THE BIRTH OF THE CIVIL DEATH PENALTY AND THE EXPANSION OF FORCED ADOPTIONS: REASSESSING THE CONCEPT OF TERMINATION OF PARENTAL RIGHTS IN LIGHT OF ITS HISTORY, PURPOSES, AND CURRENT EFFICACY

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TABLE OF CONTENTS

INTRODUCTION 1320

I. THE HISTORY OF TERMINATION OF PARENTAL RIGHTS IN RELATION TO ADOPTION 1327

A. *Current Law* 1328

B. *The Backdrop for Termination of Parental Rights: The Introduction of Adoption into American Law and the Rise and Fall of Adoption Numbers* 1332

C. *The Birth of Termination of Parental Rights* 1338

1. Case Law Illuminates the Questions in Adoption Law 1851-1950 and Lays the Groundwork for Creating Separate Termination of Parental Rights Proceedings 1338

2. Defining Abandonment 1341

3. The Relation Between Dependency and Adoption, and the Foresight of *Lacher v. Venus* 1343

D. *Calls for Change in the 1940s and 1950s* 1348

1. Demand for Children to Adopt 1349

2. Children in Need 1351

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a. Two Studies Frame Discussion of Length of Stays in Foster Care.....1351
b. The Foster Care Problem Framed as a Legal Issue.....1354
c. The Foster Care Problem Portrayed as a Problem of Abandonment.....1354
d. A Red-Tape Problem Allows a Non-Adversarial Solution.....1356
e. The Push for Transracial Adoption.....1357
3. Recommendations for Legal Change.....1361
II. ASSESSING THE REASONS TO DETACH TERMINATION OF PARENTAL RIGHTS FROM ADOPTION.....1364
A. *Clarity*.....1366
B. *Mingling of Issues*.....1372
C. *Protecting the Anonymity of Adoptive Families*.....1376
D. *Recruitment of Foster Parents*.....1378
E. *Any Outstanding Concern Can Be Addressed Through an Alternative to Stand-Alone Termination of Parental Rights*.....1382
III. REASSESSING TERMINATION OF PARENTAL RIGHTS.....1387
A. *A New World of Foster Care*.....1387
B. *A New World of Adoption*.....1390
CONCLUSION.....1398

INTRODUCTION

The legal construct of termination of parental rights—the act of permanently severing the legal relationship between parent and child—is deeply embedded in contemporary American child welfare law. Indeed, since the passage of the Adoption and Safe Families Act of 1997 (ASFA),[1] it can fairly be said that our entire foster care system is structured around the threat of terminating parental rights.[2] From the day a child is taken

1 Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.).

2 *See generally* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., RETHINKING CHILD WELFARE PRACTICE UNDER THE ADOPTION AND SAFE FAMILIES ACT OF 1997 (2000), https://affcny.org/wp-content/uploads/2008/11/asfaguide.pdf [https://perma.cc/9XC2-E9NY]; *see also* Kendra Huard Fershee, *The Parent Trap: The Unconstitutional Practice of Severing Parental Rights Without Due Process of Law*, 30 GA. ST. U. L. REV. 639, 640 (2014) ("[T]he Supreme Court's recent recognition of protections for the procedural and substantive due process rights of parents is clear: states must be extremely cautious when seeking to terminate parental rights. However, after ASFA, the opposite has been happening. States have every incentive to rush to judgment and sever parental rights . . . .").

into state-supervised care, the clock begins ticking toward the possible permanent destruction of the parent-child relationship. In response to the financial incentives in ASFA that reward states for terminating parents' rights, states have ended over two million parent-child relationships.[3] The United States now permanently severs the parental relationships of over seventy thousand children a year.[4] As a result, over one in every hundred children in the United States are legally cut off from their parents.[5] Black children are more than twice as likely as white children to have their legal ties to their parents severed, and the rate is even higher for Native American children.[6]

The shift in child welfare policy to favor more frequent termination of parental rights has been subject to considerable debate.[7] Some argue it serves children's interests, particularly their interest in stability.[8] Critics have emphasized the profound costs to children of losing their relationships with their families and, often, the communities from which they come.[9] Professor Dorothy Roberts, among others, has highlighted the structural racism of the child welfare system and the particular harm terminating parental rights inflicts on Black families and Black

3 Ctr. for the Study of Soc. Pol'y, *ASFA 25 Years Later: Time for Repeal* (Nov. 15, 2022), https://cssp.org/2022/11/asfa-25-years-later-time-for-repeal [https://perma.cc/B6WM-LZN5].

4 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT NO. 27 (2020) [hereinafter CHILDREN'S BUREAU, AFCARS REPORT NO. 27], https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport27.pdf [https://perma.cc/P6R4-AHWW].

5 *See* Chloe Jones, *1 in 100 Kids Lose Legal Ties to Their Parents by the Time They Turn 18. This New Bill Aims to Help*, PBS NEWSHOUR (Jan. 3, 2022, 4:30 PM), https://www.pbs.org/newshour/nation/1-in-100-kids-lose-legal-ties-to-their-parents-by-the-time-they-turn-18-this-new-bill-aims-to-help [https://perma.cc/4MLY-64AB].

6 Christopher Wildeman, Frank R. Edwards & Sara Wakefield, *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 33 (2020) (concluding that the cumulative prevalence of termination of parental rights is 2.4 times higher for Black children than white children and 2.7 times higher for Native American children than white children).

7 *Compare* ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 198–200, 204 (1999) (recommending policies that would expedite termination of parental rights and increase adoptions of children in foster care), *with* Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1716–17 (2000) (reviewing BARTHOLET, *supra*, and concluding that the proposals to increase termination of parental rights and adoptions "would gravely harm . . . children").

8 *See, e.g.*, Richard J. Gelles & Ira Schwartz, *Children and the Child Welfare System*, 2 U. PA. J. CONST. L. 95, 103–08 (1999).

9 *See, e.g.*, Vivek S. Sankaran & Christopher E. Church, *The Ties That Bind Us: An Empirical, Clinical, and Constitutional Argument Against Terminating Parental Rights*, 61 FAM. CT. REV. 246, 256–58 (2023); Adrienne Whitt-Woosley & Ginny Sprang, *When Rights Collide: A Critique of the Adoption and Safe Families Act from a Justice Perspective*, 93 CHILD WELFARE 111, 122–26 (2014); Ashley Albert et al., *Ending the Family Death Penalty and Building a World We Deserve*, 11 COLUM. J. RACE & L. 861, 872–78 (2021).

communities.[10] Others have documented the injustice of disproportionately severing parent-child bonds in Native American, low-income, and otherwise disadvantaged families.[11]

The most powerful calls for change have come from activists whose own families have been separated by the child welfare system.[12] As one collective of directly impacted Black mothers put it: terminations of parental rights "are a violent legal mechanism that kill families, and ASFA is the civil death penalty that enacts the execution."[13] ASFA, they contend, "is a continuation of many troubling histories in the United States where normative judgements [were made] around who were worthy families and who were not, who were worthy communities and who were not."[14]

These critiques are driving an important reassessment of the widespread practice of terminating parental rights.[15] But there has been a significant omission in the discussion: virtually no attention has been paid to the fact that until relatively recently it was entirely unheard of to sever all of a child's parental ties because *no such legal step was available.*

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10 *See* DOROTHY ROBERTS, TORN APART: HOW THE CHILD WELFARE SYSTEM DESTROYS BLACK FAMILIES—AND HOW ABOLITION CAN BUILD A SAFER WORLD (2022); DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002) [hereinafter ROBERTS, SHATTERED BONDS].

11 *See, e.g.*, Janet L. Wallace & Lisa R. Pruitt, *Judging Parents, Judging Place: Poverty, Rurality, and Termination of Parental Rights*, 77 MO. L. REV. 95, 116–17, 122 (2012) (arguing that courts excessively terminate the parental rights of low-income, rural parents); NAT'L COUNCIL ON DISABILITY, ROCKING THE CRADLE: ENSURING THE RIGHTS OF PARENTS WITH DISABILITIES AND THEIR CHILDREN 76–86 (2012), https://www.ncd.gov/assets/uploads/reports/2012/ncd-rocking-the-cradle.pdf [https://perma.cc/N7PC-5Q2B] (describing how the child welfare system discriminates against parents with disabilities); Philip M. Genty, *Procedural Due Process Rights of Incarcerated Parents in Termination of Parental Rights Proceedings: A Fifty State Analysis*, 30 J. FAM. L. 757 (1992) (describing the injustice of common practices that terminate the rights of incarcerated parents).

12 *See* Chris Gottlieb, *Black Families Are Outraged About Family Separation Within the U.S. It's Time to Listen to Them*, TIME (Mar. 17, 2021, 9:00 AM), https://time.com/5946929/child-welfare-black-families [https://web.archive.org/web/20240227125633/https://time.com/5946929/child-welfare-black-families]; Molly Schwartz, *Do We Need to Abolish Child Protective Services?*, MOTHER JONES (Dec. 10, 2020), https://www.motherjones.com/politics/2020/12/do-we-need-to-abolish-child-protective-services [https://perma.cc/UF6R-L2TM].

13 Albert et al., *supra* note 9, at 887.

14 *Id.* at 878.

15 *See* Comm. on the Elimination of Racial Discrimination, Concluding Observations on the Combined Tenth to Twelfth Reports of the United States of America, ¶¶ 43–44, U.N. Doc. CERD/C/USA/CO/10-12 (Sept. 21, 2022); COMM'N ON YOUTH AT RISK ET AL., AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES, RESOLUTION 606 (2022), https://www.americanbar.org/content/dam/aba/administrative/news/2022/08/hod-resolutions/606.pdf (last visited Feb. 9, 2024); CHILDREN'S RTS., FIGHTING INSTITUTIONAL RACISM AT THE FRONT END OF CHILD WELFARE SYSTEMS: A CALL TO ACTION TO END THE UNJUST, UNNECESSARY, AND DISPROPORTIONATE REMOVAL OF BLACK CHILDREN FROM THEIR FAMILIES (2021), https://www.childrensrights.org/wp-content/uploads/2021/05/Childrens-Rights-2021-Call-to-Action-Report.pdf [https://perma.cc/FN3R-T6P4].

The legal mechanism used to terminate parental rights, which is now ubiquitous in child welfare proceedings, did not exist until the mid-twentieth century and, when introduced, was rarely used. Understanding how and why this legal mechanism developed reveals that it is now used in ways that are inconsistent with its initial purposes, inflict unintended consequences, and can no longer be justified.

The phrase "termination of parental rights" did not exist until the late nineteenth century.[16] For nearly a century after the phrase was introduced in the case law, parental rights were only terminated within adoption proceedings, simultaneously with parental rights being granted to the adopting parents with whom the children already resided. This Article will argue that judicial action in those proceedings was better understood as a *transfer* of rights than as an extinguishing of rights. It was only in the 1940s that the idea arose of separating the two components of an adoption proceeding into two distinct legal proceedings: one that could terminate the birth parents' rights and another that could grant parental rights to adoptive parents.

In the middle of the twentieth century, for the first time, termination of parental rights statutes were enacted around the country.[17] Even after their passage, termination of parental rights remained a rare event for most of the rest of the century.[18] Then, in the 1990s, a major effort to expand adoption arose. At a time when the number of babies voluntarily given up for adoption by their parents had dropped, Congress passed ASFA, which dramatically increased the rate at which parental rights were terminated, making far more children available for adoptions over their parents' objections.

A critical shift had occurred between the passage of termination statutes and the explosion in their use. This Article explains that traditionally in the United States, parents lost their parental rights when they voluntarily relinquished their children to relatives or other caretakers, and that disputes about parental rights mainly involved private parties. Termination of parental rights statutes were initially aimed at legally disconnecting children from parents who had abandoned them. But by the 1990s, the public child welfare system had grown

16 See *infra* Sections I.C–I.D for a more detailed discussion of, and citations for, the historical points raised in this paragraph.

17 Helen Simpson, *The Unfit Parent: Conditions Under Which a Child May Be Adopted Without the Consent of His Parent*, 39 U. DET. L.J. 347, 361–62 (1962); George E. Johnson, Note, *Legislative and Judicial Recognition of the Distinction Between Custody and Termination Orders in Child Neglect Cases*, 7 J. FAM. L. 66, 67 (1967).

18 *See* Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 627 n.10 (1976); *see also* Johnson, *supra* note 17, at 70 ("[T]ermination statutes have seldom been used.").

dramatically, and almost all the children in out-of-home care had been involuntarily separated from their parents by state officials. In stark contrast to the private party context in which termination of parental rights was developed, today it is primarily *the state* that severs parental rights and forces adoptions of children over their parents' objections. Courts now routinely sever parent-child relationships on grounds having nothing to do with abandonment, and when the emotional bonds are meaningful to both parents and children.[19]

A robust literature has traced the expansion of the American child welfare system in the second half of the twentieth century, describing how the system treats the predictable ills of poverty as individual pathologies, rather than as systemic economic issues to be addressed through a safety net of material support for low-income families.[20] This approach ties economic support for families to government surveillance and intrusion into family life.[21] Important research has explored the threads that connect the modern child welfare system to its underpinnings in the punitive, Elizabethan poor laws, and documented the recurring pattern in American history of unjustly separating children in marginalized communities from their parents, including during slavery, Reconstruction, the Orphan Train movement, Native American boarding school programs, and the Indian Adoption Project.[22] Many of these examples underscore that child welfare efforts conducted in the name of children's best interests are often infused with prejudices against marginalized communities and lead to wrongful family separation.

Against the backdrop of this literature, this Article explains how a legal mechanism that developed in the private adoption context has been inappropriately conscripted by the child welfare system to become one of the legal tools used most vigorously by the state against low-income families, particularly families of color. Because the shift came incrementally and without debate, current practitioners and policymakers have failed to see how dramatic a transformation has occurred.

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19 *See infra* Section I.A.

20 *See, e.g.*, Josh Gupta-Kagan, *Towards a Public Health Legal Structure for Child Welfare*, 92 NEB. L. REV. 897, 903–08, 920–26 (2014); MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY (2020); DUNCAN LINDSEY, THE WELFARE OF CHILDREN 155–56 (1994); JANE WALDFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE AND NEGLECT 124–25 (1998).

21 WALDFOGEL, *supra* note 20, at 84–85, 118–19.

22 *See, e.g.*, LAURA BRIGGS, TAKING CHILDREN: A HISTORY OF AMERICAN TERROR (2020); ROBERTS, SHATTERED BONDS, *supra* note 10; PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997); Peggy Cooper Davis, *"So Tall Within"—The Legacy of Sojourner Truth*, 18 CARDOZO L. REV. 451 (1996); LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 8–13 (1999).

Excavating the history of this legal concept shows that whatever their original virtues, none of the reasons that initially justified detaching termination of parental rights proceedings from adoption proceedings have merit today. Moreover, terminating parental rights outside of adoption proceedings has led to the unintended consequence of creating legal orphans—children who have no legal connection to any family and suffer a range of negative outcomes. This Article argues that the purposes of terminating parental rights can be better served by returning to the transfer-of-rights model that was initially used for adoptions.[23] Among other benefits, the proposed alternative approach would end the historically anomalous phenomenon of legal orphanhood.

This Article proceeds in three Parts. Part I begins with a historical analysis that situates termination of parental rights within U.S. adoption law more broadly, identifying the legal questions raised in early adoption case law that laid the groundwork for developing stand-alone termination of parental rights proceedings, and examining how the growing demand for babies to adopt and new concerns about children languishing in foster care led to the idea of matching "demand" with "supply" by making more foster children eligible for adoption. This Part explains how the supply-and-demand analysis led to a legal mechanism for terminating parental rights outside of adoption proceedings.

Part II considers why the calls to increase adoption included explicit calls to detach termination of parental rights actions from adoption proceedings. It identifies four concerns that motivated the push to establish stand-alone termination proceedings and argues that these concerns have little, if any, validity in the current child welfare system. It also explains that, to the extent there is any continuing belief that terminating parental rights serves a legitimate interest in recruiting adoptive parents, an alternative, less draconian legal mechanism can achieve that goal without inflicting the harms that result from the current approach.

Part III describes the shift in the foster care population between the time stand-alone termination of parental proceedings were introduced and the 1990s, when ASFA was enacted. In the earlier era, most foster children had been voluntarily placed in foster care by their parents; by the 1990s, most foster children had been separated from their parents by the

23 Some points raised in this Article suggest that termination of parental rights may not be the best approach to take even within adoption proceedings. Returning to a model that views parental rights as rights that are transferred rather than extinguished opens the question of whether all rights in the traditional bundle of parental rights should always be transferred together. In another piece, I pursue that question and consider options for transferring some, but not all, parental rights in adoption. Chris Gottlieb, *A Path to Eliminating the Civil Death Penalty: Unbundling and Transferring Parental Rights*, 19 HARV. L. & POL'Y REV. (forthcoming 2024).

state.[24] When termination proceedings were introduced, the parents whose rights were terminated typically had minimal contact with their children, and terminating parental rights was viewed as bringing the legal relationships in line with the actual relationships. Today, terminations of parental rights commonly sever close family bonds. Consequently, a legal mechanism that was once viewed as a noncontroversial, almost administrative procedure, is now referred to by litigants and courts alike as the family "death penalty."

Part III also documents the changing adoption landscape in the 1970s and 1980s, when the number of babies voluntarily relinquished by birth parents dropped dramatically as abortion became more accessible and single motherhood became more acceptable. Thus, the time at which the child welfare system most aggressively began increasing the number of children put up for adoption over their parents' objection was a time when prospective adoptive parents were frustrated by the lack of children to adopt.

This Part argues that it is important to consider how the narratives around transracial adoption interacted with public dialogue about "the best interests" of foster children during this time. There were competing narratives between proponents and opponents of the adoption of Black children by white parents. Notably, at the same time that the federal government offered states incentives to increase the adoption of foster children, federal law came down on the side of "race-blind" adoptive placements for children in state care with the passage of the Multiethnic Placement Act. This legislative combination, coupled with the overrepresentation of Black children in foster care, meant that terminating the rights of more parents of foster children would lead to the adoption of more Black children by white foster parents.

Revisiting the birth of termination of parental rights offers strong reasons to stop terminating parental rights outside of adoption proceedings. The current practice must be reassessed with recognition that severing family ties in marginalized communities serves the interests of adults in more privileged communities—a correlation that should provoke extreme caution in light of the American child welfare system's shameful history of breaking up disadvantaged families.

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24 *Compare* Hiram D. Gordon, *Terminal Placements of Children and Permanent Termination of Parental Rights: The New York Permanent Neglect Statute*, 46 ST. JOHN'S L. REV. 215, 227 (1971) (reporting that, as of 1971, "[m]ost children in foster care in the United States were separated voluntarily from their parents"), *with* Katharine Hill, *Prevalence, Experiences, and Characteristics of Children and Youth Who Enter Foster Care Through Voluntary Placement Agreements*, 74 CHILD. YOUTH & SERVS. REV. 62, 65 (2017) (reporting that, in 2013, over ninety-five percent of children in foster care had been removed from their parents involuntarily through court order).

I. THE HISTORY OF TERMINATION OF PARENTAL RIGHTS IN RELATION TO ADOPTION

Today, stand-alone termination of parental rights proceedings are so integral to the way child welfare agencies and courts approach foster care cases that professionals in the field do not think of these proceedings as one among various possible approaches. Revisiting the social trends and motives that led to the development of this legal mechanism, therefore, offers an opportunity to critically assess whether the practice of terminating parental rights is aligned with contemporary values and understandings of children's needs.

After providing an overview of the role of terminations of parental rights in current practice, this Part analyzes the historical circumstances that led to separating proceedings to terminate parental rights from adoptions. This transition occurred in the 1940s and 1950s, about a hundred years into the life of American adoption law. A stand-alone legal mechanism to terminate parental rights would not have been coherent, let alone viewed as desirable, through most of American history. But a number of legal questions that arose in early adoption case law and the changing social dynamics of adoption in the post–World War II era laid the foundation for a groundswell of support in the middle of the twentieth century for changing the legal approach to termination of parental rights in order to increase the number of adoptions.

Three aspects of the child welfare field shifted in the twentieth century in ways that are particularly important to understanding the development of termination of parental rights law: (1) the changing racial dynamics of foster care and adoption, (2) the growing professionalization of the social work field and the related rise in the influence of child welfare agencies, and (3) the shift from private to public control of child welfare efforts. The last of these entailed a shift from most children entering foster care through voluntary placements by their parents to most entering as a result of involuntary, state-imposed family separations.[25]

25 While a comprehensive analysis of these topics is beyond the scope of this Article, they have been extensively explored elsewhere, and I will draw on that work to explain how they have influenced termination of parental rights law. *See, e.g.*, JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950, at 20–23 (2000); E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION (1998); ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972).

A. *Current Law*

Today, all fifty states have public child welfare agencies that routinely file petitions to terminate parental rights.[26] Although each state has its own substantive law of termination of parental rights, every state has accepted the federal funds that are tied to extensive requirements regarding when and how children enter and leave foster care, including how quickly states are expected to move to terminate parental rights in order to facilitate adoptions of children in foster care.[27] Thus, despite differences in detail, the state law in this area is heavily shaped by federal law. The three federal laws that currently do the most to shape states' child welfare laws are (1) the Child Abuse Prevention and Treatment Act,[28] (2) the Adoption Assistance and Child Welfare Act of 1980,[29] and (3) the Adoption and Safe Families Act of 1997.[30]

Under federal law, when children become wards of the state and enter foster care, parents are given a service plan and told that they have fifteen months to successfully complete that plan before the state will seek to terminate their parental rights.[31] The phrase "termination of parental rights" is typically stamped in warnings on court orders well before a termination petition is filed (e.g., "Failure to comply with this order may

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26 *See* LAURA RADEL & EMILY MADDEN, OFF. OF HUM. SERVS. POL'Y, U.S. DEP'T OF HEALTH & HUM. SERVS., FREEING CHILDREN FOR ADOPTION WITHIN THE ADOPTION AND SAFE FAMILIES ACT TIMELINE: PART 1—THE NUMBERS 4 (2021), https://aspe.hhs.gov/sites/default/files/private/pdf/265036/freeing-children-for-adoption-asfa-pt-1.pdf [https://perma.cc/J9T8-427V]. In some states, termination petitions are filed by private foster care agencies rather than by public child protective service agencies, but those private agencies are working as contractors for the government. For ease of exposition, I will refer to all agencies that are public or working under contract with a public agency as "public agencies" and nonprofit agencies that are not working under contract with the government as "private agencies." *See* Wilder v. Bernstein, 645 F. Supp. 1292, 1315–16 (S.D.N.Y. 1986) (holding that private foster care agencies who contract with the state to provide foster care are acting as agents of the state for at least some purposes), *aff'd*, 848 F.2d 1338 (2d Cir. 1988).

