child is entitled to reasonable parenting time rights to ensure that the minor child has frequent and continuing contact with the noncustodial parent unless the court finds, after a hearing, that parenting time would endanger seriously the child's physical, mental, moral or emotional health.

See also COLO. REV. STAT. § 14-10-124(1.5)(a) (2002); DEL. CODE ANN. tit. 13, § 728(a) (2003); 750 ILL. COMP. STAT. ANN. 5/607(a), (c) (West 2002); IND. CODE §§ 31-17-4-1 to 31-17-4-2 (2002); KAN. STAT. ANN. § 60-1616(a) (2001); KY. REV. STAT. ANN. § 403.320(1) (Michie 2002); MO. REV. STAT. § 452.400(1) (2002); UTAH CODE ANN. § 30-3-35 (2002) (specifying a schedule of minimum visitation to which the non-custodial parent is entitled in the absence of an agreement between the parties); *Capri M.P. v. Ronald O.*, 480 A.2d 669, 673-74 (Del. Fam. Ct. 1984); *Shook v. Shook*, 247 S.E.2d 855, 856 (Ga. 1978) (finding that a non-custodial parent's fundamental right to visitation was violated by failure to specify visitation times in the absence of a finding that he was unfit); *In re Marriage of Rykhoek*, 525 N.W.2d 1, 4 (Iowa Ct. App. 1994); *V.C. v. M.J.B.*, 748 A.2d 539, 554-55 (N.J. 2000) (allowing for the denial of visitation only after finding the parent unfit); *Sterbling v. Sterbling*, 519 N.E.2d 673, 676 (Ohio Ct. App. 1987); *Suddes v. Spinelli*, 703 A.2d 605, 607 (R.I. 1997) ("Visitation rights are to be strongly favored and will be denied only in an extreme situation in which the children's physical, mental, or moral health would be endangered by contact with the parent in question."); *Hervieux v. Hervieux*, 603 A.2d 337, 338 (R.I. 1992) (stating that visitation should be denied to a noncustodial parent only in "extreme circumstances"). But see OKLA. STAT. ANN. tit. 43, § 112(A)(2) (West 2002) ("Unless not in the best interests of the children, [the court] may provide for the visitation of the noncustodial parent with any of the children of the noncustodial parent."); WYO. STAT. ANN. § 20-2-202(a) (Michie 2002) ("The court may order visitation it deems in the best interests of each child . . .").

Tellingly, some states have statutory provisions creating a presumption against any visitation when the parent has murdered another family member. See, e.g., N.Y. DOM. REL. LAW § 240(1-c)(a) (McKinney 2003); R.I. GEN. LAWS § 15-5-24.5 (2002).

In a few states, statutes assert, either tautologically or incoherently (depending on what is meant by "harm"), that it is in a child's best interests to have substantial contact with both parents absent a showing that this would harm the child. See, e.g., VT. STAT. ANN. tit. 15, § 650 (2002). At least one state characterizes visitation as a right of the child. See WIS. STAT. ANN. § 767.24(2)(b) (West 2003) ("A child is entitled to periods of physical placement with both parents unless, after a hearing, the court finds that physical placement with a parent would endanger the child's physical, mental or emotional health.").

or an assault or sexual assault which causes grievous bodily harm or the fear of such harm; or (iv) the parent has been convicted as an adult of a sex offense . . . .<sup>254</sup>

State legislators and judges believe parents have a natural and constitutional right to spend time with a child after a divorce decree or paternity decision, regardless of whether this is good for the child,<sup>255</sup> although the Supreme Court has never established such a right.<sup>256</sup>

Thus, for the child to avoid a social relationship with a non-custodial legal parent, it is not sufficient for the custodial parent or the child's guardian *ad litem* to show that it would be better for the child not to spend time with the non-custodial parent. Such might be the case when the child has no established relationship with the non-custodial parent (as is generally the case when the child was just born and the father has not been in the same household as the mother) and the non-custodial parent, though he cannot be proven to present a serious danger, is unlikely to contribute much positive to the child and is likely to undermine the custodial parent's ability to care for the child. For example, in *In re Marriage of Hopkins*,<sup>257</sup> an Iowa appellate court upheld a trial court decision imposing paternity on a mother's ex-husband — over his objection that he was not the father — and ordering twice-yearly visitation between this unwilling father and the child, who was born six months after the mother left the man and moved from Iowa to Hawaii.

One might think it too speculative to determine at the outset of a child's life whether it will be best for him or her to have any social relationship with a biological parent who has not yet had much opportunity to act as a parent.<sup>258</sup> Most

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<sup>254</sup> WASH. REV. CODE § 26.10.160 (2003).

<sup>255</sup> See, e.g., *In re Marriage of L.R.*, 559 N.E.2d 779, 789 (Ill. App. Ct. 1990) ("The courts of this State have been reluctant to deny visitation rights because of the principle that parents have a natural or inherent right of access to their children . . . ."); *Chandler v. Bishop*, 702 A.2d 813, 817 (N.H. 1997).

<sup>256</sup> As noted below in the context of terminating parental rights, although the Supreme Court has indicated in dictum that the best interests of the child is an insufficient basis for permanently terminating parental rights, it has never held that to be the case. See *infra* notes 330–31 and accompanying text. In addition, denial of visitation is not equivalent to termination of parental rights, because a legal parent denied visitation would retain the right to request visitation again at any time.

<sup>257</sup> 453 N.W.2d 232 (Iowa Ct. App. 1990).

<sup>258</sup> For an expression of this view, see Mary Shanley, *Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60, 80–81 (1995). Shanley's objection to such speculation, which is stated in a discussion of biological fathers' power to block adoptions, is not, however, that judges might make erroneous judgments about the qualities of men who wish to be parents. Her concern, rather, is that some men will be prevented from parenting their biological offspring even though they are minimally fit, because they have less to offer a child than potential adoptive parents

practitioners and teachers of family law would likely acknowledge, though, that in a significant percentage of cases, a biological parent who does not satisfy the criteria for termination of parental rights<sup>259</sup> — which might be because he or she has never been in a position before to harm the child in question — or whose rights simply have not been terminated even though the criteria are satisfied, nevertheless is unprepared to play a positive role in a child's life. In many such cases, the child would be better off if the court awarded custody to the other parent and did not order any visitation, leaving it to the custodial parent's discretion whether any visitation should take place.

Under current law, however, showing that to be the case would not be sufficient to prevent a court from granting the biological parent a right to spend time with the child. As noted above, a custodial parent or guardian *ad litem* opposing a non-custodial parent's request for court-ordered visitation would need to demonstrate that even supervised visitation would pose a serious danger to the child, reflecting a very low standard for biological parents to qualify for a legally-protected social relationship with a child. As a result, countless children in this country are forced to maintain a social relationship with biological parents so lacking in ability to parent that they are not even allowed to be alone with the child.<sup>260</sup> In contrast, a best interests requirement or standard would be comparative and would effectively establish a fairly high threshold. A custodial parent opposing a non-custodial legal parent's request for visitation might need to prove only that the non-custodial parent's interactions with the child likely would not be sufficiently beneficial for the child to justify forcing the child to forego other opportunities for relationships or other activities and to justify compelling the custodial parent and the child to arrange their schedule around such interactions.

The unfitness standard for (only) biological parents who have perfected their legal rights reflects a right that the legal system attributes to certain adults, to protect the adults' own interests, and that trumps the welfare of children in that range of cases lying between the serious danger standard and the best interests standard. In this context, the child has only a weak, limited right. Courts must consider the

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do. She apparently believes this is unfair to biological fathers regardless of whether it is best for the children. For Shanley, the only consideration that overrides biological fathers' interests is the supposed entitlement of mothers (even drug-addicted ones) to "decisional autonomy" in determining who will raise the children they relinquish for adoption. *Id.* at 81–89. She offers no argument for adopting such an extreme adult-centric approach to determining with whom the state will entrust the care and upbringing of a child.

<sup>259</sup> See *infra* notes 330–64 and accompanying text.

<sup>260</sup> See Janet R. Johnston & Robert B. Straus, *Traumatized Children in Supervised Visitation: What Do They Need?*, 37 FAM. & CONCILIATION CTS. REV. 135, 136 (1999) ("The majority of children who use the services of supervised visitation centers have been subjected to an extraordinary range of traumatic family experiences; many of them have experienced multiple traumas in their short lives.").

child's welfare, but only to the extent of assuring themselves that the child would not be in serious danger. Beyond that, the child's interests have no effect on the decision whether to order some visitation; the non-custodial parent's rights are otherwise decisive.

Another type of situation in which the parental right of visitation can operate contrary to children's welfare is where the non-custodial parent has been abusive to the child in the past, but where it is possible through supervision of visitation to guard against serious physical abuse in the future. In the case of *Hanke v. Hanke*,<sup>261</sup> for example, parents of a four-year old girl had separated before she was born, after the mother learned of the father's physical abuse and sexual molestation of the mother's daughter from another marriage, which the father admitted doing as a way of punishing the mother.<sup>262</sup> There also was evidence that the father had physically and sexually abused the mother.<sup>263</sup> In the first three years of the child's life, the father had only a few, supervised visits with the girl. The father then sought more visitation, and the trial court ordered weekly four-hour unsupervised visits.<sup>264</sup> Soon, there was evidence that the father sexually abused his daughter, though not enough apparently for a child protective agency to act. Remarkably, the trial court soon thereafter *increased* the father's visitation to unsupervised overnights, apparently to punish the mother for moving out-of-state without court permission and resisting ordered visitation.<sup>265</sup> On appeal, the mother succeeded in getting the order of unsupervised visitation overturned, but the appellate court indicated that the father should still have supervised visitation with the child.<sup>266</sup> The appellate court did not consider the possibility that the father should not have any visitation or, in other words, that the girl might have a right to avoid a relationship with her abusive biological father.

Some of the most difficult visitation conflicts involve older children who refuse to visit with a non-custodial parent. Courts generally will not grant a request by the child or the custodial parent that visitation be suspended simply because the child is adamantly opposed to visitation; courts routinely order visitation over the objection of the child.<sup>267</sup> They do so even when the child shows good reasons, short of serious endangerment, for not wanting to visit, because the courts view the non-

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<sup>261</sup> 615 A.2d 1205 (Md. Ct. Spec. App. 1992).

<sup>262</sup> *Id.* at 1207-08.

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1208.

<sup>265</sup> *Id.* at 1208-09.

<sup>266</sup> *Id.* at 1209.

<sup>267</sup> See, e.g., *Worley v. Whiddon*, 403 S.E.2d 799 (Ga. 1991); *Reynolds v. Reynolds*, 426 S.E.2d 102, 104 (N.C. Ct. App. 1993); cf. OKLA. STAT. ANN. tit. 43, § 113(B)(2) (West 2002) ("The court shall not be bound by the child's choice and may take other facts into consideration in awarding custody or limits of or period of visitation.").

custodial parent's right to visitation as dispositive.<sup>268</sup> Such situations present conflicts not only with children's best interests, but also with older children's autonomy. In practice, older offspring generally can avoid spending time with a non-custodial parent by simply refusing to comply with a court order. Rarely will a court go to the extreme length of ordering police physically to force a teenager to attend visitation, and the law today is generally opposed to trying to coerce an older child by cutting off child support payments.<sup>269</sup> There have been instances, though, of courts going to extreme lengths, including jailing children, to induce them to visit non-custodial parents.<sup>270</sup> And arguably an adolescent is harmed simply by being thrust into a legal situation in which she can protect her interests and exercise self-determination only by violating a court order.

In contrast to the legal obligation of children to spend time with non-custodial parents, a non-custodial legal parent is under no obligation to spend time with the child. A person who has been determined to be the biological parent of a child may be compelled to provide financial support for the child even if he does not want a relationship with the child.<sup>271</sup> But states do not force any biological parent to have a social relationship with a child if the parent does not wish to do so. Visitation occurs only if the parent wants it. A petition by a custodial parent or a child for an order compelling a non-custodial parent to visit a child would be a non-starter. For example, in a 1995 Ohio case, *Hamilton v. Hamilton*,<sup>272</sup> a custodial mother of a girl with multiple disabilities petitioned to increase the non-custodial father's visitation time with the girl so that the mother could have more than a few hours a week for herself. The court held that it had no power to increase the father's visitation time against his will, or even to force him to take advantage of the visitation time already granted him, stating: "Because it is a right, not a duty, a court cannot force a nonresidential parent to visit his or her child."<sup>273</sup>

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<sup>268</sup> See, e.g., *In re Sayeh R.*, 693 N.E.2d 724 (N.Y. 1997) (subjecting teens to order of visitation with mother even after mother's boyfriend had murdered their sister); Darlene Gavron Stevens, *Bolingbrook Teens Give Up Hunger Strike*, CHI. TRIB., Feb. 5, 1997, at 7 (discussing teens who did not want visitation with non-custodial father because they believed he had abandoned them and had used a custody fight to hurt their mother).

<sup>269</sup> See GREGORY ET AL., *supra* note 223, at 468-69.

<sup>270</sup> See Kathleen Murray, *When Children Refuse to Visit Parents: Is Prison an Appropriate Remedy?*, 37 FAM. & CONCILIATION CTS. REV. 83, 83, 86 (1999). Courts have also at times jailed custodial parents as punishment for not forcing children to attend court-ordered visitation. See *id.* at 83-84, 89.

<sup>271</sup> Indeed, non-custodial parents must pay child support even if they want to have visitation and a court refuses to order it. See, e.g., N.J. STAT. ANN. § 9:2-4.1(c) (West 2002) ("A denial of custody or visitation [because a parent has been convicted of sexual assault] shall not by itself terminate the parental rights of the person denied visitation or custody, nor shall it affect the obligation of the person to support the minor child.").

<sup>272</sup> 667 N.E.2d 1256 (1995).

<sup>273</sup> *Id.* at 1260. The only "sanction" available to a custodial parent when the non-custodial

The best interests standard does play some role in visitation decisions, however. If and when a non-custodial parent seeks visitation and gets past the threshold determination that he will get *some* visitation, *then* the best interests standard comes into play. At that point, the court must determine the amount and particular form of visitation, and in most states, courts ostensibly make that determination based on the best interests of the child.<sup>274</sup> To guard against a perceived possibility of abuse or neglect, a court might order only occasional, brief, and/or supervised visits.

However, in most jurisdictions, there is a presumption that non-custodial parents will receive "standard visitation" absent a showing that this is likely to result in significant harm.<sup>275</sup> Standard visitation generally means weekend-long stays every other week, one overnight every week, and a couple of weeks in the summer.<sup>276</sup> Courts regularly depart from this presumption with newborns and infants,<sup>277</sup> but even with infants, courts will begin a routine of standard visitation — not based on a determination that that is best for the child, but rather because they believe the non-custodial parent is entitled to standard visitation as early as is feasible.<sup>278</sup> To the

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parent fails to take advantage of visitation time ordered might be to recover any additional costs borne (e.g., child care expenses) by the custodial parent as a result. *See, e.g.*, N.J. STAT. ANN. § 2A:34-23.3 (West 2002) (giving judicial discretion to "award[] . . . monetary compensation for additional costs incurred when a parent fails to appear for scheduled visitation").

<sup>274</sup> *See, e.g.*, *Chandler v. Bishop*, 702 A.2d 813, 817–18 (N.H. 1997) ("[T]he natural father of a child born out of wedlock . . . has a constitutional right to custody and visitation . . . . At the same time, the courts' overriding concern in *structuring* custody and visitation matters is the best interests of the child . . . .") (emphasis added). In most states, the same statutory provision governs custody and visitation decisions, and ostensibly applies the same standard to both; in fact, visitation might be subsumed under the term "custody" or "custodial arrangement." *See supra* notes 177–86. As such, language to the effect that the child's interests are "primary" or that the "welfare of the community" is relevant also qualify the best interests standard governing visitation. *See supra* notes 182–84.

<sup>275</sup> *See, e.g.*, UTAH CODE ANN. § 30-3-32 (2002) (stating that "[a]bsent a showing by a preponderance of evidence of real harm or substantiated potential harm to the child," post-divorce the child shall "have frequent, meaningful, and continuing access to each parent"); *id.* § 30-3-34 (stating a presumption for applying a statutory schedule of minimum visitation); *id.* § 30-3-35 (setting forth the schedule); WASH. REV. CODE § 26.10.160 (2003) (outlining limitations on visitation rights); *In re Marriage of Fields*, 671 N.E.2d 85 (Ill. App. Ct. 1996) (holding that the custodial parent bears the burden of showing that supervision of non-custodial parent's visitation is necessary to protect the child from serious harm, and upholding the award of liberal visitation rights, including weekend overnights, with father who had sexually molested step-son); *R.W.H. v. D.M.H.*, 898 S.W.2d 144, 148 (Mo. Ct. App. 1995) (holding that the statutory "endangerment-impairment standard" applies to requests to have visitation supervised or limited); Smith, *supra* note 194, at 42–43.

<sup>276</sup> *See* UTAH CODE ANN. § 30-3-35 (2002); Smith, *supra* note 194, at 42.

<sup>277</sup> *See, e.g.*, *Bissonette v. Gambrel*, 564 A.2d 600, 602 (Vt. 1989) (upholding visitation award limited to two six-hour periods each week with no overnights).

<sup>278</sup> *See, e.g.*, *Klein v. Klein*, 460 N.Y.S.2d 607 (App. Div. 1983); *cf.* FLA. STAT. ANN. §

extent that this occurs, the child's interests in practice are also not determinative of this decision as to the amount and form of visitation; courts implicitly balance the child's interests and the perceived interests and rights of non-custodial parents, and afford children only the limited right against very harmful interaction.

In addition, as with custody decisions, certain extraneous considerations and biases creep into visitation decisions. As evidenced in a number of published opinions, a non-custodial parent who is gay might receive less visitation time than he otherwise would because of a judge's condemnation of his sexual orientation.<sup>279</sup> The prevailing rule today, though, is that a non-custodial parent's sexual orientation or lifestyle should not influence the visitation decision except insofar as it demonstrably affects the welfare of the child.<sup>280</sup>

Some decisions have suggested judicial bias relating to religion. In that realm, courts have moved toward a position somewhat more protective of parents, as they have in custody decision making, providing that potentially harmful religious practices or beliefs should not count against a parent unless they are likely to occasion harm to the child exceeding a threshold of substantiality.<sup>281</sup> Courts have developed this rule on the basis of an explicit balancing of children's well-being against the perceived constitutional rights of parents.<sup>282</sup>

With respect to visitation on the whole, then, the law effectively accords children only a limited right. Children effectively have a right to avoid a relationship with a parent who poses a serious danger to them if supervision is an inadequate guard against that danger. But children do not have a right against being thrust into a social relationship with a legal parent who is simply a bad parent or

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61.13(8) (West Supp. 2003) ("If the court orders that parental responsibility, including visitation, be shared by both parents, the court may not deny the noncustodial parent overnight contact and access to or visitation with the child solely because of the age or sex of the child."); UTAH CODE ANN. § 30-3-35.5 (2002) (ordering gradually increasing visitation schedule for children under five, with overnight visitation beginning when the child is eighteen months). For discussion of the competing views among social scientists on the desirability of infants spending overnights with non-custodial parents, see Richard A. Warshak, *Who Will Be There When I Cry in the Night?: Revisiting Overnights — A Rejoinder to Biringen et al.*, 40 FAM. CT. REV. 208 (2002); Linda Luther-Starbird & Jean E. LaCrosse, *Parenting Time Schedules for Infants and Toddlers: Evidence Regarding Overnights*, COLO. LAW., Oct. 2002, at 103.

<sup>279</sup> See, e.g., Miller, *supra* note 232, § 5, at 99.

<sup>280</sup> See *Boswell v. Boswell*, 721 A.2d 662, 672–78 (Md. 1998) (establishing rule in Maryland and discussing case law in other jurisdictions); GREGORY ET AL., *supra* note 223, at 471; Miller, *supra* note 232, § 6, at 99.

<sup>281</sup> See *Kendall v. Kendall*, 687 N.E.2d 1228, 1233 (Mass. 1997) ("We adhere to the line of cases requiring clear evidence of substantial harm."); GREGORY ET AL., *supra* note 223, at 470.

<sup>282</sup> See, e.g., *Kendall*, 687 N.E.2d 1228; *Rieker v. Rieker*, 1999 WL 111309, \*3–\*4 (Neb. Ct. App. Feb. 23, 1999); *Chandler v. Bishop*, 702 A.2d 813, 818 (N.H. 1997).

who is not as good a caretaker as other potential parent-like figures in a child's life. Children do ostensibly have a "right" to the least harmful kind of relationship with a "bad but not seriously dangerous" parent and a right to the optimal form of relationship with a good non-custodial parent, though in both types of cases judges sometimes allow perceived rights of parents or the judges' own moral sensibilities to trump children's interests to some degree.