27 KAREN SPAR, CONG. RSCH. SERV., RL30759, CHILD WELFARE: IMPLEMENTATION OF THE ADOPTION AND SAFE FAMILIES ACT (P.L. 105-89) 1 (2004), https://www.everycrsreport.com/files/20041108_RL30759_96784ee8d3d99882a9c887e9da08de67ee99e872.pdf [https://perma.cc/XLV2-NMNL] ("Since 1997, all states have enacted their own laws to implement parts of ASFA.").

28 Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified as amended at 42 U.S.C. § 5101–5106).

29 Pub. L. No. 96-272, § 101, 94 Stat. 500, 501–13 (codified as amended in scattered sections of 42 U.S.C.).

30 Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended in scattered sections of 42 U.S.C.). There are other federal laws, such as the Family First Prevention Services Act, Pub. L. No. 115-123, §§ 50701–50782, 132 Stat. 64, 232–69 (2018) (codified as amended in scattered sections of 42 U.S.C.), that affect state law, but the three federal laws mentioned in the text are the most important federal influences on the structure and content of state child welfare law.

31 Raymond C. O'Brien, *Reasonable Efforts and Parent-Child Reunification*, 2013 MICH. ST. L. REV. 1029, 1029–30, 1052.

result in the Termination of Your Parental Rights," "If your child is in foster care for fifteen months, the agency may be required by law to file to terminate your parental rights," etc.). No capable, modern defense attorney in the field can fail to see the looming possibility of termination of parental rights as central to client counseling and litigation strategy throughout foster care cases.

In addition, the relationships between parents and the social workers assigned to assist them are shaped by the threat of termination of parental rights. In the vast majority of cases, states are required to make efforts to reunify foster children with their parents. But with the advent in the 1980s of a social work approach called "concurrent planning," foster care caseworkers are now encouraged to begin formulating an alternative plan for foster children—typically adoption—right as they enter foster care.[32]

ASFA imposes financial penalties on states for failing to file termination of parental rights petitions within fifteen months of a child entering foster care, in the absence of a statutory exception.[33] ASFA also rewards states financially for every foster care adoption they accomplish over a baseline.[34] In addition to the monetary incentives that go directly to states, the federal government provides monthly subsidies directly to the majority of foster parents who adopt.[35] Those subsidies continue until the youth turns eighteen or twenty-one. Currently the United States spends more than $2.6 billion annually subsidizing 469,000 adoptions.[36]

In the wake of these financial incentives and the effect they have had on the social work support provided to families, the chance that a child will experience a termination of parental rights has risen significantly,

32 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CONCURRENT PLANNING FOR TIMELY PERMANENCE (2018), https://www.childwelfare.gov/pubPDFs/concurrent_planning.pdf [https://perma.cc/G8AL-C23P] (describing efforts to encourage concurrent planning and stating that twenty-four states require it in at least some circumstances).

33 42 U.S.C. § 675(5)(E). The exceptions to the statutory time period are: (1) the child is being cared for by a relative, (2) there is a compelling reason the filing of a petition to terminate parental rights would not be in the child's best interest, or (3) the state has not provided the services it deemed necessary to safely return the child to the parent. *Id.*

34 *See* EMILIE STOLTZFUS, CONG. RSCH. SERV., R43025, CHILD WELFARE: STRUCTURE AND FUNDING OF THE ADOPTION INCENTIVES PROGRAM ALONG WITH REAUTHORIZATION ISSUES 1 (2004), https://sgp.fas.org/crs/misc/R43025.pdf [https://perma.cc/N5PF-SQ64] ("The Adoption Incentives program (Section 473A of the Social Security Act) provides federal bonus funds to state child welfare agencies that increase adoptions of children . . . .").

35 *See Title IV-E Adoption Assistance*, CHILDREN'S BUREAU, https://www.acf.hhs.gov/cb/grant-funding/title-iv-e-adoption-assistance [https://perma.cc/4D3W-3EJP] (July 3, 2023).

36 *Id.*

doubling between 2000 and 2016.[37] The number has reached over seventy thousand children a year.[38]

This surge in terminations of parental rights has led to two unprecedented developments. First, the number of public adoptions (adoptions sought by the state for children in state custody)[39] has surpassed for the first time the number of private adoptions (adoptions that result from parents voluntarily relinquishing their children).[40]

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37 Wildeman, Edwards & Wakefield, *supra* note 6, at 33.

38 *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., TRENDS IN FOSTER CARE AND ADOPTION: FY 2012–2021, at 1 (2022) [hereinafter CHILDREN'S BUREAU, TRENDS], https://www.acf.hhs.gov/sites/default/files/documents/cb/trends-foster-care-adoption-2012-2021.pdf [https://perma.cc/FBM7-6HRC].

39 I use the term "public adoptions" to refer to adoptions of children who are wards of the state. "Private adoptions" are those that do not involve children who are wards of the state; they include adoptions arranged by private agencies (when not operating under state contracts) and those arranged by individuals without agency facilitation. Parents sometimes sign surrenders while their children are wards of the state, most often when a termination of parental rights petition is pending. Although such surrenders technically require a parent's consent, I do not refer to these surrenders as "voluntary" because they are often signed in exchange for an agreement that the parent will be allowed continued contact with their children after adoption, under threat that if the parents do not surrender their rights, they will be terminated and contact with their children will be entirely cut off. *See* Ashley Albert & Amy Mulzer, *Adoption Cannot Be Reformed*, 12 COLUM. J. RACE & L. 557, 588–89, 593 (2022) (discussing the pressure to sign a surrender when a termination petition is pending and the fact that post-adoption contact agreements are often not enforceable); *see also* Shad Polier, *Amendments to New York's Adoption Law: The "Permanently Neglected" Child*, CHILD WELFARE, July 1959, at 1, 4 (indicating that the drafter of New York's termination of parental rights statute anticipated that the filing of termination petitions would increase the number of parental surrenders signed). I refer only to surrenders of parental rights that occur without facilitation by the state as "voluntary." I will not address here the important discussion in the adoption literature of whether and when any surrender should be considered meaningfully voluntary in light of various pressures, financial and otherwise, that have historically been exerted on mothers who sign away their rights to their children. *See, e.g.*, RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES (2001); BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 105–57 (2002) (discussing the pressures on unmarried single mothers to relinquish their children for adoption).

40 *Compare* Veera Korhonen, *Number of Children Adopted with Public Child Welfare Agency Involvement in the United States from 2007 to 2021*, STATISTA (Nov. 28, 2023), https://www.statista.com/statistics/255376/number-of-children-adopted-with-public-child-welfare-agency-involved-in-the-us [https://perma.cc/Z8E5-AHR5] (showing over 66,000 children in the United States were adopted with the involvement of a public child welfare agency in 2019), *with* Olga Khazan, *The New Question Haunting Adoption*, THE ATLANTIC (Oct. 19, 2021), https://www.theatlantic.com/politics/archive/2021/10/adopt-baby-cost-process-hard [https://web.archive.org/web/20240312020825/https://www.theatlantic.com/politics/archive//2021/10/adopt-baby-cost-process-hard/620258] ("Of the nearly 4 million American children who are born each year, only about 18,000 are voluntarily relinquished for adoption."). *Accord How Many Children Are Adopted Each Year?*, AM. ADOPTIONS, https://www.americanadoptions.com/adoption/10_adopted_kid_facts [https://web.archive.org/web/20240113192434/https://www.americanadoptions.com/adoption/10_adopted_kid_facts] ("As of 2014, statistics of

Second, there is a growing number of youth with the new status of "legal orphan." These are children whose legal connection to their parents has been severed and who have not been adopted.[41] Although the exact number of children who remain legal orphans is not known, it is clear that in recent decades tens of thousands of children have left foster care at age eighteen or twenty-one without legal ties to any adults. They are orphans under the law even though they have living parents who love them.[42] It is well documented that these youth fare poorly on multiple metrics, including increased risk of incarceration, homelessness, and unemployment.[43] Less documented, but undisputed, is the emotional harm to young people of leaving them without family ties. One foster youth captured that harm succinctly, saying: "I belonged to nobody."[44]

Despite the universal disfavor of legal orphan status, contemporary child welfare practitioners and policymakers assume without discussion that children will not be adopted out of foster care unless there is first a legal proceeding in which parents' rights are surrendered or terminated.[45] Consequently, all current efforts to encourage adoption of foster children are viewed as being contingent on increasing the number of families in which parental rights are terminated, which encourages a parallel increase in the number of legal orphans. The history of adoption reveals

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adopted children showed the number of domestic infant adoptions was 18,329. That number has stayed consistent through 2020. The Department of Health and Human Services Children's Bureau showed adopted children statistics reported a steady increase in adoption from the foster care system. As of 2019, more than 66,000 children were adopted via foster care.").

41 *See* Raquel Ellis, Karin Malm & Erin Bishop, *The Timing of Termination of Parental Rights: A Balancing Act for Children's Best Interests* 1 (Child Trends, Research Brief No. 2009-40, 2009), https://cms.childtrends.org/wp-content/uploads/2009/09/Child_Trends-2009_09_09_RB_LegalOrphans.pdf [https://perma.cc/GJ8F-V5E9] ("Legal orphans refer to children who no longer have legal ties to their birth family, yet have no adoptive family either."). The term "legal orphan" was coined by Marty Guggenheim. *See* LaShanda Taylor Adams, *Backward Progress Toward Reinstating Parental Rights*, 41 N.Y.U. REV. L. & SOC. CHANGE 507, 508 (2017) (citing Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care—an Empirical Analysis in Two States*, 29 FAM. L.Q. 121, 122 (1995)).

42 *See 51 Useful Aging Out of Foster Care Statistics*, NAT'L FOSTER YOUTH INST. (May 25, 2017), https://nfyi.org/51-useful-aging-out-of-foster-care-statistics-social-race-media [https://perma.cc/J56U-8DNW]; Ellis, Malm & Bishop, *supra* note 41, at 10–11.

43 *See* SHARON MCCULLY & ELIZABETH WHITNEY BARNES, NAT'L COUNCIL OF JUV. & FAM. CT. JUDGES, FOREVER FAMILIES: IMPROVING OUTCOMES BY ACHIEVING PERMANENCY FOR LEGAL ORPHANS 4–5 (2013), https://www.ncjfcj.org/wp-content/uploads/2013/04/LOTAB_3_25_13_newcover_0.pdf [https://perma.cc/GLX4-MUH3] (describing the poor outcomes for legal orphans on a variety of social measures); *see also* Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 115 (2013) (calling the creation of over a hundred thousand legal orphans "perhaps ASFA's most disturbing legacy").

44 *See* Godsoe, *supra* note 43, at 134.

45 *See, e.g.*, RADEL & MADDEN, *supra* note 26, at 2 ("Termination of parental rights is necessary before another family may adopt the child.").

that this approach was not inevitable and that it is not as defensible as it once may have seemed.

B. *The Backdrop for Termination of Parental Rights: The Introduction of Adoption into American Law and the Rise and Fall of Adoption Numbers*

The concept of terminating parental rights can only be understood against the backdrop of the development of adoption law. There was no need for or interest in terminating parental rights—and therefore no legal concept of doing so—until there was an interest in transferring those rights to adoptive parents. A comprehensive history of adoption is beyond the scope of this Article and the terrain has been well covered elsewhere,[46] but this Section traces the aspects of adoption in the United States that are necessary to situate the introduction of stand-alone termination of parental rights proceedings.

Though legal adoption goes back to the Code of Hammurabi and was well established in the Roman Empire, it was unknown at common law and was not introduced by statute in the United States until 1851.[47] Earlier, in the 1700s and the first half of the 1800s, adoptions were sometimes accomplished in the United States through private legislative enactments (in which state legislatures voted to approve a particular adoption and associated name change) and the registration of deeds—an approach that highlights that adoptions were viewed primarily as a *transfer* of rights.[48] Like much of the adoption practice that came before it, these adoptions were focused on the transmission of inheritance rights and continuing family names, which is not to say they did not reflect emotional bonds as well.[49]

The first modern use of adoption in the United States came with the passage of the Massachusetts Adoption of Children Act of 1851.[50] The

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46 *See, e.g.*, E. Wayne Carp, *Introduction: A Historical Overview of American Adoption*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 1 (E. Wayne Carp ed., 2002); BEREBITSKY, *supra* note 25.

47 CARP, *supra* note 25, at 3.

48 *Id.* at 7, 11 (explaining that adoptions by deed "provided a legal procedure 'to authenticate and make a public record of private adoption agreements,' analogous to recording a deed for a piece of land" (quoting Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 466 (1971))); BEREBITSKY, *supra* note 25 at 20; Note, *Improving the Adoption Process: The Pennsylvania Adoption Act*, 102 U. PA. L. REV. 759, 759–60 (1954).

49 *See* MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 269–70 (1985); CARP, *supra* note 25, at 4.

50 Act of May 24, 1851, ch. 324, 1851 Mass. Acts 815. A few states passed adoption laws in the civil law vein, beginning a couple of years earlier, but the Massachusetts Act is generally taken to mark the beginning of the modern adoption era. *See* GROSSBERG, *supra* note 49, at 271–72.

modern approach prioritized promoting the welfare of the child through judicial assessment of the prospective adoptive home.[51] By 1900, most states had followed Massachusetts in passing statutes that allowed courts to authorize adoptions.[52] These statutes mark the ascent of a new perspective on adoption that required a court's consideration of the child's interests and the adequacy of the proposed adoptive home.[53] Two aspects of these statutes are notable for present purposes. First, they generally allowed adoption only upon the consent of the birth parents.[54] Second, they specified that the adoption would end the rights and obligations of the birth parents and that those rights and obligations would be granted to the adoptive parents.[55] Thus, while these statutes expanded the role of the courts and placed a new priority on children's well-being, they continued the idea—seen in the earlier registrations of adoptions—of adoption as a voluntary transfer of rights from one parent (or one set of parents) to another.

Although definitive statistics are not available, historians have concluded that adoptions under these statutes were relatively rare prior to the end of the nineteenth century.[56] Census data indicates that the number of adopted children was not substantial until a marked jump in the 1900 census.[57] While adoption began to get favorable attention in the media at the beginning of the twentieth century,[58] social work practice

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51 CARP, *supra* note 25, at 11–12.

52 GROSSBERG, *supra* note 49, at 272.

53 This focus tracked other aspects of family law that similarly were beginning to focus on children's best interests. *See id.* at 237–43. Some commentators have noted that assertions of children's best interests are often best understood as masking assertions of adults' interests. *See, e.g.*, Guggenheim, MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS, at xii, 90, 152–59 (2005).

54 The Massachusetts statute, and others modeled directly on it, made no allowance for adoption without consent of the birth parents. 1851 Mass. Acts 815. Some subsequent adoption statutes allowed exceptions to consent for parental unfitness. GROSSBERG, *supra* note 49, at 274–75. There is no case law suggesting these exceptions were commonly used.

55 *See, e.g.*, 1851 Mass. Acts 815.

56 *See* GORDON, *supra* note 22, at 10 ("[L]egal adoption became customary only in the twentieth century and was rarely practiced previously . . . .").

57 Chiaki Moriguchi & John M. Parman, Adoption and Adult Outcomes in the Early 20th Century 35 tbl.4 (Mar. 31, 2015) (unpublished manuscript), https://jmparman.people.wm.edu/research-files/adoption-paper-03-31-15.pdf [https://perma.cc/LS5E-4R38] (showing that census data reported fewer than thirty adoptive children in the United States in most decades prior to 1900, when an estimated 101,764 adoptions were reported).

58 *See* BEREBITSKY, *supra* note 25, at 51–101; *see also, e.g.*, *More Homes Seek Children Now Than Children Homes*, N.Y. TIMES, May 8, 1927, at 188 ("A good deal of publicity has lately been given to the adoption of children by wealthy people, and these stories have prompted others to think that, even though their means may be less, they might do the same thing. The idea has proved contagious." (quoting Sophie van Senden Theis, Secretary of the Child Placing Department of the New York State Charities Aid Association)).

strongly favored convincing unwed mothers to keep their babies into the 1930s.[59] Then, a significant shift in the understanding of adoption and its role occurred in the 1940s.

Historians have described 1946–1970 as the period in which "adoption won widespread cultural legitimacy."[60] Indeed, in the postwar era, adoption became a touchstone in the cultural understanding of family and motherhood, becoming part of the era's "celebration of marriage and domesticity."[61] A number of factors fed into the new embrace of adoption, including the ascendance of the notion of an idealized middle-class family in which the woman's role centered on mothering, and a shift in the emphasis from nature to nurture in the understanding of child development.[62] Prior to that time, adoption had been seen as risky because genetics were seen as determinative of children's future success, and there was rampant prejudice against the low-income parents of children available for adoption.[63] Medical advances that allowed for the diagnosis of sterility also contributed to the use of adoption as a response to infertility.[64]

Whereas in earlier eras children had been valued for their labor, the shift from a subsistence to a market economy and the pushback against the use of child labor after industrialization led to a very different understanding of the role of children in households.[65] As Viviana Zelizer

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59 E. Wayne Carp, *Professional Social Workers, Adoption, and the Problem of Illegitimacy, 1915–1945*, 6 J. POL'Y HIST. 161, 168 (1994) ("[I]t is all but impossible to find a professional social worker before the early 1940s advocating, as a first resort, the separation of unmarried mothers from their children."); BEREBITSKY, *supra* note 25, at 12–15 (discussing growing media coverage of adoption and social workers' "skeptic[ism] about the value of adoption").

60 BEREBITSKY, *supra* note 25, at 16.

61 *Id.* at 16, 100–02; *see also* E. Wayne Carp, *The Sentimentalization of Adoption: A Critical Note on Viviana Zelizer's* Pricing the Priceless Child, 5 ADOPTION & CULTURE 7, 19 (2017) ("The sentimentalization of adoption during the 1940s was the result of numerous factors, including the low birthrate of the Depression, wartime prosperity, and the baby-boom pronatalism that put a premium on family and home life.").

62 *See, e.g.*, MELOSH, *supra* note 39, at 115; VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 9 (1985).

63 *See* Marshall Field, President, Child Welfare League of Am., Address to the National Conference on Adoptions (Jan. 26, 1955), https://pages.uoregon.edu/adoption/archive/FieldCWLA.htm [https://perma.cc/QV3P-K76L]; BEREBITSKY, *supra* note 25, at 28–29.

64 Carp, *supra* note 46, at 13.

65 *Compare* Neva R. Deardorff, *"The Welfare of the Said Child . . . ,"* 53 SURV. MIDMONTHLY 457, 457 (1925) ("Adoption gives the adopters control of the services and earnings of a child during minority and a claim for non-support thereafter; it becomes a very practical matter when an aged couple of no financial resources adopt an adolescent or a young child."), *with* BEREBITSKY, *supra* note 25, at 21 ("The married couple and their children—not the household—soon became the fundamental unit of society. In these families, separate from the larger community, the focus centered on the emotional rather than the economic support that members provided one another. In

explained in the classic *Pricing the Priceless Child*, by midcentury there was a shift from viewing children as economically productive to viewing them as emotionally valuable.[66] As this sentimental understanding of childhood began to shape family life, adoption took on a new role in which it was viewed as a way to complete incomplete (typically infertile) families and to promote the best interests of children.[67]

Another factor in the broadening acceptance of adoption was the growth of the social work profession. Although in the Progressive Era social workers favored preserving families over separating children from parents, ultimately the profession "claimed adoptive placement as part of their domain."[68] The interests of the profession became entwined with the growth of the adoption phenomenon, which it came "to manage . . . through professional protocols and expert supervision."[69] As part of this "professionalization" of the field, the U.S. Children's Bureau, a federal agency established in 1912, and the Child Welfare League of America (CWLA), which began in 1921, pushed for the development of adoption standards.[70] The resulting standards were explicitly centered on claims of concern for children's welfare and linked that concern to an enhanced role for social workers in the adoption process. Thus, historians have concluded that the embrace of adoption in the postwar era not only provided a social mechanism for socially censuring sexual activity by unmarried girls and women, and shaped gender roles around the notion of a domestic idyll in which women are only complete if they are mothers, but also promoted the stature of the social work profession.[71]

As adoption became more acceptable, and the postwar notion of family took cultural center stage, the number of adoptions in the United States increased dramatically. Between 1944 and 1970, the estimated

private homes presided over by a loving mother and united by affection, children were a crucial element.").

66 *See* ZELIZER, *supra* note 62, at 192–93; *see also* Carp, *supra* note 61, at 18–19 (disagreeing with Zelizer about the timing of the "sentimentalization of adoption," and dating it to the 1940s).

67 What is understood to constitute the best interests of children is, of course, highly contestable and contingent on prevailing social mores. Critics have highlighted that assertions of children's best interests often reflect racial bias and serve to promote unstated adult interests. *See* Guggenheim, *supra* note 7, at 1720; Albert & Mulzer, *supra* note 39, at 574–80. The point here is not to assess the assertions about best interests made in the postwar period, but rather to explain that the public discussion at the time linked adoption with children's best interests.

68 MELOSH, *supra* note 39, at 3.

69 *Id.*

70 *See Minimum Standards*, ADOPTION HIST. PROJECT, https://pages.uoregon.edu/adoption/topics/minimumstandards.htm [https://perma.cc/F8TX-AHTV] (Feb. 24, 2012).

71 *See* REGINA G. KUNZEL, FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945, at 141–43 (1993); MELOSH, *supra* note 39, at 4, 40, 108–09.

number of adoptions increased year-on-year in every year but one.[72] By the end of the 1950s, there were over 100,000 adoptions per year.[73] Adoptions reached their peak in 1970 at 175,000 total, of which 89,200 were adoptions of children by unrelated adults.[74] Following that peak, the number of non-relative adoptions fell dramatically, dropping by nearly fifty percent in five years to 47,700.[75] Virtually all commentators agree that the sharp drop in adoptions was not driven by a decrease in the number of people who wanted to adopt, but rather by a decrease in the number of babies available for adoption.[76] The change resulted from increased access to birth control and abortion and the increased acceptability of single parenthood. The demand for babies to adopt had outstripped the supply for some time,[77] but, in the 1970s and 1980s, the gap grew larger as the number of babies offered for adoption began to dwindle. That demand increasingly outpaced the supply of babies will be a salient point when analyzing the development of termination of parental rights law.[78]

Two additional historical points are critical to understanding the circumstances under which stand-alone terminations of parental rights proceedings developed. First, throughout the history of adoption in the United States, there have been three types of adoptions: those arranged by public agencies, those arranged by private agencies, and those arranged by private individuals without the aid of public or private agencies (sometimes called "independent adoptions").[79] The relative proportions of these three kinds of adoptions has shifted over time for a variety of reasons, some of which will be discussed in the next Section. For now, it is sufficient to note that the percentage of independent adoptions dropped substantially over time, particularly between 1950 and 1970, while the number of public adoptions rose dramatically, more than

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72 Wm. Robert Johnston, *Historical Statistics on Adoption in the United States, Plus Statistics on Child Population and Welfare*, JOHNSTON ARCHIVE, https://www.johnstonsarchive.net/policy/adoptionstats.html [https://perma.cc/GS5G-HEQY] (Nov. 12, 2022) (summarizing adoption and foster care statistics for the United States from 1940 to 2021).

73 Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564, 564 (1961).

74 Johnston, *supra* note 72; Penelope L. Maza, *Adoption Trends: 1944–1975*, ADOPTION HIST. PROJECT, https://pages.uoregon.edu/adoption/archive/MazaAT.htm [https://perma.cc/H7JA-6P3K] (Feb. 24, 2012). To the extent possible, the numbers discussed in the text will exclude stepparent adoptions, which raise important questions, but are not the focus of this Article.

75 Johnston, *supra* note 72; Maza, *supra* note 4.

76 *See infra* Section III.B.

77 *See* MELOSH, *supra* note 39, at 20, 36.

78 *See infra* Sections I.D.1, III.B.

79 CHRISTINE WARD GAILEY, BLUE-RIBBON BABIES AND LABORS OF LOVE: RACE, CLASS, AND GENDER IN U.S. ADOPTION PRACTICE 1–2 (2010).

doubling from eighteen percent in 1951 to thirty-nine percent in 1975.[80] After 1975, it is more difficult to track these percentages exactly (because the federal government stopped tracking them), but, for the reasons discussed below, it is clear that the percentage of public adoptions continued to rise. By 2014, over two-thirds of adoptions were reported to be public adoptions—meaning adoptions of children who are wards of the state, facilitated by government agencies.[81]

Second, the racial makeup of adopted children has changed significantly. Prior to 1950, almost all adopted children were white.[82] Beginning in the 1950s, there were calls to increase the adoption of Black children. At first, these calls were largely aimed at ending discrimination against Black children who were viewed as in need of adoption. These calls came both from the largely white social work profession and from civil rights groups, though the civil rights groups focused more on recruiting Black adoptive parents.[83] In the late 1960s and 1970s, transracial adoption came more to the fore, a complex and controversial development.[84] One point, however, is uncontested: in the second half of the twentieth century, the social acceptability of transracial adoption grew and, with it, the number of adoptions of nonwhite children by white adults.

In broad strokes one could summarize this history by saying that, between roughly 1850 and 1890, adoption was introduced into American law, but was not widely used or accepted; between 1890 and 1945, it became more accepted and more common; between 1945 and 1970, adoption reached its heyday; and beginning in 1970, it was curtailed by the diminishing availability of babies voluntarily placed for adoption. The set of questions at the heart of this Article is when, how, and why in this trajectory was the legal concept of termination of parental rights conceived and promulgated.

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80 Maza, *supra* note 74.

81 *Compare How Many Children Are Adopted Each Year?*, *supra* note 40, (showing approximately 18,000 private adoptions in 2014), *with* Korhonen, *supra* note 40 (showing approximately 57,000 public adoptions in 2016).

82 *See* BEREBITSKY, *supra* note 25, at 9.

83 *See infra* Section I.D.2.e.

84 *See* Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 41 (1993).

C. *The Birth of Termination of Parental Rights*

1. 1851–1950 Adoption Case Law

As to be expected with a new statutory mechanism of such import, following the introduction of adoption statutes, questions arose in court disputes regarding their implementation. Also unsurprisingly, as adoption became more common, interest groups began to try to influence the law that governed the field. Certain developments in adoption law have been closely studied. For example, legal reforms that required adoption records be sealed and kept strictly confidential have received detailed study.[85] But the development of stand-alone termination of parental rights proceedings has received virtually no attention.[86] This Section begins to fill that gap, starting with a review of the rise and various uses of the concept of "termination of parental rights."

The first *mention* of "termination" of parental rights in case law does not arrive until the second half of the nineteenth century,[87] and, even then, it is not used in the modern sense. The early cases are focused on parents' right to the "service" (meaning labor and wages) of their children until they reach majority.[88] In these cases, parents are typically suing to claim they wrongfully lost the wages of children who married or were "seduced" away from providing financially to the parent, and the question is whether the parents' right to benefit from the work of their children had been legally "terminated."[89]

As time went on, the case law began to use the phrase "termination of parental rights" in the modern sense of referring to the severing of the entire bundle of parental rights. The phrase arose in two kinds of cases: disputes involving adoptions and custody disputes not involving adoptions. In custody cases, it was clear that the first principle was that

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85 *See generally* CARP, *supra* note 25, at 40–44 (discussing the history of the accessibility of adoption records); Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 373–85 (2001) (discussing the history of access to adoption and birth records).

86 The story of the development of adoption in the United States is often told without reference to any legal proceedings other than adoption proceedings. Indeed, many histories of adoption do not even list "termination of parental rights" in their indices. *See, e.g.*, CARP, *supra* note 25; BEREBITSKY, *supra* note 25; MELOSH, *supra* note 39.

87 *See* Aldrich v. Bennett, 63 N.H. 415, 415 (1885).

88 *See, e.g.*, Hervey v. Moseley, 73 Mass. (7 Gray) 479 (1856); *Aldrich*, 63 N.H. 415; Ellington v. Ellington, 47 Miss. 329 (1872).

89 *See Moseley*, 73 Mass. at 479 ("A parent cannot maintain an action for enticing away a daughter between the ages of twelve and eighteen from the parent's service, and procuring her marriage, without the plaintiff's consent, to a man of bad character, by fraudulent representations to the city clerk and to the magistrate.").

the "relation of parent and child is sacred" and the parent had an extremely strong right to custody, with a high burden on anyone who hoped to overcome that right.[90] Thus, for instance, even in a case in which the child had been living with the couple seeking guardianship for ten years, and the court found it would be in the child's best interest to remain with that couple, the child's birth parent nonetheless retained the right to demand custody.[91] It is clear that the courts believed that this strong rule in favor of parents not only served them, but generally benefitted children as well, because being with their parents was presumed to be in their best interest.[92]

The phrase "termination of parental rights" also began to appear in adoption cases because birth parents' parental rights did not survive an adoption (except an adoption by a stepparent). Thus, when a question arose as to whether an adoption was valid, another way to phrase that question was to ask whether the birth parents' rights had been terminated. Whether an adoption could legally occur and whether the parents' rights could legally be terminated was—in theory and in practice—the same question. The transfer of rights to the adoptive parent and the termination of rights of the birth parent happened simultaneously.[93] And this shift of rights generally "remain[ed] a voluntary transfer (by consent, and decree of approval) rather than an adversary action in which a child is taken from one party involuntarily and given to another."[94] However, the court could waive the obligation to obtain the parents' consent if the child had been abandoned.[95] Thus,

90 Montgomery v. Hughes, 58 So. 113, 113–14 (Ala. Ct. App. 1911) ("The laws of nature teach us that the relation of parent and child is sacred, that the welfare of the child is conserved by the cultivation and promotion of that affection which should exist between parent and child, and that as a general proposition no one can watch over the growth and development of the child as a loving father or mother can and will.").

91 Rouse v. Mathews (*In re* Mathews), 164 P. 8, 9–10 (Cal. 1917).

92 *See Hughes*, 58 So. at 114.

93 *See, e.g.*, Act of May 24, 1851, ch. 324, § 7, 1851 Mass. Acts 815, 816 ("The natural parent or parents of such child shall be deprived, by such decree of adoption, of all legal rights whatsoever as respects such child . . . ."); Schiltz v. Roenitz, 56 N.W. 194, 195 (Wis. 1893) ("The natural parents of such child shall be deprived by such order of adoption of all legal rights whatsoever respecting such child . . . ."); *see also supra* Section I.B.

94 Harvey Uhlenhopp, *Adoption in Iowa*, 40 IOWA L. REV. 228, 240 (1955).

95 *See, e.g.*, Winans v. Luppie, 20 A. 969, 969–70 (N.J. 1890). Consent could also be waived in some states on other bases. *See id*. at 969 (describing New Jersey adoption statute that required consent of parents "if living, and not hopelessly intemperate or insane" (quoting Act of March 9, 1877, ch. 83, § 1, 1877 N.J. Laws 123, 123–24)); *see also* GROSSBERG, *supra* note 49 at 274–75. These provisions do not appear from the case law to have been subject to significant litigation in this period. *Cf. In re* Miller, 197 N.Y.S. 880, 882 (Cnty. Ct. Erie Cnty. 1922).

courts began to speak of parents' rights terminating because they had abandoned their child.[96]

As adoption became more common, legal questions increasingly arose about the procedures and effects of adoption.[97] For instance, in 1889, one Massachusetts court considered whether a child who was adopted by his grandfather after the death of his father inherits as both a grandson and a son, or only as one or the other. (The child was allotted only one portion—as adopted son—by the court.)[98] In 1902, the question arose whether an oral agreement to adopt a child creates a right of inheritance. (It does not.)[99]

As these cases suggest, through the first few decades of the twentieth century, most adoption cases involved disputes over inheritance.[100] At first, there was resistance to the idea that an adopted child would have a right of inheritance (and some adoption statutes specifically limited adoptees' inheritance rights),[101] but ultimately it was settled that one of the legal rights that comes with adoption is the right to inherit from an adoptive parent just as a child inherits from a birth parent.[102] Settling this question was one aspect of establishing the principle that adoption entailed a complete transfer of all legal rights and duties from the birth parent to the adoptive parent.[103]

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96 *See, e.g.*, *Winans*, 20 A. at 970 (determining that the birth mother had "abandoned" a child and therefore under the adoption statute her consent was not required where the ten-year-old child had lived with the putative adoptive parents for most of her life); *In re* Denny's Adoption, 11 Pa. D. & C. 611, 616–17 (Orphans' Ct. 1928) (holding that the father's consent to adoption was not required because he had abandoned the child, who had lived for over eight years with the maternal grandparents who were seeking to adopt).

97 *See, e.g.*, Boutlier v. City of Malden, 116 N.E. 251, 252–54 (Mass. 1917) (holding that an adoptive mother has the right to collect damages for wrongful death).

98 Delano v. Bruerton, 20 N.E. 308, 309 (Mass. 1889). *But see* Bartram v. Holcomb (*In re* Bartram's Estate), 198 P. 192, 194 (Kan. 1921) (allowing an adopted child to inherit through status both as son and grandson).

99 Kinney v. Murray, 71 S.W. 197, 203–05 (Mo. 1902).

100 *See, e.g.*, *In re* Woodward, 70 A. 453, 454–55 (Conn. 1908); *In re* Fitzgerald's Estate, 272 N.W. 117, 117 (Iowa 1937); *see also* GROSSBERG, *supra* 49, at 268 ("[F]ear for the safety of inheritance rights dominated common law discussions of the issue [of adoption] into the twentieth century.").

101 *See, e.g.*, Act of May 24, 1851, ch. 324, § 6, 1851 Mass. Acts 815, 816.

102 *See* Samuels, *supra* note 85, at 395. Questions of inheritance by the adoptee from the kin of the adoptive parent have proven more controversial. *See* Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why (the Impact of Adoptions, Adult Adoptions, and Equitable Adoptions on Intestate Succession and Class Gifts)*, 37 VAND. L. REV. 711, 720 (1984); Maurice H. Merrill & Orpha A. Merrill, *Toward Uniformity in Adoption Law*, 40 IOWA L. REV. 299, 317 (1955).

103 *See* GROSSBERG *supra* note 49, at 276 (explaining that at first courts "denied [adopted children] a full legal membership in their adoptive households," but "[e]ventually, adoptees' inheritance rights were seen as the logical culmination of the new relationship").

Some of these disputes over inheritance involved a challenge to the validity of the putative adoption (where invalidity of the adoption would change who counted as an heir). Thus, they sometimes addressed the question of whether there had been parental consent to an adoption. But these were rarely disputes between birth parents and putative adoptive parents competing for parental rights. Rather, they were disputes between adoptees and biological relatives of putative adoptive parents, who challenged the legitimacy of the adoptions in order to secure larger inheritances.[104]

It was not until the 1930s and 1940s that courts increasingly focused on the concept of termination of parental rights in lawsuits between two litigants who were directly contesting which of them should have parental rights to a child.[105] Most often, these cases consider whether the birth parents' consent was required for adoption, with the aspiring adoptive parents arguing that the birth parents had forfeited the right to consent—i.e., the right to prevent an adoption—because they had abandoned the child.[106]

There are two aspects of this early adoption case law that illuminate the issues that are ultimately addressed in the next round of adoption law reform, which comes in the middle of the twentieth century: cases defining abandonment and cases considering the relation between dependency and adoption.

2. Defining Abandonment

First, the courts grappled with determining what constituted abandonment, which was the most common basis to waive the requirement of parental consent to adoption.[107] The "classic definition" of abandonment seen in opinions from around the country was quite narrow, often captured by the language: "[C]onduct on the part of the

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104 *See, e.g.*, *Woodward*, 70 A. at 458–59 (holding that although the deceased birth parents of an adopted child might have challenged the adoption, another person could not contest the adopted person's right to an inheritance after the adopted person had attained majority); *see also Fitzgerald's Estate*, 272 N.W. at 117–18 (addressing a dispute between birth mother and collateral heirs of the adopting parents over rights of inheritance from adopted person's estate).

105 *See, e.g.*, *In re* Davis' Adoption, 255 N.Y.S. 416, 425 (Sur. Ct. 1932) (addressing a dispute over parental rights between adoptive and birth parents); *In re* Graham, 199 S.W.2d 68, 69–70 (Mo. Ct. App. 1946) (hearing a petition by prospective adoptive parents against birth parents for parental rights of children); Brooks v. De Witt, 178 S.W.2d 718, 719–20 (Tex. Civ. App.) (hearing a suit by birth parents against adoptive parents for custody of natural children), *rev'd*, 182 S.W.2d 687 (Tex. 1944).

106 *In re* Weinbach, 175 A. 500, 501–02 (Pa. 1934) (finding that the mother abandoned her child and therefore her consent to adoption was waived).

107 *See, e.g.*, Simpson, *supra* note 17, at 370–75 (surveying courts' analysis of abandonment).

parent, which evinces a settled purpose to forego all parental duties, and relinquish all parental claims to the child."[108] As one commentator described the case law, "[A]bandonment must be complete and absolute."[109] Another commentator explained, "Traditionally, the natural parent has to do very little to indicate that he does not have a settled intent to abandon the child."[110]

The stringency of the abandonment standard was most famously laid out by then-Judge Benjamin Cardozo in 1924, when he was on the New York Court of Appeals. In *In re Bistany*, the court found that, although six-year-old Ellen had been living with the couple who wished to adopt for over three years, there had been no abandonment.[111] The court said there could only be a finding of abandonment sufficient to waive consent to adoption where "by acts so unequivocal as to bear one interpretation and one only the parents manifested an intention to abandon the child forever."[112] And the court went on to describe the generosity to be given parents in the assessment of whether they abandoned their child:

> They may have weakly hesitated. They may have foolishly delayed. They may have drifted into a situation in which their desires and expectations were open to misconception. They may even have experimented a little, to test their own feelings. All that is not enough. They must be found to have renounced.[113]

The opinion also made clear that the growing trend for courts to protect children's best interests (with best interests assessed by the courts)[114] had no place in this realm. Where the question is one of whether parents have waived their right to consent to adoption, the court said, arguments about "the welfare of the child, her prosperity and happiness . . . are foreign to the issue."[115]

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108 *Id.* at 370 (quoting Winans v. Luppie, 20 A. 969, 970 (N.J. 1890)).

109 *Id.* (listing cases).

110 Jean P. Ritz, Note, *Termination of Parental Rights to Free Child for Adoption*, 32 N.Y.U. L. REV. 579, 588 (1957).

111 145 N.E. 70, 71–72 (N.Y. 1924).

112 *Id.* at 71.

113 *Id.* at 71–72.

114 *See* GROSSBERG, *supra* note 49, at 210, 237–41.

115 *Bistany*, 145 N.E. at 72.

3. The Relation Between Dependency and Adoption and the Foresight of *Lacher v. Venus*[116]

Although not nearly on the scale practiced today, state officials did intervene in families in the name of protecting children in the 1800s and the first half of the 1900s.[117] Some states had statutes authorizing officials to remove children from parents, and where there was no such statutory authority, courts exercised equitable *parens patriae* power to do so.[118] These removals could be based on allegations of abuse or neglect, and though the terminology varied, the cases were dependency proceedings, which assessed whether there was a basis to find that the child should be deemed dependent on the state. As discussed above, the vast majority of children in foster care in this period were there because their parents had voluntarily placed them there, but some were there as a result of these dependency proceedings.[119]

Until adoption statutes were introduced and questions of waiving parental consent to adoption raised, there had been no reason to determine what the effects of dependency findings were on any parental rights other than the right to custody. If a court found that parental behavior threatened a child to such an extent that it justified taking the child from the parent's custody, then the court limited the parent's custodial rights,[120] but the parent retained all other parental rights, including the right to seek to reobtain custody.[121] It was only when adoption became an option that questions arose concerning additional possible effects of dependency findings. Some individuals with whom dependent children had been placed began seeking to adopt, and some institutions that had custody of dependent children began seeking to place them for adoption. There is no indication that these efforts were widespread, but they occurred often enough that they led to a few published decisions on the question of whether a finding of dependency was a basis to waive the requirement of parental consent to adoption. The

116 188 N.W. 613 (Wis. 1922).

117 John E.B. Myers, *A Short History of Child Protection in America*, 42 FAM. L.Q. 449, 449–54 (2008).

118 *See id.* at 450; Simpson, *supra* note 17, at 353.

119 These dependency placements were sometimes structured differently than foster care placements are today, but the differences are not relevant to the point made in this Article.

120 Myers, *supra* note 117, at 451.

121 Johnson, *supra* note 17, at 66 ("If the court decides a child is neglected, it may transfer legal custody from the parent to a designated legal guardian, perhaps a relative or friend or welfare agency, but the custody order does not terminate the parent's rights since it is a *temporary* order subject to periodic review.").

Wisconsin Supreme Court issued a particularly illuminating example of such decisions in 1922.

In *Lacher v. Venus*,[122] the Wisconsin Supreme Court issued an extraordinary opinion. It was one of the first attempts by a court to grapple with the question of whether parental rights can and should be terminated *prior* to an adoption proceeding. In the case, parents challenged an adoption of their daughter when the only consent to the adoption had been provided by a state school where the child was residing; she had been placed there by a court in an earlier dependency proceeding.[123] In a decision that foreshadows much of the next century of debate in child welfare, the court vacated the adoption and held that the parents' rights had been violated.[124] The case has received little attention from commentators, perhaps because its conclusions are now so accepted that the questions it addressed are no longer recognized as questions. But, as discussed below, the case elucidates a key step toward the termination of parental rights scheme that subsequently developed.

In *Lacher*, a juvenile court had determined that five-year-old Myrtle Lacher and five of her siblings were dependent children based on a finding that their parents were unable to care for them, and placed them with a state school.[125] While Myrtle was at the residential school, Mr. and Mrs. Venus filed a petition seeking to adopt her.[126] The school consented to the adoption and affirmed that in its view, the adoption would be beneficial to Myrtle.[127] Without notice having been provided to the Lachers, a county court granted the adoption.[128] Several months later, the Lachers sought the return of Myrtle and her siblings from the school, and a different county court approved the release of the children. When Myrtle was not released to the Lachers, they brought a motion to vacate the adoption, a claim that ultimately made its way to the Wisconsin Supreme Court.[129]

At the center of the dispute was a tension between the state's adoption statute, which required parents' consent for adoption, and another state statute, which provided that the state Board of Control was legal guardian of all state school residents and had the authority to consent to their adoption.[130] The key argument presented in favor of the

122 188 N.W. 613 (Wis. 1922).

123 *Id.* at 614.