*c. Custody disputes between a legal parent and a non-parent*

The divergence between custody rules and a children's rights model, and the privileging of legal parents' entitlement over children's welfare, becomes even clearer when one considers situations in which an adult who is not a legal parent has acted in a parent-like role in relation to a child but the state has refused to accord legal protection to the resultant relationship. Legal parenthood, which our legal system will confer on only one or two adults, is still largely an "exclusive status"<sup>283</sup> — that is, a status that excludes others from receiving legal recognition of their role in a child's life, even when that role has been a primary one. This is so despite widespread recognition of the multiplicity of family forms that now exist in American society and research demonstrating that many simultaneous emotional bonds can and typically do constitute a healthy relational life for children.<sup>284</sup>

Most states do not even allow persons other than legal parents standing to seek custody of a child — even shared custody with a legal parent — where a legal parent wants custody and the state has not adjudicated that parent unfit.<sup>285</sup> A significant minority of states authorize persons in particular roles, such as grandparent, step-parent, or de facto parent, to petition for custody of a child, even exclusive custody, as against legal parents.<sup>286</sup> But in those states, persons who are not legal parents are

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<sup>283</sup> See generally Bartlett, *supra* note 20; Nancy D. Polikoff, *The 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, 468–71 (1990).

<sup>284</sup> See Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 381 (1996) (discussing the empirical literature).

<sup>285</sup> See Robyn Cheryl Miller, Annotation, *Child Custody and Visitation Rights Arising from Same-Sex Relationship*, 80 A.L.R. 5th 1, §§ 3[b], 4 (2000); see, e.g., *Nunn v. Arenson*, 14 P.3d 175, 177 (Wash Ct. App. 2000) ("Under . . . Washington's nonparental child custody statute, a nonparent lacks standing to seek custody of a child, as against a fit parent who has physical custody of the child.").

<sup>286</sup> See, e.g., CAL. FAM. CODE § 4600 (West 2002). A few states ostensibly allow for petitions even by non-relatives who have not been caregivers for a child — for example, friends of the family. See, e.g., LA. CIV. CODE ANN. art. 133 (West 2003):

If an award of joint custody or of sole custody to either parent would result in substantial harm to the child, the court shall award custody to another person with whom the child has been living in a wholesome and stable environment, or

still unlikely to receive custody, because they bear the “formidable burden” of demonstrating that the legal parents are unwilling or unfit to have custody.<sup>287</sup> It is not sufficient to show that it would be in the child’s best interest, all things considered, for these non-legal-parents to have custody.<sup>288</sup>

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otherwise to any other person able to provide an adequate and stable environment.

But in practice such persons simply do not petition for visitation, and it seems unlikely that courts in those states would grant such a petition.

<sup>287</sup> See Cahn, *supra* note 34, at 14–16.

<sup>288</sup> See, e.g., LA. CIV. CODE ANN. art. 133 (West 2003) (requiring “substantial harm” to child before custody may be awarded to a non-parent); *Kuespert v. Miller*, 705 So. 2d 470 (Ala. Civ. App. 1997); *In re N.Z.B.*, 779 So. 2d 508 (Fla. Dist. Ct. App. 2000) (stating that a court’s job is to enforce the rights of the natural parent, not to make the best custodial arrangement for a child); *Clark v. Wade*, 544 S.E.2d 99 (Ga. 2001); *Brooks v. Carson*, 390 S.E.2d 859, 863 (Ga. Ct. App. 1990) (holding that a non-parent may not be granted custody of a child unless the child’s legal parents have been found unfit, stating that “the law . . . naturally abhors interference between parent and child by third parties who are of no relation”); *S.F. v. M.D.*, 751 A.2d 9, 15 (Md. Ct. Spec. App. 2000) (“In a custody dispute, however, when the dispute is between a biological parent and a third party, there is a presumption that the child’s best interest is served by awarding custody to the biological parent. This presumption can be overcome by a showing of the parent’s unfitness or by exceptional circumstance.”) (citation omitted); *In re A.R.A.*, 919 P.2d 388, 391–92 (Mont. 1996); *Locklin v. Duka*, 929 P.2d 930 (Nev. 1996) (holding that mother’s leaving child in care of grandmother for nine years and having only sporadic contact with the child did not constitute extraordinary circumstances justifying award of custody to grandmother); *Watkins v. Nelson*, 748 A.2d 558, 559 (N.J. 2000) (noting that a custody presumption in favor of a parent over a non-parent “can be rebutted by proof of gross misconduct, abandonment, unfitness, or the existence of ‘exceptional circumstances,’ but never by a simple application of the best interests test”); *Grindstaff v. Byers*, 567 S.E.2d 429 (N.C. Ct. App. 2002) (holding the best interests of the child standard impertinent to a custody contest between father and third parties, where father had not abandoned children nor been found unfit); *Simons v. Gisvold*, 519 N.W.2d 585, 587 (N.D. 1994) (holding that the non-parent must show that custody with parent would cause serious harm to child); *Reynolds v. Goll*, 661 N.E.2d 1008, 1010 (Ohio 1996) (stating that “parents who are deemed suitable are considered to have the ‘paramount’ right to custody of their minor children” and “parents may be denied custody only if the preponderance of the evidence indicates abandonment, contractual relinquishment of custody, total inability to provide care or support, or that the parent is otherwise unsuitable”) (quoting *In re Perales*, 369 N.E.2d 1047, 1051–52 (Ohio 1977)); *Hogan v. Platts*, 430 S.E.2d 510 (S.C. 1993) (overturning award of custody to aunt and uncle with whom mother placed child before mother died, because the trial court had not determined that the largely absent biological father was unfit); *Bottoms v. Bottoms*, 457 S.E.2d 102, 104 (Va. 1995) (stating that the presumption favoring a parent is strong, but can be rebutted when clear and convincing evidence establishes parental unfitness); cf. ME. REV. STAT. ANN. tit. 18-A, § 5-204(c) (West 2002) (authorizing conferral of guardianship on non-parent where a parent has created a living situation that is “intolerable for the child even though the living situation does not rise to the level of jeopardy required for the final termination of parental rights”); MO. REV. STAT. § 452.375(5)(a) (2002) (each legal parent must be found “unfit,

A quite common situation involves children who have been raised for a significant period of time by their grandparents and whose biological parents swoop back into the picture after being off pursuing other interests or wallowing in addiction. In most jurisdictions, the parent in that situation has the legal right to take the child away immediately and become the primary custodian of the child, absent proof of willful abandonment or present unfitness.<sup>289</sup> For example, in *Locklin v. Duka*,<sup>290</sup> the Nevada Supreme Court upheld a lower court decision returning a child to the custody of her mother after the mother had left the child in the custody of a grandmother for nine years, during which time the mother had only sporadic contact with the child, was addicted to drugs, and lived in an abusive relationship. Because the mother, after drug rehabilitation, now satisfied the state's standard of minimal fitness to parent and had not manifested a sufficiently clear intent to abandon the child, she was deemed entitled to have the child back.<sup>291</sup> Foster care, discussed

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unsuitable, or unable to be a custodian" before court may award custody to non-parent); WIS. STAT. ANN. § 767.24(3)(a) (West 2003) ("If the interest of any child demands it, and if the court finds that neither parent is able to care for the child adequately or that neither parent is fit and proper to have the care and custody of the child, the court may . . . transfer legal custody of the child to a relative of the child."); B.J. v. J.D., 950 P.2d 113, 117 (Alaska 1997) (upholding award of custody to mother's former boyfriend, who had served as de facto parent to the child while the mother left the child in his custody for five months, stating that "an award of custody to a natural parent is 'preferable and only to be refused where clearly detrimental to the child'") (quoting *Turner v. Pannick*, 540 P.2d 1051, 1055 (Alaska 1975)); *Heltzel v. Heltzel*, 638 N.W.2d 123, 138 (Mich. Ct. App. 2001):

[C]ustody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within § 3, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.

*But see* KY. REV. STAT. ANN. § 403.270(2) (Michie 1999) ("The court shall determine custody in accordance with the best interests of the child and equal consideration shall be given to each parent and to any de facto custodian."); N.H. REV. STAT. ANN. § 458:17(VI) (2002) (noting that the court may award custody to a step-parent or grandparent if it is in the best interests of child).

<sup>289</sup> See, e.g., OKLA. STAT. ANN. tit. 10, § 21.1 (West 2002) (establishing a *per se* rule giving preference to parents over grandparents and other non-parents in awarding custody); *Malpass v. Hodson*, 424 S.E.2d 470 (S.C. 1992) (upholding award of custody to mother of six-year-old son who had lived with grandparents since he was nine months old). *But see* IDAHO CODE § 32-717(3) (Michie 2002) (authorizing courts to give a grandparent with whom a child has resided "in a stable relationship" the same standing as a parent to seek custody in the best interests of the child); cf. *In re Marriage of Rudsell*, 684 N.E.2d 421 (Ill. App. Ct. 1997) (upholding award of custody to friends of mother in whose care mother had left child for the two-and-one-half years immediately after birth).

<sup>290</sup> 929 P.2d 930 (Nev. 1996).

<sup>291</sup> *Id.* at 935.

separately below, is factually and legally similar to these sorts of cases.

A somewhat different, and also very common, situation involves step-parents or non-marital partners of a legal parent who have resided and co-parented with a legal parent. A spouse or partner might for several years participate equally with the legal parent in raising a child and develop a strong emotional and psychological bond with the child, yet not even have standing to seek custody of the child when the relationship between the adults ends.<sup>292</sup> Many gay or lesbian couples go through the procreation process together, intentionally and cooperatively enlisting the assistance of a third party or securing artificial insemination services, fully intending that both will be equal parents to the child, yet the law in most jurisdictions does not recognize both as parents for purposes of ordering custodial relationships after dissolution of the adult relationship.<sup>293</sup> In some states, even if the legal parent exits the picture, because of rights termination, abandonment, or death, the partner who has helped raise the child might be pushed aside by grandparents or other relatives who are given preference in assigning custody.<sup>294</sup>

Children thus have no right under prevailing rules to continue living with a long-term caregiver if the caregiver has not had legal parent status conferred upon her or him under the laws governing maternity, paternity, or adoption. The rights of legal parents trump the interests of children in these situations. Indeed, a state appellate court in Michigan recently stated explicitly that requiring the legal parent in such a situation to show that it would be in the child's best interests to return to her custody would violate "the fundamental constitutional right of parents to raise their children."<sup>295</sup>

An alternative to a third-party custody petition that grandparents or other non-legal-parents might pursue, in an effort to maintain a primary relationship with a child, is to seek termination of the legal parents' rights and then adoption, but that is a very difficult and uncertain path to take, as discussed below. When the state

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<sup>292</sup> See, e.g., *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979); *D.N. v. V.B.*, 814 A.2d 750 (Pa. Super. Ct. 2002); *Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995); cf. *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (holding that a former lesbian partner had no standing to seek visitation order, even though she had acted like a parent both before and after the child's birth, and stating that this would be true of a request for custody as well); *Multari v. Sorrell*, 731 N.Y.S.2d 238 (App. Div. 2001) (holding that a non-biological father had no standing to seek visitation with the child of his former girlfriend, and stating that the same would be true of a petition for custody). But cf. 750 ILL. COMP. STAT. ANN. 5/601(b)(3) (West 1999) (conferring standing on step-parents to seek custody in very limited circumstances); *id.* § 602(a) (placing the burden on the step-parent to rebut presumption that it is in child's best interests for biological parent to have custody).

<sup>293</sup> As discussed *infra*, at notes 430–35 and accompanying text, such non-legal-parent caregivers have had some success in some U.S. jurisdictions securing visitation privileges with a child, thus ensuring they will continue to have some relationship with the child.

<sup>294</sup> See, e.g., OKLA. STAT. ANN. tit. 10, § 21.1(A) (West 2002).

<sup>295</sup> *Heltzel v. Heltzel*, 638 N.W.2d 123, 135 (Mich. Ct. App. 2001).

does permanently terminate the rights of parents, grandparents and others who have cared for a child generally will have preference over other applicants for adoption.<sup>296</sup> Absent a termination and adoption, however, these caregivers will, at best, occupy a role in the child's life as merely an occasional visitor. The law governing third-party visitation is discussed below.

*d. Foster Care and Social Parent-Child Relationships*

When the state finds that parents have seriously abused or neglected their children, it typically removes the children from the parents' home, assumes temporary legal custody of them, and places the children in foster homes. This state action affects all of a child's existing relationships; the child is then largely cut off from non-family members, and interactions with family members, including parents, are usually severely curtailed. It also creates the possibility for development of new relationships — in particular, a new social parent-child relationship with foster parents and horizontal relationships with other children in the foster parents' home. Children also enter foster care as a result of parents voluntarily entrusting children temporarily to the state.<sup>297</sup> Over half a million children, almost one percent of all children in this country, are in foster care today.<sup>298</sup>

The typical legal standard for involuntary removal of a child from his or her home is not a best interests standard but rather an imminent danger standard, requiring evidence that the child is likely to suffer substantial harm by remaining in the house with the parents.<sup>299</sup> Courts have been explicit in explaining that the

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<sup>296</sup> See, e.g., FLA. ADMIN. CODE ANN. r. 65C-16.002 (2003) ("Grandparents with whom a child has lived for at least six months must be notified that their grandchild is being considered for adoption . . . . Such grandparents must be afforded the opportunity to petition for the child's adoption, and the court is required to give first priority to that petition.").

<sup>297</sup> See, e.g., N.Y. SOC. SERV. LAW § 383-c (McKinney 2003) (providing for the surrender of custody by parents to agency); VA. CODE ANN. § 63.2-900 (Michie 2003) (authorizing local agencies to accept for placement "such persons under eighteen years of age as may be entrusted to it by the parent").

<sup>298</sup> See Wertheimer, *supra* note 40, at 1.

<sup>299</sup> See, e.g., CONN. GEN. STAT. ANN. § 46b-129 (b) (West 2003) (authorizing the removal of any child who is "suffering from serious physical illness or serious physical injury or is in immediate physical danger from the child's or youth's surroundings"); VA. CODE ANN. §§ 16.1-251(A), § 16.1-252(E)(1) (Michie 2003) (providing that a court in abuse and neglect proceedings may order a child to be placed in state custody only when the child "would be subjected to an imminent threat to life or health to the extent that severe or irremediable injury would be likely to result if the child were returned to or left in the custody of his parents"); *id.* § 63.2-1517 (requiring for emergency removal "imminent danger to the child's life or health to the extent that severe or irremediable injury would be likely to result"); *Hatch v. Dep't for Children, Youth & Their Families*, 274 F.3d 12, 21 (1st Cir. 2001) (stating that most courts addressing the constitutional rights of parents in connection with child protective removals have held that a social worker must have evidence that "the child has

standard for removal reflects a balancing of the child's interests against the rights of the parent, rather than purely a concern for the welfare of children.<sup>300</sup> Moreover, children cannot demand state intervention if child protective workers elect not to act, so children have no right to suspend their relationship with an abusive or neglectful parent.

Significantly, the law also does not recognize a right of children, incidental to their interest in maintaining relationships with other family members and with non-family members, to remain in their homes while the state attempts to rehabilitate their parents. Absent a criminal proceeding against an offending parent, it is generally not the parent who is taken into state custody, but the child. As noted in connection with adoption, the state does make some effort to maintain family relationships by applying a preference for relatives in making foster care placements. And as discussed below, children generally have some right to contact with family members during foster care. Nevertheless, it is the child who suffers the greatest dislocation when parents commit abuse or neglect.

After children are placed in foster care, parents are deemed to have a right to some visitation with the child absent a likelihood of harm to the child.<sup>301</sup> Thus,

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been abused or is in imminent peril of abuse"); *Wallis v. Spencer*, 202 F.3d 1126, 1138 (9th Cir. 2000):

Officials may remove a child from the custody of its parent without prior judicial authorization only if the information they possess at the time of the seizure is such as provides reasonable cause to believe that the child is in imminent danger of serious bodily injury and that the scope of the intrusion is reasonably necessary to avert that specific injury.

See also *In re Richard G.*, 770 A.2d 625, 626–27 (Me. 2001) (indicating that Maine's removal statute authorizes removal from a parent's custody only upon a finding of "jeopardy," which the statute defines as "serious abuse or neglect").

<sup>300</sup> See, e.g., *Hatch*, 274 F.3d at 20–21 (explaining the constitutional basis of the legal standard for emergency removal of children).

<sup>301</sup> See N.J. STAT. ANN. 9:6-8.19(b) (West 2003) ("The parents or guardian of a child in protective custody may, upon request and in the reasonable discretion of the physician [or state official], visit the said child, provided that the life or health of the child will not be endangered by such visit."); WASH. REV. CODE § 13.34.232(d) (2003); UTAH ADMIN. CODE 501-7-5(G) (2002) ("The foster care services provided by an agency shall include: . . . a plan for the parental visits with the child."); *Smith v. Org. of Foster Families*, 431 U.S. 816, 828 (1977) ("The natural parent has not only the right but the obligation to visit the foster child . . ."); *In re Dylan T.*, 76 Cal. Rptr. 2d 684, 689 (Ct. App. 1998) ("[V]isitation between an incarcerated parent and a [dependent] minor cannot be arbitrarily determined based on factors which do not show by clear and convincing evidence that visitation would be detrimental to the minor."); *In re Ko.W.*, 774 A.2d 296, 304, 309 (D.C. 2001) (noting that, although the father had no visitation with his dependent children for five years, the trial court erred in failing to order visitation now, because the absence of any findings on allegations of sexual abuse meant that the state had not met "the formidable burden imposed by the law on those who seek to deny a father all contact with his children" of overcoming the presumption that "during the pendency of a neglect proceeding, the court should authorize

visitation will occur even when it is not in the best interests of the child, so long as the visitation does not present a serious danger to the child.<sup>302</sup> Again, children would likely have no recourse if the state acted contrary to its rules, in this context by allowing visitation that presented a serious danger. In contrast to their disposition toward abusive and neglectful parents, states generally impose on themselves no legal duty to ensure continued contact between a child in foster care and extended family members or non-relatives, regardless of the prior relationship between those persons and the child.

The state must end foster care and return the child to the custody of parents when parents who have voluntarily placed a child simply demand return, or when, in cases of involuntary placement, the standard for removal — that is, danger of substantial harm — is no longer met. To prevent return to the parent, it is generally not sufficient for the state simply to show that it would be in the child's best interests to remain in foster care.<sup>303</sup> Children in foster care might be better off if their initial legal parents, who already have proven to be inadequate parents, were forced to compete with the foster parents, whom the state has in theory pre-determined to be adequate parents, for long-term custody of a child.<sup>304</sup> Should the

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visitation at least on a weekly basis unless such 'at least weekly visitation would create imminent danger or be detrimental to the well-being of the child'") (citations omitted); GUGGENHEIM ET AL., *supra* note 120, at 160. Note that this does not mean that parents or children are entitled to as much visitation as they want.

<sup>302</sup> See, e.g., VA. CODE ANN. § 16.1-252(F)(2) (Michie 2003) (mandating that, after placement of a child in foster care, a court shall "[o]rder that reasonable visitation be allowed between the child and his parents . . . if such visitation would not endanger the child's life or health").

<sup>303</sup> See, e.g., *People ex rel. A.W.R.*, 17 P.3d 192, 198 (Colo. Ct. App. 2000) (holding that "the juvenile court correctly applied a parental unfitness standard in determining that the child could be returned home," and noting that "a decision to return the child home necessarily serves the best interests of the public"); *Drummond v. Fulton County Dep't of Family & Children Servs.*, 228 S.E.2d 839, 842 (Ga. 1976) (holding that the best interests standard is inapplicable to a contest between foster parents and natural parents, and that custody of foster children must be returned to the natural parents unless they remain unfit); *Fowler v. Fowler*, 722 So. 2d 125, 129 (La. Ct. App. 1998) (quoting *Gordy v. Langner*, 502 So. 2d 583, 587 (La. Ct. App. 1987)):

[A]t a subsequent hearing to change custody brought by the natural parent previously deemed unfit, the burden of proof should rest on that natural parent to demonstrate that he or she had rehabilitated and that facts which gave rise to him or her being deprived of custody at the initial hearing no longer exist.

*Cf. Smith*, 431 U.S. at 828 (noting that involuntary foster care placement differs from voluntary placement by parents principally in that in the latter case, but not the former, parents are "entitled to return of the child on demand"). *But see* CONN. GEN. STAT. ANN. § 46b-129(k)(4) (West 2003) ("The court shall revoke commitment if a cause for commitment no longer exists and it is in the best interests of the child or youth.").

<sup>304</sup> States are increasingly accepting of permanent foster care. See, e.g., MD. CODE ANN., FAM. LAW § 5-544(2) (2002); ME. REV. STAT. ANN. tit. 22, § 4064 (West 2002); VA. CODE

initial parents lose, they could become permanent non-custodial parents, visiting the child as appropriate.<sup>305</sup> But generally the law does not contemplate such an outcome. And again, children would have no standing to insist that the state adhere to its own standards of protection.<sup>306</sup>

With respect to creation of new social parent-child relationships, the legal rules governing foster care typically provide that the child shall be placed in a "suitable" foster home or state facility<sup>307</sup> while also creating some preference for placement with relatives.<sup>308</sup> State laws require a screening of potential foster parents in an effort to ensure that all are suitable, and the placing agencies monitor the child's situation after placement.<sup>309</sup> In practice, the screening might not be particularly

ANN. § 63.2-908 (Michie 2003).