124 *Id.* at 618.

125 *Id.* at 614.

126 *Id.*

127 *Id.*

128 *Id.*

129 *Id.*

130 *Id.* at 614–15.

adoption was that although there was no notice or opportunity to be heard at the adoption proceeding—let alone consent to the adoption—the parents' due process rights had been satisfied in the earlier dependency proceeding at which they had been deemed unfit and custody of the children turned over to the state school.[131] According to this argument, that dependency hearing provided sufficient due process to allow parental rights to be extinguished, and the school thereafter had the right to consent to an adoption.[132]

A number of aspects of the decision are notable. First, though it could have analyzed the dispute as one of statutory construction,[133] the court addressed the matter primarily as one of the constitutional rights of the parents, essentially holding that the doctrine of constitutional avoidance required reading the statute to require parental consent.[134] Presaging *Meyer v. Nebraska*[135] and *Pierce v. Society of Sisters*,[136] the initial U.S. Supreme Court cases on parental rights that would be decided shortly afterward, the *Lacher* majority held that the parents had a substantive due process right to the care and control of their children.[137] Though the term "substantive due process" would not be coined until the next decade,[138] the Wisconsin Supreme Court held that there is a "constitutionally guaranteed right to form and preserve the family" and that "such is a right of substance, though based on sentiment."[139] The dissent, for its part, foreshadows *Prince v. Massachusetts*,[140] the U.S. Supreme Court case that established limits on the rights announced in *Meyer* and *Pierce*, by noting that parents' rights come with "concomitant dut[ies]" and that failure in the latter forfeits the former.[141]

The *Lacher* opinion and dissent spell out—for the first time in a published opinion—the competing concerns that will dominate child welfare policy debates over the next century. At a time that courts were generally beginning to move away from viewing children as property and to focus on children's best interests in different areas of family law,[142] the

131 *Id.* at 616; *id.* at 619 (Owen, J., dissenting).

132 *Id.* at 619.

133 For instance, given that the adoption statute required notice to parents, the court could have simply overturned the adoption based on the acknowledged lack of notice to the Lachers. *See id.* at 614–16 (majority opinion).

134 *See id.* at 616–18.

135 262 U.S. 390 (1923).

136 268 U.S. 510 (1925).

137 *Lacher*, 188 N.W. at 616–18.

138 G. EDWARD WHITE, THE CONSTITUTION AND THE NEW DEAL 259 (2000).

139 *Lacher*, 188 N.W. at 617.

140 321 U.S. 158 (1944).

141 *Lacher*, 188 N.W. at 620 (Owen, J., dissenting) (emphasis omitted).

142 *See* GROSSBERG, *supra* note 49, at 264; ZELIZER, *supra* note 62, at 138–65.

court grappled with how to articulate parents' rights to rear their children without relying on a notion of children as chattel. The opinion is one of the first to address—and reject—the pull of the "best interests" approach that has often been promoted as the replacement for the theory that children are property. The court explicitly rejects the idea that without a basis in property, parents' rights lose strength:

> If a man's money shall not be legally taken away from him save by due process of law, much less shall his child. We do not deem it necessary to base this decision upon or dwell at any length upon such possible sordid, because material, grounds for our conclusion, but rest it upon the natural right of parenthood, a far finer and higher quality, and for that reason more sacredly to be upheld.[143]

The court is clear that this sacred ground trumps best interests: "Undoubtedly many children would be better cared for were the state to shift them to other homes than those nature gave them."[144] Further, the court explicitly rejects the idea that because the state has acted as "good Samaritan" in caring for a child who has not been in the custody of the child's parents for an extended time, it has thereby acquired the right to say that "the natural blood ties of the family shall be absolutely dissolved and new relationships established."[145] The state cannot "transform a temporary separation of the family incurred by reason of misfortune into an absolute severance of those ties so interwoven with human hearts [except] under due process of law."[146] This prefigures the language of the U.S. Supreme Court when, sixty years later, in *Santosky v. Kramer*, it will hold that a dependency finding does not lessen a parent's due process rights in a termination of parental rights proceeding.[147]

The *Lacher* case decided a question that had to be addressed once adoption statutes were enacted and whose answer laid the foundation for our current statutory approach to terminating parental rights: Does a

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143 *Lacher*, 188 N.W. at 617–18.

144 *Id.* at 618. The dissent strongly disagreed: "I have an abiding conviction that parental rights are unduly exalted and allowed to dominate the best interests of the child as well as of the public." *Id.* at 619–20 (Owen, J., dissenting). But notably, the dissent went on to say it would prefer that the state provide support that would allow children to remain safely in their homes rather than be put in state care in the first place, concluding that this is a question of policy for the legislature. *Id.* at 620. This, too, echoes current debate, as many critics of the child welfare system argue for such a policy. *See, e.g.*, MARTIN GUGGENHEIM, *supra* note 53, at 188–93.

145 *Lacher*, 188 N.W. at 618.

146 *Id.*

147 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State.")

court finding of dependency,[148] which overcomes a parent's presumptive right to custody, and a placement of the child in the custody of a child welfare agency, transfer the right to consent to adoption from the parent to the agency?

By the 1920s, when *Lacher* was decided, over one hundred thousand children were placed in homes or facilities outside of their parents' care.[149] Once adoption statutes made adoption a possibility, the effect of those placements on the right to consent to adoption had to be clarified. The *Lacher* court held that a dependency finding breached some, but not the entire bundle of, parental rights and was not sufficient to waive parental consent to adoption.[150] This holding rejected the position taken by the dissent that the parents' rights were terminated when the child was committed to the care of the state school and that no further action was necessary for the state to have authority to place the child for adoption.[151]

Of course, the decision of one court did not resolve for other states the question of parents' rights when their children were found to be dependent on state care.[152] But the *Lacher* opinion eloquently lays out the

148 Courts at the time, as now, used different terms for the finding that could lead to shifting custody away from parents, and "dependency" is a catchall term for those findings of abuse, maltreatment, or other bases of state intervention to protect children. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., DEFINITIONS OF CHILD ABUSE AND NEGLECT (2018), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/define.pdf?VersionId=P2GBlQKK7w_ohrCN3oV2TiD6QIkkEjIP [https://perma.cc/C5WH-VVZT] (providing state statute definitions of abuse, neglect, and dependency); UTAH DIV. OF CHILD & FAM. SERVS., FACILITATOR HANDBOOK—UNDERSTANDING CHILD WELFARE AND THE DEPENDENCY COURT: A GUIDE FOR SUBSTANCE ABUSE PROFESSIONALS 13 (2007), https://cybercemetery.unt.edu/archive/oilspill/20130214222054/http://www.ncsacw.samhsa.gov/files/SATP-Facilitator-Handbook.pdf [https://perma.cc/2EDY-SKTP] ("A dependency court is a court that has jurisdiction in cases of child abuse or neglect.").

149 *See* Katherine Q. Seelye, *Orphanage Revival Gains Ground*, N.Y. TIMES (Dec. 20. 1997), https://www.nytimes.com/1997/12/20/us/orphanage-revival-gains-ground.html [https://web.archive.org/web/20240115003409/https://www.nytimes.com/1997/12/20/us/orphanage-revival-gains-ground.html]; W.H. SLINGERLAND, CHILD-PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS 39 (1919).

150 *Lacher*, 188 N.W. at 616–18.

151 *Id.* at 619 (Owen, J., dissenting).

152 *Cf.* Fischer v. Meader, 111 A. 503, 505 (N.J. 1920) (allowing adoption without notice to mother because child was a ward of state, but distinguishing situations in which children are state wards due to poverty and the mother is "good"); *In re* Goshkarian, 148 A. 379, 381 (Conn. 1930) (holding that when "the custody of a child has been taken from its parents because it is neglected and uncared for, their consent to its adoption is not required"). As late as 1967, there was still confusion on the issue in some states. *See* Johnson, *supra* note 17, 73–74, 80. In one of the few commentaries to address at all the topic of stand-alone termination of parental rights proceedings, a student note took for granted that it was preferable for termination to be separate from adoption and chided the state legislatures that had not yet passed stand-alone termination of parental rights statutes. *Id.* at 70.

choice to be made and ultimately other states followed the same path, even before it was required by *Santosky*.[153]

It is only because dependency findings do not cut the entire bundle of parental rights that it became potentially useful to conceive of a legal proceeding that would terminate parental rights after custody had already been transferred away from parents. Notably, the understanding that *Lacher* settled on in a 4-3 decision is so accepted today that even those who most adamantly call to increase termination of parental rights do not suggest that a finding of dependency alone is sufficient to make a child available for adoption.[154]

Clarity on the issue decided in *Lacher*—that a finding of dependency was not enough to terminate parental rights—was a necessary step toward the current structure of termination of parental rights law. The following Section examines the next steps taken in that direction.

D. *Calls for Change in the 1940s and 1950s*

Beginning in the 1940s, there were increasing calls to expand adoption. Specific calls to enact stand-alone termination statutes (which will be discussed in Part II) did not gain traction until the following decade, but those later laws can only be understood within the broader push to increase the number of adoptions overall. This Section examines two sources of pressure for change in adoption law and policy: (1) the increased demand for adoptable children by parents wanting to adopt and (2) growing concern that children were staying too long in foster care. These two pressures rose concurrently and led some commentators to think in terms of matching the growing "demand" for children to adopt with the "supply" of children languishing in foster care. To bring the demand and supply together required making more foster children eligible for adoption. Section I.D.3 identifies three legal changes proposed in the 1940s and 1950s that were aimed at increasing the adoption of children from foster care and discusses two of them: a proposal to loosen the definition of abandonment, and a proposal to introduce new causes of action that would provide grounds to waive parental consent to adoption. The third proposal was to introduce statutes that detached decisions on terminating rights from adoption proceedings and created

153 *See, e.g.*, *In re Whetstone*, 188 So. 576 (Fla. 1939); *see also* Simpson, *supra* note 17, at 354–55 ("No matter what the parent may have done, if this is not named in the statute as grounds for dispensing with consent, then the child simply cannot be adopted without the parent's consent.").

154 *See, e.g.*, Elizabeth Bartholet, *The Challenge of Children's Rights Advocacy: Problems and Progress in the Area of Child Abuse and Neglect*, 3 WHITTIER J. CHILD & FAM. ADVOC. 215, 217 (2004).

stand-alone termination proceedings, which is the subject of Part II. It was that final recommendation that prompted the birth of termination of parental rights as a distinct legal action.

1. Demand for Children to Adopt

As discussed above, adoption was embraced in the mid-1940s for all kinds of cultural reasons having to do with the role of the nuclear family in the postwar era and the ability of adoption to reflect and promote the era's notions of motherhood and the model family. As a consequence, there was a sharp increase in the number of applications to adopt, beginning just after the war and climbing until the late 1950s. Adoption agencies were "inundated with requests for children."[155] As one historian put it, "Overwhelmed by the number of applications and constricted by inflexible rules, adoption agencies aroused much ill will and resentment among childless couples."[156]

As the demand for children to adopt grew, there were calls for changes to adoption law.[157] Adoption laws had been designed in the first instance to grant legal status to existing relationships by permitting adults to adopt children who were already in their care. Those laws were no longer an ideal fit now that policymakers were increasingly interested in *creating* adult-child relationships by promoting the placement of children into new homes for the purpose of adoption. When the goal shifted from formalizing existing relationships to making more children available for adoption by childless parents, that generated interest in modifying the adoption laws to achieve that purpose.[158]

The enormous pressure to expand adoption in this period can be seen in the activity of state legislators on the subject. More than half of all states amended their adoption laws between 1948 and 1951.[159] Many of these statutory reforms directly supported expanding adoption by

155 CARP, *supra* note 46, at 12–13.

156 *Id.* at 13.

157 For an interesting Marxist analysis of the development of adoption law in this period, see David Ray Papke, *Pondering Past Purposes: A Critical History of American Adoption Law*, 102 W. VA. L. REV. 459, 470 (1999) ("What is intriguing, though, is the way legislators and judges have in the second half of the twentieth century refined contemporary adoption law to facilitate and accommodate the desires of people with satisfactory financial means to be adoptive parents.").

158 Simpson, *supra* note 17, at 352 (describing "a wave of adoption law revisions in recent years" that "generally strengthened the nonconsensual provisions of the adoption statutes").

159 HENRIETTA L. GORDON, ADOPTION PRACTICES, PROCEDURES AND PROBLEMS: A REPORT OF THE SECOND WORKSHOP HELD IN NEW YORK CITY UNDER THE AUSPICES OF THE CHILD WELFARE LEAGUE OF AMERICA, MAY 10–12, 1951, at 16 (1951) [hereinafter CWLA ADOPTION REPORT]; *see* Note, *supra* note 48, at 760–61.

loosening the requirements for parental consent to adoption, thereby making more children available to adopt.[160] Statutory reforms also included: (1) requiring more investigation of potential adoptive homes, (2) mandating a six-month trial placement in the home prior to approving the adoption, and (3) encouraging agency adoption over independent adoption.[161] These latter changes stemmed from the increased focus on having courts protect children's best interests and on efforts to enhance the role and stature of social workers.[162] On their face, such changes might seem to create obstacles to—rather than to facilitate—adoption, and they may have slowed or precluded some individual adoptions. But over time, the shift from independent adoptions to agency adoptions—and the concomitant rise in the influence of social workers in the adoption field—opened the door to expanding adoption.[163] The U.S. Children's Bureau in particular promoted the importance of employing social work expertise in adoption placements.[164] Once professionals and agencies were active in the field, they had institutional interests in perpetuating and expanding adoption.

That the reforms in adoption law at this time were motivated in large part by increased demand for children to adopt was not hidden. As one commentator put it in 1955: "Both the statutory treatment and the phenomenon of a demand for children available for adoption far exceeding the supply have been due to the growing recognition that family ties created by adoption are as rich and as rewarding to all concerned as those arising from physical parenthood."[165]

Notably, the growing aspiration to adopt was specifically the desire of white couples to adopt white children. A 1951 report from the CWLA sums up the unmet demand this way:

The public expression of the disappointment of the vast number of white couples who apply to adopt white children and who must be refused because the [white] children who need adoption constitute only a small fraction of [the total] number, seriously jeopardizes sound

160 Simpson, *supra* note 17, at 352. Increasing the authority to waive consent based on abandonment continued later in the decade. *See, e.g.*, *id.* at 360 (noting that Florida "amended its statute to dispense with consent in case of abandonment").

161 *See* Note, *supra* note 48, at 762–63; BEREBITSKY, *supra* note 25, at 133.

162 *See* BEREBITSKY, *supra* note 25, at 133 (discussing social workers "tr[ying] to bring adoption under their professional jurisdiction").

163 *See* MELOSH, *supra* note 39, at 108–11, 121–24.

164 BEREBITSKY, *supra* note 25 at 133–37 (describing the "struggle[]" of social work to "claim its place as a legitimate profession").

165 Merrill & Merrill, *supra* note 102, at 300 (footnote omitted).

adoption practices. This is one of the problems for which no solution has yet been found.[166]

This racial dynamic is relevant to understanding the other pressure that came to the fore at the time, to which the next Section turns: concern about getting children out of foster care.

2. Children in Need

At the same time that demand by white couples to adopt was increasing, pressure to increase the number of adoptions also came from another direction: concern about the growing population of foster children. The number of children in foster care had risen substantially during the Depression. Between 1910 and 1933, the number of children in foster care rose from 176,000 to about 250,000, where it hovered through the 1950s.[167] Not only had the numbers of children entering foster care risen, but commentators became concerned in particular about how long they were staying there. Many children were entering foster care—which was intended to be a temporary, stopgap measure—and not leaving. In the 1950s, attention began to focus on this problem, which child welfare experts dubbed "foster care limbo"[168] and "foster care drift."[169]

a. Two Studies Frame Discussion of Length of Stays in Foster Care

In the 1950s, the issue of foster care drift began to garner attention when two studies of foster children spotlighted the issue. These studies played a critical role in shifting adoption policy. Both studies proposed that the solution to foster care drift was to have more foster children adopted, and both studies concluded that a key impediment to this solution was the failure of parents who were uninvolved with their children to consent to their adoption. These studies generated significant media attention.

The first study was conducted in 1955 by the Welfare and Health Council of New York City (Council Report), a consortium of over 380

166 CWLA ADOPTION REPORT, *supra* note 159, at 1. Note that the claim that Black families were not interested in adopting has been challenged. *See, e.g.*, BILLINGSLEY & GIOVANNONI, *supra* note 25, at 142 (discussing the Urban League's documentation that adoption agencies discriminated against Black prospective adoptive parents).

167 *See* Marshall B. Jones, *Crisis of the American Orphanage, 1931–1940*, 63 SOC. SERV. REV. 613, 614 (1989).

168 HENRY S. MAAS & RICHARD E. ENGLER, CHILDREN IN NEED OF PARENTS 4 (1959) (describing children in foster care as "children in limbo").

169 Linda Katz, *Concurrent Planning: Benefits and Pitfalls*, 78 CHILD WELFARE 71, 73 (1999).

public and private health and welfare agencies.[170] The Council Report examined the situations of over a quarter of the approximately 14,500 children in foster care in New York City.[171] Its focus on the need to promote increased adoption was captured by its title: *Children Deprived of Adoption*. The second study was sponsored by the CWLA and conducted by two professors of social work, Henry Maas and Richard Engler (CWLA Report). In 1957 and 1958, Maas and Engler sent research teams to gather information and conduct interviews with sixty child welfare agencies in nine communities around the country. The study led to a 1959 book, *Children in Need of Parents*.[172]

Both reports emphasized that children who entered foster care often languished there a long time—"as long as ten to fifteen years."[173] And both studies concluded that many of the children would be substantially better off if they could be adopted. The Council Report found that caseworkers believed adoption was an appropriate plan for approximately twenty percent of the children studied[174] and that fewer than four percent of the children studied were legally available for adoption.[175] The CWLA Report went further, suggesting that of the 268,000 children in foster care in the United States at the time, fewer than twenty-five percent would return home to their birth parents and that adoption was the best option for the rest.[176]

These studies and their recommendations were widely noticed. The *New York Times* reported on the Council Report under the headline "Red Tape Called Bar to Adoptions."[177] The *Times* article began by describing a "jungle-like legal tangle and 'paralyzing inertia' [that] keep[s] thousands of foster children from enjoying the benefits of adoption."[178] The CWLA Report "shocked the social work profession with their meticulously documented portrait of what has come to be called foster care drift."[179] The effect of this study has been described as "revolutioniz[ing] foster

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170 WELFARE & HEALTH COUNCIL OF N.Y.C., CHILDREN DEPRIVED OF ADOPTION: A REPORT BY THE COMMITTEE ON ADOPTION AND SERVICES TO UNMARRIED MOTHERS 4 (1955); *Red Tape Called Bar to Adoptions*, N.Y. TIMES, Sept. 30, 1955, at 28.

171 WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 4.

172 MAAS & ENGLER, *supra* note 168, at 3.

173 WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 1.

174 *Id.* at 15.

175 *Id.* at 4, 9 (indicating that of 4,021 children studied, 141 were legally available for adoption).

176 Joseph H. Reid, *Action Called For—Recommendations*, *in* MAAS & ENGLER, *supra* note 168, at 378, 379–80.

177 *Red Tape Called Bar to Adoptions*, *supra* note 170

178 *Id.* (explaining that the Council Report found that some of these children had been in foster care fifteen years and their parents were not known or played "no parental role").

179 Linda Katz, *Effective Permanency Planning for Children in Foster Care*, 35 SOC. WORK 220, 220 (1999); *see also* Katz, *supra* note 169, at 73.

care and adoption in the United States."[180] As one historian later described it, "Members of the child welfare network found it particularly jarring that some children remained in foster care only because their parents, with whom they had little or no contact, refused to consent to adoption."[181]

CWLA produced and circulated a pamphlet summarizing their study's findings.[182] The pamphlet was not a dry empirical analysis but rather a rallying call to action that interspersed data with emotionally compelling descriptions of individual children who bounced from foster home to foster home without ever establishing family-like bonds. Clearly intending to move a mass audience, the pamphlet began, "This is a story about children . . . ."[183] It closed with: "Children need what they need when they need it. Providing it later is always too late. You, a citizen, can see to it that it reaches them in time."[184]

To make its case, the pamphlet drew on the growing psychological literature on attachment theory popularized by John Bowlby.[185] This theory allowed the pamphlet to portray foster children sympathetically as longing for attachment, but also to threaten that children who develop attachment issues are likely to turn to lives of delinquency.[186] It was a moment when theories of nurture were beginning to overtake theories of nature in the thinking about children. That shift made adoption more palatable and allowed for the idea that "underclass" foster children who

180 Ethan G. Sribnick, Rehabilitating Child Welfare: Children and Public Policy, 1945–1980, at 50, 135 (May 2007) (Ph.D. dissertation, University of Virginia), https://libra2.lib.virginia.edu/downloads/4f16c323s?filename=X030334133.pdf [https://perma.cc/TQ6Y-88Z7] (describing *Children in Need of Parents* as a book that "would revolutionize foster care and adoption in the United States" and "frame the debate over foster care for the next two decades"); *see also* CHILD WELFARE LEAGUE OF AM., CHILDREN IN NEED OF PARENTS 6, 8–9, 11–12 (1959) (discussing MAAS & ENGLER, *supra* note 168).

181 Sribnick, *supra* note 180, at 147–48.

182 CHILD WELFARE LEAGUE OF AM., *supra* note 180.

183 *Id.* at 5.

184 *Id.* at 22.

185 *See* 1 JOHN BOWLBY, ATTACHMENT AND LOSS (2d. ed. 1982).