<sup>305</sup> Cf. VA. CODE ANN. § 63.2-908(G) (Michie 2003) ("The court order placing the child in a permanent placement shall include a specification of the nature and frequency of visiting arrangements with the natural parents."). For arguments that permanent foster care or guardianship with continued parental visitation is better for children in many cases than adoption with complete severance of the child's relationship with initial parents, see Garrison, *supra* note 284; Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 873 (2000).

<sup>306</sup> See *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989).

<sup>307</sup> See, e.g., CONN. GEN. STAT. ANN. § 46b-129(j) (West 2003) ("[T]he court may vest such child's or youth's care and personal custody in any private or public agency which is permitted by law to care for neglected, uncared-for or dependent children or youth or with any person or persons found to be suitable and worthy of such responsibility . . ."); VA. CODE ANN. § 16.1-252(F) (Michie 2003) ("If the court determines that . . . the removal of the child is proper, the court shall . . . [o]rder that the child be placed in the temporary care and custody of a suitable person . . ."). Some states' statutes, though, suggest a best interests standard. See, e.g., UTAH ADMIN. CODE 501-7-5(F) (2002) ("In determining where a child is placed the agency shall consider proximity to the child's home, placement in the least restrictive setting possible, the ability of the parents to visit; however, the welfare of the child shall override any of these considerations.").

<sup>308</sup> See MD. CODE ANN., FAM. LAW § 5-544(1)(ii) (2002) (providing that if return of child to parents is not feasible, child should be placed with relatives unless that would not be in the child's best interests); VA. CODE ANN. § 16.1-252(F) (Michie 2003) (requiring that "consideration being given to placement in the temporary care and custody of a relative or other interested individual, including grandparents"); Paupeck, *supra* note 166, at 533.

<sup>309</sup> See VA. CODE ANN. § 63.2-904(A) (Michie 2003):

Before placing . . . any such child in a foster home [the] child-placing agency shall cause a careful study to be made to determine the suitability of such home . . . , and after placement shall cause such home . . . and child to be visited as often as necessary to protect the interests of such child.

See also *Alliance for Children's Rights v. L.A. County Dep't of Children & Family Servs.*, 116 Cal. Rptr. 2d 288 (Ct. App. 2002) (discussing mandated oversight procedures in one county in California); *Mark G. v. Sabol*, 717 N.E.2d 1067, 1070-72 (N.Y. 1999) (discussing state laws requiring screening and monitoring of foster parents); Catherine J. Ross & Naomi R. Cahn, *Subsidy for Caretaking in Families: Lessons from Foster Care*, 8 AM. U. J. GENDER

rigorous, and it is not uncommon for foster parents to abuse children without state officials detecting it for some time.<sup>310</sup> In addition, state agencies might not fully comply with oversight rules.<sup>311</sup> But the law at least aspires to keep closer watch over foster parents than it generally does over legal parents. Children removed from their homes thus have only a limited right with respect to formation of these substitute parent-child relationships, but arguably a more robust one than that with respect to formation of legal parent-child relationships with biological parents.

Maintenance of these new relationships is a quite different matter. Legislators and social service agencies generally view foster care as a temporary arrangement and the foster home as just a place to park the child while waiting for return to his or her parents or for adoption placement.<sup>312</sup> The foster care system favors placing children in homes rather than using institutional care because it allows a child to have a more normal family life,<sup>313</sup> yet state agencies historically have discouraged foster parents from becoming emotionally attached to the children, fearing an emotional attachment to foster parents would impede the goal of reuniting children with their natural parents.<sup>314</sup> Consistent with this outlook, state statutes generally confer on children no right to remain in a foster home once placed,<sup>315</sup> and most children move around to different families.<sup>316</sup> Indeed, state agencies often will move a child from one foster home to another solely because the first family was becoming too attached to the child. When removal occurs, foster parents and children have no legal basis for opposing it.<sup>317</sup> Moreover, when the state changes

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SOC. POL'Y & L. 55, 65 (2000).

<sup>310</sup> See *Lewis v. Anderson*, 308 F.3d 768 (7th Cir. 2002) (stating the widely followed rule that the state is not liable in tort to children placed with abusive foster parents even when the state is grossly negligent; rather, the state is liable only when it knew or suspected that foster parents were abusive); *Mark G.*, 717 N.E.2d at 1067 (dismissing suit against municipality by children who were abused or neglected in foster care); Mary Kate Kearney, *DeShaney's Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275, 283-86 (2002) (discussing suits against state for placement with abusive foster parents).

<sup>311</sup> See, e.g., *Alliance for Children's Rights*, 116 Cal. Rptr. 2d 288 (hearing a challenge to agency's excessive requests for waivers from monthly visit requirement).

<sup>312</sup> See HOLLINGER, *supra* note 86, § 3.02[2]; Ross & Cahn, *supra* note 309, at 57-58.

<sup>313</sup> See *Alliance for Children's Rights*, 116 Cal. Rptr. 2d at 296; Ross & Cahn, *supra* note 309, at 58.

<sup>314</sup> See HOLLINGER, *supra* note 86, § 3.02[2]; Megan M. O'Laughlin, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Termination v. Reunification*, 51 VAND. L. REV. 1427, 1434 (1998).

<sup>315</sup> See, e.g., N.Y. SOC. SERV. LAW § 383(2) (McKinney 2003) (providing that the foster care placement agency "may in its discretion remove such child from the home where placed").

<sup>316</sup> See, e.g., *Wallis v. Spencer*, 202 F.3d 1126, 1141 (9th Cir. 2000).

<sup>317</sup> See *Rodriguez v. McLoughlin*, 214 F.3d 328, 340 (2d Cir. 2000), *cert. denied*, 532 U.S. 1051 (2001) (holding that foster parents have no constitutionally protected interest in preserving their relationship with a foster child, and that New York law imposes no

a child's placement or returns a child to his or her legal parents, the child's relationship with foster parents usually is severed completely, even though the child might benefit from continuing contact with the foster parents. A petition by the foster parents for visitation with the child would be denied in most jurisdictions.<sup>318</sup>

This outlook presupposes that the reunited natural family must exclude all other parent-like figures. A bond with foster parents would not make reintegration difficult for the child if the child were allowed continuing contact with the foster parents. In other words, one can imagine social services agencies taking a very different approach to foster care, one that allows bonds to form naturally with foster parents and affords protection to that bond by facilitating continued contact between a child and foster parents even if the child returns to the legal parents. This approach would have the incidental benefit of improving a child's chances for

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"substantive predicates for, or substantive limitations on, the exercise of official discretion with respect to matters of removal or visitation" concerning a foster child); *Sherrard v. Owens*, 644 F.2d 542 (6th Cir. 1981); *Kyeas v. County Dep't of Pub. Welfare*, 600 F.2d 693 (7th Cir. 1979); *Drummond v. Fulton County Dep't of Family & Children Servs.*, 563 F.2d 1200, 1207 (5th Cir. 1977); *People ex rel. A.W.R.*, 17 P.3d 192, 196 (Colo. Ct. App. 2000) (holding that foster parents have no protected interest that would enable them to prevent return of child to natural parents and to seek permanent custody of the child, and citing numerous cases in other jurisdictions reaching the same result); *Drummond v. Fulton County Dep't of Family and Children Services*, 228 S.E.2d 839 (Ga. 1976) (rejecting foster parents' petition for adoption and holding that foster parents did not even have standing to contest state decision making about the child's placement nor a right to a hearing before the child was removed from their home after two years); *Swiss v. Cabinet for Families & Children*, 43 S.W.3d 796 (Ky. Ct. App. 2001) (holding that foster parents had no standing to seek custody of child removed from their care); *Harriet II v. Alex LL*, 740 N.Y.S.2d 162 (App. Div. 2002) (overturning trial court holding that foster children have a constitutional right to maintain contact with foster parents); *Oxendine v. Catawba County Dep't of Soc. Servs.*, 281 S.E.2d 370, 375 (N.C. 1981) ("Foster parents are given only physical custody, which the department or agency having legal custody is free to revoke at any time. There is nothing in the language of the statute which gives foster parents standing to contest the department or agency's exercise of its rights as legal custodian."); *GUGGENHEIM ET AL.*, *supra* note 120, at 161. *But cf.* MASS. REGS. CODE tit. 102, § 5.08(16)(a) (2002) (requiring that any change in foster care placement "be based on a documented assessment of the child's needs"); W. VA. CODE ANN. § 49-2-14(b) (Michie 2003) (prohibiting the termination of a child's relationship with foster parents after the child has been in their care for eighteen consecutive months, absent a showing that this would be in child's best interests); *Ross & Cahn*, *supra* note 309, at 61 (noting that the Adoption and Safe Families Act established a new federal mandate that foster parents receive mere "notice of, and an opportunity to be heard at, any reviews and permanency hearings," against a history of not even allowing foster parents access to such proceedings).

<sup>318</sup> See, e.g., *Worrell v. Elkhart County*, 704 N.E.2d 1027 (Ind. 1998); *Swiss v. Cabinet for Families & Children*, 43 S.W.3d 796 (Ky. Ct. App. 2001); *Harriet II*, 740 N.Y.S.2d at 162 (overturning award of visitation to former foster mother); see also *infra* notes 428-35 and accompanying text (discussing third-party visitation).

adoption if return to the legal parents is not possible, because a bond with foster parents often leads to adoption. That such an approach is not unworkable is suggested by the fact that it is essentially what happens when parents leave their children with relatives for a time or when social services places a child in relative foster care. If an agency places a child with grandparents as foster parents, it does not try to ensure that there is no bonding with the grandparents, and the agency does not regard it as a harm to the child if the bond develops and the child later returns to the parents. This likely is because the agency assumes the parent will voluntarily arrange for continued contact with the grandparents, but as discussed below, the law generally allows courts to order such contact even over the objection of the parent. The best regime for children might be one in which they are able to continue their relationship with unrelated foster parents in the same sort of circumstances in which children are enabled to continue their relationship with "related" adults, such as step-parents and grandparents, who have previously served as their primary caregivers.

If the state does terminate parents' rights, then children have a relatively robust right to maintain their relationship with their foster parents. The adoption laws of some states make a special point of stating explicitly that foster parents are eligible to adopt the children in their care,<sup>319</sup> signaling a clear rejection of the historical practice of discouraging or even prohibiting foster parents from adopting the children they cared for,<sup>320</sup> and the law in many states affords foster parents priority over other potential adoptive parents with respect to children in their care,<sup>321</sup> at least

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<sup>319</sup> COLO. REV. STAT. ANN. § 19-5-202 (1) (West 2002) ("Any person twenty-one years of age or older, including a foster parent, may petition the court to decree an adoption."); GA. CODE ANN. § 19-8-3(b) (2003) ("Any adult person, including but not limited to a foster parent, meeting the requirements of subsection (a) of this Code section shall be eligible to apply to the department or a child-placing agency for consideration as an adoption applicant in accordance with the policies of the department or the agency."); MICH. COMP. LAWS § 710.41(3) (2003) ("This section shall not be construed to prevent a child residing in a licensed foster home from being adopted by the foster parent or parents."); N.H. REV. STAT. ANN. § 170-B:4 (2002) (specifying, among other persons, that any foster parent is eligible to adopt a child); *cf.* ARIZ. REV. STAT. § 8-105.02 (2003) ("The division shall not remove a child from the child's foster parents for the sole reason that the foster parents have applied to adopt the child.").

<sup>320</sup> See HOLLINGER, *supra* note 86, § 3.02[2].

<sup>321</sup> See, e.g., MO. REV. STAT. § 453.070(7) (2002):

Any adult person or persons over the age of eighteen, who, as foster parent or parents, have cared for a foster child continuously for a period of nine months or more and bonding has occurred as evidenced by the positive emotional and physical interaction between the foster parent and child, may apply to such authorized agency for the placement of such child with them for the purpose of adoption if the child is eligible for adoption. The agency and court shall give preference and first consideration for adoptive placements to foster parents.

Tennessee's statute includes a similar preference for foster parents:

in part out of concern for children's interests in stability and in maintaining established bonds.<sup>322</sup> Many states also lessen the investigation and probation requirements for adoption when the applicants have served as foster parents to the child in question.<sup>323</sup> However, relatives of the child have preference over foster

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When a child is placed in a foster home by the department or otherwise, and becomes available for adoption due to the termination or surrender of all parental or guardianship rights to the child, those foster parents shall be given first preference to adopt the child if the child has resided in the foster home for twelve (12) or more consecutive months immediately preceding the filing of an adoption petition.

TENN. CODE ANN. § 36-1-115(g)(1) (2002). Utah gives a preference for foster parents after only six months of maintaining an in-home relationship with the child:

In assessing the best interest of a child in the custody of the Division of Child and Family Services whose foster parents have petitioned for adoption, the court shall give special consideration to the relationship of the child with his foster parents, if the child has been in that home for a period of six months or longer.

UTAH CODE ANN. § 78-30-1.6 (2002); *see also* N.Y. SOC. SERV. LAW § 383(3) (McKinney 2003) (providing that, where foster parents have cared for a child for twelve months or more, the placing agency "shall give preference and first consideration to their application over all other applications for adoption"); VA. CODE ANN. § 63.2-1229 (Michie 2003) (requiring court to accept and investigate a petition for adoption filed by parties who have served as foster parents for the child for eighteen months or more); ALA. ADMIN. CODE r. 660-5-22-.03 (2002); FLA. ADMIN. CODE ANN. r. 65C-16.002(4)(a) (2003) ("[T]he placement of choice is with the foster parents with whom they are living if determined to be in the child's best interest.").

<sup>322</sup> *See, e.g.,* John B. v. Niagara County Dep't of Soc. Servs., 735 N.Y.S.2d 333, (N.Y. App. Div. 2001); *In re Wesley R.*, 2002 WL 31890764, \*3-\*6 (N.Y. Fam. Ct. Dec. 13, 2002) (favoring foster parents over relatives who had adopted child's siblings in contest for adoption of the child).

<sup>323</sup> This generally depends on how long the child has been in the foster parent's care. *See, e.g.,* ARIZ. REV. STAT. § 8-112(E) (2003); CAL. FAM. CODE § 8730 (West 2003); MINN. STAT. § 259.41(c) (2003) ("In the case of a licensed foster parent seeking to adopt a child who is in the foster parent's care, any portions of the foster care licensing process that duplicate requirements of the home study may be submitted in satisfaction of the relevant requirements of this section."); N.Y. DOM. REL. LAW § 112(6) (McKinney 2003) ("When the adoptive parents are the foster parents in whose home the adoptive child has been placed out or boarded out for a period in excess of three months, such period shall be deemed to constitute the required period of residence."); VA. CODE ANN. § 63.2-1229 (Michie 2003) (waiving post-placement visits by adoption agency when adopting parties have served as foster parents for eighteen months or more); *see also* N.J. STAT. ANN. § 9:3-48(c)(4) (West 2003):

If the plaintiff is a brother, sister, grandparent, aunt, uncle, birth father, stepparent or foster parent of the child, or if the child has been in the home of the plaintiff for at least two years immediately preceding the commencement of the adoption action, and if the court is satisfied that the best interests of the child would be promoted by the adoption, the court may dispense with this evaluation and final hearing and enter a judgment of adoption immediately upon

parents in many states, even where the relatives have had less of a relationship with the child than the foster parents have had.<sup>324</sup>

In sum, children have only a limited right to suspend their relationship with abusive parents; it is not sufficient that such an action would be in a child's best interests, nor is a best interest finding necessary to resume the relationship after it has been suspended. Children have only a limited right in connection with selection of foster parents as well, and no right to maintain a relationship with foster parents unless the initial legal parents entirely forfeit their claim on the child by not becoming rehabilitated, in which case they have a subordinate or non-determinative right, subject to the claims of relatives.

### 3. Ending Legal Parent-Child Relationships

Legal rules governing termination of parent-child relationships today are ridiculously complicated. Their Byzantine nature is not so much the inevitable consequence of attempting to deal with complex human realities as it is a reflection of piecemeal reactions by state legislatures to numerous successive, and sometimes inconsistent, directives from Congress (in the form of conditions attached to federal funding) and from federal courts, particularly the Supreme Court. States generally have not stepped back to ask what aims they are trying to accomplish through statutory provisions relating to termination and how they can devise a coherent body of rules for accomplishing those aims.<sup>325</sup> The only clear conclusion is that, despite the presence of rhetoric about protecting the welfare of children in many statutes and court opinions, the legal rules do not make the best interests of the child the controlling standard in termination decisions.

When people think about termination of parental rights, they think of the state forcing a parent out of a child's life. What few realize is that parents themselves can easily terminate a social relationship with a child unilaterally, just as they can easily avoid such a relationship in the first place. The state does not force any adult who does not wish to do so to continue a relationship with a child, even if that adult has been a custodial parent. Parents may not legally abandon their children in situations that endanger the children — for example, by leaving a child in a dumpster. But if they do so, the remedy is not to force them to continue the relationship, which would be nonsensical. Rather, the law's reaction is more likely to be the termination of their legal rights whether they want that or not, and perhaps to prosecute them

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completion of the preliminary hearing.

<sup>324</sup> See, e.g., *Johnson v. Burnett*, 538 N.E.2d 892 (Ill. App. Ct. 1989) (holding that foster parents had no standing to intervene in action for adoption by aunt and uncle, and no liberty interest in continued custody of child).

<sup>325</sup> See Scott & Scott, *supra* note 203, at 2468 (“[L]egal regulation of the termination of the parent-child relationship has lacked conceptual coherence.”).

criminally as well.<sup>326</sup> And there are no adverse repercussions for ending one's relationship with a child in a manner that does not endanger the child. A parent may voluntarily surrender his or her parental rights at any time in order to free the child for potential adoption by other adults.<sup>327</sup> In recent years, nearly every state has passed legislation explicitly authorizing parents to leave their infant children at a "safe haven" site without fear of the sort of legal action that might ensue if they abandoned a child in such a way as to put the child in danger of serious harm.<sup>328</sup> As with a biological parent who elects not to establish a relationship in the first instance, the state can and does compel some parents who voluntarily end their relationship with a child to continue providing financial support for the child.<sup>329</sup> But otherwise the state requires no continued involvement in the child's life.

This freedom of parents to slough off a child actually appears consistent with children's interests. Parents inclined to do that presumably would not make good parents for a child if forced to occupy that role. Thus, biological parents' liberty to avoid a relationship with a child protects children's interests in the limited range of situations in which biological parents prefer not to be legal parents and act to effectuate that preference.

On the other hand, when indifferent parents take no action themselves to end their legal parenthood, the children's interest in avoiding a parent-child relationship with adults who do not want to be parents receives little protection. This is also true with respect to incompetent or malevolent parents. Children do not have a comparable right to end a relationship with a legal parent. Termination does not occur simply because it is in a child's best interests that it occur — that is, in a

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<sup>326</sup> See *D.K.M. v. R.J.S.*, 924 P.2d 985 (Wyo. 1996).

<sup>327</sup> See HOLLINGER, *supra* note 86, § 2.01; See, e.g., S.D. CODIFIED LAWS §§ 25-5A-28, 25-5A-29 (Michie 2002). There have been instances in which courts have refused biological parents' requests for termination of their own rights, but these are cases in which no other persons were seeking to adopt the child and the effect and purpose of the ruling was simply to continue to impose a support obligation on the petitioning parents; the courts did not order the parents to have a social relationship with the child. See, e.g., *In re D.W.K.*, 365 N.W.2d 32 (Iowa 1985).

<sup>328</sup> See Child Welfare League of Am., Baby Abandonment Project, at <http://www.cwla.org/programs/prev/flocrittsafehaven.htm> (listing 40 states that passed such laws between 1999 and August 2002) (last visited June 23, 2003); Tanya Amber Gee, Comment, *South Carolina's Safe Haven for Abandoned Infants Act: A "Band-Aid" Remedy for the Baby-Dumping "Epidemic,"* 53 S.C. L. REV. 151, 151 n.2 (2001).

<sup>329</sup> See, e.g., HAW. REV. STAT. § 571-63 (2002) ("No judgment of termination of parental rights . . . shall operate to terminate the mutual rights of inheritance of the child and the parent or parents involved, or to terminate the legal duties and liabilities of the parent or parents, unless and until the child has been legally adopted."); D.C. CODE ANN. § 16-2361 (2003) (noting that a child retains the ability to inherit until final adoption decree); OKLA. STAT. ANN. tit. 10, § 7006-1.3(B) (West 2003) (providing that the termination of parental rights does not terminate the duty of either parent to support his or her minor child).

situation where it might reasonably be said that the child would, if able, choose to end the relationship. Indeed, the United States Supreme Court has suggested in dictum that it would violate parents' constitutional rights to terminate their legal parental status simply because that is best for the child,<sup>330</sup> and many state courts have taken that view.<sup>331</sup> Consistent with this perception of legal parents' constitutionally protected legal entitlement to maintain their legal status, state statutes in fact set a much higher threshold.