186 *See* CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 6, 8–9, 11–12, 21 (discussing MAAS & ENGLER, *supra* note 168) (portraying individual children sympathetically, but noting "[t]he high incidence of mental disease, criminality and economic dependency among adults who were once foster children should be a warning"). The Council Report also described individual children from its study, though more briefly. WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 13 (describing Jeanie, age four, who had been in foster care for most of her life, but whose mother had never visited since placing her, and reporting that "[i]t ha[d] been six years since the parents have visited Jerry," who is described as a "lovable" twelve-year-old). Concern was also expressed about the high cost of foster care to taxpayers, which it was noted could be reduced through having more foster children adopted. CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 21; WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170at 2, 15.

were seen as dangerous could be "saved," thereby protecting society from the threat they otherwise posed.[187]

Several aspects of these studies and their promotion are particularly relevant to the adoption policy reforms that followed.

b. The Foster Care Problem Framed as a Legal Issue

First, both studies explicitly recommended statutory reform aimed at making more children available for adoption. In their view, one of the key problems in foster care was that children were not being legally freed for adoption because of issues surrounding the parental consent requirement.[188] Though the reports recommended nonlegal reforms as well,[189] both reports identified legal change as critical to meeting the needs of languishing foster children.

The CWLA pamphlet noted that two-thirds of the communities studied were covered by laws that were not clear concerning the basis on which parental rights could be terminated. It recommended changes to ensure the relevant "laws [are] clear and codified" and to "free children for adoption quickly after their parents have abandoned them."[190] The Council Report emphasized: "The legal machinery for freeing children of hopelessly ill parents and of parents who cannot and will not provide for them either emotionally or economically, should be made more workable, with greater recognition of the needs of the children."[191]

c. The Foster Care Problem Portrayed as a Problem of Abandonment

Second, these studies emphasized that the children languishing in foster care had been voluntarily placed there by parents who had then abandoned them and ceased to act as parents.[192] They emphasized that the children had been in foster care for years and painted a picture of

187 *See* CHILD WELFARE LEAGUE OF AM., *supra* note 180 at 7, 10 (warning "[i]n these children lies a strong potential for mental illness, delinquency, criminality," but also describing that it is possible for some "to move into permanent homes before damaging psychological symptoms develop[]").

188 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 11; WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 11, 16.

189 As discussed below, *infra* Section I.D.2.e, both reports recommended increased adoption services. The CWLA pamphlet also recommended increased efforts to prevent the need for foster care through the provision of social services while children were home with their parents. CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 16–17. But it was only the recommendation to increase adoption out of foster care, not the recommendation to shrink the flow of children into foster care, that seems to have been picked up by policymakers and implemented.

190 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 18–19.

191 WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 16.

192 At the time, two-thirds of children in foster care had been voluntarily placed there by their parents. CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 7.

children left behind. The CWLA Report said the majority of these children did not have contact with, or any positive emotional connections to, their parents.[193] The report vividly described them as "left-over children" and "orphans of the living."[194] Similarly, the Council Report described children growing up "lonely, rejected, and completely lacking family ties or attachments";[195] some of these children's parents suffered from serious illness, the report said, while other parents "simply did not want" their children.[196]

Other commentators at the time endorsed this characterization of the foster care problem, with one describing how "temporary" placements would become permanent:

> After placing a child in an agency, the parents continue to visit him for a while, then gradually lose interest, and eventually abandon him completely. For many years of his life the child is cared for by an agency or in a succession of foster homes, never knowing its natural parents.[197]

This belief that a significant number of foster children had essentially been abandoned by their parents directly motivated many of the statutory reforms of the time.[198] The drafter of New York's 1959 termination of parental rights statute said the new statute was meant to address cases where parents were "unwilling to maintain a real relationship with their children."[199] Later, New York's high court described the legislative intent behind that statute this way:

> Recent studies disclose that there are thousands of children in foster homes or institutions where they have been placed by their natural parents or by orders of the children's courts, who grow up with only the barest of contact with their natural parents. Tragically, such contacts while so infrequent or superficial as to be meaningless to the child, are a bar to a judicial finding of 'abandonment'. Consequently, although many of these children could be adopted if the legal rights of the natural parents were terminated, they are, as a practical matter,

193 *Id.* at 10.

194 *Id.* at 4, 9, 22.

195 WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 1, 14.

196 *Id.* at 1.

197 Ritz, *supra* note 110, at 579.

198 *See In re* Anonymous, 351 N.E.2d 707, 710 (N.Y. 1976) (describing the adoption statute in place in the 1950s as "mak[ing] no provision for the vastly greater number of children who, though not 'abandoned' in the legal sense, have been abandoned in every other sense and are doomed to live in foster homes or institutions because the natural parents are *unwilling* to provide them with a family life even though able to do so and even though given every assistance by social agencies" (emphasis added)).

199 Polier, *supra* note 39, at, 1–2.

> unadoptable, and continue in custodial care at the cost of blighted lives and at great public expense.[200]

d. A Red Tape Problem Allows a Nonadversarial Solution

Whether or not it was ever accurate to portray these foster children as utterly disconnected from their parents,[201] that notion likely made it easier to convince people that laws should be changed to ease the legal route to adoption. The problem was framed, at least in part, as a need to "free" children from legal connections to birth parents with whom the children had no emotional connections.[202] This characterization allowed recommendations aimed at increasing adoption to appear to offer benefit to the children without loss to anyone. The children's birth parents were not characterized as villains because the problem was not characterized as one of villainy, but rather of bureaucracy—"red tape," in the *New York Times*' words. Although the birth parents were sometimes described in offensive ways, the reports focused more on describing perceived inadequacies—emphasizing that parents often were physically or mentally ill—rather than on blaming them. The CWLA pamphlet said that "[m]ost parents who give up their children to permanent foster care are not vicious; they are weak, immature, indecisive, disturbed."[203] This picture does not seem offered to support recommendations that were viewed as punishing parents, but rather as benefitting children.[204] It was a picture that paved the way for statutory reforms that were seen largely as providing administrative fixes to bureaucratic problems.

Because the children in question were described as abandoned, the potential adoptive parents were not viewed as taking other parents' children away from them. With interested adults on only one side of the equation, pushing to make these children available for adoption could be seen as nonadversarial. Indeed, a light bulb seems to go on about the possibility of matching unwanted children with aspiring parents. The CWLA researchers highlight "the extent of the discrepancy which exists, country-wide, between the great demand among the adopting public for infants who are physically and psychologically perfect and the *oversupply*

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200 *Anonymous*, 351 N.E.2d at 710.

201 *See* BEREBITSKY, *supra* note 25, at 90 ("[M]any people did not realize that the majority of dependent children still had parents or other relatives who had legal claims on them.").

202 Reid, *supra* note 176, at 383 ("For only a fraction of children in foster care is there a possibility of return to their own homes. . . . In our opinion, a situation should not be permitted to exist wherein parents may essentially abandon their children in foster care and yet retain legal control over them.").

203 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 11–12.

204 *See* MAAS & ENGLER, *supra* note 168, at 2. (describing the study's major concern as "[o]ur concern for children[,] . . . a conscience which lies implicit in American life").

of somewhat less than perfect children who are older than two years of age."[205]

But there was a complication for those who aspired to match the parents who were on waitlists to adopt with the "supply" of children in foster care: many of those children were Black.[206]

e. The Push for Transracial Adoption

The CWLA Report strongly recommended making it easier to free children for adoption, but also emphasized that this would not be enough to address the problem identified. The authors worried that "[o]nly a very small percentage of these children are children who may now be considered 'readily adoptable,'" explaining that only white children who are under five years old and have no disabilities were readily adoptable.[207] The CWLA pamphlet put the issue more bluntly (and offensively): noting that only a fifth of children who are legally available for adoption find adoptive placements, the pamphlet asks, "What is wrong with the others?" and answers: "They are too old . . . . They are different. Some are Negro, Portuguese, Spanish, or American Indian in origin."[208]

The aspiring adoptive parents were typically white and did not hide that they wanted to adopt white children.[209] The CWLA authors discuss this issue without explicitly condemning the racial prejudices of the potential adoptive parents and the adoption service providers, but they advocate for efforts to overcome these prejudices. When, for instance, they quote a pediatrician saying that "[t]he children available for adoption here are inferior to the families that want children for adoption," the authors are encouraging social workers to work against such attitudes.[210] The CWLA Report advocated moving past what the authors described as "[c]onscious or unconscious attitudes on the part of caseworkers [that] may well serve as a barrier to the placement of

205 *Id.* (emphasis added).

206 Nearly fifty-five percent of the foster children studied in the Council Report were Black. WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 6. An even greater percentage (sixty percent) of the children whose interests the study found would be served by adoption were Black. *Id.* at 8. In the first part of the twentieth century, Black children were largely excluded from the American child welfare system. That started to change during the Great Migration and the number of Black children in the child welfare system increased relative to white children after World War II. *See* BILLINGSLEY & GIOVANNONI, *supra* note 25 at 72, 90.

207 Reid, *supra* note 176 at 383.

208 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 13; *see also id.* (describing children with physical or emotional challenges as difficult to place).

209 The first recorded adoption of a Black child by white adults did not occur until 1948. *Transracial Adoptions*, THE ADOPTION HIST. PROJECT, https://pages.uoregon.edu/adoption/topics/transracialadoption.htm [https://perma.cc/SH5M-PNRL] (Feb. 24, 2012).

210 *See* CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 13–14.

children."[211] Similarly, the Council Report noted and bemoaned the dearth of adoptive homes for Black children.[212]

In what would have been viewed as a progressive approach by many at the time, these experts thought the way to serve nonwhite foster children was to promote their adoption. They wanted to promote their adoption both by expanding the number of nonwhite adoptive parents and by increasing the number of adoptions of nonwhite children by white parents. Toward the former end, the experts recommended increasing recruitment of nonwhite adoptive parents and changing the requirements for qualifying as an adoptive parent.[213] For instance, adoptive agencies often accepted only adoptive couples in which the mother did not work outside the home. More Black women worked outside the home than white women, and this requirement prevented many Black couples from adopting.[214] Both studies recommended increasing adoption services specifically to promote the adoption of Black children.[215] Notably, one of the studies proposed that a financial subsidy be provided to potential adoptive parents, which it said would encourage nonwhite couples to adopt.[216] More generally, the recommendations were simply to improve the public relations aspect of recruiting adoptive parents. The CWLA pamphlet asked: "Are your agencies making imaginative use of newspaper and magazine articles, radio and television

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211 Reid, *supra* note 176, at 384.

212 WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 14 (discussing children being denied permanent placement because of "the color of their skin").

213 *See* CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 14. For a discussion of the racial discrimination against Black prospective adoptive parents, see BILLINGSLEY & GIOVANNONI, *supra* note 25, at 142, 146.

214 *See* Reid, *supra* note 176, at 386; CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 129.

215 *See* Reid, *supra* note 176, at 384 (discussing a study of the adoption of Black children that described communication failures and other barriers that prevented adoption agencies from working effectively in Black communities); WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 16; *see also* Reid, *supra* note 176, at 384–85 ("Since agencies frequently did not communicate with major segments of the public, they must study carefully why it is they do not reach certain groups and develop methods and change procedure so that they can.").

216 The CWLA Report recommended that the "extreme shortage of foster homes for minority groups," particularly Black children, be addressed by offering more financial support to Black women to replace their wages for out-of-home work with foster care subsidies. *See* Reid, *supra* note 176, at 386, 390 ("A more radical suggestion, that should not be discarded without further exploration, is continued subsidy on a time-limited basis of families who cannot afford to adopt children—again, particularly minority group families . . . ."). The recommendation was for a temporary subsidy aimed at facilitating adoption by couples who were on their way to being able to support a child. Subsidies were ultimately introduced in 1980, but they are not temporary. *See* Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, § 101, 94 Stat. 500, 501–13 (codified as amended in scattered sections of 42 U.S.C.). Today, a monthly stipend is provided to the majority of those who adopt children from foster care until the adopted youth turns eighteen or twenty-one.

programs to reach all segments of the community? Is a major concentrated effort being made to find homes for the children who are different—racially, physically or emotionally?"[217]

The goal of increasing the number of Black foster children who were adopted was shared by some organizations with Black leadership in the 1950s. The interracial National Urban League and Adopt-A-Child, an organization started by Black social workers, actively recruited Black couples to adopt Black children.[218] But these Black-led programs generally did not promote the adoption of Black children by white couples, as the two studies did.

There was a crucial shift in the thinking of child welfare experts in the 1940s and 1950s that is exemplified by these studies. While they did not use the term "transracial adoption," which was not yet part of the vernacular, the authors began to promote the idea that it would be good to move away from race matching in adoption. Given that the number of white couples seeking to adopt far outnumbered the white children available, these experts believed it would benefit Black children if it was more common for white parents to adopt Black children.[219]

As noted, while the studies did not condemn—or even chastise—the attitudes of white couples who were interested in adopting only white children, they did subtly applaud white couples who were more open-minded. They tout the "surprising number of couples [who] are willing to take a child . . . whose skin is darker than average."[220] And they speak of the "imagination" and "courage" of agencies who do the work to find the "right" home for difficult-to-place children.[221] They specifically call for "an aggressive and progressive community adoption program, serving without discrimination children of all races, ages, sexes and creeds."[222]

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217 *See* CHILD WELFARE LEAGUE OF AM., *supra* note 180 at 19.

218 *See* BILLINGSLEY & GIOVANNONI, *supra* note 25, at 141–73.

219 Critics of the push for transracial adoption have made compelling arguments that the effort was suffused with racism and rested on an underlying idea that white families were superior. *See* Albert & Mulzer, *supra* note 39, at 579–80. Moreover, efforts to increase the adoption of Black children by Black families were stymied by racial bias. *See* Pereta Rodriguez & Alan S. Meyer, *Minority Adoptions and Agency Practices*, 35 SOC. WORK 528, 529–30 (1990).

220 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 14; *see also* Reid, *supra* note 176, at 384 (discussing adoptive applicants who have "conviction about the satisfaction that can be obtained in the adoption of the child of less than average intelligence or serious physical defect or minority race").

221 WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 16; *see also* Reid, *supra* note 176, at 379 ("This study shows that some agencies and communities have developed imaginative child welfare programs, [and] have placed the so-called 'hard-to-place child . . . .'").

222 WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 16; *see also* Reid, *supra* note 176, at 383 ("Agencies need to locate these families [who are willing to adopt children who are older, nonwhite, or have special needs] and then whole communities need to support and accept the adoption of such children.").

The underlying message is that good social workers could advance a progressive agenda by helping potential adoptive parents get past their biases against nonwhite children.

A more direct message and the most significant shift in rhetoric is seen in the way these reports discuss the children who are in foster care. The explicit call was to reject the prevailing view that some children are "unadoptable," in the sense of being undesirable to prospective adoptive parents, and replace it with a zeal to view all children as "adoptable." The CWLA pamphlet has a section titled "is any child unadoptable?"[223] The section explains that there is hope for abandoned foster children and proclaims that the seeming barriers can be overcome. Its evidence includes that: "Permanent homes have been found for Sue, who is half-Indian, for destructive, aggressive Laura, for six-year-old Minna, with an IQ under 80 . . . [and] Billy Varnum, five, an emotionally disturbed child."[224] Motivated agencies, it reported, "are performing a remarkable job in placing such children."[225] The Council Report similarly asserts that "children previously considered 'unadoptable' can be happily and satisfactorily placed" for adoption.[226]

Transracial adoption was viewed by some, as one commentator put it, as the "little revolution."[227] The rate of transracial adoption of nonwhite children did rise in the wake of these calls, though as discussed below,[228] this increase was short-lived. By the end of the 1960s, the child welfare establishment was committed to the concept of transracial adoption, with CWLA adopting standards recommending that "[r]acial background in itself should not determine the selection of the home for a child" and that "agenc[ies] should be ready to help families who wish to adopt children of another race."[229] But the discussion of moving away from racial matching ended up being largely aspirational with respect to the adoption of American Black children; the number of transracial adoptions within the United States peaked by 1971 and then began to fall.[230]

The rhetoric, however, that all children are adoptable, and the "race-blind" approach to adoption that began to be touted by child welfare experts in the 1950s, remained an important part of the understanding of

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223 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 14.

224 *Id.*

225 *Id.*

226 WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 16.

227 *See* CARP, *supra* note 25, at 168.

228 *See infra* Section III.B.

229 CHILD WELFARE LEAGUE OF AM., STANDARDS FOR ADOPTION SERVICE 34 (rev. ed. 1968).

230 *See infra* Section III.B. As domestic adoptions rose and then fell during the second half of the twentieth century, and the discussions of moving away from racial matching in those adoptions were occurring, there was an increase in international transracial adoptions, which involved their own complicated racial dynamics. *See* GAILEY, *supra* note 79, at 79–83.

policymakers into the 1990s. It was this understanding that shaped the adoption-related statutes passed in the 1990s and that shapes child welfare policy today, as will be discussed in Part III.[231]

These nonlegal approaches to increasing the adoption of foster children are certainly important. But we now return to recommendations for legal changes aimed at increasing the number of adoptions.

3. Recommendations for Legal Change

The CWLA and Council Reports were fairly general in their recommendations for legal change. As noted, they spoke of improving the "legal machinery for freeing children" for adoption.[232] But lawyers, academics, and, ultimately, the CWLA, turned those general recommendations into specific proposals for amending statutes. The recommendations fell into three categories, each of which was aimed at making it easier to adopt children without their parents' consent.[233] These categories are not mutually exclusive, and some commentators were proponents of all three, but it is helpful to separate them conceptually. It is only the third proposal, which recommended detaching decisions on terminating rights from adoption proceedings, that led to the current structure of termination of parental rights law. All three proposed changes were incorporated into law, but it is important to recognize that the first two reforms could have been pursued as means to increase adoption without necessarily adopting the third proposal.

As discussed, courts were generally required to find that parents had abandoned their children or were otherwise unfit before adoption could be pursued without parental consent. The first reform proposal involved efforts to loosen what had come to be seen as an overly restrictive standard of abandonment. Prior to these reforms, some statutes had explicitly defined abandonment narrowly. For instance, one statute required five years of abandonment before parental consent to adoption could be waived.[234] More commonly, the statutory definition of abandonment was vague and, as discussed, the term "abandonment" had

231 *See infra* Part III.B.

232 *See* WELFARE & HEALTH COUNCIL N.Y.C., *supra* note 170, at 16; CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 18–19.

233 Other statutory changes related to adoption were recommended in this period that were not aimed at increasing the number of adoptions. These included requiring more investigation of adoption homes and promoting the role of adoption agencies. Simpson, *supra* note 17, at 352.

234 CHILD WELFARE LEAGUE OF AM., *supra* note 180, at 11. More typically, the time period for abandonment was between ninety days and two years. *See* Simpson, *supra* note 17, at 371–72.

been interpreted extremely narrowly by judges.[235] As one commentator described the case law, "[A]bandonment must be complete and absolute."[236]

The drafter of New York's 1959 termination statute described this "rigid requirement" that abandonment include a "settled purpose to forego forever all parental rights," which led, he said, to an "intolerable gap . . . between social reality and prevailing legal concepts."[237] The CWLA Report described the underlying reluctance of judges, who viewed parental rights as "God-given," to "challenge the Almighty on matters so grave."[238]

Because it was recognized that "[a]bandonment [was] the most litigated ground in non-consensual adoptions,"[239] it made sense that those who wished to increase adoptions sought to loosen the definition of "abandonment."[240]

But changing the definition of abandonment was not the only substantive change in the law that was sought. The drafter of New York's first termination of parental rights statute explained that something more than a redefinition of abandonment was needed.[241] That additional factor, the second proposed legal reform aimed at increasing adoptions out of foster care, was the introduction of new causes of action that would serve as grounds to waive parental consent to adoption. As the drafter of the New York statute put it, "The approach called for was the creation of a *new* concept to cover the case of a child already in the care of a social agency, when the agency believed that an adoptive home could and should be found for the child."[242] As this quote indicates, this approach entailed a shift in emphasis from viewing parents as the key decision-makers in adoption to viewing agencies (and judges reviewing agency positions) as the key decision-makers. Recall that initially adoption

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235 *See In re* Anonymous, 351 N.E.2d 707, 710 (N.Y. 1976) ("In 1959 the Legislature recognized the existence of a serious situation which had resulted from the stringent test set for the finding of abandonment. This situation was compounded by the necessity for such a finding of abandonment, absent parental consent, in the adoption process."); *In re* Adoption of Force, 131 N.E.2d 157, 159 (Ind. App. 1956) ("The overwhelming weight of authority in the adjudicated cases supports a definition which contains language expressive of a general idea that it is a complete and absolute relinquishment which constitutes abandonment.").

236 Simpson, *supra* note 17, at 370.

237 Polier, *supra* note 39, at 1.

238 MAAS & ENGLER, *supra* note 168, at 31, 39 (discussing parental rights generally).

239 Simpson, *supra* note 17, at 370.

240 Ritz, *supra* note 110, at 584 (noting that "the question of abandonment has caused the real problem").

241 Polier, *supra* note 39, at 2.

242 *Id.*

required parental consent without exception.[243] Recall also that the waiver of consent for abandonment had a strong intent element (the parent had to intend to abandon the child). Thus, it is clear that adoption law was originally based on the premise that birth parents are the decision-makers with respect to whether their children can be adopted. But the push for new bases to waive parental consent, which ultimately became new causes of action to terminate parental rights, was significantly different. The new grounds for waiver of parental consent authorized ending parent-child relationships as a matter of policy when someone other than the parent decided that the child should be adopted.

The primary cause of action proposed as a new basis to terminate parental rights was long-term neglect (which went by different names, including "substantial and continuous or repeated neglect," "persisting neglect," and "permanent neglect").[244] New York passed a termination of parental rights statute that included "permanent neglect" as a cause of action in 1959.[245] And, in 1961, the U.S. Children's Bureau issued a legislative guide that recommended that other states pass similar statutes making long-term neglect a cause of action to terminate parental rights.[246] This type of cause of action was centered on a finding that a parent had not done enough once a child entered foster care to address the issues that led to the child's placement and to maintain a positive relationship with the child. Because foster care was supposed to be temporary, the parent's failure to take steps to regain custody was seen as a basis to terminate parental rights so that the child's interests could be pursued through adoption. This approach also drew on the sentimental view of childhood and the parent-child relationship that had come to the fore as the twentieth century wore on.[247] As the drafter of the New York statute put it: "Manifestation of love and affectionate concern for a child and planning for his future are of the very essence of the parental relationship."[248]

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243 *See supra* Section I.C.1 (citing Massachusetts' Adoption of Children Act, Act of May 24, 1851, ch. 324, 1851 Mass. Acts 815).

244 HARRIET L. GOLDBERG, CHILDREN'S BUREAU, 394-1961, LEGISLATIVE GUIDES FOR THE TERMINATION OF PARENTAL RIGHTS AND RESPONSIBILITIES AND THE ADOPTION OF CHILDREN 15 (1961); Polier, *supra* note 39 at 2; Ritz, *supra* note 110, at 592 (proposing language for a statute to terminate parental rights).

245 *See* Act of Apr. 15, 1959, ch. 450, 1959 N.Y. Laws 1239 (codified as amended at N.Y. SOC. SERV. LAW § 384-b (McKinney 2024)); Polier, *supra* note 39, at 2–3; Gordon, *supra* note 24, at 230–31.

246 GOLDBERG, *supra* note 244, at 8, 16. The Children's Bureau also recommended that mental illness and mental disability be statutory bases to terminate parental rights, though it noted that this was more controversial. *Id.* at 16.

247 *See* ZELIZER, *supra* note 62, at 30.

248 Polier, *supra* note 39, at 3.

The proponents of this approach emphasized that social services should be offered to parents before long-term neglect could be used as a basis to terminate their parental rights. New York even required child welfare agencies to make "diligent efforts" to provide reunification support as an element of the cause of action to terminate parental rights.[249] As the drafter explained, "This requirement expresses a societal judgment that the community is not justified in terminating parental rights in the absence of 'abandonment' unless the community has, through the social agency, sought to reweld the parent-child relation."[250] Commentators in the decades since have persuasively argued that this requirement of support is often honored more in the breach than through meaningful efforts,[251] but the requirement was integral to the argument made for the new grounds to terminate parental rights.

The third kind of change recommended was to separate the legal action of terminating parental rights from adoption proceedings and make it a stand-alone legal action. That is the structural change in the law that is the central focus of this piece and the one to which the next Part turns.

II. ASSESSING THE REASONS TO DETACH TERMINATION OF PARENTAL RIGHTS FROM ADOPTION

It was in the context of the growing concern over the number of children languishing in foster care that calls arose to separate termination of parental rights proceedings from adoption proceedings. While there was a push to use various tactics to increase adoptions, creating a separate process to terminate the rights of parents of children in foster care was identified as one important route to achieve that end.

In the 1950s, child welfare officials and social work organizations recommended, and a number of commentators in the legal literature supported, separating terminations from adoptions.[252] This step was also endorsed by a New York commission tasked with making recommendations for legislative change in the area of child welfare,[253]

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249 *In re* Sheila G., 462 N.E.2d 1139, 1140 (N.Y. 1984); *see also* GOLDBERG, *supra* note 244, at 15; SOC. SERV. § 384-b(7)(a).

250 Polier, *supra* note 39, at 3; *see also Sheila G.*, 462 N.E.2d at 1140.

251 *See, e.g.*, ROBERTS, SHATTERED BONDS, *supra* note 10, at 131–32; Guggenheim, *supra* note 7; CHILDREN'S RTS., *supra* note 15, at 9.

252 *See* GOLDBERG, *supra* note 244, at 9; Note, *supra* note 48, at 772; Ritz, *supra* note 110, at 580.

253 N.Y. TEMPORARY COMM'N ON THE CTS., 1956 REPORT OF THE TEMPORARY COMMISSION ON THE COURTS TO THE GOVERNOR AND THE LEGISLATURE OF THE STATE OF NEW YORK 66–67 (1956).

which was particularly significant because New York frequently leads the way for other states in developing child welfare legislation.[254] The termination of parental rights statute New York passed was ultimately used as a model for other states.[255]

Courts, too, offered support for the idea of separating the proceedings. As the Utah Supreme Court put it in 1958, it was "sound public policy" to keep termination and adoption proceedings separate because

[t]hat policy is designed to prevent harrassment [sic] and possible extortion that might result if possibly unscrupulous natural parents, guilty of neglecting their child, gained knowledge of its whereabouts and that of its adoptive parents. That policy, directed against requiring such consent and notice [at the time of adoption], also is designed to allay the fears of prospective adoptive parents, and to encourage willing persons to give underprivileged children an opportunity in life, through adoption, that they otherwise would be denied[]—without a constant fear that the affection that almost invariably comes with the adoption of a child will be fractured.[256]

Though not always carefully distinguished by their proponents, the reasons offered for instituting stand-alone termination of parental rights proceedings can be divided into four categories: (1) the need to establish clarity regarding children's legal status prior to the filing of an adoption to prevent temporary caretakers from bonding with children who would not remain in their care, (2) concern that having a single legal proceeding address both the rights of the birth parents and the suitability of a particular set of adoptive parents was confusing and would tempt courts to blur the two inquiries, (3) the hope that separation between the two proceedings would allow complete confidentiality for adoptive families because the two sets of parents would not be required to attend the same legal proceeding, and (4) the belief that "freeing" children from their birth parents would make it easier to recruit adoptive parents.

Assessing these arguments in turn, one finds that any persuasive power they may have had has faded considerably, if not dissipated entirely, in the light of modern child welfare practices.

254 *See* ANDREA ELLIOTT, INVISIBLE CHILD: POVERTY, SURVIVAL & HOPE IN AN AMERICAN CITY 180–82 (2021); Myers, *supra* note 117, at 451–52.

255 *See* GOLDBERG, *supra* note 244, at 16 (recommending other states adopt statutes similar to New York's).

256 Jacob v. State *ex rel.* Pub. Welfare Comm'n, 323 P.2d 720, 721–22 (Utah 1958).

A. *Clarity*

One of the concerns that motivated statutory change was a perceived lack of clarity regarding the legal issues involved with adopting children out of foster care. The Council Report found that children "[were] being denied the permanent security of a home of their own" in part because of "the confusion and legal complications surrounding the surrender of a child."[257] And the Children's Bureau's legislative guide concluded, "Clarity of status of the natural parent, the child, and of the responsibility of the social agency . . . far outweighs the [cost of the] time which will be needed to complete the judicial severance."[258]

Although, as discussed above, the abandonment exception to requiring parental consent was interpreted strictly[259]—too strictly for some commentators—that did not mean it was interpreted uniformly. It was, in fact, somewhat difficult to anticipate when a child would be legally available for adoption. Of course, if a parent was deceased, it was clear consent was not required. But for parents who had been out of touch with a child, it was difficult to predict whether courts would waive consent. As one commentator noted in 1957, "[I]t is not easy to determine exactly what acts must be present before the court will find that an abandonment has taken place."[260]

Even after the *Bistany* decision discussed above narrowed the definition of abandonment in New York,[261] trial courts there still believed that "[t]he question as to the nature and extent of the acts required to demonstrate an actual abandonment . . . has never been defined with any degree of clarity or finality."[262] Similarly, a 1947 opinion by the Supreme Court of Hawai`i concluded that "it would be difficult to frame a definition of abandonment which could reasonably be applied to all cases."[263]

Predicting when a court would find that parents had abandoned their children was difficult because an abandonment finding was not contingent solely on the length of time a parent had been out of touch

257 *See* WELFARE & HEALTH COUNCIL OF N.Y.C., *supra* note 170, at 14.

258 GOLDBERG, *supra* note 244, at 9, 11 (comparing the clarity of termination to relinquishment, in which "various reciprocal rights, privileges, duties, and obligations of parents and children usually continue but remain unclear, the child's status is questionable, and the agency's area of functioning is uncertain").

259 Ritz, *supra* note 110, at 586 ("The 'natural rights' of the parents are jealously guarded . . . .").

260 *Id.*

261 *See supra* notes 111–115 and accompanying text.

262 *In re* Cohen's Adoption, 279 N.Y.S. 427, 433 (Sur. Ct. 1935).

263 *In re* Adoption of Geison Tom, 37 Haw. 532, 540 (1947).

with the child.[264] Intention was an element of abandonment, opening the way to varying interpretations of factual scenarios in which a parent had left a child with other caretakers for a lengthy period of time.[265] Aspiring adoptive parents who had been caring for a child for years might only learn when they filed for adoption that the child was not adoptable because the parent would not consent and the court would not find there had been abandonment.[266]

As adoption became more accepted, there were more cases involving children who had been left with caretakers who ultimately filed adoption petitions that were contested by the children's parents. As one commentator noted, "[A]n adoption usually was not contemplated at the time the child was left with the foster parents, but after a few years they became attached to the child and decided to adopt."[267] Yet "[n]o two courts agree on the 'unequivocal acts' which will spell out an abandonment," and "attempt[ing] to reconcile the [abandonment] cases is hopeless."[268]

This lack of predictability raised a concern distinct from the view, discussed above, that the strict interpretation of abandonment should be loosened. Separate from the position that long-term caretakers who had bonded with children should be allowed to adopt them, was the concern that children would be less likely to be placed with such caregivers in the first place. Children, one commentator explained, would be rendered "nonadoptable"[269] because agencies "[would] not take the risk of creating new ties when the child might be taken from its new home in a few months."[270] This commentator went so far as to say this effect on agencies "nullifie[d]" the abandonment exception to the parental consent requirement.[271]

Thus, one of the motivations to separate terminations of parental rights proceedings from adoptions was to allow agencies to place children with adoptive parents "with clear conscience" and without "fear the adoptive parents and the child would be injured if the natural parents

264 *See id.* at 539 ("There is a sharp conflict of authority as to what conduct amounts to an abandonment within the meaning of the statutes.").

265 *See, e.g.*, Winans v. Luppie, 20 A. 969, 970 (N.J. 1890) (defining abandonment as conduct that "evinces a settled purpose to forego all parental duties, and relinquish all parental claims to the child").

266 *See, e.g.*, *In re* Bistany, 145 N.E. 70, 71–72 (N.Y. 1924); Rouse v. Mathews (*In re* Mathews), 164 P. 8, 9–10 (Cal. 1917).

267 Ritz, *supra* note 110, at 588.

268 *Id.*

269 *Id.*

270 *Id.* at 583.

271 *Id.*

were able [successfully] to contest . . . the adoption."[272] Otherwise, "there was no other way to test the case except upon the adoption."[273]

One advocate for separate termination of parental rights proceedings explained that considering abandonment and adoption proceedings in one hearing had several consequences:

> *First, and most important, the fact that there has been no prior termination proceeding may prevent the placement of the child in adoption and the occurrence, consequently, of any adoption proceeding at all.* Child-care agencies often are reluctant to place a child in a pre-adoptive home who is not legally free for adoption. Otherwise they would expose the child and prospective parents to the grave risk that after they establish strong emotional ties the child will be removed from the home or, because of a court decision against termination, the child will be deemed nonadoptable.[274]

Notably, the concern here is focused on encouraging *agencies* to place children for adoption, while the case law that developed the abandonment exception to consent primarily involved *parents* placing their child with a caretaker who subsequently sought to adopt the child.[275] Had those parent-placement cases remained the typical adoption cases, policymakers who wanted to promote adoption likely would have remained focused on loosening the standard for waiving consent, either by expanding the definition of abandonment or by creating other exceptions to the parental consent requirement. And, in fact, states took both those steps in the second half of the twentieth century.[276] But as child welfare increasingly moved from the private to the public domain,[277] new issues arose. As long as adoption was primarily a private matter between individuals, there was no motive, a priori, to make children "adoptable"

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272 Simpson, *supra* note 17, at 368.

273 *Id.*

274 Gordon, *supra* note 24, at 228–29 (emphasis added).

275 *See* Ritz, *supra* note 110, at 583 ("[L]itigation involving the issue of consent arises only in connection with voluntary or independent placements where the natural parent or a private individual acting on her behalf has delivered the child into the home of the petitioner."). Frequently, questions concerning the abandonment exception arose only after the people seeking to adopt had had care of the child for a lengthy amount of time. *See, e.g.*, Dwinnell v. Fallon (*In re* Anderson), 248 N.W. 657 (Minn. 1933); *see also supra* Section I.D.1. Individuals who wished to adopt did have an interest in clarifying issues having to do with consent other than the abandonment issue (i.e., issues having to do with what was required to make a written surrender of a child enforceable or when revocation of written consent was allowed). That is because in situations of written consent, mothers were often surrendering newborns to couples who were seeking to adopt. Those issues are not relevant to the justification for termination of parental rights discussed in this Article.

276 *See* Simpson, *supra* note 17, at 352 (explaining "[t]here has been a wave of adoption law revisions within recent years" that "have generally strengthened the nonconsensual provisions of the adoption statutes, especially in defining abandonment" to allow more adoptions).

277 *See* Myers, *supra* note 117, at 452–54.

by determining in advance of placements that they had been abandoned. It was only when agencies sought to increase adoptions that policymakers began to call for separate termination of parental rights proceedings, so that a child's availability for adoption could be determined prior to their placement.

If this rationale for having stand-alone proceedings for the termination of parental rights was ever valid, it is not today because of a major shift in child welfare policy that occurred in the 1980s and 1990s. At that time, there was a renewed outbreak of concern that kids were languishing in foster care.[278] The reforms that had resulted from the 1950s focus on foster care drift had not been successful at reducing the foster care population. Then, beginning in the 1970s, there was a substantial uptick in the number of children entering foster care following an explosion of media coverage about child abuse, which led to federal legislation requiring mandated reporting of a broad range of concerns about children to child abuse hotlines.[279] This time, concern about the length of foster care stays was informed by the growing influence of attachment theory, which highlighted the harm of disrupting children's relationships with their caretakers by routinely changing their placements.[280] While that harm might seem obvious today, it was a new insight in the child welfare field. Remarkably, child welfare agencies previously had purposely moved children from one foster home to another in order to prevent foster children and foster parents from developing strong emotional bonds.[281] Beginning in the 1970s, it began to be recognized that being cycled through multiple foster homes was emotionally damaging to children.[282] In the 1980s, the social work field developed a new tactic to address this aspect of foster care drift; they called it "concurrent planning."[283]

Concurrent planning entails beginning to plan, as soon as a child enters foster care, for a second permanency goal in addition to trying to

278 *See, e.g.*, Donald N. Duquette, Sandra K. Danziger, Joan M. Abbey & Kristin S. Seefeldt, *We Know Better Than We Do: A Policy Framework for Child Welfare Reform*, 31 U. MICH. J.L. REFORM 93, 95 (1997).

279 *See* Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, § 4(b)(2), 88 Stat. 4, 6–7 (1974) (repealed 1996); BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE 87 (1984).

280 *See* NINA BERNSTEIN, THE LOST CHILDREN OF WILDER: THE EPIC STRUGGLE TO CHANGE FOSTER CARE 113 (2001) (citing JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT J. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 6 (1979)).

281 *See* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 854–55 (1977).

282 *See* GOLDSTEIN, FREUD & SOLNIT, *supra* note 280, at 42.

283 Katz, *supra* note 169, at 73.

reunify the family of origin.[284] "Permanency" became the watchword for child welfare practitioners as they tried to prevent children from remaining too long in foster care, and concurrent planning was central to the field's thinking about permanency. The idea was to have a "Plan B" underway as early as possible in case family reunification did not occur.[285] In that way, agencies could both shorten the length of stay in foster care and reduce the number of placements a child would have. With concurrent planning, the goal was to place children as early as possible in preadoptive homes instead of doing what was called "sequential planning." In sequential planning, caseworkers tried first to accomplish family reunification and only began looking for adoptive placements after reunification work had been undertaken and deemed to have failed.[286]

Concurrent planning was introduced at the federal level in 1980 in the Adoption Assistance and Child Welfare Act[287] and became a cornerstone of federal child welfare practice with the passage of ASFA.[288] Although ASFA did not mandate concurrent planning at the start of foster placements, it specifically allowed it,[289] and the hearings that led to

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284 *Id.* at 72, 80; *see also* Amy C. D'Andrade, *The Differential Effects of Concurrent Planning Practice Elements on Reunification and Adoption*, 19 RSCH. ON SOC. WORK PRAC. 446, 447 (2009).

285 D'Andrade, *supra* note 284, at 447.

286 *See* ALICE BOLES OTT, NAT'L RES. CTR. FOR FOSTER CARE & PERMANENCY PLAN., TOOLS FOR PERMANENCY (1998), https://www.hunter.cuny.edu/socwork/nrcfcpp/downloads/tools/cpp-tool.pdf [https://perma.cc/TEG3-TKCF]. Recently, there has been acknowledgment that kinship guardianship should be considered as a possible plan when reunification is not possible. *See* Social Security Act Amendments of 1994, Pub. L. No. 103-432, § 109, 108 Stat. 4398, 4408 (codified as amended at 42 U.S.C. § 1395ww(d)(5)(I)(ii)) (allowing incentive payments for kinship guardianship as well as adoption); Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2015). But the focus of concurrent planning has always primarily been on adoption. *See, e.g.*, CHILDREN'S BUREAU, *supra* note 32, at 2 (describing efforts to improve concurrent planning by requiring "[s]imultaneous reunification services and efforts to identify an adoptive resource family"); Erum Nadeem, Austin J. Blake, Jill M. Waterman & Audra K. Langley, *Concurrent Planning: Understanding the Placement Experiences of Resource Families*, 26 ADOPTION Q., no. 1, at 1, 2 (2023) ("Under concurrent planning, two routes toward permanency, family reunification and adoptive placement, are pursued in tandem.").

287 Pub. L. No. 96-272, § 101, 94 Stat. 500, 501–13 (1980) (codified as amended in scattered sections of 42 U.S.C.); Linda Katz, *Permanency Action Through Concurrent Planning*, ADOPTION & FOSTERING, July 1996, at 8, 8.

288 Carolyn Lipp, *Fostering Uncertainty: A Critique of Concurrent Planning in the Child Welfare System*, 52 FAM. L.Q. 221, 224 (2018) ("ASFA paved the way for the concurrent planning revolution."); William Wesley Patton & Amy M. Pellman, *The Reality of Concurrent Planning: Juggling Multiple Family Plans Expeditiously Without Sufficient Resources*, 9 U.C. DAVIS J. JUV. L. & POL'Y 171, 172 (2005) ("This Act ushered in a requirement of concurrent planning under which the government must simultaneously provide parents assistance to reunify with their children and to prepare for permanent placement for dependent children should reunification fail.").

289 42 U.S.C. § 671(a)(15)(F) ("[R]easonable efforts to place a child for adoption . . . may be made concurrently with reasonable efforts [to reunify the family].").

ASFA touted the approach.[290] As a condition of federal funding for foster care, ASFA also required that states follow a strict timeline for filing termination of parental rights petitions—and as soon as a termination petition was filed, a requirement of concurrent planning kicked in.[291] Concurrent planning is now required from the outset of foster care placements in approximately forty-six states.[292]

Some have cautioned that concurrent planning undermines reunification efforts.[293] They argue that it is unrealistic to expect foster parents to work hard to facilitate a child's return to her parents while also committing to adopt the child if family reunification is not promptly achieved.[294] However legitimate these concerns might be, concurrent planning has carried the day. It is widely taught and heralded as "best practice" in the field of child welfare.[295] Today, the majority of children adopted out of foster care are adopted by their foster parent.[296]

The preeminence of concurrent planning means that the need-for-clarity argument that justified separating termination of parental rights from adoption proceedings simply does not apply today. Agencies do not wait until parents' rights are terminated before placing children in preadoptive homes.[297] On the contrary, agencies are supposed to place children in preadoptive placements as early as possible, even though statistically it is likely that children entering foster care will return to their families of origin.[298]

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290 Richard P. Barth, Fred Wulczyn & Tom Crea, *From Anticipation to Evidence: Research on the Adoption and Safe Families Act*, 12 VA. J. SOC. POL'Y & L. 371, 372–73 (2005).

291 42 U.S.C. § 671(a)(15)(F).

292 *See* CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., CONCURRENT PLANNING FOR TIMELY PERMANENCE FOR CHILDREN 3 (2021), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/concurrent_plan.pdf [https://perma.cc/4GNF-XQY6].

293 *See* Patton & Pellman, *supra* note 288, at 173 ("Concurrent planning has not been the panacea that its creators imagined. Instead, it has had the effect of rushing parents through inadequate family reunification with little forethought for appropriate permanent plans for children.").

294 *Id*.

295 *See* Sarah Gerstenzang & Madelyn Freundlich, *A Critical Assessment of Concurrent Planning in N.Y. State*, 8 ADOPTION Q., no. 4, 2005, at 1, 20.

296 *See* CHILDREN'S BUREAU, *supra* note 4, at 6. Most of the other children adopted out of foster care are adopted by a relative. *See id.*

297 Ellis, Malm & Bishop, s*upra* note 41, at 5 ("Many judges also pointed out that the use of concurrent planning has assured that most foster children are in placements with caregivers who are willing to provide permanency either through adoption or legal guardianship.").

298 *See* Katz, *supra* note 169, at 72, 80; Nadeem, Blake, Waterman & Langley, *supra* note 286, at 1 ("Under the concurrent planning system, children are placed with caregivers who are able and willing to adopt the child if reunification with birth parents does not occur.").