All states' statutes contain sections authorizing courts to end an adult's role as legal parent of a child, against the parent's wishes, for any one of several reasons — abuse, neglect, abandonment, non-support, and incarceration being the most common.<sup>332</sup> When courts do so, the result is typically to sever completely the social relationship between that adult and the child.<sup>333</sup> Thereafter, the child could be in one of several situations. If there is already another legal parent — for example, if one of two existing legal parents has his or her rights terminated and the other does not — the child will thereafter typically have just one legal parent, absent later adoption by a spouse of that parent, and will be in a custodial relationship with that parent. If there is not another legal parent remaining, the child might be adopted immediately, in which case the state places the child into a new parent-child relationship with one or two adults, by the process described above in section II.A.1.c, or the state might continue placement in foster care, discussed above in section II.A.2.d, while it seeks adoptive parents for the child.

Termination can occur by one of two procedural routes. The state may petition

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<sup>330</sup> See *Santosky v. Kramer*, 455 U.S. 745, 760 n.10 (1982); see also Meyer, *supra* note 47, at 782–91.

<sup>331</sup> See, e.g., *In re Scott S.*, 775 A.2d 1144, 1150–51 (Me. 2001); *In re Baby M*, 537 A.2d 1227, 1252 (N.J. 1988) (“It has long been decided that the mere fact that a child would be better off with one set of parents than with another is an insufficient basis for terminating the natural parent’s rights.”). Meyer notes that “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.” Meyer, *supra* note 47, at 785.

<sup>332</sup> See *infra* notes 339–50 and accompanying text.

<sup>333</sup> In practice, an adult whose parental rights have been terminated involuntarily could maintain a relationship with the child if the child’s subsequent caregiver lawfully permits it. This is more likely when the subsequent caregiver had a relationship with the person whose rights were terminated, although, of late, adoptive parents have increasingly been willing and encouraged to allow continuing contact between the ex-parent and the child. Of course, when a person’s parental rights were terminated because of serious abuse or endangerment, the subsequent caregiver might be legally prohibited from allowing contact; giving the ex-parent access might be deemed neglect. A few states today have statutory provisions authorizing courts to order visitation between a terminated parent and the child, provided that it is consistent with the best interests of the child. See FLA. STAT. ANN. § 39.811(7)(b) (West 2002); LA. CHILD. CODE ANN. art. 1037.1(A) (West 2003); MD. CODE ANN., FAM. LAW § 5-312(e) (2002).

for termination under child protection provisions in state codes. In addition, private parties seeking to adopt a child can, in connection with their petition to adopt, seek termination of an existing legal parent's rights. Importantly, in most jurisdictions, neither children themselves nor their representatives can initiate proceedings to end a parent-child relationship.<sup>334</sup>

With respect to state petitions for termination under child protection laws, state statutes typically admonish courts to consider in some fashion what is best for the child involved. This requirement usually appears in precatory language separate from the actual rules that the courts must apply.<sup>335</sup> In many states, the best interests standard is also stated as a necessary, but not sufficient, condition for terminating parental rights in one of the several substantive grounds.<sup>336</sup> In other words, state laws prohibit courts from terminating parental rights when that would be worse for

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<sup>334</sup> See Jenina Mella, Annotation, *Termination of Parental Rights Based on Abuse or Neglect*, 9 CAUSES OF ACTION 2D 483 § 17 (2003). A representative for a child in foster care might, however, be able to force the state to seek termination — for example, by seeking a show-cause order requiring the state to justify a failure to comply with compulsory termination rules, such as those imposed on the states by the federal Adoption and Safe Families Act. See *infra* notes 356–58 and accompanying text.

<sup>335</sup> See ALASKA STAT. §§ 47.10.088(c), 47.10.086(f) (Michie 2002); ARIZ. REV. STAT. § 8-533(B) (2003); CAL. FAM. CODE § 7890 (West 2003); COLO. REV. STAT. § 19-3-604(3) (2002); D.C. CODE ANN. § 16-2353(a) (2003); FLA. STAT. ANN. § 39.810 (West 2002); GA. CODE ANN. § 15-11-94 (2002); IDAHO CODE § 16-2005(e) (Michie 2002); IOWA CODE § 232.116(2) (2003); KAN. STAT. ANN. § 38-1583(e) (2002); ME. REV. STAT. ANN. tit. 22, § 4050(1) (West 2003); MASS. GEN. LAWS ANN. ch. 210, § 3(a) (West 2003); MICH. COMP. LAWS §§ 712A.19(5)(b), 712A.19A(7) (2002); MINN. STAT. § 260C.301(7) (2002); MISS. CODE ANN. § 93-15-103(1), (4) (2003); MO. REV. STAT. § 211.447(5) (2003); MONT. CODE ANN. §§ 41-3-604(2)(b), 42-2-608(1)(h)(i) (2002); N.H. REV. STAT. ANN. §§ 169-D:10(a), 170-C:1 (2002); N.J. STAT. ANN. § 9:2-4(c) (West 2002); N.M. STAT. ANN. § 32A-5-15(A) (Michie 2002); N.C. GEN. STAT. § 7B-1100(3) (2003); N.D. CENT. CODE § 14-09-06.2 (2002); OHIO REV. CODE ANN. § 2151.01 (Anderson 2002); OKLA. STAT. ANN. tit. 10, § 7006-1.1(A) (West 2002); 23 PA. CONS. STAT. ANN. § 2511 (West 2002); R.I. GEN. LAWS §§ 15-7-7(c)(1), 40-11-12.1(e) (2002); S.D. CODIFIED LAWS § 26-8A-27 (Michie 2002); UTAH CODE ANN. § 78-3a-406(3) (2003); W. VA. CODE ANN. § 49-6-5b(b)(2) (Michie 2003); WIS. STAT. ANN. § 48.417(2)(b) (West 2003).

<sup>336</sup> See ALA. CODE § 12-15-65(g)(1) (2002); ARK. CODE ANN. § 9-27-341 (Michie 2002); CONN. GEN. STAT. ANN. § 45a-717(e)(1) (West 2001); DEL. CODE ANN. tit. 13, § 1103(a) (2002); HAW. REV. STAT. ANN. § 571-63 (Michie 2003); 705 ILL. COMP. STAT. ANN. 405/2-21(5) (West 1999); IND. CODE ANN. § 31-35-2-4(b)(2) (Michie 2002); KY. REV. STAT. ANN. § 625.090(1)(b) (Michie 2002); LA. CHILD. CODE art. 1037(a) (West 2003); ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(a) (West 2003); MD. CODE ANN., FAM. LAW § 5-13(a) (2002); NEB. REV. STAT. § 43-292 (2003); NEV. REV. STAT. 128.105(1) (2002); N.Y. FAM. CT. ACT § 614-1(e) (McKinney 2002); OR. REV. STAT. § 419B.500 (2002); S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 2002); TENN. CODE ANN. § 36-1-113(c)(2) (2002); TEX. FAM. CODE § 161.001(2) (Vernon 2002); VA. CODE ANN. § 16.1-283 (Michie 2002); VT. STAT. ANN. tit. 15A, § 3-504(a) (2002); WASH. REV. CODE § 13.34.190(2) (2003).

the child than the status quo, but do not require that courts *do* terminate when that would be better for the child, and in fact effectively *preclude* courts from terminating *solely* on the grounds that that would be better for the child. In almost all cases, courts must also find either that the parent manifested an intent to waive his or her claim to the child or that the parent is in some way culpable — egregiously so and for a protracted period of time.<sup>337</sup> Under state statutes and court decisions applying them, “the essential requirement is that the decision to terminate rights must be focused upon the parent’s conduct or condition as opposed to the interests of the child.”<sup>338</sup>

Abandonment, non-support, and non-contact predicates for termination of parental rights, which exist in nearly every state,<sup>339</sup> effectively base termination on a decision by the parent that he or she does not wish to have a parent-child relationship with the child. The concept of abandonment entails an intention on the part of the parent to exit the parent-child relationship, and statutory provisions

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<sup>337</sup> See Meyer, *supra* note 47, at 775–82. Meyer notes that a few states have had statutory provisions that ostensibly authorize termination based on “no fault”-type grounds like a parent’s simple inability to care for a child, the child’s bonding with a new family, or even, in two states, that termination would be in the child’s best interests. Meyer explains, however, that courts in these states have either struck down such statutes as violative of parents’ constitutional rights or have injected a fault requirement into the statutory provisions, refusing to terminate parental rights when the parent has not done something blameworthy. *Id.* at 778–81, 787.

<sup>338</sup> *Id.* at 785–86.

<sup>339</sup> See ALA. CODE §§ 26-18-6, 26-18-7 (2002); ARK. CODE ANN. § 9-9-220(2)(A) (Michie 2002); CAL. FAM. CODE § 7822 (West 2003); CONN. GEN. STAT. ANN. § 17a-112(c) (West 2001); COLO. REV. STAT. § 19-3-604 (2002); DEL. CODE tit. 13, § 1103(a) (2002); D.C. CODE ANN. §§ 16-2354(b)(3)-B, 16-2353(b)(3A) (2001); FLA. STAT. ANN. §§ 63.0423, 383.50 (West 2002); GA. CODE ANN. § 15-11-94(b)(3) (2002); HAW. REV. STAT. ANN. § 571-61(b)(1) (Michie 2003); IDAHO CODE § 16-2005 (Michie 2002); IOWA CODE § 600A.8(3) (2003); KAN. STAT. ANN. § 38-1583(d) (2002); KY. REV. STAT. ANN. § 625.090(2) (Michie 2002); LA. CHILD. CODE arts. 1015(4), 1037(4) (West 2003); ME. REV. STAT. ANN. tit. 22, § 4055(1)(B)(2)(b)(iii) (West 2003); MD. CODE ANN., FAM. LAW § 5-313(a) (2002); MASS. GEN. LAWS ANN. ch. 210, § 3(c) (West 2003); MICH. COMP. LAWS ANN. § 712A.19b(3)(a) (West 2002); MINN. STAT. § 260C.301(1)(b)(1) (2002); MISS. CODE ANN. § 93-17-7(2)(b) (2003); MO. REV. STAT. § 211.447(4) (2003); MONT. CODE ANN. § 42-2-608(1)(b) (2002); NEB. REV. STAT. § 43-292(3) (2003); N.H. REV. STAT. ANN. § 170-C:1 (2002); NEV. REV. STAT. 128.106(5) (2002); N.J. STAT. ANN. § 9:2-13(d) (West 2002); N.M. STAT. ANN. § 32A-5-15(B) (Michie 2002); N.C. GEN. STAT. § 7B-1111(7) (2001); N.D. CENT. CODE § 27-20-44(1)(a) (2002); OHIO REV. CODE ANN. §§ 2151.414(E)(14) (Anderson 2002); OKLA. STAT. ANN. tit. 10, § 7505-4.2(b) (West 2002); OR. REV. STAT. § 419B.508 (2002); 23 PA. CONS. STAT. ANN. § 2511A(1) (West 2002); R.I. GEN. LAWS § 15-7-7(2)(V) (2002); S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 2002); TEX. FAM. CODE ANN. § 161.001(1) (Vernon 2002); UTAH CODE ANN. § 78-3A-408 (2003); VT. STAT. ANN. tit. 15A, § 3-504 (2002); WIS. STAT. ANN. § 48-415(1) (West 2003); WYO. STAT. ANN. § 1-22-110 (Michie 2001).

regarding failure to support or contact the child typically state explicitly a requirement of willfulness.<sup>340</sup> Simply having been absent and uninvolved is not sufficient; a court must find that the parent's absence and lack of involvement reflected an intention to not have a relationship.<sup>341</sup> Thus, when a mother has prevented the biological father from becoming aware of, locating, or having contact with her child, courts do not find abandonment.<sup>342</sup> Courts often find that the most meager of efforts to maintain a relationship require denial of a petition to terminate on abandonment grounds.<sup>343</sup> A parent might leave a child for years in the care of another person, but occasionally drop in for a visit, and such occasional contact is sufficient to prevent termination.<sup>344</sup>

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<sup>340</sup> See Meyer, *supra* note 47, at 776–77; see also ALA. CODE §§ 26-18-6, 26-18-7 (2002); CAL. FAM. CODE § 7822 (West 2003); COLO. REV. STAT. § 19-3-604(1)(a)(I) (2002); DEL. CODE ANN. tit. 13, § 1103(a) (2002); FLA. STAT. ANN. §§ 63.0423, 383.50 (West 2002); HAW. REV. STAT. ANN. § 571-61(b)(1) (Michie 2003); IDAHO CODE § 16-2005 (Michie 2002); IOWA CODE § 600A.8(3) (2003); MISS. CODE ANN. § 93-17-7(2)(b) (2003); MONT. CODE ANN. § 42-2-608(1)(b) (2002); NEB. REV. STAT. § 43-292(3) (2003); N.H. REV. STAT. ANN. § 170-C:1 (2002); NEV. REV. STAT. 128.106(5) (2002); N.J. STAT. ANN. § 9:2-13(d) (West 2002); N.M. STAT. ANN. § 32A-5-15(B) (Michie 2002); N.C. GEN. STAT. § 7B-1111(7) (2001); N.D. CENT. CODE § 27-20-44(1)(a) (2002); OHIO REV. CODE ANN. 2151.414(E)(14) (Anderson 2002); OKLA. STAT. ANN. tit. 10, § 7505-4.2(b) (West 2002); OR. REV. STAT. § 419B.508 (2002); 23 PA. CONS. STAT. ANN. § 2511A(1) (West 2002); R.I. GEN. LAWS § 15-7-7(2)(V) (2002); S.C. CODE ANN. § 20-7-1572 (Law. Co-op. 2002); TEX. FAM. CODE ANN. § 161.001(1) (Vernon 2002); UTAH CODE ANN. § 78-3A 408 (2003); VT. STAT. ANN. tit. 15A, § 3-504 (2002); WIS. STAT. ANN. § 48-415(1) (West 2003); WYO. STAT. ANN. § 1-22-110 (Michie 2001).

<sup>341</sup> HOLLINGER, *supra* note 86, § 2.10[2]; see, e.g., LA. CHILD. CODE art. 1015 (West 2003) (defining abandonment of a child as “leaving him under circumstances demonstrating an intention to permanently avoid parental responsibility,” as by failing to have contact with or provide support for the child); *In re Adoption of SMR*, 982 P.2d 1246, 1249 (Wyo. 1999) (“In order for a willful abandonment of a child to occur, there must be clear and convincing evidence of ‘an actual intent to terminate the parental ties and a purpose to relinquish parental ties.’”).

<sup>342</sup> See Meyer, *supra* note 47, at 766–68, 777.

<sup>343</sup> See HOLLINGER, *supra* note 86, § 2.10[3][c]; Meyer, *supra* note 47, at 771. Meyer notes that, in recent years (in reaction to Baby Richard-type cases), some state legislatures and courts have explicitly or effectively modified adoption laws so as to require more effort on the part of a biological father in order to avoid termination on the basis of abandonment. *Id.* at 772–75. But the failure to make that effort is still excused if it does not reflect willful abandonment. *Id.* at 777.

<sup>344</sup> See, e.g., *SMR*, 982 P.2d at 1248 (rejecting termination petition as to a mother who had left her child in the custody of the biological father's relatives for five years, with only “intermittent personal and telephone contact with the child”); see also *In re J.J.J.*, 718 P.2d 948, 952 (Alaska 1986) (“[W]e have declined to dispense with a noncustodial parent's right to withhold consent to a stepparent adoption as long as the noncustodial parent had made a few perfunctory communications or an occasional gesture of support.”).

These termination provisions therefore really effectuate a right of the parents — namely, a right to end the relationship at their election. The parent is often absent in those cases from the proceedings, not objecting to termination but simply not having formally relinquished his or her rights. When the parent does object, a decision to terminate effectively holds the parent to the choice he or she implicitly made in exercising the right adults have to avoid or end a relationship with a child. The child might be said to possess, at most, a reliance interest that receives protection only at the state's discretion.

Provisions for termination based on criminal conviction and incarceration are sometimes justified as reflecting the same sort of judgment about a parent — namely, that he or she has effectively chosen to end the parent-child relationship. Some courts have stated that parents who choose to engage in conduct they know could result in being incarcerated, while also knowing that they have a child and parental responsibilities, effectively choose to abandon the child.<sup>345</sup> In addition, in most states, the mere fact of incarceration, no matter how long the sentence, is not sufficient basis for terminating; a court must also find an additional reason for thinking the convict is unfit to parent — for example, if the crime for which he or she was sentenced was a physical attack on a child.<sup>346</sup>

When termination is based on abandonment, non-support, or incarceration, the best interests of the child might not be relevant at all; it is generally neither a necessary nor a sufficient condition that termination be best for the child.<sup>347</sup> This means that a parent-child relationship can continue even when that is not best for the child — for example, because it prevents the child from entering into other relationships, even though the existing legal parent is incapable of acting as a parent. Children thus have no right to end a legal relationship with a parent who has abandoned them. The irrelevance of children's interests also means that a relationship could in theory be terminated even when *that* is not best for the child. For example, in the few states where termination can be based on incarceration *per*

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<sup>345</sup> See, e.g., *F.G. v. Dep't of Children & Families*, 820 So. 2d 1027, 1030 (Fla. 2002) (treating father's imprisonment for drug offenses as demonstrative of abandonment); *In re Adoption of C.D.M.*, 39 P.3d 802, 810 (Okla. 2001) (finding that father's conduct leading up to incarceration, including commission of criminal acts that resulted in imprisonment, evidenced disregard for parental responsibilities); *id.* at 809 (citing additional cases).

<sup>346</sup> HOLLINGER, *supra* note 86, § 2.10[2]; see, e.g., *In re Brian James D.*, 550 S.E.2d 73, 76 (W. Va. 2001); *In re Dayley*, 733 P.2d 743, 772 (Idaho 1987):

[A]bsent other factors which indicate abandonment of the child, the mere fact of incarceration is insufficient to establish abandonment. The evidence in this case clearly indicates that the respondent has done what limited things are in his power to continue to maintain a relationship with the child and that prior to his incarceration he maintained regular personal contact.

<sup>347</sup> See, e.g., ARK. CODE ANN. § 9-9-220 (Michie 2002); COLO. REV. STAT. § 19-3-604(1)(a)(I) (2002); GA. CODE ANN. § 19-7-1(b) (2002); LA. CHILD. CODE art. 1015 (West 2003).

se,<sup>348</sup> one parent might seek termination of the other's parental rights based solely on the fact that the other parent is in prison, even though there is no gain to the child's well-being from doing so, and even though this might have the effect of permanently ending a relationship that could have been beneficial at some point in the future. The child would ordinarily be a party to such an action, and his or her guardian *ad litem* could object if the rule were applied inappropriately, so children do have some right against wrongful termination, but an imperfectly-tailored or subordinate one.

Abuse and neglect predicates for termination of parental rights are generally the most complicated. The Adoption and Safe Families Act, discussed below, has made them more so. Unlike abandonment and non-support/contact cases, cases in which a termination petition is based upon allegations of abuse or neglect are more often ones in which the legal parent has been involved in the child's life and wishes to continue to do so, but has for whatever reason not acted toward the child in a minimally acceptable way. This is not always the case, however. Some parents abuse or neglect children from birth. Indeed, some women abuse their children before they are born by ingesting toxic substances.

In many states, *one* of the findings a court must make, in order to terminate on the basis of abuse or neglect, is that termination would be in the best interests of the child.<sup>349</sup> In addition to finding that termination would be best for the child, however, a court must also find, by clear and convincing evidence, that the abuse or neglect was severe, that state agencies have made "reasonable efforts" to rehabilitate the parents, and that the parents have failed to respond appropriately to the state's efforts.<sup>350</sup> Thus, termination does not occur even when that would be best for the child, if (a) the abuse or neglect was not so egregious as to trigger the judge's sense

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<sup>348</sup> See, e.g., ALA. CODE § 26-18-7(a)(4) (2002); FLA. STAT. ANN. § 39.806(1)(d) (West 2002) (termination based on lengthy incarceration).

<sup>349</sup> See, e.g., HAW. REV. STAT. ANN. § 571-63 (Michie 2003) ("No judgment of termination of parental rights entered under sections 571-61 to 571-63 shall be valid or binding unless it contains a finding that . . . the adjudication of termination of parental rights is necessary for the protection and preservation of the best interests of the child concerned . . ."); see also KY. REV. STAT. ANN. § 625.090 (Michie 2002); MO. REV. STAT. § 211.447(5) (2003). In a few states, the wishes of the child may be taken into account. See CAL. FAM. CODE § 366.26(c)(1)(B) (West 2003) (stating that a child over twelve can stop termination proceedings); GA. CODE ANN. § 19-8-4 (2002) (stating that a child over fourteen must consent to an adoption that terminates parental rights); N.M. REV. STAT. ANN. § 40-4-9(A)(2) (Michie 2002) (sating that the wishes of a child over fourteen can be respected); S.C. CODE ANN. § 20-7-1690(A)(1) (Law. Co-op. 2002) (stating that a child over fourteen must consent to an adoption that terminates parental rights).

<sup>350</sup> See Mella, *supra* note 334, §§ 4, 9, 10; see, e.g., 13 DEL. CODE ANN. tit. 13, § 710A (2002); D.C. CODE ANN. §§ 16-914, 16-1005 (2001); MICH. COMP. LAWS ANN. § 712A.13a (West 2002); N.J. STAT. ANN. § 2C:25-29 (West 2002); WYO. STAT. ANN. § 14-2-309 (Michie 2002).

of moral outrage, (b) the state agencies have not yet supported the parent in efforts to become rehabilitated, even if the likelihood of rehabilitation is slight, *or* (c) the parent has tried to reform himself or herself and has had some modest success. Some further explanation of each of these requirements will help make clear how they can operate contrary to the welfare of the child involved.

First, the substantive standards of abuse or neglect sufficient to terminate parental rights are quite high and usually require that the adult already have harmed the child.<sup>351</sup> This means that it is extremely difficult to terminate the parental rights of a person who has not yet spent much time with a child, even if that person is clearly unsuitable to serve as a parent. This might be true, for example, with an infant child and a drug addicted mother or a man who has been declared the legal father even though he has little interest in caring for a child or assisting the mother. It also means that it is extremely difficult to terminate the rights of a parent who keeps a child alive and does not inflict serious physical injury, but who provides no

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<sup>351</sup> For example, Florida sets forth its standards in the following manner:

[A]ny person who has knowledge . . . may petition for the termination of parental rights . . . [w]hen the parent or parents engaged in egregious conduct . . . that threatens the life, safety, or physical, mental, or emotional health of the child. . . . [T]he term "egregious conduct" means abuse, abandonment, neglect, or any other conduct . . . that is deplorable, flagrant, or outrageous by a normal standard of conduct. Egregious conduct may include an act or omission that occurred only once but was of such intensity, magnitude, or severity as to endanger the life of the child.

FLA. STAT. ANN. § 39.806(1)(f)(2) (West 2000). Oklahoma's substantive standards are as follows:

[A] court may terminate the rights of a parent to a child in the following situations[:] . . . a. the parent has physically or sexually abused the child . . . or failed to protect the child . . . from physical or sexual abuse that is heinous or shocking to the court[:] b. the child . . . has suffered severe harm or injury as a result of such physical or sexual abuse[:] c. the parent has physically or sexually abused the child . . . or failed to protect the child . . . from physical or sexual abuse subsequent to a previous finding that such parent has physically or sexually abused the child . . . or failed to protect the child . . . from physical or sexual abuse[:] d. the child has been adjudicated a deprived child, pursuant to the provisions of the Oklahoma Children's Code, as a result of a single incident of severe sexual abuse, severe neglect or the infliction of serious bodily injury or torture to the child . . . [:] or e. the parent has inflicted chronic abuse, chronic neglect or torture on the child . . . .

OKLA. STAT. ANN. tit. 10, § 7006-1.1(10) (West 2002); *see also* ALA. CODE § 26-18-7 (2002) (authorizing termination when a parent "has tortured, abused, cruelly beaten or otherwise maltreated the child"); LA. CHILD. CODE art. 1015(3) (West 2003); *In re Baby M*, 537 A.2d 1227, 1242 (N.J. 1988) (stating that New Jersey's substantive rule for involuntary termination of parental rights "requires a most substantial showing of harm to the child if the parental relationship were to continue, far exceeding anything that a 'best interests' test connotes").

nurturing, is psychologically abusive, routinely inflicts minor physical harms on the child, and/or regularly puts the child at moderate risk of harm by others.<sup>352</sup> There is a kind of “(at least) one severe bite” rule for ending a parent-child relationship.

One might view this legal regime as reflecting a moral judgment that parents are entitled to do whatever they want with a child up to the point at which their conduct suggests that they really do not want to be a parent, or at which their conduct triggers condemnation even by those onlookers who have the lowest standards of parenting. Looked at from the child's standpoint, it might reflect a moral judgment that children are entitled to no more than bare physical survival. What it clearly does not reflect is a legislative judgment that children are always or even usually better off staying with their biological parents absent the most egregious conduct.<sup>353</sup>

Second, the requirement of reasonable efforts means that a court must decline a petition to terminate parental rights when the state agencies have not done their job — that is, when they have not yet offered the parent the right kind of services, or enough services, and given them time to take advantage of the services. This is true even if there is, at the time of the court's decision (regardless of whether there was initially), no reasonable prospect of rehabilitating the parent. In such circumstances, the statutes on their face compel the court to reject the petition for termination and to order the state agency to make (perhaps futile) rehabilitative efforts.<sup>354</sup>

Third, the requirement that the parent not have responded appropriately has two implications. It reinforces the requirement that state agencies provide services; if the parent can convince a judge that his or her failure to rehabilitate was not because of a willful refusal to cooperate, but because the agency has not done enough, then the court must deny the petition. In practice, at least, it also results in petitions for termination being denied on the basis of the slenderest hope of future improvement. If the parent has been trying, and especially if she has made some modest improvements, courts tend to order that she be given more time, even if the hope is slender and the potential improvement would bring the parent up only to the lowest acceptability of fitness.<sup>355</sup>

In sum, abuse and neglect predicates for termination reflect a balancing of the rights of parents against the welfare of children, with parents' rights usually coming

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<sup>352</sup> See also *supra* notes 299–306 and accompanying text.

<sup>353</sup> Cf. Scott & Scott, *supra* note 203, at 2412 (“For the population of children in foster care, a large gap separates the cases in which parents can resume care of their child from the cases in which parenting is so clearly deficient that state agents pursue termination of parental rights.”).

<sup>354</sup> See, e.g., *In re Brittany S.*, 22 Cal. Rptr. 2d 50 (Ct. App. 1993); Div. of Fam. Servs. v. X., 802 A.2d 325, 337 (Del. Fam. Ct. 2002); see also Anne M. Payne, *Parent's Mental Deficiency as Factor in Termination of Parental Rights — Modern Status*, 1 A.L.R.5th 469 §§ 16.5, 18[c], 40[b], 41, 43 (1992).

<sup>355</sup> See Scott & Scott, *supra* note 203, at 2410–12, 2469.

out the winner. In any event, as noted above, children and their representative generally have no authority to initiate termination proceedings on this basis. As with abandonment, non-support, and incarceration, then, children have no right to end their relationship with parents on the grounds that they are abusive and/or neglectful *per se*.

Congress endeavored to end the chronic problems of long-term foster care, and of state agencies undertaking exercises in futility, by passing the Adoption and Safe Families Act ("ASFA"), which became effective in 1997.<sup>356</sup> The most salient features of ASFA are provisions requiring that states, as a condition for receiving certain federal funds, (1) require child protective agencies to petition for termination, and authorize courts to order termination, on the grounds simply that a child has been in foster care for fifteen of the prior twenty-two months (the "15-22 rule"), and (2) forego the reasonable efforts requirement in instances where the parent in question has previously had parental rights terminated as to another child, has subjected a child to "aggravated circumstances," such as torture or severe and chronic physical abuse, or has engaged in one of a number of specific, heinous crimes, such as having killed another family member or having created the child in question by raping the mother.<sup>357</sup> In either of these two situations, states may avoid application of the rule by showing that it would operate contrary to the best interests of the child. ASFA also requires that whenever states begin the termination process, and there is not another legal parent available, they must concurrently begin the process of making the child available for adoption or otherwise finding a suitable permanent custodial arrangement.<sup>358</sup>

These are positive steps toward securing permanent loving parent-child relationships with other adults. And it might be that ASFA, by mandating termination proceedings in certain circumstances, gives children and their representatives a basis for triggering a termination action when the state fails to initiate one. It does not confer on children standing *per se* to petition for termination, but it provides a clear basis for a show-cause order against the state child protective agency, which a guardian *ad litem* should be able to request in a foster care review hearing or in an initial adjudication of abuse or neglect. This might be one respect, then, in which children can be said to have a right to end a parent-child relationship, albeit a limited one. ASFA contains significant gaps, however. For example, when a child has been in and out of foster care, and out for sufficient periods so that the 15-22 rule is not triggered, a child today might still linger in the system for years, even though he or she might be a viable candidate for adoption. Or when a child has not been in foster care at all — for example, when

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<sup>356</sup> Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended in scattered sections of 42 U.S.C.) [hereinafter ASFA].

<sup>357</sup> 42 U.S.C. § 671(a)(15)(D) (2000).

<sup>358</sup> *Id.* § 671(a)(15)(E)(ii).

the child has been in the custody of another parent, he or she might remain legally tethered to a terrible parent for many years. And it leaves the "reasonable efforts" requirement in place for cases where there is no real likelihood of transforming a legal parent into a good caretaker but where that parent has not engaged in conduct so extreme as to trigger the aggravated circumstances exception.

Adding further complexity to the law of termination of parental rights, states typically have, in addition to provisions for termination in their child protection statutes, provisions in another part of their codes — the part dealing with adoption — authorizing involuntary termination of parental rights. They do so implicitly by identifying special circumstances in which the consent of a legal parent to the adoption is not required and by stating that adoption terminates the rights of that parent.<sup>359</sup> The circumstances in which parental consent is not required generally include the sort of "implicit relinquishment" predicates found in child protective statutes — that is, abandonment and non-contact/non-support.<sup>360</sup> Otherwise, the biological parents must be proven unfit or voluntarily relinquish their claim on the child.<sup>361</sup> It is not enough to show that it would be in the child's best interests for the persons petitioning for adoption to be his or her legal parents.<sup>362</sup>

This has been so even in the notorious "botched adoption" cases, such as those involving "Baby Richard," "Baby Jessica," and "Baby Emily," where an adoption has been formally approved and adoptive parents have proceeded to care for a child for a significant period, but then the biological father surfaces and claims that his parental rights were not properly terminated. State courts have held in those cases

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<sup>359</sup> See, e.g., HOLLINGER, *supra* note 86, § 2.10.

<sup>360</sup> See CARBONE, *supra* note 189, at 170–71; HOLLINGER, *supra* note 86, § 2.10; Meyer, *supra* note 47, at 770–74.

<sup>361</sup> HOLLINGER, *supra* note 86, § 2.10; see, e.g., 705 ILL. COMP. STAT. ANN. 405/2-29(2) (West 2003).

<sup>362</sup> See HOLLINGER, *supra* note 86, § 2.10; Cahn, *supra* note 34, at 18–19 ("There is simply no issue as to whether it would be in the best interests of the child for her to remain with her biological parents, or for her to be adopted . . ."). Cahn notes that some states ostensibly allow for adoption where biological parents are "withholding consent contrary to the child's best interests," but also writes that in practice, "the standards are generally interpreted far more strictly than a simple best interest test." *Id.* at 15 n.58; see, e.g., VA. CODE ANN. § 63.2-1203 (Michie 2003) ("If, after consideration of the evidence, the circuit court finds that the valid consent of any person or agency whose consent is required is withheld contrary to the best interests of the child . . . , the circuit court may grant the petition without such consent . . ."); Hickman v. Fuddy, 489 S.E.2d 232, 237 (Va. Ct. App. 1997) ("[N]ot only must the prospective adoptive placement serve the child's best interests, but the continued relationship with the non-consenting parent must prove to be detrimental."); see also *In re Baby M*, 537 A.2d 1227, 1243 (N.J. 1988) ("[W]here there has been no written surrender to an approved agency or to DYFS, termination of parental rights will not be granted in this state absent a very strong showing of abandonment or neglect. . . . It is clear that a 'best interests' determination is never sufficient to terminate parental rights . . .").

that they may not even consider the interests of the child.<sup>363</sup> State officials have wrenched young children from their families to hand them over to men who are strangers in every way other than the biological tie. Although formally this is a situation of non-termination — that is, the courts decide that a man's parental rights vested at an earlier time even though they were not recognized, and those rights were never terminated — it is, in reality, another form of termination. It is a termination of the parent-child relationship between the child and the adoptive parents, a termination based on neither intentional forfeit nor misuse of custodial power on the part of the parents. Courts consistently have rejected claims by adoptive parents that they and their children have a right to maintain the family relationship they have formed.<sup>364</sup> These outcomes are so patently offensive to the personhood of children that several legislatures have responded in recent years by passing legislation requiring that the best interests of the child control in those situations.<sup>365</sup> Perhaps because the claim of the non-biological-parent caregivers is so strong in these situations, the law is beginning to treat them as on the same footing as biological parents and therefore may resolve the disputes on the basis of a rule similar to that applied in custody disputes between biological parents in divorce and paternity proceedings. But the prevailing rule appears still to be that the child's interests are irrelevant in these situations and that everything turns on the rights of the biological parent.

Finally, the talisman of exclusive parental status rears its head again in the termination context. Traditionally, termination under either child protective statutes or adoption statutes has resulted in a permanent and complete severance of the

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<sup>363</sup> HOLLINGER, *supra* note 86, § 8.01[a]. See generally Scott A. Resnik, *Seeking the Wisdom of Solomon: Defining the Rights of Unwed Fathers in Newborn Adoptions*, 20 SETON HALL LEGIS. J. 363 (1996) (describing and critiquing judicial action in these cases).

<sup>364</sup> See HOLLINGER, *supra* note 86, § 8.01[a].

<sup>365</sup> See, e.g., NEV. REV. STAT. 128.160 (2002):

1. In any action commenced by the natural parent of a child to set aside a court order terminating the parental rights of the natural parent after a petition for adoption has been granted, the best interests of the child must be the primary and determining consideration of the court.

2. After a petition for adoption has been granted, there is a presumption . . . that remaining in the home of the adopting parent is in the child's best interest.

See also OKLA. STAT. ANN. tit. 10, § 7505-7.2 (West 2002) (precluding challenge to adoption on any grounds after three months, and applying best interests standard to any challenge prior to three months following adoption decree); VA. CODE ANN. § 63.2-1205 (Michie 2002) (defining Virginia's best interests of the child standard); *Moore v. Asente*, — S.W.3d —, 2003 WL 21355996 (Ky. June 12, 2003) (holding, on basis of novel interpretation of general non-parent custody law, that adoptive parents had "physical custody" of child relinquished to them by biological parents, even though biological parents' consents were later found invalid, and that trial court should therefore determine legal parentage of the child, as between the adoptive parents and the biological parents, on the basis of the child's best interests).

parent-child relationship.<sup>366</sup> Thereafter, the biological parents would have no contact with the child, regardless of whether the child is in state custody or in an adoptive home. Neither the ex-parent nor the child (through a guardian *ad litem*) would have standing to petition for visitation.<sup>367</sup> Yet many children might benefit from having some continued interaction with the biological parent.<sup>368</sup> Although an adult might be unsuitable to raise a child, the child might nevertheless benefit from getting to know the adult.<sup>369</sup> Of course, many adoptive parents fear such contact, and *requiring* that children have such contact could deter some potential adoptive parents from seeking to adopt,<sup>370</sup> but traditionally courts *could not* arrange for such contact even when adoptive parents were willing. There is some movement today, though, to change this and to encourage "open adoptions,"<sup>371</sup> and some courts in recent years have even ordered post-adoption visitation with former parents.<sup>372</sup>

Conversely, when an adoption gets undone, as in the Baby Richard case, and a child is returned to biological parents, perhaps after several years in an adoptive home, courts generally will not order the biological parents to allow the child to maintain his or her relationship with the adoptive parents.<sup>373</sup> They might *encourage* the biological father to allow continuing contact,<sup>374</sup> but the result is usually that the child is completely and suddenly cut off from the adults he or she knows as parents. Such cases are paradigmatic instances of parental rights of possession trumping the welfare of the child.

In sum, children have almost no right to end a relationship with bad parents. Their interests are generally subordinated to the conflicting desires and claims of parents, and, with very limited exception, even when the rules would serve their welfare, they have no standing to insist on their enforcement. Moreover, in all the cases in which the law allows for termination, the rules are readily explainable as protections of societal interests in avoiding welfare dependency and social pathologies; children's welfare plays no necessary role. On the other hand, children do have an absolute right in some situations in most jurisdictions against the state

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<sup>366</sup> See HOLLINGER, *supra* note 86, § 13-B.01; Meyer, *supra* note 47, at 813; Strasser, *supra* note 86, at 1020-22.

<sup>367</sup> See, e.g., *Harold K. v. Ryan B.*, 730 N.E.2d 88, 95-96 (Ill. App. Ct. 2000) (holding that the governing statutes did not authorize courts to order visitation with biological parents whose rights were terminated).

<sup>368</sup> Meyer, *supra* note 47, at 814-16; Scott & Scott, *supra* note 203, at 2445.

<sup>369</sup> See Bartlett, *supra* note 20, at 909-11.

<sup>370</sup> See Meyer, *supra* note 47, at 830-31.

<sup>371</sup> See Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution*, 2 U. PA. J. CONST. L. 150 (1999).

<sup>372</sup> See, e.g., *In re Adoption of Vito*, 728 N.E.2d 292 (Mass. 2000) (holding that trial courts may order such visitation when the former parent had a developed relationship with the child).

<sup>373</sup> For citations to those cases, see Meyer, *supra* note 47, at 754 n.5.

<sup>374</sup> See, e.g., *Girard v. Williams*, 966 P.2d 1155, 1167 (Mont. 1998).

severing their relationship with their parents when that would not be good for the child. A finding that termination of parental rights would be in the child's best interests is a necessary condition for severing the parent-child relationship on the basis of abuse or neglect, and perhaps on other bases as well.

#### 4. Children's Relationships With Siblings

In addition to creating parent-child relationships, the state creates legal sibling relationships — in other words, determines whom the law will treat as a sibling and therefore afford some protection for sibling-like social relationships. It generally does so by creating parent-child relationships between an adult and more than one child. There is no distinct legal proceeding for creating a sibling relationship. Yet the rules governing creation of parent-child relationships for the most part require no consideration of whether it would be in a child's best interests for a legal sibling relationship to arise. If the law required individualized consideration of children's welfare in creating parent-child relationships, courts could consider whether the adult in question is a parent of other children and what effect the presence of those other children might have on the child in question. But maternity and paternity rules almost never call for an individualized determination of a child's best interests. Only in the context of adoption might the law explicitly command consideration of sibling relationships, and then only in terms of the interests of the child to be adopted, not as to children already in the family. In the vast majority of situations, therefore, children have no right in connection with the initial formation of their legal or social sibling relationships.

The law takes greater direct interest in sibling relationships once they are formed. Direct state decisions affecting the continuation of sibling relationships take place in the context of custody decision making in divorce and paternity proceedings, and in the context of foster care and termination of parental rights. State delegation to parents of authority to make decisions about their children's social relationships with siblings when siblings live separately from one another is discussed below in Section II.B.2.d.

Custody decisions in divorce and paternity proceedings often entail explicit consideration of whether siblings will continue to be part of the same household. When parents have more than one child, courts have the option of awarding "split custody," which means giving each parent primary custody of one or more children; no state's statute governing custody prohibits splitting up siblings. Courts would make the decision whether to split siblings pursuant to the same standard governing the award of custody of a single child to one parent or another — that is, in most states, the best interests standard. And the subsidiary rules discussed above that appear to compromise the best interest aim are unlikely to have an effect on whether siblings remain in the same household — in particular, a parent who was the

primary caretaker for one child is likely also to have been the primary caretaker for any other children of the couple.

In addition, many states' custody statutes today include among the factors courts are to consider each child's relationship or interactions with siblings,<sup>375</sup> and even in the absence of statutory direction, courts take sibling relationships into account in a best interests determination.<sup>376</sup> Recently, some legislatures and courts have even created a legal presumption against split custody<sup>377</sup> as awareness has grown of the great importance that sibling bonds can have for children, particularly in the midst of marital dissolution.<sup>378</sup> The prevailing rule thus ostensibly affords children an absolute right with respect to remaining in the same household as siblings following divorce; if it is in the best interests of all siblings, in light of their total circumstances, to remain together, then that should be the result.

When siblings *are* placed in different households, courts typically arrange visitation time between each child and the parent who is not the custodial parent of the child so that the visiting child also spends time with his or her siblings. Thus, there is rarely an issue of sibling visitation post-divorce. If a court failed to do so, however, there can arise situations in which parents do not independently arrange for siblings to spend time together. The legal question then would become whether

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<sup>375</sup> See, e.g., ARIZ. REV. STAT. § 25-403(A)(3) (West 2003); COLO. REV. STAT. § 14-10-124(1.5)(a)(III) (West 2003); D.C. CODE ANN. § 16-914(a)(3)(C) (2003); IDAHO CODE § 32-717 (Michie 2002); IND. CODE ANN. §§ 31-14-13-2(4)(B), 31-17-2-8(4)(B) (West 2003); KY. REV. STAT. ANN. § 403.270(2)(c) (Banks-Baldwin 2003); MINN. STAT. ANN. §§ 2257.025(a)(5), 518.17(a)(5) (West 2003); MO. ANN. STAT. § 452.375.2(3) (West 2002); N.J. STAT. ANN. § 9:2-4(c) (West 2003); N.M. STAT. ANN. § 40-4-9(A)(3) (Michie 2002); OHIO REV. CODE ANN. § 3109.04(F)(1)(c) (West 2003); VA. CODE ANN. § 20-124.3(4) (Michie 2002); WIS. STAT. ANN. § 767.24(5)(c) (West 2003).

<sup>376</sup> See, e.g., *Parkerson v. Parkerson*, 306 S.E.2d 97 (Ga. 1983) (upholding transfer of custody from mother to father that was based on child's interest in living with older sibling); *Rogers v. Rogers*, 973 P.2d 1118, 1121 (Wyo. 1999) ("[S]eparating siblings from each other through custody awards to different parents is not a preferred resolution, but the effect of the separation of siblings is simply one of several factors that courts consider in determining the best interests of the child or children.").