B. *Mingling of Issues*

Another reason offered in favor of detaching termination of parental rights from adoption proceedings was a concern articulated by some child welfare commentators that courts would otherwise mingle two issues that should be resolved separately. If there was one hearing to decide (1) whether the parents' right to consent could be waived, and (2) whether adoption by a particular couple was in a child's best interests, then, it was feared, courts would blur the issues because they would be overly influenced by their desire to serve the best interests of the child.[299] Case law, however, was clear that the finding of a basis to waive a parent's consent (abandonment or unfitness) was a distinct, threshold question, and that question did not depend on what was in the child's best interests.[300] Even where consent had not been required by the plain language of adoption statutes, courts had "added a statutory gloss requiring a showing that the parent has failed in his responsibilities to his child before his consent can be deemed unnecessary."[301] Only with consent or a basis to waive consent could the court move on to the question of whether the proposed adoption was in the child's best interests.[302]

Despite this framework requiring two distinct determinations, commentators were concerned that assessing whether the parent has forfeited the right to consent in the same proceeding in which the court assesses the proposed adoptive home "result[s] in confusing the legal issues."[303] These commentators worried about "a natural tendency to compare the two homes and the parties."[304] Separation of the proceedings, it was asserted, would allow the issues to "be examined more objectively."[305] This concern was laid out in a comment to the Uniform Adoption Act of 1953:

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299 *See* Simpson, *supra* note 17, at 359 ("The radically different issues involved have led to demand for statutes to terminate parental rights in a judicial proceeding prior to the adoption hearing.").

300 *See* Ritz, *supra* note 110, at 582 ("[T]he judge in the adoption proceeding is faced with two distinct questions: (1) whether the natural parent has forfeited his right to withhold consent to the adoption, and (2) whether the petitioners should be allowed to adopt the child. These questions present separate problems and involve different policy factors. The mere fact that the child's welfare would be promoted by the adoption is not enough to cut off the natural parents' rights . . . .").

301 *See* Gordon, *supra* note 24, at 221.

302 *See supra* Section I.C.

303 *See* Ritz, *supra* note 110, at 583.

304 Simpson, *supra* note 17, at 359.

305 *Id.* at 367.

> [C]ontroversies respecting the termination of parental rights should be settled in other proceedings in a court with jurisdiction of the parties before the adoption proceedings are brought. . . . The issues to be tried in a controversy over the termination of parental rights, i.e., the degree of unfitness of a parent, are quite different than the inquiry properly before an adoption court. The two should not be mixed. The trial of controversial issues over parental rights should not cast an influence in the adoption proceedings where the sole inquiry should be the future best interests of the child.[306]

Only then can the adoption court devote its entire attention to the inquiry whether the adoptive home will serve the best interests of the child and whether the child is properly placed in the adoptive home.

While this concern is clearly stated by a number of commentators, it is difficult to understand what motivated it. It is expressed as a concern about protecting birth parents' rights in light of a perceived danger that courts would be too quick to waive parental consent when adoptive homes appeared to serve children's best interests. But it is puzzling to understand how a concern to protect birth parents' rights could support a new mechanism to *terminate* rights—a mechanism that by all accounts was intended to increase the number of situations in which rights would be terminated. It is particularly difficult to understand the motivation given that there is no indication (at least from the present vantage point) that courts *were* mingling the issues in a way that damaged parents' rights. None of the proponents of this concern point to case examples, and the case law in general, as noted, was understood to construe exceptions to the parental consent requirement quite strictly[307]—indeed, too strictly for the likes of many.[308]

The potential tension between birth parents' rights and the best interests of children was an issue that had been explicitly addressed by courts in the first half of the twentieth century, and it is clear that courts favored parents' rights. The *Bistany* case for which Judge Cardozo wrote the opinion discussed above was regularly cited by courts both in and outside of New York to support strong protection of parents' rights.[309] And the *Bistany* dissent pulled no punches in laying out the case for

306 Comment, *Uniform Adoption Act*, 40 IOWA L. REV. 329, 330 (1955).

307 *See* Simpson, *supra* note 17, at 360 ("The rule seems clearly established and there is nothing to show that it has been weakened in recent years: the parent has the right to his child as long as he is fit.").

308 *See supra* Section I.C; *see also* Lacher v. Venus, 188 N.W. 613, 619–20 (Wis. 1922) (Owen, J., dissenting) ("I have an abiding conviction that parental rights are unduly exalted and allowed to dominate the best interests of the child as well as the public.").

309 *See, e.g.*, *In re* Cohen's Adoption, 279 N.Y.S. 427, 431–32 (Sur. Ct. 1935); *In re* Adoption of Force, 131 N.E.2d 157, 159 (Ind. 1956); Dwinnell v. Fallon (*In re* Anderson), 248 N.W. 657, 657 (Minn. 1933).

overcoming those rights in favor of the child's best interests. Treating the adoption proceeding as a contest between the relative merits of the birth and the adoptive parents, the dissenting judge clearly disdains the child's birth parents, whom he describes as allowing their child "to be taken into a family much above their own station in life . . . and to acquire a taste for material comforts and luxuries which they could not possibly give her."[310] He goes on:

> Now at the age of 6 1/2 years, they wish to break up those pleasant relations by taking her into an eastside tenement, consisting of a dining room, kitchen, two bedrooms, and bathroom, already overcrowded by the parents and five boys. This, the court ought not to sanction. It is not for the interest of the child, and her interest must certainly be considered. . . . It seems to me there cannot be the slightest doubt in the mind of any one, upon the uncontradicted facts set out in this record, that "the moral and temporal interests" of this child will be promoted by the adoption.[311]

As distasteful as this type of analysis is to modern ears, that makes it all the more difficult to understand the argument that the two questions had to be addressed in separate proceedings. The *Bistany* dissent did blur the issues of waiving of consent and best interests, and that approach was decisively rejected by the majority and by the many other courts that cited the case.[312]

Thus, it is difficult to see this argument for separating termination of parental rights from adoption as at all persuasive, even at the time it was offered. And today? Any danger that courts will blur the issues of parental fitness and best interests still does not justify stand-alone termination proceedings. First, most stand-alone termination of parental rights proceedings now require a best interests inquiry.[313] Statutes routinely mandate that courts conduct a threshold inquiry into parental fitness and, if unfitness is found, then conduct a distinct inquiry into whether it is in the child's best interests to terminate parental rights.[314] Under these statutes, the issue of the parents' fitness and the issue of the

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310 *In re* Bistany, 145 N.E. 70, 74 (N.Y. 1924) (McLaughlin, J., dissenting).

311 *Id.*

312 *See, e.g.*, *In re* McDonnell's Adoption, 176 P.2d 778, 783 (Cal. 1947).

313 *See* CHILDREN'S BUREAU, DEP'T OF HEALTH & HUM. SERVS., GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 2 (2021), https://cwig-prod-prod-drupal-s3fs-us-east-1.s3.amazonaws.com/public/documents/groundtermin.pdf [https://perma.cc/FA26-8LBV] ("When addressing whether parental rights should be terminated involuntarily, the laws in most States require that a court do the following: Determine, by clear and convincing evidence, that the parent is unfit; Determine whether severing the parent-child relationship is in the child's best interests." (footnote omitted)).

314 *See, e.g.*, N.Y. FAM. CT. ACT §§ 622–623 (McKinney 2024).

child's best interests are supposed to be determined independently, but they are addressed in the same proceeding.[315]

Further, while not all best interests inquiries today involve the "beauty-contest" danger of comparing the birth parent to a particular adoptive parent—because termination proceedings are sometimes brought when a child is not in a preadoptive home—they very often do. With concurrent planning, as discussed in the previous Section, many children are in preadoptive homes when termination petitions are filed. And if they are not yet in a preadoptive home when the petition is filed, the agency is required under ASFA to make efforts to find a preadoptive placement before the termination proceeding is complete.[316]

Thus, the danger that a court will be inappropriately swayed on the fitness inquiry is alive and well under the current structure involving stand-alone termination proceedings. It is not uncommon for children to be bonded to foster parents who are considered preadoptive, and judges are well aware that finding for the parent on the fitness question will prevent the adoption from proceeding.[317] Moreover, the comparative economic advantages typically found in preadoptive foster homes compared to the homes of birth parents continue.[318] The current structure of stand-alone termination proceedings, therefore, provides no greater protection against judges being swayed by the appeal of the proposed adoptive parent when evaluating the fitness of the birth parent.

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315 *Id.* § 622.

316 42 U.S.C. § 671.

317 *See, e.g.*, *In re* Jessica U., 59 N.Y.S.3d 195, 199–200 (N.Y. App. Div. 2017) (affirming termination of a mother's parental rights although she had "maintained contact with the children and attended or completed countless offered services and supervised visits," while noting that one of the children had "resided primarily in a preadoptive home since shortly after her birth, where she is well cared for, thriving and attached to the only parents and family with which she has lived and known" and two of the children were "bonded with and have adapted well to their respective preadoptive foster families").

318 *See, e.g.*, David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 606 (2009) ("The law takes underclass families to be inferior, and '[u]nder nuclear family-based adoption policy, the law terminates the birth parents' rights before it engrafts parental rights in the adoptive parents.' When children then move to bourgeois nuclear families, the law assumes that this move must be good for the children." (alteration in original) (footnote omitted) (quoting Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMPLE L. REV. 1649, 1653 (1995))); Guggenheim, *supra* note 7, at 1724 (finding that "inadequacy of income, more than any other factor, constitutes the reason that children are removed" from their birth parents (quoting DUNCAN LINDSEY, THE WELFARE OF CHILDREN 155 (1994))). Not only do foster parents tend to be in a higher income bracket than birth parents of foster children, but they also receive monthly subsidies as foster parents that typically continue if they adopt. *See* Hannah Roman, *Foster Parenting as Work*, 27 YALE J.L. & FEMINISM 179, 181 (2016). Critics of the system have noted that many birth parents could raise their children safely if they had been provided equivalent financial support. ROBERTS, SHATTERED BONDS, *supra* note 10, at 157–58.

Indeed, parent defenders report that one of the toughest challenges in winning appeals of termination of parental rights cases is that by the time an appeal on parental fitness is heard, the child frequently has been living in the potential adoptive home for years and judges are loathe to make decisions that will disrupt those caretaking arrangements.[319]

Thus, this argument offers no justification today for continuing to hold stand-alone termination proceedings.

C. *Protecting the Anonymity of Adoptive Families*

Another argument offered in favor of separate termination proceedings was that it would avoid the need for birth parents to learn the identity of adoptive parents.[320] This was another argument that was only relevant to agency adoptions. As with the clarity argument, it would not have been a meaningful point earlier, when the majority of adoptions followed direct placements of children by birth parents with caretakers of their choosing.[321] By the mid-twentieth century, however, as the social work profession gained more influence and more adoptions were done through agencies, the ability grew to keep birth and adoptive parents apart. As E. Wayne Carp and others have explained, in the 1940s, there was a quick shift toward promoting the confidentiality of all parties involved in adoptions.[322] This embrace of confidentiality was incorporated through various legislative reforms.[323]

In the era in which confidentiality of adoptions was viewed as highly desirable, it did provide a reason to separate termination proceedings from adoption proceedings. If a parent's rights had been terminated, they had no right to receive notice when the adoption proceeding was filed, preventing them from appearing in court and learning the identity of the adoptive parent. If an agency sought a termination of parental rights prior to placing a child in an adoptive home, then after the termination, the parent had no right to learn where the child was or with whom the child was placed. Consequently, separating the proceedings was touted as a

319 *See* E-mail from Amy Mulzer, Senior Att'y for L. & Appeals Fam. Def. Prac., Brooklyn Def. Servs., to author (Feb. 28, 2024, 09:28 EST) (on file with author).

320 *See* Simpson, *supra* note 17, at 368 ("Another possible advantage of the termination of parental rights statute is that the natural parents have no way of knowing where the child is or who the adoptive parents are.").

321 *See supra* Section II.A.

322 *See* Carp, *supra* note 46, at 2; GOLDBERG, *supra* note 244, at 24.

323 *See* Carp, *supra* note 46, at 2; GOLDBERG, *supra* note 244, at 24.

means to give "adoption agencies a freer hand" to keep the two sets of parents unknown to each other.[324]

One proponent of separate proceedings went so far as to warn that keeping the decisions regarding parents' rights within adoption proceedings would "leav[e] the door open for interference in the child's new home and perhaps for blackmail by the natural parents" (though no examples of that happening in the absence of confidentiality protections were cited).[325]

While this concern was aimed primarily at keeping adoptive parents unknown to birth parents, the Children's Bureau noted that confidentiality should go the other way as well, protecting the anonymity of birth parents.[326]

In short, the concern about confidentiality—in both directions—was strong enough midcentury to make it a compelling justification for separating termination from adoption proceedings. But this justification carries no water in today's foster care system. First, a full third of children adopted out of foster care are adopted by relatives,[327] so everyone involved already knows each other. Second, there has been a dramatic shift away from the view among child welfare experts that anonymity in adoption is desirable, and the vast majority of adoptions are no longer confidential.[328] Indeed, open adoption—in which the birth parent has continuing contact with the child after adoption—is now common in private adoptions and widely encouraged.[329] Third, the ubiquity of concurrent planning renders anonymity beyond reach in the majority of cases. Most adoptions from foster care follow many months and sometimes years of the birth parents and preadoptive parents meeting in agency visiting rooms as family reunification is pursued. Rather than

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324 *See* Johnson, supra note 17, at 68 ("[A] possible advantage [of separate proceedings] is that adoptive parents may adopt the child without the natural parent's knowledge of the proceedings or of the whereabouts of the child upon adoption.").

325 *See* Ritz, *supra* note 110, at 583.

326 *See* GOLDBERG, *supra* note 244, at 24–25 ("[T]o protect anonymity and to assure that the child is legally free for adoption, a certified copy of the termination decree should be filed directly with the court by the guardian of the child's person. In this way, adoption petitioners would not see the information contained in the termination decree."). *See generally* Samuels, *supra* note 85 (challenging the conventional understanding that in this period the parties to adoptions preferred confidentiality).

327 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT NO. 30, at 6 (2024), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcars-report-30.pdf [https://perma.cc/GQG9-3AS3].

328 DEBORAH H. SIEGAL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 7 (2012), https://njarch.org/wpress/wp-content/uploads/2015/11/2012_03_OpennessInAdoption.pdf [https://perma.cc/6848-5P5S].

329 *See* SIEGAL & SMITH, *supra* note 328, at 6–7.

keep them apart, agencies are supposed to actively encourage birth parents and preadoptive parents to interact.[330]

Finally, even where an adoptive placement occurs after rights have been terminated, anonymity is a chimera in the cellphone and internet era—not something an adoptive parent can reasonably expect. Children who are old enough to have their parents' phone numbers frequently stay in touch with parents whose rights have been terminated. And even if adoptive parents try to hide information from younger children, the children and their birth parents often find each other on the internet.

D. *Recruitment of Foster Parents*

The fourth argument offered in support of separating termination of parental rights from adoption proceedings is related to the concern discussed above about clarifying a child's legal status prior to the filing of an adoption. That concern was that adoption agencies hesitated to place children in preadoptive homes before it was clear that the child would be legally available for adoption. There was an additional concern that even if agencies could be convinced to try to place children for adoption before it was clear they could be adopted—as they do now—potential adoptive parents would be unwilling to accept children into their homes who were still legally connected to their parents.

The drafter of New York's termination of parental rights statute put it bluntly, describing it as "difficult, and often impossible" to find adoptive homes for children before they were legally "freed for adoption."[331] In his view, "[f]amilies seeking a child for adoption are most

330 *See Foster Care: A Path to Reunification*, CHILD WELFARE INFO. GATEWAY (Mar. 13, 2019), https://www.childwelfare.gov/more-tools-resources/podcast/episode-35 [https://perma.cc/ZQT9-E62M]; *Policy #1: Support Relationships Between Birth and Foster Families*, CHAMPS, https://playbook.fosteringchamps.org/policy-goal/support-relationships-between-birth-and-foster-families [https://perma.cc/P92G-7AYM]; Sandra Stukes Chipungu & Tricia B. Bent-Goodley, *Meeting the Challenges of Contemporary Foster Care*, 14 FUTURE CHILD. 86 (2004) (observing that foster parents are increasingly "expected to . . . mentor birth parents"); ADOPTUSKIDS, EQUIPPING FOSTER PARENTS TO ACTIVELY SUPPORT REUNIFICATION 3 (2019), https://www.adoptuskids.org/_assets/files/AUSK/Publications/equipping-foster-parents-to-support-reunification-web508.pdf [https://perma.cc/86WL-9Y28]; Margaret Beyer, *Too Little, Too Late: Designing Family Support to Succeed*, 22 N.Y.U. REV. L. & SOC. CHANGE 311, 335–36 (1996) (promoting "[p]artnerships between birth and foster families through visiting, shared parenting, and informal contacts"). *See generally* Andrew Sanchirico & Kary Jablonka, *Keeping Foster Children Connected to Their Biological Parents: The Impact of Foster Parent Training and Support*, 17 CHILD & ADOLESCENT SOC. WORK J. 185 (2000).

331 Polier, *supra* note 39, at 2.

unlikely to be willing to build their lives around a child, particularly an older child, unless given an assurance that adoption will follow."[332]

This concern arose out of the changing understanding of adoption in the post–World War II period. It would not have been an issue even a couple decades earlier when adoption was widely understood to be about granting legal recognition to existing relationships. Nor would it have been compatible with the earlier sense that adoption was intended primarily to benefit the children involved—an act of charity for needy children.[333] With the broader social acceptance of adoption came the idea that it benefited the adoptive parents as much as the children. Once adoption was seen as completing incomplete (often infertile) families, there was an interest in finding children who were adoption eligible or, in modern parlance, "free for adoption." For the first time, it became important to identify children who were unencumbered by connections to their families of origin. Adoption remained understood as benefitting children, but now, for the first time, policymakers saw expanding termination of parental rights as a way to bring together the "supply" of children in foster care with a rising "demand" for adoptable children. To connect the supply and demand seemed at the time to require cutting the children's ties to their birth families.

Since that time, the adoption landscape has changed significantly, in ways that will be discussed in Part III. But even with the changes, the overarching conception that adoption is about bringing together children in need of parents and adoptive parents searching to complete their families continues to frame current understanding. Thus, it may be unsurprising that some child welfare practitioners continue to see terminating birth parents' rights as a crucial step in recruiting adoptive parents. Adoption recruitment specialists commonly say that "many prospective adoptive parents are reluctant to care for a child whose birth parents' rights are still intact."[334] Perhaps because of this, in situations where concurrent planning has not resulted in a preadoptive placement, some child welfare agencies wait to actively recruit adoptive placements until after termination is completed.[335] Indeed, some of the programs designed to recruit adoptive families for hard-to-place youth forbid the

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332 *Id.* Of course, this understanding is directly at odds with the concurrent planning approach that is central to current child welfare policy. *See supra* Section II.A.

333 MELOSH, *supra* note 39, at 105 ("Once practiced as a limited and marginal response to the needs of dependent children, adoption became social policy; it was proclaimed the 'best solution' to the 'problem' of out-of-wedlock pregnancy."). This Article is focused here on adoption in the United States. In earlier eras in Rome and elsewhere, adoption was viewed as benefitting the father who adopted, allowing him to carry on his family line. *See, e.g.*, Ritz, *supra* note 188, at 580 n.12.

334 *See* Ellis, Malm & Bishop, *supra* note 41, at 1.

335 *Id.* at 5.

use of their services on behalf of children whose parents still have legally recognized rights.[336] Judges presiding over child welfare cases sometimes echo the same idea, holding that one reason for terminating parental rights is that children whose parents' rights are terminated will be easier to place for adoption.[337]

So what weight should the concern about adoptive parent recruitment carry today? Does this concern justify maintaining a legal mechanism for terminating parental rights separate from adoption? Unlike the first three concerns used to justify separating the proceedings, this one remains a colorable concern to consider today. But it cannot, without more, support the continued use of the stand-alone termination of parental rights mechanism.

First, the numbers do not add up. There is no way to know with precision how many children placed in adoptive homes after termination of parental rights would not have been adopted if parental rights had not been severed prior to the placement. What is clear is that far too often terminating parental rights does not lead to adoption. At any given time in the United States, there are between 58,400 and 72,000 children whose parents' rights have been terminated and fewer than 18,000 are in preadoptive homes.[338] Even more telling, while the federal data does not

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336 *See id.* at 2.

337 Parental rights cannot legally be terminated solely based on the perceived effect on placement for adoption, but judges use that as a factor in determining children's best interests, which is often an element of causes of action to terminate parental rights. *See, e.g.*, *In re* I.N.C. & E.R.C., 843 S.E.2d 214, 218 (N.C. 2020) ("The likelihood of finding a pre-adoptive home would increase significantly if the boys were free for adoption and legal risk was removed."); *In re* M.-A.F.-S., 421 P.3d 482, 499 (Wash. Ct. App. 2018) ("[A]s a general matter, more pre-adoptive homes are available to children who are legally free than those who are not."). While some courts believe that it is in children's interests to terminate parental rights because it increases the chance of identifying adoptive resources, others do not. In fact, one study of why states were failing to meet the ASFA imposed deadlines for termination of parental rights found that "some judges are concerned about the prospect of creating legal orphans, and the absence of an identified adoptive family does make some judges more apprehensive about TPR." *See* Ellis, Malm & Bishop, *supra* note 41, at 1. Another study found:

> Respondents in all three states reported that judges typically will not proceed with TPR until an adoptive family has been identified for the child. Indeed, this was a requirement for TPR in Wisconsin. . . . In all three states, most children adopted from foster care are adopted by their foster family, a relative, or someone else in the child's existing network. Adoptions by persons previously unknown to the child are rare.

LAURA RADEL & EMILY MADDEN, OFF. OF HUM. SERVS. POL'Y, U.S. DEP'T OF HEALTH & HUM. SERVS., FREEING CHILDREN FOR ADOPTION WITHIN THE ADOPTION AND SAFE FAMILIES ACT TIMELINE: PART 2—STATE PERSPECTIVES 8 (2021), https://aspe.hhs.gov/system/files/pdf/265036/freeing-children-for-adoption-asfa-pt-2.pdf [https://perma.cc/2KB9-L7SL].