<sup>377</sup> See *In re Wesley R.*, 2002 WL 31890764, at \*6 (N.Y. Fam. Ct. Dec. 13, 2002); *Fuerstenberg v. Fuerstenberg*, 591 N.W.2d 798, 809 (S.D. 1999) ("Siblings should not be separated absent compelling circumstances."); *Reavis v. Reavis*, 955 P.2d 428 (Wyo. 1998) ("We have repeatedly stated that divided custody is not favored by this court."); Marrus, *supra* note 207, at 990-91. Courts have, in numerous cases, nevertheless ordered split custody based on a determination that other factors overcame the presumption and supported a finding that dividing the children was in the best interests of one or more of them. See *id.* at 991-94. See generally Dana E. Prescott, *Biological Altruism, Splitting Siblings and the Judicial Process: A Child's Right to Constitutional Protection in Family Dissolution*, 71 UMKC L. REV. 623, 637-43 (2003).

<sup>378</sup> See William Wesley Patton, *The Status of Siblings' Rights: A View Into the New Millenium*, 51 DEPAUL L. REV. 1, 3 (2001); Marrus, *supra* note 207, at 980-87, 990-91.

children have a right to maintain contact with each other, a right that limits the decision making authority that states confer on parents as a component of custody. I discuss that issue in the next section of the Article.

Sibling relationships also are disrupted by child protective proceedings. As noted above, when the state places children in foster care, the placing agencies have great discretion over where the children live. And although the law in some states requires such agencies to *attempt* to keep siblings together in the same residence, in most states the law does not *require* them to keep siblings together when that would be best for them.<sup>379</sup> Some state agencies have in the past actually had a policy of placing siblings in separate homes,<sup>380</sup> and it is still fairly common for siblings to be placed in different foster homes.<sup>381</sup>

Likewise, if the state terminates the rights of parents as to siblings, the law generally requires state adoption agencies to *attempt* to place siblings together with the same adoptive parents,<sup>382</sup> but it does not require them to do so.<sup>383</sup> Ultimately, as

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<sup>379</sup> HOLLINGER, *supra* note 86, § 13.02[3][c][ii]; *see, e.g.*, FLA. STAT. ch. 39.001(k) (2003); B.H. v. Johnson, 715 F. Supp. 1387, 1396–98 (N.D. Ill. 1989) (holding that the state was not legally required to ensure sibling visitation after removing siblings from their parents' custody); Black v. Beame, 419 F. Supp. 599 (S.D.N.Y. 1976), *aff'd*, 550 F.2d 815 (2d Cir. 1977). *But see* MASS. REGS. CODE tit. 102, § 5.08(10) (2002) ("Siblings shall be placed in the same foster or adoptive home unless the licensee documents a written explanation in the children's record as to why such placement is not in the best interest of the children."); Aristotle P. v. Johnson, 721 F. Supp. 1002, 1012 (N.D. Ill. 1989) (holding that "a policy facilitating sibling visitation" is in the best interest of the child).

<sup>380</sup> *See Aristotle P.*, 721 F. Supp. at 1005–07 (holding that this policy violated children's constitutional right of association).

<sup>381</sup> *See* HOLLINGER, *supra* note 86, § 13.02[3][c][ii]; Patton, *supra* note 378, at 1.

<sup>382</sup> *See, e.g.*, CONN. GEN. STAT. § 45a-726(b) (2003); FLA. ADMIN. CODE ANN. r. 65C-16.002(3) (2003); GA. COMP. R. & REGS. r. 290-9-2-.06(6)(b) (2002) ("Children of the same family shall be kept together when possible unless it has been determined through casework services that this is not desirable. If not in the best interest of the children involved, the reasons shall be documented in the records."). *But see* 922 KY. ADMIN. REGS. 1:030(12) (2001) ("Brothers and sisters shall not be separated from one another unless the Cabinet for Families and Children shows conclusively that the separation will benefit the child."); MASS. REGS. CODE tit. 102, § 5.08(10) (2003) (requiring adoption agencies to place children together unless that is not in the children's best interests); MO. CODE REGS. ANN. tit. 13, § 40-73.080(5)(C) (2002); N.Y. COMP. CODES R. & REGS. tit. 18, § 421.18(d)(3) (2002) (adoption agencies must place siblings or half-siblings in same adoptive home unless it demonstrates that "the placement would be contrary to the health, safety or welfare of one or more of the children").

<sup>383</sup> *See* HOLLINGER, *supra* note 86, § 13.02[3][c][ii]; Patton, *supra* note 378, at 4–5 (describing cases rejecting claims that siblings have a fundamental liberty interest in associating with each other); *id.* at 19 (discussing rules for placement of siblings in foster care); *id.* at 23–24 (discussing rules for placement of siblings in adoptive homes). *But see* W. VA. CODE ANN. § 49-2-14(e) (Michie 2003) (requiring state adoption placement agency to grant petition for adoption of a child by persons who previously adopted a sibling of the child).

discussed above, an order of adoption must be in the best interests of a child, so a court would in principle order adoption of one child without his or her sibling only if this were in the child's best interests all things considered, in light of the available alternatives.<sup>384</sup> Arguably, then, children do have a strong right in connection with maintaining their relationships with siblings when it comes to adoption, though one constrained as a practical matter by the availability of adoptive parents willing to adopt siblings.

When child protective agencies do separate siblings, the siblings might seek visitation with each other. Whether siblings are all in state custody or one child is in state custody and another is in the custody of parents, under the law of at least a minority of states, they can petition for an order of visitation with each other if the state agency with custody does not voluntarily arrange for such visitation.<sup>385</sup> After adoption placing siblings in different homes, the opportunity for visitation with each other generally depends on the rules governing parental authority over children's interactions with non-parents,<sup>386</sup> which is the subject of the next, and final, section. Some states, though, have special statutory provisions authorizing courts to order

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unless this would not be in child's best interests).

<sup>384</sup> Cf. *John B. v. Niagara County Dep't of Soc. Servs.*, 735 N.Y.S.2d 333 (App. Div. 2001) (finding that trauma of separation from foster parents would be greater harm than separation from sibling); *In re Wesley R.*, 2002 WL 31890764, at \*6 (N.Y. Fam. Ct. Dec. 13, 2002) (acknowledging that reunification of siblings is a consideration in adoption, but finding it overridden in this case by the child's need to maintain a relationship with foster parents and, significantly, an interest in maintaining relationships with "foster siblings").

<sup>385</sup> See, e.g., CAL. WELF. & INST. CODE § 362.1 (West 2003) (requiring that any order placing a child in foster care must contain a provision for visitation between the child and any siblings, unless this would be detrimental to either child); MD. CODE ANN., FAM. LAW § 5-525.2 (Michie 1999) (giving children standing to petition for visitation with siblings and directing court to base decision on "the best interests of the children promoting the greatest welfare and least harm to the children"); MASS. GEN. LAWS ANN. ch. 119, § 26 (West 2003); N.H. REV. STAT. ANN. § 169-C:19-d (2002) (court must ensure that separated siblings enjoy visitation "whenever reasonable and practical, and based on a determination of the best interests of the child"); see also CONN. GEN. STAT. ANN. § 46b-129(p) (West 2003):

Upon motion of any sibling of any child committed to the Department of Children and Families pursuant to this section, such sibling shall have the right to be heard concerning visitation with, and placement of, any such child. In awarding any visitation or modifying any placement, the court shall be guided by the best interests of all siblings affected by such determination.

With respect to children who are in state custody because of incorrigibility or delinquency, the state is generally not under a legal obligation to ensure regular contact between the children removed and any siblings that remain in the parents' custody. See Patton, *supra* note 378, at 7-8.

<sup>386</sup> See, e.g., *Harold K. v. Ryan B.*, 730 N.E.2d 88, 95 (Ill. App. Ct. 2000) (holding that governing statutes did not authorize courts to order visitation with siblings after biological parents' rights were terminated and children were separated by adoption).

post-adoption visitation between siblings.<sup>387</sup>

### *B. State Delegation of Decision Making to Custodians*

Parents with custodial responsibility for children are necessarily given some power over the children's relationships. It clearly would be undesirable from a child welfare perspective for the state routinely to make decisions directly about, for example, with whom a child will play. It would also be undesirable for the state to delegate to private citizens other than a child's parents (again, assuming the child is in the parents' custody) the power to make these decisions on a daily basis. Parents otherwise are orchestrating children's daily activities and presumptively are motivated to make choices concerning children's interactions with third parties that are in their children's best interests, and state micro-managing of all children's daily lives would be overly intrusive and less likely to result in sound decisions. This suggests that it generally is most conducive to children's welfare to have their parents decide with whom they will associate on a daily basis. The state's decision to delegate substantial decision making authority to legal custodians is therefore justifiable on the basis of children's welfare.

Beyond the assignment of principal decision making power, however, there is the question of *how extensive* an authority states give parents or, looked at from another perspective, of what restrictions or standards, if any, the state imposes on the exercise of that authority. Does the state confer complete power and then exit the scene, leaving parents to act however they choose? Or does the state require that parents make decisions in a certain way — for example, subject to a mandatory minimum of contact with peers or relatives, or in accordance with a best interests standard — and override parental decisions when they fail to comply? States must determine the extent of parental power over children's relational lives in order to resolve the disagreements that can arise between parents and other persons, including their children and other persons who want to have some relationship with their children. This final Part of the Article examines the legal rules governing parental decision making to reveal how the states have answered those questions and on what basis they have arrived at answers.

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<sup>387</sup> See, e.g., CAL. WELF. & INST. CODE § 16002 (West 2003); FLA. STAT. ANN. § 39.811(7)(b) (West 2002); MASS. GEN. LAWS ANN. ch. 119, § 26 (West 2003). New York courts have interpreted a very broadly worded sibling visitation statute, N.Y. DOM. REL. LAW § 71 (McKinney 2003), as potentially applying to adoption situations. See *Elias C. v. Katherine H.*, 626 N.Y.S.2d 479 (App. Div. 1995) (upholding denial of an order of visitation between half-siblings because there were no established bonds between them).

## 1. General Abuse and Neglect Laws

As with most other decisions parents make within the family setting, most parental decisions about children's relationships are legally constrained, if at all, only by the general abuse and neglect provisions in state statutes. State statutory definitions of abuse and neglect do not mention relationships specifically, and it is unlikely that legislators drafting abuse and neglect laws think at all about the quantity or quality of children's relationships with persons other than parents. But the laws define "abuse" and "neglect" in sufficiently general terms that they *could* encompass gross misuse of power over children's relationships. A typical definition of "abuse" includes infliction of serious psychological or emotional injury by other than accidental means,<sup>388</sup> which might include severing a child's relationships with certain other people if this would be traumatic for the child. A typical definition of "neglect" includes failing or refusing to provide care necessary for a child's health,<sup>389</sup> and this could include a failure to facilitate or encourage a sufficient number or depth of relationships with persons other than the parents, such as extended family members and peers, if that results in stunted psychological or emotional development, depression, or a "failure to thrive."

Therefore, general child protection laws might in theory impose on parents an affirmative obligation to ensure substantial socializing for a child outside the parent-child relationships and an opportunity to form deep and lasting relationships with extended family members and persons outside the family. It is unlikely that parents' failure to nurture a relationship with a particular person — even a grandparent — in and of itself would be harmful to a child. But abruptly cutting off any one existing, strong relationship could be harmful to a child, and a failure to nurture *any* significant relationships with persons outside the immediate family could be quite detrimental in the long run and constitute emotional and psychological neglect. When the media reports stories of militant recluses staring down FBI SWAT teams, many people find it entertaining, while others just hope no one gets killed. But behind each of those stories is usually a family environment that is potentially quite damaging to children because of the profound effects it must have on children not only to be cut off from all outsiders, but also to be indoctrinated with paranoid beliefs about the danger of contact with outsiders. Even in less dramatic cases, cutting off all or nearly all of a child's contact with the outside world is a kind of deprivation that carries the potential for serious harm, a severe thwarting of a child's emotional and psychological development, and a truncating of a child's life prospects.

In theory, then, a state child protective office could in limited circumstances charge a parent with abuse or neglect for depriving a child of contact with other

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<sup>388</sup> See, e.g., VA. CODE ANN. § 63.2-100 (Michie 2002).

<sup>389</sup> See, e.g., *id.*

people. But this does not happen.<sup>390</sup> States generally do not consider it unlawful even if parents withdraw a child *entirely* from the world outside the family. Even in extreme instances of isolation, states take no action to enlarge children's social world. Parents are deemed entitled to establish whatever social circumstances they wish for their children, absent action by a relative under the visitation laws discussed below. Conversely, children have no right to state child protective intervention.<sup>391</sup>

In any event, even if state agencies interpreted abuse and neglect statutes to govern parental relationship decisions, the standard by which parental decisions are judged would not be the best interests of the child, but rather whether parental decisions caused serious injury or substantially impaired a child's health. The law does not even nominally command parents to make decisions in a way that is best for their children, but rather merely commands them not to do anything very harmful. Thus, although abuse and neglect laws might on the surface appear to confer some very limited right — that is, a right simply to have some contact with some humans other than their parents — as applied they accord children no right whatsoever in connection with their relationships with non-parents.

## 2. Third-Party Visitation Laws

States do, however, have special statutory provisions authorizing some non-parent individuals to petition a court for an order of visitation if parents refuse to allow them contact with the child. These statutes indirectly impose a limited restriction on the power that the state bestows on parents over children's relational lives, insofar as they authorize a court to override parental decisions under certain circumstances. The substantive rules governing court decisions as to "third-party visitation" are now in flux. Before the Supreme Court's decision in *Troxel v. Granville*, discussed below, legislatures and courts were fairly receptive to visitation requests by grandparents and, to a lesser degree, by what might be called "quasi parents" — that is, step-parents and others who had served in a parent-like social role. All states' statutes authorized courts to order visitation with grandparents in some circumstances, over the objection of parents.<sup>392</sup> Significantly, the prevailing standard for adjudicating such requests for visitation was the best interests of the

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<sup>390</sup> An extensive search of reported state court decisions turned up no cases in which a child protective agency made such a charge. *Cf. K.L.P. v. S.P. & P.P.*, Nos. 2020270 & 2020271, 2003 Ala. Civ. App. LEXIS 404 (Ala. Civ. App. June 13, 2003) (holding that grandparents' prediction that grandchild would suffer emotional distress if they were denied visitation did not allege the kind of harm constituting "abuse" and warranting intervention).

<sup>391</sup> *Cf. DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989) (holding that children have no constitutional right to state protection from abuse or neglect by parents).

<sup>392</sup> See Emily Buss, *Adrift in the Middle: Parental Rights After Troxel v. Granville*, 2000 SUP. CT. REV. 279, 280; Marrus, *supra* note 207, at 1004 n.162.

child, and courts generally viewed such statutes as protections of children's welfare rather than of grandparents rights or interests,<sup>393</sup> supporting a conclusion that the law in effect established an absolute right of children to maintain a social relationship with their grandparents, at least in some circumstances. A minority of states extended the rule to "de facto" parents other than grandparents and to other relatives or interested persons.<sup>394</sup> On the other hand, legislatures and courts generally gave no protection to "horizontal relationships" between children and persons other than quasi-parental figures — for example, siblings and half-siblings — who lived in different households.<sup>395</sup>

#### *a. The Supreme Court Curtails Third-Party Visitation*

Third party visitation statutes in the U.S. had been under attack for some time before the Supreme Court addressed their constitutionality in 2000, in *Troxel v. Granville*.<sup>396</sup> Parents whom state courts forced to allow grandparents or other third parties to spend time with a child sometimes appealed the decisions and claimed that the orders violated their constitutional rights as parents. The Supreme Court created a substantive due process right for parents in the 1920s, under the Fourteenth Amendment of the United States Constitution, in cases involving parental objections to state regulation of education,<sup>397</sup> and reaffirmed that right in later cases.<sup>398</sup> Some lower courts had interpreted that right as empowering parents to resist state restrictions on their child-rearing choices in a broader range of contexts — including choices about a child's relationships — and as requiring states to demonstrate substantial justification for any restrictions.<sup>399</sup> Other lower courts, though, had upheld third-party visitation statutes against constitutional challenge.<sup>400</sup>

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<sup>393</sup> See Marrus, *supra* note 207, at 1006–08. At least one of these statutes even put the burden on the parent to show that the visitation would not be in the child's best interests. See, e.g., HAW. REV. STAT. § 571-46(7) (2000).

<sup>394</sup> See Marrus, *supra* note 207, at 1013; Morley et al., *supra* note 173, at 203–04; Stephen Hellman, *The Child, the Step Parent, and the State: Step Parent Visitation and the Voice of the Child*, 16 *TOURO L. REV.* 45, 51–53 (1999) (citing visitation statutes in a minority of states that were broad enough to encompass step-parents). *But see In re Thompson*, 11 S.W.3d 913 (Tenn. Ct. App. 1999) (holding that former lesbian partners of mothers did not even have standing to petition for visitation).

<sup>395</sup> See Marrus, *supra* note 207, at 996–1001, 1004–05, 1009–10, 1013; Patton, *supra* note 378, at 3–27.

<sup>396</sup> 530 U.S. 57 (2000) (plurality opinion).

<sup>397</sup> See *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

<sup>398</sup> See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

<sup>399</sup> See Patton, *supra* note 378, at 28–29.

<sup>400</sup> Patton, *supra* note 378, at 28–29 & n. 148; see, e.g., *West v. West*, 689 N.E.2d 1215 (Ill. App. Ct. 1998).

In 2000, litigation in Washington State percolated to the Supreme Court, and in *Troxel*, the Court rendered a decision specifically addressing the power of parents over children's relational lives. The Court reviewed a Washington statute that was one of the most liberal third-party visitation laws then in existence.<sup>401</sup> It allowed any person at any time to receive court-ordered visitation over the objection of parents if a court determined that to be in the best interests of the child. The statute thus conformed to an absolute children's rights model, insofar as it made the child's welfare solely determinative.<sup>402</sup> The statute was liberal in three ways: (1) the class of potential petitioners was unlimited; (2) actions were not confined to the time of a divorce or of a death of one parent, but rather could be brought at any time in a child's life; and (3) the substantive standard was simply the best interests of the child, with no deference accorded to parental entitlement or to parents' judgment about the child's interests.

At the time of the Supreme Court's decision in *Troxel*, statutory provisions authorizing court-ordered "third party" visitation in most other states were more restrictive than the Washington statute along one of the three dimensions listed above. Most limited the class of petitioners to grandparents, and some limited the time of petitioning to a time of divorce or the death of a parent.<sup>403</sup> Some imposed

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<sup>401</sup> Justice O'Connor characterized the statute as "breathtakingly broad." *Troxel*, 530 U.S. at 67.

<sup>402</sup> The statute at issue in *Troxel v. Granville* was WASH. REV. CODE § 26.10.160 (2002). Washington also has a separate statute that specifically addresses grandparent visitation. *Id.* § 26.09.240. It states, in part, that "[v]isitation with a grandparent shall be presumed to be in the child's best interests when a significant relationship has been shown to exist." *Id.* § 26.09.240(5)(a). This presumption is rebuttable by a preponderance of the evidence showing that visitation would endanger the child's physical, mental, or emotional health. The rest of the statute, which applies more generally to "a person other than a parent" who petitions the court for visitation, requires that a significant relationship exist between the child and the petitioner, and goes on to list the factors that are to be used in determining what is in the child's best interests. *Id.* § 26.09.240(6)(a)–(h). These factors include:

- (a) The strength of the relationship between the child and the petitioner;
- (b) The relationship between each of the child's parents or the person with whom the child is residing and the petitioner;
- (c) The nature and reason for either parent's objection to granting . . . visitation;
- (d) The effect that granting visitation will have on the relationship between the child and the child's parents or the person with whom the child is residing;
- (e) The residential time sharing arrangements between the parents;
- (f) The good faith of the petitioner;
- (g) Any criminal history or history of physical, emotional, or sexual abuse or neglect by the petitioner; and
- (h) Any other factor relevant to the child's best interest.

*Id.*

<sup>403</sup> See Karen Czapanskiy, *Grandparents, Parents and Grandchildren: Actualizing Interdependency in Law*, 26 CONN. L. REV. 1315, 1331 n.66 (1994).

a threshold requirement that petitioning grandparents show they had lived with the child for a significant period of time.<sup>404</sup> Thus, unless certain people petitioned at a certain time and demonstrated harm, parents' rights controlled. Because of its liberality along all three dimensions, the Washington statute presented a good target for a challenge by parents and a good starting point for a Court aiming to impose limits on such statutes.

As it happens, though, the facts presented by the *Troxel* litigation principally put in question the third aspect of the statute's liberality — the best interests standard. The persons petitioning for visitation were grandparents, the category of non-parents generally believed to have the strongest claim to visitation. And the petition followed soon after one parent, the petitioner's son, had died, a situation in which the child's connection with grandparents is generally believed to be particularly important and in which there is only one parent opposing the visitation rather than two — in fact, the deceased parent's preference likely would be opposed to that of the living parent.<sup>405</sup>

The Supreme Court held that the Washington statute was unconstitutional "as applied" in the case before it,<sup>406</sup> in which there had been no finding that the children had been affected adversely by the absence of visitation.<sup>407</sup> Initially, *Troxel* was hailed as a victory for parents' rights and a blow for third parties who sought visitation, especially grandparents. However, there was no majority view as to why application of the law was unconstitutional, and the multitude of opinions the Court produced can be read, singly and in combination, in a number of ways. On the political front, grandparent advocacy groups (and other organizations) quickly lined up to resist any dramatic legislative curtailment of third-party visitation and to urge instead careful amendment of statutes so as to stay within the dimly-perceived bounds of the Constitution, as drawn by the Court, while still affording them the right to visit with their grandchildren.<sup>408</sup>

Among legal scholars, David Meyer offers one of the more favorable readings of the *Troxel* decision, characterizing it as a manifestation that most of the Justices now favor "an essentially pragmatic approach to the constitutional problem of parents' rights," one that properly "balances traditional respect for parental

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<sup>404</sup> See John DeWitt Gregory, *Defining the Family in the Millenium: The Troxel Follies*, 32 U. MEM. L. REV. 687, 694–95 (2002).

<sup>405</sup> *Troxel*, 530 U.S. at 60–61.

<sup>406</sup> Actually, just four Justices contended that the statute was unconstitutional as applied. Justices Souter and Thomas took the stronger position that it was unconstitutional on its face. See Earl M. Maltz, *The Trouble With Troxel*, 32 RUTGERS L.J. 695, 703–05 (2001).

<sup>407</sup> See *In re Visitation of Troxel*, 940 P.2d 698 (Wash. Ct. App. 1997).

<sup>408</sup> Several websites were set up to call attention to the issue, encouraging grandparents to lobby in support of protections for grandparent visitation. See, e.g., AARP, Grandparent Visitation Rights, at <http://www.aarp.org/confacts/grandparents/visitation.html> (last visited June 23, 2003).

prerogative against the emerging demands of non-traditional caregiving relationships.”<sup>409</sup> Meyer writes that, although a majority of the Justices reaffirmed that legal parents have a fundamental right to direct their children’s lives, the Court adopted a less rigorous test for laws that infringe upon that right than has previously been applied, thereby allowing states more room to protect relationships between children and non-parents.<sup>410</sup> On this view, the Washington courts just went too far, by applying the state statute without according any deference to parental judgment, while a somewhat more stringent substantive standard for securing a visitation order, or a more deferential application of a best interests test, might well survive Supreme Court review.

That might all be true and yet not signal a move on the Supreme Court toward an approach more solicitous of children’s welfare. The “demands of non-traditional caregiving relationships” to which the Court gave recognition could be understood as simply the demands of other adults. Only one of the nine Justices in *Troxel*, Justice Stevens, contended that children, too, have a (as-yet-unrecognized) constitutionally protected “liberty interest” of some sort in connection with their relationships.<sup>411</sup> And even Justice Stevens did not contend that children have a

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<sup>409</sup> Meyer, *supra* note 22, at 711–12.

<sup>410</sup> *Id.* at 713–14.

<sup>411</sup> See *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting): [A] parent’s interest in a child must be balanced against the State’s long-recognized interests as *parens patriae* and, critically, the child’s own complementary interest in preserving relationships that serve her welfare and protection. While this Court has not yet had occasion to elucidate the nature of a child’s liberty interests in preserving established familial or family-like bonds, it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

Several things are noteworthy about this statement by Justice Stevens. First, the suggestion that the Court had never before encountered an opportunity to recognize and articulate children’s liberty interests in relationships is ludicrous. The Court previously had decided numerous cases involving children’s relationships, including the series of cases addressing the right of unwed fathers to be legal parents. See *supra* notes 44–47 and accompanying text. Second, “liberty interest” is a peculiar characterization for young children’s interest in relationships. “[I]nterest in preserving relationships that serve her welfare and protection” is more apt; children’s interests are not limited to being able to make choices. Third, the liberty interest of parents to which Justice Stevens referred is, in constitutional parlance, something parents assert against the state, so one might wonder whether Justice Stevens was recognizing state action inherent in parental power to deny children’s relationships. Lastly, Justice Stevens suggests that children’s interests must be balanced against the interests of parents. This implies that he (a) perceives a divergence of interests between parents and children and (b) believes it appropriate in some cases to sacrifice the welfare of children in order to serve the interests of parents. This latter position is inconsistent with a model of absolute rights for children in connection with their relationships.

fundamental right with respect to their relationships with non-parents, such that states might be prohibited from empowering parents to cut off beneficial relationships children have with third parties.<sup>412</sup>

As Meyer points out, many of the Justices in *Troxel* devoted some attention to the interests of children, and ultimately none ruled out altogether the permissibility of court-ordered third-party visitation.<sup>413</sup> The Justices in the plurality did not condemn the best interests standard but rather appeared to command simply that states act on the basis of a presumption that parents' views of a child's best interests are correct. And the plurality opinion suggested that one reason some deference to parents is required is that parents can reasonably be presumed to know what is best for their children and to act on that basis,<sup>414</sup> although it also relied on notions of parental entitlement.<sup>415</sup> It is not clear that this represents an implicit move toward recognizing rights of children, or toward a view of parents as fiduciaries of their children, whose authority is derivative of claims their children possess. Given the nature of the substantive due process analysis, it can be read as simply a challenge to the means-ends rationality of the state's third-party visitation provision, which the state attempted to justify on the basis of its interest in promoting the welfare of children. By no means does the plurality opinion suggest that states *must* authorize courts to order third-party visitation in some circumstances, which is a conclusion one might come to if one took seriously the idea that children have a right to maintain relationships with extended family members when that is important to their well-being.

#### *b. Grandparent Visitation After Troxel*

How has *Troxel* altered the landscape of third-party visitation law? Principally, it has created uncertainty. Because the Supreme Court did not issue a definitive

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<sup>412</sup> The children at issue in *Troxel* were not represented in the litigation, and the grandparents did not base any claims on rights of the children. See Barbara Bennett Woodhouse & Sacha Coupet, *Troxel v. Granville: Implications for At Risk Children and the Amicus Curiae Role of University-Based Interdisciplinary Centers for Children*, 32 RUTGERS L.J. 857, 857 (2001).

<sup>413</sup> Meyer, *supra* note 22, at 714.

<sup>414</sup> *Id.*; See, e.g., *Troxel*, 530 U.S. at 68:

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

<sup>415</sup> See *Troxel*, 530 U.S. at 70 ("[T]he decision whether such an intergenerational relationship would be beneficial in any specific case is for the parent to make in the first instance.").

answer as to exactly what is and is not constitutional on this issue, courts have had to reexamine their states' grandparent and third-party visitation statutes in light of the various rationales of the several Justices who wrote opinions in the case. The result has been much doctrinal inconsistency.<sup>416</sup> *Troxel* has left states scrambling to come up with schemes that balance the rights of the parents with the best interests of the child without overstepping whatever vague constitutional boundaries the *Troxel* decision suggests. It is clear, however, that *Troxel* put the brakes on the trend toward expansion of third-party visitation and is diminishing the rights of children in connection with their relationships with non-parents.

The State of Washington itself has not amended its third-party visitation statute. The provision at issue in *Troxel* technically remains unchanged, because the Supreme Court did not strike down the "breathtakingly broad" statute as facially unconstitutional, but rather found it to be unconstitutional as applied. The Court left open the possibility that the statute *could* be applied in a constitutional manner, and so its decision effectively constrains Washington state courts in applying the visitation statute rather than requiring any legislative amendment to it.

Every other state today also retains a statute on the books authorizing courts to order third-party visitation.<sup>417</sup> As discussed below, in some states the statute might

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<sup>416</sup> See Gregory, *supra* note 404, at 718–24.

<sup>417</sup> See ALA. CODE § 30-3-4.1 (2001); ALASKA STAT. § 25.20.065 (Michie 2001); ARIZ. REV. STAT. § 25-409 (2001); ARK. CODE ANN. § 9-13-103 (Michie 2002); CAL. FAM. CODE §§ 3101, 3102, 3104 (West 2001); COLO. REV. STAT. §§ 19-1-117, 19-1-117.5 (2001); CONN. GEN. STAT. ANN. §§ 46b-57, 46b-59 (West 2001); DEL. CODE ANN. tit. 10, § 1031(7) (2001); FLA. STAT. ANN. §§ 39.509, 752.01 (West 2001); GA. CODE ANN. § 19-7-3 (2001); HAW. REV. STAT. § 571-46.3 (2001); IDAHO CODE § 32-719 (Michie 2001); 750 ILL. COMP. STAT. ANN. 5/607 (West 2001); IND. CODE ANN. §§ 31-17-5-1, 31-17-5-2 (Michie 2001); IOWA CODE § 598.35 (2002); KAN. STAT. ANN. § 38-129 (2001); KY. REV. STAT. ANN. § 405.021 (Banks-Baldwin 2001); LA. REV. STAT. ANN. § 9:344 (West 2002); LA. CIV. CODE ANN. art. 136 (West 2002); ME. REV. STAT. ANN. tit. 19-A, § 1803 (West 2001); MD. CODE ANN., FAM. LAW § 9-102 (2001); MASS. GEN. LAWS ch. 119, § 39D (2002); MICH. COMP. LAWS § 722.27b (2001); MINN. STAT. § 257C.08 (2001); MISS. CODE ANN. § 93-16-3 (2001); MO. REV. STAT. § 452.402 (2001); MONT. CODE ANN. § 40-9-102 (2001); NEB. REV. STAT. § 43-1802 (2001); NEV. REV. STAT. 125C.050 (2001); N.H. REV. STAT. ANN. § 458:17-d (2002); N.J. STAT. ANN. § 9:2-7.1 (West 2002); N.M. STAT. ANN. § 40-9-2 (Michie 2001); N.Y. DOM. REL. LAW § 72 (McKinney 2002); N.C. GEN. STAT. § 50-13.2A (2001); N.D. CENT. CODE § 14-09-05.1 (2002); OHIO REV. CODE ANN. § 3109.051 (Anderson 2002); OKLA. STAT. ANN. tit. 10, § 7505-6.5 (West 2002); OR. REV. STAT. § 109.121 (2001); 23 PA. CONS. STAT. ANN. §§ 5311–5313 (West 2001); R.I. GEN. LAWS §§ 15-5-24.1 to 15-5-24.3 (2001); S.C. CODE ANN. § 20-7-420 (Law. Co-op. 2001); S.D. CODIFIED LAWS § 25-4-52 (Michie 2001); TENN. CODE ANN. § 36-6-306 (2001); TEX. FAM. CODE ANN. § 153.433 (Vernon 2002); UTAH CODE ANN. § 30-5-2 (2001); VT. STAT. ANN. tit. 15, § 1011 (2001); VA. CODE ANN. § 20-124.2 (Michie 2001); WASH. REV. CODE §§ 26.09.240, 26.10.160 (2002); W. VA. CODE §§ 48-10-101 to 48-10-501 (2001); WIS. STAT. §§ 48.925, 767.245, 880.155 (2001); WYO. STAT. ANN. § 20-7-101 (Michie 2001).

now be partially or wholly unenforceable, as a result of state court decisions applying *Troxel* to find them unconstitutional in part or in whole. In most states, the statute limits the category of petitioners to grandparents, and so is not "breathhtakingly broad" in terms of who can seek to override parental choices.<sup>418</sup> Others include other specified relatives as well.<sup>419</sup> Several, though, are like the Washington statute in allowing anyone, whether a blood relative or not, to petition for visitation with a child.<sup>420</sup> Some states limit the contexts in which third parties can seek a court order — for example, allowing petitions only when the child is not living in an intact nuclear family with both legal parents or only when a legal proceeding concerning the child's custody has already been initiated<sup>421</sup> — whereas others allow a petition at any time and in any situation,<sup>422</sup> as the Washington statute does. And there is variety with respect to the substantive standard as well, with most statutes having a best interests standard<sup>423</sup> but some containing a harm

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<sup>418</sup> See Miller, *supra* note 285, §§ 6–9; see, e.g., MASS. GEN. LAWS ch. 119, § 39D (2002); WYO. STAT. ANN. § 20-7-101 (Michie 2001).

<sup>419</sup> See, e.g., ARK. CODE ANN. § 9-13-102 (Michie 2003) (siblings); 750 ILL. COMP. STAT. ANN. 5/607(b) (West 2003) (grandparents, great-grandparents, siblings, and step-parents); LA. REV. STAT. ANN. § 9:344(C)–(D) (West 2002) (siblings); N.J. STAT. ANN. § 9:2-7.1 (West 2002) (siblings); N.Y. DOM. REL. LAW § 71 (McKinney 2002) (siblings); OKLA. STAT. ANN. tit. 10, § 5A (West 2002) (siblings); R.I. GEN. LAWS § 15-5-24.3(b) (2001) (siblings).

<sup>420</sup> See, e.g., OHIO REV. CODE ANN. § 3109.051(B) (Anderson 2002); VA. CODE ANN. § 20-124.2(B) (Michie 2001).

<sup>421</sup> Massachusetts, for example, permits grandparents to petition for visitation only [i]f the parents of an unmarried minor child are divorced, married but living apart, under a temporary order or judgment of separate support, or if either or both parents are deceased, or if said unmarried minor child was born out of wedlock whose paternity has been adjudicated by a court of competent jurisdiction or whose father has signed an acknowledgement of paternity, and the parents do not reside together . . . .

MASS. GEN. LAWS ch. 119, § 39D (2002); see also, e.g., CAL. FAM. CODE § 3104 (West 2002); 750 ILL. COMP. STAT. ANN. 5/607(b) (West 2003); LA. REV. STAT. ANN. § 9:344 (West 2002) (discussing situations involving death or incarceration of a parent, or separation of parents); OHIO REV. CODE ANN. § 3109.051(B) (Anderson 2002) (permitting non-parents to petition for visitation in "a divorce, dissolution of marriage, legal separation, annulment, or child support proceeding that involves a child"); *McDuffie v. Mitchell*, 573 S.E.2d 606, 608 (N.C. Ct. App. 2002) ("Grandparents' right to visitation is dependent on there either being an ongoing case where custody is an issue between the parents or a finding that the parent or parents are unfit."); *Liston v. Pyles*, 1997 WL 467327 (Ohio Ct. App. Aug. 12, 1997) (denying standing to former lesbian partner because there was no pending divorce, separation, or annulment proceeding).

<sup>422</sup> See, e.g., WYO. STAT. ANN. § 20-7-101 (Michie 2001).

<sup>423</sup> See, e.g., CAL. FAM. CODE §§ 3101–3104 (West 2001); DEL. CODE ANN. tit. 10, § 1031(7) (2001); 750 ILL. COMP. STAT. ANN. 5/607(b) (West 2003); LA. REV. STAT. ANN. § 9:344 (West 2002); N.J. STAT. ANN. § 9:2-7.1(a) (West 2002); N.Y. DOM. REL. LAW § 71 (McKinney 2002); OKLA. STAT. ANN. tit. 10, § 5A (West 2002); R.I. GEN. LAWS §§ 15-5-

standard.<sup>424</sup> Statutes with a best interests standard can further be divided into those that establish a presumption in favor of parental judgment and those that do not.<sup>425</sup>

Since *Troxel*, there has been a steady stream of lower court decisions applying the ruling to statutes in states other than Washington. As courts after *Troxel* continued to apply their own respective state's statute to order non-parent visitation against parental opposition, parents inevitably claimed that the statute was unconstitutional, citing *Troxel*. At this point, many courts have held their states' third-party visitation statutes unconstitutional on their face or as applied.<sup>426</sup> Others have upheld their statutes, often by holding that the statutes must be interpreted somewhat narrowly to salvage their constitutionality — in particular, by requiring something more than a showing that visitation would be in the child's best interests.<sup>427</sup> What the prevailing rules will be after the dust settles is uncertain, but

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24.3(a)(2)(i), (b)(2)(i) (2001). The Wyoming statute is unusual in containing a best interests standard explicitly but vaguely constrained by parental rights: "If the court finds, after a hearing, that visitation would be in the best interest of the child and that the rights of the child's parents are not substantially impaired, the court shall grant reasonable visitation rights to the grandparent." WYO. STAT. ANN. § 20-7-101(a) (Michie 2001). The Virginia statute does something similar: "The court shall give due regard to the primacy of the parent-child relationship but may upon a showing by clear and convincing evidence that the best interest of the child would be served thereby award custody or visitation to any other person with a legitimate interest." VA. CODE ANN. § 20-124.2(B) (Michie 2001).

<sup>424</sup> See, e.g., GA. CODE ANN. § 19-7-3 (2001); TENN. CODE ANN. § 36-6-306 (2001); see also *Neal v. Lee*, 14 P.3d 547 (Okla. 2000) (reaffirming earlier holding that state statute must be interpreted to require showing of harm absent visitation).

<sup>425</sup> The Virginia custody statute, for example, effectively creates a presumption by requiring third parties to present clear and convincing evidence that visitation would be in the best interests of the child. See VA. CODE ANN. § 20-124.2 (Michie 2001). Similarly, New Jersey law places the burden on the third party to show visitation is in the child's best interests, though it shifts the burden if the third party previously has served as "a full-time caretaker for the child." N.J. STAT. ANN. § 9:2-7.1(c) (West 2002). In Rhode Island, there is an explicit presumption "that the parent's decision to refuse the grandparent visitation with the grandchild was reasonable," which a grandparent must rebut by clear and convincing evidence. R.I. GEN. LAWS § 15-5-24.3(a)(2)(v) (2001). In contrast, Illinois law creates no presumption in favor of parents. See 750 ILL. COMP. STAT. ANN. 5/607(b) (West 2003).

<sup>426</sup> See *Wickham v. Byrne*, 769 N.E.2d 1 (Ill. 2002); *In re Marriage of Howard*, 661 N.W.2d 183 (Iowa 2003); *Gregory*, *supra* note 404, at 719–21; see also *Belair v. Drew*, 776 So. 2d 1105 (Fla. 2001) (holding that the statutory grant of grandparents' visitation rights upon dissolution of the parents' marriage infringed the state's constitutional right to privacy); *Saul v. Brunetti*, 753 So. 2d 26 (Fla. 2000) (holding that the statutory grant of grandparents' visitation rights violated the father's right to privacy).

<sup>427</sup> See *Roth v. Weston* 789 A.2d 431 (Conn. 2002) (holding that third parties seeking visitation must establish that they have had a parent-like relationship with the child and that the child would suffer substantial harm in the absence of visitation); *Blixt v. Blixt*, 774 N.E.2d 1052 (Mass. 2002); *Currey v. Currey*, 650 N.W.2d 273 (S.D. 2002); *Gregory*, *supra* note 404, at 721–25.

it is fairly clear that children's rights regarding relationships with grandparents are being eroded.

*c. Visitation With Other Non-Parent Adults*

Grandparents are not the only non-parents who seek visitation with a child; there is a multitude of other adults who petition courts for third-party visitation. These include other relatives, same-sex partners of a parent, former step-parents wishing to see their step-child after a divorce, biological relatives seeking visitation when a child has been adopted or parental rights have been terminated, and foster parents seeking visitation when a child has been returned to the biological parent or otherwise removed from their care. Although public attention focuses on the plight of grandparents seeking visitation, *Troxel* affected children's relationships with these other people in their lives as well.

In a majority of states, children's relationships with third parties other than grandparents received no protection even before *Troxel*, because third-party visitation statutes limited standing to grandparents, and that situation continues to prevail.<sup>428</sup> At least one court has openly acknowledged that the statutory standing rules could operate to the detriment of children.<sup>429</sup> In the minority of states allowing a broader range of persons to petition, third parties other than grandparents generally

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<sup>428</sup> See Miller, *supra* note 285, §§ 6–9; see, e.g., *Galjour v. Harris*, 795 So. 2d 350 (La. Ct. App. 2001), *cert. denied*, 534 U.S. 1020 (2001) (ordering visitation for grandparents after the death of a parent, but refusing request for visitation by an aunt and uncle); *Lee P.S. v. Lisa L.*, No. V-26997/01, 2002 WL 31957952 (N.Y. App. Div. Jan. 21, 2003) (holding that former same-sex partner had no standing to seek visitation with child); *Multari v. Sorrell*, 731 N.Y.S.2d 238 (App. Div. 2001) (holding that a non-biological father had no standing to seek visitation with the child of a former girlfriend); *Perry-Rogers v. Fasano*, 715 N.Y.S.2d 19 (App. Div. 2000) (holding that a gestational mother in whom a fertility clinic accidentally implanted someone else's embryo had no standing under state law to seek visitation with child to whom she gave birth). Courts likewise have produced a number of decisions relating to same-sex parenting. See, e.g., *In re Thompson*, 11 S.W.3d 913, 915 (Tenn. Ct. App. 1999) (holding that lesbian partners "who, in the context of a long-term relationship, planned for, participated in the conception and birth of, provided financial assistance for, and until foreclosed from doing so by the biological mother, acted as a parent to the child ultimately borne by her partner," had no standing to petition for visitation with the children); see also *Kathleen C. v. Lisa W.*, 84 Cal. Rptr. 2d 48 (Ct. App. 1999) (same); *Alison D. v. Virginia M.*, 572 N.E.2d 27 (N.Y. 1991) (same); *Titchenal v. Dexter*, 693 A.2d 682 (Vt. 1997) (same). The court in *Galjour* suggested that the interests of other relatives in a relationship can in some circumstances be served by awarding visitation to grandparents; the grandparents can, when the child is with them, allow other relatives to visit as well. *Galjour*, 795 So. 2d at 356.

<sup>429</sup> See *In re Thompson*, 11 S.W.3d at 922–23 (quoting *Alison D.*, 572 N.E.2d at 588) ("While one may dispute in an individual case whether it would be beneficial to a child to have continued contact with a nonparent, the Legislature did not in section 70 give such nonparent the opportunity to compel a fit parent to allow them to do so.").

fared better before *Troxel* when they previously had functioned as a “de facto” parent for a child.<sup>430</sup> In this context as well, however, several courts after *Troxel* have affirmed the entitlement of parents to govern a child’s life and have required some showing that a child would be harmed by loss of contact with the non-parent or that the custodial parent is not disposed to act in the best interests of the child. For example, in *Seyboth v. Seyboth*,<sup>431</sup> the North Carolina Court of Appeals denied a step-father’s petition for visitation following divorce. Citing *Troxel* and finding no reason to question the mother’s motivation or ability to make decisions on the basis of what was best for her child, the court presumed that her decision not to allow visitation was in the best interests of the child and found insufficient basis for overriding that presumption.<sup>432</sup> Similarly, in *Harrington v. Daum*,<sup>433</sup> the Oregon Court of Appeals determined that a father had the right to terminate his children’s visitation with their deceased mother’s boyfriend, based on his belief that the visitation interfered with his relationship with the children.<sup>434</sup> On the other hand, in *T.B. v. L.R.M.*, the Pennsylvania Supreme Court held in 2002 that *Troxel* was inapplicable to cases in which the petitioner had served in a de facto parent role, and ruled that the common law doctrine of *in loco parentis* provided a legal basis for a biological mother’s former lesbian partner to petition for visitation, where the partner had served as a parent to the child.<sup>435</sup> Thus, there are divergent views on the implications of *Troxel* for this category of cases as well.

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<sup>430</sup> See, e.g., *Simpson v. Simpson*, 586 S.W.2d 33 (Ky. 1979) (involving step-mother); *E.N.O. v. L.M.M.*, 711 N.E.2d 886 (Mass. 1999) (concluding that the judge properly allowed a de facto parent’s motion for temporary visitation with the child and, in considering the motion, properly considered whether such visitation would be in the child’s best interests); *Youmans v. Ramos*, 711 N.E.2d 165 (Mass. 1999) (concluding that a judge may order visitation between child and maternal aunt who was child’s de facto parent after considering the best interests of the child); *In re T.L.*, 1996 WL 393521 (Mo. Cir. Ct. May 07, 1996); 748 V.C. v. M.J.B., A.2d 539 (N.J. 2000); *Vest v. State ex rel. N.M. Human Servs. Dep’t*, 866 P.2d 1175 (N.M. Ct. App. 1993) (involving foster parents); *Holtzman v. Knott*, 533 N.W.2d 419 (Wis. 1995); see also WYO. STAT. ANN. § 20-7-102 (Michie 2002) (authorizing visitation for persons who have served as a primary caregiver for at least six months); cf. *Keenan v. Somberg*, 792 A.2d 47 (R.I. 2002) (dismissing visitation petition by man who once thought he was the biological father but never became de facto parent).

<sup>431</sup> 554 S.E.2d 378 (N.C. Ct. App. 2001).

<sup>432</sup> *Id.* at 382.

<sup>433</sup> 18 P.3d 456 (Or. Ct. App. 2001).

<sup>434</sup> See also *Keenan*, 792 A.2d at 47 (rejecting petition for visitation by man who once mistakenly believed he was the child’s father).

<sup>435</sup> 786 A.2d 913 (Pa. 2001); cf. *A.F. v. D.L.P.*, 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001) (holding that a mother’s former partner lacked standing to petition for visitation order because partner had not become “psychological parent” to the child). Former same-sex partners are also likely to fare better when the partners previously signed an agreement as to post-separation visitation. *Miller*, *supra* note 285, § 11; see *Rubano v. DiCenzo*, 759 A.2d 959 (R.I. 2000).

*d. Sibling Visitation*

Siblings might seek visitation with one another when separated into different residences as a result of divorce or adoption, or as a result of an older sibling attaining majority and moving out of the household shared by parents and another sibling. As was true before *Troxel*, only a minority of states authorize siblings to petition for a visitation order, as against the wishes of custodial parents, either by referring specifically to siblings in their third-party visitation statutes or by authorizing any blood relative or interested party to petition.<sup>436</sup> Thus, the prevailing rule gives children *no* right to maintain a relationship with siblings who live in a different household. Children's interests receive protection only when and to the extent that parents choose to exercise their decision making power in a manner consistent with children's interests. This is so even though sibling relationships generally are more important to a child's well-being than are relationships with grandparents, which do receive legal protection, and even though severance of sibling bonds can have quite detrimental effects on children.<sup>437</sup>

In the minority of states in which courts are authorized to order visitation between siblings, courts after *Troxel* are likely, at a minimum, to give substantial deference to the parents' decision. There have been few sibling cases decided since *Troxel*. In one, *In re Tamara R.*,<sup>438</sup> the Maryland Court of Special Appeals overrode the objection of a father to visitation between a daughter, who had been removed from his custody because of allegations of sexual abuse, and her siblings, who remained in the father's custody.<sup>439</sup> The father argued that visitation violated his constitutionally protected right to raise his children as he saw fit.<sup>440</sup> In resolving the dispute, the Maryland court noted that, per *Troxel*, there is a presumption that a parent who opposes non-parent visitation does so because it is in the best interests of the child.<sup>441</sup> However, the court held that the state's interest in protecting Tamara was sufficiently compelling to justify overriding the parental objection to visitation with her siblings, "if there is evidence that denial of sibling visitation with her sibling would harm the minor child who is separated from her family."<sup>442</sup> In

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<sup>436</sup> See Patton, *supra* note 378, at 8; See, e.g., *Harold K. v. Ryan B.*, 730 N.E.2d 88, 95 (Ill. App. Ct. 2000) (holding that the governing statutes did not authorize courts to order visitation with siblings after biological parents' rights were terminated and children were separated by adoption).

<sup>437</sup> See Marrus, *supra* note 207, at 980–87, 1015–16; see also *id.* at 1013–18 (considering and responding to possible policy reasons for not giving legal protection to sibling relationships).

<sup>438</sup> 764 A.2d 844 (Md. Ct. Spec. App. 2000).

<sup>439</sup> *Id.* at 846.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.* at 851.

<sup>442</sup> *Id.* at 854.

contrast, an intermediate state appellate court in California has held, on the basis of *Troxel*, that the state's statute authorizing orders of sibling visitation after the death of a parent is unconstitutional as applied to cases where the surviving, custodial parent who opposes visitation has not been found unfit.<sup>443</sup>

*e. Summary*

The state imposes some limitation on parental power over children's relationships, but it is quite modest. There is no effective general standard of minimum socialization and no state-initiated protection for a child's important relationships with people other than legal parents. Unless some third party wishing to spend time with a child over the objection of a parent initiates a legal proceeding, parents are entirely unconstrained in their decision making. Most likely this is, in the vast majority of cases, of no moment, because most parents likely *are* motivated to do what is best for their children and, with respect at least to relationships with third parties, are sufficiently competent to do so adequately. But it would be foolish and irresponsible to deny that some parents are motivated by things other than what is best for their children and that some parents are not well prepared to facilitate or assess the value of relationships between their children and others.<sup>444</sup> Thus, the state's decision to confer such extensive power on parents inevitably results in some loss of well-being for some children. This is not to say that the loss is easily avoidable, or that a legal regime more protective of children's interests is possible and feasible. It is simply to acknowledge that state decisions indirectly determining children's relationships with persons other than their legal parents also cause children to suffer.

From the perspective of children's rights, we can conclude that children effectively have no right to a minimally adequate relational life; although state agencies could read such a right into abuse and neglect laws, they do not do so. Children might be said to have a right only to develop or maintain a relationship with a very small class of willing non-parent individuals, insofar as third-party visitation statutes authorize courts to order visitation with specific non-parents based on a finding that it is in a child's best interests. However, this right is in most jurisdictions limited to relationships with grandparents, and after the Supreme Court's decision in *Troxel*, some courts are limiting the right to one against being harmed by termination of relationships, scaling back rights that, on the surface of statutes in some states, appeared more absolute. Children in the custody of their parents have no right in most jurisdictions with respect to their relationships with

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<sup>443</sup> *Herbst v. Swan*, 125 Cal. Rptr. 2d 836 (Ct. App. 2002).

<sup>444</sup> *See, e.g., Barker v. Barker*, 98 S.W.3d 532 (Mo. 2003) (ordering reinstatement of grandparent visitation where parents denied visitation because the grandparents had sided with the father's brother in a dispute over a youth basketball game).

any third parties other than grandparents, not even former *de facto* parents or siblings. And as is true in every other context, children have no right to compel unwilling adults to have a social relationship with them; grandparents and others who could have a very beneficial relationship with a child are free not to carry on such a relationship.

### III. CONCLUSION

This extensive review of the law governing children's relationships makes plain that the state is deeply involved, in a complex way, in ordering children's relational lives. Idyllic views of the family occupying a private sphere untouched by the coarse hands of the state, absent serious dysfunction, are simply fiction. For many of us, the state's overt role is limited to selecting at our birth who will raise us, bestowing on those persons extensive power over our lives for so long as the state categorizes us as children, and then liberating us from that power at a certain age. But the state always stands ready during our childhood to reorder our lives, and for a substantial number of people, perhaps a majority, the state significantly restructures their family relationships at one or more points during their childhood.

In all the ways it involves itself in creating, shaping, and disrupting children's interpersonal relationships, the state is expected not to act arbitrarily, but rather to operate under the rule of law, pursuant to established procedures and norms. This Article has undertaken to draw a map of the variegated norms, the multitude of substantive rules, through which the state determines these intimate, fundamental aspects of our early lives, which in turn largely determine the direction and quality of our later lives. Looking at the landscape up close, one area at a time, leaves an impression of disconnected and disparate domains. Stepping back to look at the whole does little to dissipate that impression. Certainly the political history of family law rule formation suggests that there is no overarching design and no coherent set of guiding principles. There is instead *ad hoc*, reactive legislating and inconsistent balancing of conflicting ideals and interests. There are some discernable trends — in particular, toward greater emphasis on the interests of the individual child and toward greater recognition of non-traditional family forms. But the progress is generally of the “two steps up and one step back” sort.

If I imagine in the eyes of a just-born child the question: “What lies in store for me, in terms of my family life and my connections to other human beings?,” I feel compelled to attempt some general observations. I might say something along these lines: “First of all, don't expect your interests or views to count for very much. The woman who created you now owns you, whether that is good for you or not. There was also a man involved, in a tenuous way, in the process of creating you, and if he is around then he will own you too, whether that is good for you or not. They could both decide they don't want you, in which case the state will pick someone else to

take you. Fortunately, there are a lot of people waiting in the wings, hoping that if the couple who created you would not be good parents then they will decide right away not to keep you. Those people in the wings jump through a lot of hoops to have a chance at being your parents, so they are likely to be above average, as parents go in a society that does little to foster competence (let alone excellence) in child rearing. But if one or both of the people who created you wants to keep you, as they almost always do, it doesn't matter if they are much worse prospects than those people waiting in the wings. They get to keep you, the state gives them that right.

"Once the matter of who takes you home is settled, the state tells those people that they have a right to control the rest of your life, including your connections with other human beings, pretty much however they want. They are free to use their power over your life to serve their own desires rather than your interests, as long as they do not treat you so badly as to make it likely that you will become a sociopath. For some reason, the state does not perceive that danger in parents' entirely isolating children from the rest of humanity, so it is possible you will not get to know anyone other than your one or two parents during the first eighteen years of your life. More likely, your parents will just cut you off from certain groups of people that they dislike for no good reason, and from extended family members with whom they do not get along, and they will decide with whom you do form relationships on the basis of who they like to associate with themselves, which will likely be only people who think and act the same way they do. The only persons other than your parents who might be able to insist on spending time with you, even if your parents don't want it, are your grandparents, but that might be true only if your parents allow them to form a close relationship with you in the first place.

"It is almost solely when your parents are at odds with each other — in particular, when they end their relationship with each other — and the state, with its modern equality-among-adults outlook, cannot figure out which of them to favor, that it glances your way and says 'well, then, let's let the kid decide.' And by 'decide,' it almost never means that you will actually make choices about your own life; rather, it means that some other adult whom you do not know will think about what would be best for you. That *could* work pretty well for you, perhaps, except that that adult who is supposed to figure out, in effect, what you would decide yourself if you were ready to do so, might not have the resources necessary to do it properly. In addition, he or she will be constantly distracted and confused by arguments of still other adults you do not know, called 'scholars,' that make some reference to you, and so sound helpful, but are really attempts to get your surrogate decision maker to favor one of the adults in your family over the other, for reasons that have little to do with you."

"And if the people to whom the state hands you over today turn out, to no one's great surprise (given the well-known fact that a significant percentage of unscreened

parents do so turn out), to be horrible people who either abandon you like an unwanted pet or keep you but treat you so badly that you are likely to become a sociopath, then the state will yank you out of your home and shuffle you around among temporary homes for a couple of years or more, at which point you will be lucky if anyone wants you."

This account would not give the newborn much confidence in his or her prospects for a happy life; it looks rather like a craps shot, perhaps with better odds and perhaps not. So I might add, by way of consolation, that it was not so long ago that someone in his or her position would have been viewed and treated in every respect not much differently from a horse or a slave. But if his or her eyes then suggested puzzlement as to whether this means the current state of affairs is closer to the best of possible worlds or to the worst of possible worlds, I am not sure what I would say.

If I instead imagine legal scholars asking for a summation of my "taxonomizing" efforts, I feel compelled to impose order and conciseness on what seems, at the end of the day, a somewhat tentative, probably imprecise, and definitely sprawling description of the law governing state decision making about children's relationships. I will make the attempt, with renewed apologies for the primitiveness of my conceptual framework and for any gaps in research or reasoning.

There is first the distinction between explicit and implicit rights. In no aspect of state decision making about children's relationships does the prevailing rule in the United States explicitly confer any "right" on children. Unlike the legal system of other countries, and despite America's alleged obsession with rights, our legal system is simply not comfortable with "children's rights" terminology. Any rights children possess, therefore, must be implicit, embedded in references to their choices or interests or in commands that particular outcomes result under certain sets of facts.

There being no rules conferring explicit rights, the legal universe can be divided into rules conferring absolute implicit rights, rules conferring non-absolute implicit rights, and rules conferring no rights on children. A legal rule would confer an absolute implicit right on children, I stipulated, if it either required individualized decision making solely on the basis of each child's best interests or preferences, or if it prescribed states of affairs that are always consistent with children's best interests. The former type of absolute implicit right can be identified on its face, while the latter can be identified only with reference to empirical observations.

Just two of the numerous rules governing state decision making about children's relationships command individualized decision making based solely on the interests and preferences of children — and then only on the surface. The prevailing rule for approval of an adoption, after biological parents or adoption agencies have selected the adoptive parents, requires an individualized determination that the adoption is

in the best interests of the child and that, in the case of older children, the child wants to be adopted by those people. Derivatively, children would also appear to have an absolute right regarding maintenance of relationships with siblings — for example, an adoption might be in a child's best interests only if his or her sibling is placed in the same family. By the point at which a court is asked to approve an adoption, however, the legally available alternatives have usually been drastically pared down to just 'adoption by these people' or 'no adoption.'

The sum total of rules governing selection of 'these people' by public agencies might also be said to confer an absolute right on children, insofar as they ostensibly require selection of the best available parents, from among ostensibly carefully screened applicants, for each individual child. On the other hand, the rules governing private agencies' selection process are unclear, at least to me, and those governing biological parents' selection of adoptive parents require only that those persons be minimally acceptable. Moreover, by excluding certain categories of people from adopting, at least with respect to particular children, and by favoring others, the law and practice of adoption effectively transform children's right into a weaker, non-determinative or partial right.

The other legal rule that comes close to conferring an absolute implicit right on children is that for custody decision making following a divorce or declaration of paternity. The majority rule commands judges solely to do what is best for the child, exercising their best judgment, guided by lists of relevant considerations that they should weigh and balance as seems appropriate under the circumstances of the individual case, without prejudice or presumption. Derivatively, this rule would also confer on children an absolute implicit right with respect to their sibling relationships. However, short-cut rules, such as a joint custody presumption or a primary caretaker presumption, apply formally in a minority of jurisdictions and might operate informally in a majority of jurisdictions. These rules weaken children's nominal rights in custody decision making insofar as they are in imperfect fit with the best interests ideal and insofar as the presumption is inordinately difficult or impossible to overcome on the basis of other considerations. In addition, courts have to some degree transformed children's right in connection with custody decisions to a non-determinative right, by completely or partially excluding certain considerations, such as societal reaction to parents' new relationships or the potential costs of parents' religious beliefs, out of concern for the interests and supposed rights of parents.

In connection with termination of parent-child relationships, children generally have an absolute right in *some* circumstances to *maintain* the relationship; in most jurisdictions, one or more bases for termination makes a best interests finding a necessary but not sufficient condition for ending the legal and social relationship. This right would rarely become operative, however. In addition, the majority rule for grandparent visitation arguably conferred an absolute right on children before

the *Troxel* decision, but the effect of that Supreme Court decision appears to be a transformation of the right into the limited one of being protected against "harm." The law in this area, however, remains very much in flux.

Whether any rules commanding particular states of affairs perfectly correlate with children's best interests requires reference to real world situations, but extensive study should not be required to conclude that none do. The rule that might seem closest to doing so — that is, the maternity rule that the woman who gives birth will be the legal mother, certainly disservices individual children in a significant percentage of cases. Significantly, all such rules operate against the background of a failsafe rule that the state may disrupt any arrangements it has created if they prove seriously damaging to children, which suggests that the law contemplates an imperfect fit. We can therefore conclude that all state-of-affairs rights children enjoy are non-absolute rights.

Among the legal rules conferring non-absolute rights, there are two types that command individualized decision making — namely, non-determinative rights, which require that children's interests or preferences be given some weight but allow these to be overridden by the interests of others, and limited rights, which ensure merely that a child's welfare does not fall below some minimal level. Among non-determinative rights, one might count the prevailing rules for approval of new parent adoption, insofar as they exclude certain categories of people — most commonly, homosexual couples — from consideration altogether even though they might constitute the best available parents for some children, or insofar as they give priority to other categories of people — such as relatives of the biological parents — even if they are not the best available parents. In a significant minority of jurisdictions, the basic custody rule suggests a balancing of children's interests with those of parents, the family, and/or the community, or with fairness to the parents, and therefore appears to confer a non-determinative right on children. Some subsidiary rules for custody that operate in all or most states — in particular, those aimed at rewarding or punishing parents for particular conduct, or respecting the constitutional rights of parents — also amount to injecting concerns other than the child's welfare into the calculation and making their right a non-determinative one.

Limited rights, protecting children from falling below some low level of well being, exist in several legal rules — namely, those governing selection of adoptive parents by biological parents, visitation with a non-custodial parent following divorce or a paternity action, selection of foster parents, and grandparent visitation.

Then there are the various non-absolute state-of-affairs rights. Paternity rules are the principal example of this sort of rule, conferring on children a weak subordinate right. The short-cut rules that some scholars and some courts favor in the custody realm could be said to embody imperfectly tailored rights for children, dictating an outcome that is assumed to be usually best for children but that is not so in a significant percentage of cases.

Lastly, there are many rules that control certain aspects of children's lives yet appear to confer on them no right whatsoever. Among these are the prevailing rules for maternity, removal of children from the care of foster parents, custody disputes between legal parents and adults who are not legal parents (but who might have served as *de facto* parents for a substantial period of time), most bases for termination of parental rights (principally because children lack standing to petition for termination), botched adoptions, creation of legal sibling relationships (except to some extent in the adoption context), and disputes between parents and persons other than grandparents who wish simply to visit with a child (including *de facto* parents and siblings).

That is the state of the law governing children's relationships in a nutshell. It is obviously very different from the law governing relationships between adults, which today confers on us absolute rights across the board — that is, in forming new relationships, maintaining existing relationships, and ending relationships. And in every context, the failure to afford children an absolute right is morally significant; in no context do the rights of others incidentally protect children's welfare in all cases.

To say that the absence of rights is morally significant is not, however, to say that is morally inappropriate. This Article has offered only a descriptive account. Any conclusion as to whether denial of rights to children in any particular context is justified must rest on an extensive normative analysis. I undertake such an analysis in a forthcoming book, tentatively entitled *Children's Relationship Rights*, and hope that many others will join in the enterprise.