338 CHILDREN'S BUREAU, TRENDS, *supra* note 38, at 1; CHILDREN'S BUREAU, AFCARS REPORT NO. 27, at 1; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE

track how many children leave foster care as legal orphans, we know that between 6,000 and 11,000 more foster children are legal orphans in any given year than are adopted from foster care.[339] In short, there is no empirical evidence that terminating parental rights prior to adoption proceedings actually leads to more adoptions.

Second, the potential benefit of recruiting more adoptive families for foster children must be weighed against the harms of stand-alone termination proceedings. Prior to the introduction of termination statutes, no youth was ever without a legal connection to some family. Indeed, no previous legal regime would have contemplated such a possibility. Children could be orphaned by the death of parents, of course, but they were never legally untethered from their birth family except when they were given new legal parents through adoption.[340]

Today, tens of thousands of children age out of foster care without legal ties to any family.[341] It is well documented that leaving foster care without a permanent placement is associated with increased rates of homelessness, underemployment, failure to obtain a high school diploma, teen pregnancy, and criminal system involvement.[342] There is also growing concern about the less quantifiable emotional harms of messaging to young people that their family of origin is so irredeemable that their relatives should be excised from their lives.[343] Moreover, a

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AFCARS REPORT NO. 26, at 1 (2019), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport26.pdf [https://perma.cc/3MMP-NYZZ]; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT NO. 25, at 1 (2018), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport25.pdf [https://perma.cc/2PD3-2FSW]; CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT NO. 24, at 1 (2017), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport24.pdf [https://perma.cc/6QH6-PUHC].

339 CHILDREN'S BUREAU, TRENDS, *supra* note 38, at 1.

340 To be more precise, children were never previously legally untethered from their birth mothers outside of adoption. Fathers who were not married to the mothers of their children did not always have a legal connection to their children at the time discussed in the text, though they are more likely to now. *See* Chris Gottlieb & Martin Guggenheim, *New York's Unconstitutional Treatment of Unwed Fathers of Children in Foster Care*, 46 N.Y.U. REV. L. & SOC. CHANGE 309, 319 (first citing 1 WILLIAM BLACKSTONE, COMMENTARIES *446, *458; and then citing WILFRID HOOPER, THE LAW OF ILLEGITIMACY 25 (1911)).

341 CHILDREN'S BUREAU, TRENDS, *supra* note 38, at 1; Jones, *supra* note 5.

342 *See* Sankaran & Church, *supra* note 9, at 258–59; Ellis, Malm & Bishop, *supra* note 41, at 2.

343 *See* Albert & Mulzer, *supra* note 39, at 587; Erin Carrington Smith & Shanta Trivedi, *The Enduring Pain of Permanent Family Separation*, 2023 FAM. JUST. J. 26. Beyond the harms to the individual children whose family ties are severed in termination proceedings, there are group-based harms inflicted on the communities from which those children come. *See* ROBERTS, SHATTERED BONDS, *supra* note 10, at 473–74 (discussing how "excessive state interference in Black family life damages Black people's sense of personal and community identity" and "reinforces negative stereotypes").

growing literature indicates that adoptees are better off if they maintain contact with their birth families.[344] There simply is no persuasive evidence that the benefits to the children who are adopted in placements found after terminations of parental rights outweigh the harms of those terminations.

Finally—and most importantly—the child welfare legal scheme can be structured to fully address the concern about recruiting adoptive parents without creating legal orphans. As I explain in the next Section, there is an alternative to completely severing parents' rights that undercuts any remaining persuasive force this concern might exert.

E. *Any Outstanding Concern Can Be Addressed Through an Alternative to Stand-Alone Termination of Parental Rights*

As the history traced above indicates, the professed goal of termination of parental rights has always been to clear the way to adoption.[345] Indeed, for the first hundred years of American adoption law (roughly the mid-nineteenth to the mid-twentieth century), termination of parental rights only occurred simultaneous with, and as an integral part of, adoption. There may remain disagreement about how often adoption should be pursued,[346] but leaving that question aside, there simply is no reason to continue to conduct termination of parental rights proceedings separate from adoption proceedings. An alternative legal

344 Albert & Mulzer, *supra* note 39, at 590–91. The psychological work that has been most influential in contemporary child welfare law is Goldstein, Freud, and Solnit's theory that law should emphasize and protect a child's bond with their current caretaker once an attachment has formed. JOSEPH GOLDSTEIN, ALBERT J. SOLNIT, SONJA GOLDSTEIN & ANNA FREUD, THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE 104–08 (1996). Peggy Cooper Davis has noted that this theory has been embraced to the extent that it discourages removing children from foster homes in which they are bonded, though it has not discouraged removals of children from birth parents. Peggy Cooper Davis, *The Good Mother: A New Look at Psychological Parent Theory*, 22 N.Y.U. REV. L. & SOC. CHANGE 347, 348 (1996). Notably, the theory's emphasis has been rejected in private family law, where children's relationships to noncustodial parents are protected, while it is offered as justification for terminating parental rights in the public law context. *Id.* at 362.

345 *See supra* Section I.C.

346 See RADEL & MADDEN, *supra* note 26, at 4 (explaining that "some observers argue that further efforts are needed to terminate parental rights expeditiously, in some cases long in advance even of current ASFA timelines, and to move more children into adoptive homes as quickly as possible," but that others instead believe that "the child welfare system . . . tak[es] too many children into foster care who could remain safely with their families and [is] not doing enough to address families' problems before seeking permanent alternatives").

mechanism can clear the path to adoption without the downsides of separate termination proceedings.[347]

There is no need to impose a family law "death penalty" in order to clarify in advance those situations in which parental consent will not be required in an adoption proceeding. All that is needed is a proceeding antecedent to adoption in which a court may rule that the child's parent is stripped of the substantive right to veto an adoption. Once a court makes that ruling, potential adoptive parents can be assured that if they petition to adopt the child, the birth parent's consent will not be required. Statutes creating such proceedings could authorize courts to extinguish a parent's right to consent to adoption on exactly the same statutory grounds upon which statutes currently authorize terminating all parental rights (e.g., abandonment, permanent neglect, etc.),[348] but without prematurely destroying the parent-child relationship. In such a regime, courts could be given the authority to transfer the right to consent to a child's adoption from the birth parent to another individual or to an agency, or courts could simply declare that a parent's right to consent to adoption is extinguished. My purpose here is not to describe this new proceeding in full detail. The critical point is that the bundle of parental rights could be disaggregated, rather than severed in toto, allowing courts to determine that a parent no longer has the right to prevent an adoption while leaving other parental rights intact, at least until the point of adoption.

A more ambitious set of changes to current law would consider whether some parental rights should survive any eventual adoption. I leave exploring that question for another day.[349] My goal here is to

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347 Josh Gupta-Kagan, among others, has usefully suggested ways other than the alternative discussed here to avoid the harms of current termination of parental rights practice, including emphasizing permanency options other than adoption and allowing nonexclusive adoption (i.e., adoption that does not entail cutting off all the birth parents' rights). *See generally* Josh Gupta-Kagan, *Nonexclusive Adoption and Child Welfare*, 66 ALA. L. REV. 715 (2015); Gupta-Kagan, *supra* note 286. *See also* Guggenheim, *supra* note 41, at 137 (suggesting terminations of parental rights be conditional and reviewable to curb the legal orphan problem). There are surely multiple avenues (that are not mutually exclusive) to address the harms of current practice. The alternative discussed in the text is one that is particularly suggested by considering the history of the development of termination statutes.

348 Such findings presumably would have to be made based on clear and convincing evidence. *See* Santosky v. Kramer, 455 U.S. 745, 748 (1982) (holding that in termination of parental rights proceedings "due process requires that the State support its allegations by at least clear and convincing evidence").

349 In a companion piece, I explore questions that would need to be addressed if the bundle of parental rights were disaggregated, offer a specific proposal that would allow the transfer of the right to consent to adoption, and recommend how other parental rights might then be allotted. Gottlieb, *supra* note 23. In particular, there is strong reason to allow birth parents' right to standing

highlight that even if more expansive changes are not pursued, the current structure of terminating parental rights separate from adoption is not necessary or defensible.[350]

As novel as this proposal may seem in the context of the modern child welfare system, in other contexts, courts routinely abrogate specific parental rights without extinguishing all of them. There is nothing unusual about empowering judges to deny parents a specific right ordinarily assigned to them while continuing to recognize their other parental rights. This is commonly done, for example, when awarding custody of a child to someone other than the parent or when a court limits a parent's right to consent to a medical procedure the court has concluded should be performed over the opposition of the parent.[351] Similarly, the option to extinguish a parent's right to consent to adoption without terminating all their parental rights is a conceptually simple example of curtailing a parent's rights to a limited extent.

But for historically contingent reasons, at the time the termination of parental rights mechanism was conceived in the middle of the twentieth century, it made sense to pull out the question regarding parental rights to stand alone as an all-or-nothing question. Why did it make sense to policymakers at the time to treat parental rights as a unitary bundle? Because the practice they were adjusting treated parental rights as a unitary bundle, and that was because the practice had arisen in proceedings in which children were being adopted by substitute parents, who acquired all the rights simultaneous with the dissolution of the existing parents' rights.

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to seek visitation to survive even after a child is adopted. *See* Alexis T. Williams, Note, *Rethinking Social Severance: Post-Termination Contact Between Birth Parents and Children*, 41 CONN. L. REV. 609, 616–21 (2008) (describing the benefits of post-termination contact between birth parents and children).

350 There is an argument that terminating parental rights might emotionally benefit children in a small category of extreme cases even where there will be no adoption, such as instances of sexual abuse by a parent. But such a benefit is largely symbolic given that parental rights need not be terminated to cut off contact with the offending parent in such cases. *See* Davis, *supra* note 344, at 349 (explaining that there is no evidence "that severance of legal ties to an absent parent would yield benefits without regard to the likelihood of adoption"). Given that the child welfare system is said to be remedial, and that punitive measures are supposed to be left to the criminal system (with its higher standard of proof), it would be a significant shift in the purported rationale for termination of parental rights to continue it based on reasons unrelated to adoption.

351 Josh Gupta-Kagan, *Children, Kin, and Court: Designing Third Party Custody Policy to Protect Children, Third Parties, and Parents*, 12 N.Y.U. J. LEGIS. & PUB. POL'Y 43, 64 (2008) ("A custody case . . . will not terminate a parent's rights; continued visitation and the opportunity to modify the custody order if circumstances change will remain."); GOLDSTEIN, *supra* note 344, at 130 (explaining that a refusal to provide lifesaving medical care "authorizes only a disposition limited to the medical intervention . . . [and] otherwise leaves the child in the general overall care and custody of her parents and restores her to them as quickly as possible").

As importantly, it was an era in which the quintessential case on the minds of practitioners pushing for legislative change and legislators implementing change was one in which the parents had abandoned their children.[352] Thus, when they broke what had been two parts of a single adoption proceeding into two separate proceedings, there was no reason for policymakers to consider disaggregating the right to consent to adoption from other parental rights instead of continuing to treat the bundle of parental rights as a unit. The parents they had in mind were not around to exercise any residual rights.

Notably, the earliest adoption statutes did not use the phrase "terminate parental rights" to describe the effect of an adoption on the birth parent. The phrase was introduced by courts interpreting the statutes (and was then picked up by legislators who passed later adoption statutes).[353] It was adoption case law that coined the term "termination of parental rights" to describe what happened to the birth parents' rights upon adoption.[354] It is interesting to consider whether the later termination of parental rights statutes would ever have been proposed if those early adoption cases had instead used the phrase "transferring parental rights" to describe what happened at the moment of an adoption decree.

But, thought experiments aside, the point is that it would have been as accurate a description of the legal action taken in adoptions prior to the middle of the twentieth century to say that parental rights were being *transferred* as to say courts were first terminating birth parents' rights and then granting rights to the adoptive parents. The transfer aspect is particularly clear when we recall that the first adoption statutes required the consent of the parent *without exception*.[355] The exceptions that allowed courts to waive a parent's consent under certain circumstances were developed in later statutes and case law.[356] As noted above, the transfer aspect is also apparent if one looks to the adoptions that were accomplished by private legislative acts in the years leading up to the enactment of adoption statutes. These individual petitions to state

352 *See supra* Section I.D.2.

353 Act of May 24, 1851, ch. 324, § 7, 1851 Mass. Acts 815, 816 (stating that upon the necessary finding of parental consent, an adoption decree would be issued and "[t]he natural parent or parents of such child shall be deprived, by such decree of adoption, of all legal rights whatsoever as respects such child"); *see also* GROSSBERG, *supra* note 49, at 271 (noting that Massachusetts passed the first modern adoption statute that "became the national model").

354 *See supra* Section I.C.

355 *See, e.g.*, Adoption of Children Act, ch. 324, § 2, 1851 Mass. Acts 815, 815 (requiring for adoption that "[i]f both or either of the parents of such child shall be living, they or the survivor of them, as the case may be, shall consent in writing to such adoption").

356 *See supra* Section I.C.

legislatures to adopt children have been described as being similar to recording the transfer of deeds.[357]

Thus, the alternative proposal suggested here would return to a conception of transferring parental rights that has a longer-standing history than the current concept of severing the bundle of parental rights without passing them to another individual. While the idea of transferring rights to children is not appealing to contemporary ears to the extent it sounds in property, it sits very comfortably with contemporary understandings of children's attachment needs.[358] Indeed, the current approach in public adoption law of severing children's legal relationships to their families of origin prior to any arrangement to replace those ties with new ones is strikingly at odds with much contemporary psychological theory, which emphasizes the importance of maintaining even frayed family bonds.[359]

Once the separation of termination of parental rights into a stand-alone proceeding is understood as the historically contingent development it is—chosen for reasons that have little, if any, validity today—it seems clear a reassessment of that choice is in order. Yet the current structure of termination of parental rights is so entrenched that contemporary practitioners have not even recognized that maintaining it is an ongoing policy choice.

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357 Carp, *supra* note 46, at 4–5 (discussing "adoption by deed"); *see also* GROSSBERG, *supra* note 49 at 269–71.

358 *See* David Kelly & Jerry Milner, Opinion, *The Need to Prioritize Relational Health*, IMPRINT (July 11, 2023, 7:00 AM), https://imprintnews.org/opinion/the-need-to-prioritize-relational-health/242912 [https://perma.cc/GVB3-9J3D]; Sankaran & Church, *supra* note 9 at 257–59.

359 ADMIN. FOR CHILD. & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-21-01, ACHIEVING PERMANENCY FOR THE WELL-BEING OF CHILDREN AND YOUTH 10 (2021), https://www.acf.hhs.gov/sites/default/files/documents/cb/im2101.pdf [https://perma.cc/5P3Z-AAWT] ("Children in foster care should not have to choose between families. We should offer them the opportunity to expand family relationships, not sever or replace them."). There is a growing consensus in the social science literature that it is harmful to children to treat adoption as a simple replacement of one family by another and to ignore the complicated emotional attachments children have to their families of origin. *See, e.g.*, THE DONALDSON ADOPTION INST., ANNUAL REPORT 2016: A PATH TO REFORM 13 (2016), https://dl.icdst.org/pdfs/files3/f68affc785e09b6ef770beb0207bae9a.pdf [https://perma.cc/HF2E-EWR5]; Marianne Berry, Debora J. Cavazos Dylla, Richard P. Barth & Barbara Needell, *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 CHILD. & YOUTH SERVS. REV. 151 (1998); Thomas M. Crea & Richard P. Barth, *Patterns and Predictors of Adoption Openness and Contact: 14 Years Postadoption*, 58 FAM. REL. 607 (2009); Karie M. Frasch, Devon Brooks & Richard P. Barth, *Openness and Contact in Foster Care Adoptions: An Eight Year Follow-Up*, 49 FAM. REL. 435 (2000); *Minnesota / Texas Adoption Research Project*, UNIV. OF MASS. AMHERST: RUDD ADOPTION RSCH. PROGRAM, https://www.umass.edu/ruddchair/research/mtarp [https://perma.cc/R339-QSX9].

III. REASSESSING TERMINATION OF PARENTAL RIGHTS

The original justifications for a stand-alone legal mechanism to terminate parental rights are no longer compelling. Worse, the mechanism has the unintended consequence of creating legal orphans, which is reason enough to replace it with the alternative discussed above. This Part argues that two additional historical developments should further motivate policymakers to reassess using termination of parental rights proceedings in our child welfare scheme.

A. *A New World of Foster Care*

First, as seen in Part II, over the last seventy years, the nature of termination cases has significantly changed. These changes not only eliminate the earlier justifications for termination statutes, they render these statutes in a completely different light. When these statutes were first passed, most terminations that were ordered by courts involved parents who had voluntarily placed their children in the custody of other caretakers.[360] The statutes were used infrequently and only in a small percentage of cases in which terminations were ordered was that over parents' objection.[361] The parents involved often were not in regular contact with their children at the time of the terminations.

Much has changed since then. Today, the paradigmatic termination case involves children who were removed from their parents' care over the parents' objection, and whose parents remain actively involved in the children's lives. It is one thing to acknowledge that a parent-child bond no longer exists by terminating a legal relationship that lagged after the bond ended; it is quite another to destroy an active relationship that both the parent and child cherish and wish to maintain.

When stand-alone parental rights proceedings were first proposed, their proponents explained that they were seeking to "free" children from legal relationships that did not reflect actual relationships.[362] The 1959 report *Children in Need of Parents* that galvanized the field to increase termination of parental rights stressed that it was children "whose parents *essentially have abandoned* them, for whom action is urgently needed."[363] As a leading voice in the child welfare world put it when describing the

360 Gordon, *supra* note 24, at 227 (reporting in 1971 that "[m]ost children in foster care in the United States were separated voluntarily from their parents").

361 *See* Note, *supra* note 18, at 69–70 (reporting in 1967 that "termination statutes have seldom been used").

362 *See, e.g.*, Reid, *supra* note 176, at 383.

363 *Id.* at 383 (emphasis added).

need to sever the parent-child legal relationship, "[T]hese are the children . . . who are simply placed and forgotten."[364] The termination statutes were meant to facilitate adoptions of children whose parents had "left [them] emotionally adrift,"[365] and "condemned to live out their lives without any real family relationship."[366]

As these descriptions indicate, before the modern termination of parental rights regime, the primary basis for waiving the requirement of parental consent to adoption was abandonment.[367] Today, courts routinely terminate parental rights despite making factual findings that the parent-child bond is vibrant,[368] and even where the children testify that they desperately want to maintain their relationship with their parents and do not want to be adopted.[369] Commonly, these parents are visiting their children and often they are begging the foster care agencies to allow them more visits.[370] Often, when petitions to terminate parental rights are filed, the parents are not only regularly visiting with their children, they are also working hard to regain custody of their children by engaging in social services to address the issues that led to the foster

364 Justine Wise Polier, *Problems Involving Family and Child*, 66 COLUM. L. REV. 305, 309–10 (1966).

365 Polier, *supra* note 39, at 1.

366 *Id.*

367 There were other bases for waiving parental consent to adoption, including what was then called "insanity," and "immorality," which included adultery, being a "drunkard," and extreme cruelty to the child. Simpson, *supra* note 17, at 362–64; GROSSBERG *supra* note 49, at 275. Case law indicates that abandonment was by far the most commonly used basis for waiving consent. Simpson, *supra* note 17, at 370 ("Abandonment is the most litigated ground in non-consensual adoptions.").

368 *See, e.g.*, *In re* Leake & Watts Servs., Inc., No. 50447, slip op. at 207 (N.Y. Fam. Ct. Bronx Cnty. Apr. 5, 2016) (terminating the rights of a father where the court stated: "He struck me as sincere in his love for both children, and no party disputes that Kevin and Kayden value [their father] in their lives").

369 *See* Chris Gottlieb, *The Lessons of Mass Incarceration for Child Welfare*, N.Y. AMSTERDAM NEWS (Feb. 1, 2018), https://amsterdamnews.com/news/2018/02/01/lessons-mass-incarceration-child-welfare [https://perma.cc/Q2R2-SXUK] ("Those in the waiting area of the Bronx Family courthouse heard a 12-year-old sobbing inconsolably outside the courtroom, where he had just told the judge he did not want to be adopted."); *see also* Peggy C. Davis, *Use and Abuse of the Power to Sever Family Bonds*, 12 N.Y.U. REV. L. & SOC. CHANGE 557, 558 (1983) (describing a mother's "[l]ove for her child and a determination to participate in some constructive way in that child's upbringing" as she fought against termination of her rights).

370 *See* D'Juan Collins, *Losing Parental Rights Won't Stop Me from Fighting to Be a Dad*, RISE (May 18, 2017), https://www.risemagazine.org/2017/05/termination-of-parental-rights-wont-stop-me-from-fighting-to-be-a-dad [https://perma.cc/VE4K-F67X] (describing a visit with his son, a father whose rights were terminated said: "The end of the visit was painful. He grabbed me by my pinky and tried walking me out the door. I took baby steps to make the walk take longer. When we got to the door, he was crying, 'Daddy! Daddy! Daddy!' all the way out the door.").

care placement.[371] Nonetheless, these parents routinely lose contested termination proceedings because the agency is able to prove that the child has been in foster care for the minimum statutory period of time (often twelve or fifteen months) and the parent is currently unable to secure the return of the child.[372]

When a parent is unable to provide primary care for their child, policymakers may, of course, have different views on how long those parents should be given to recover custody of their children before an alternative permanent plan is pursued.[373] Regardless of the time a parent is allowed, however, it is quite different to sever a parent-child bond because the parent was unable, in an arbitrary time period, to successfully modify their behavior or complete a state-mandated plan of social services than it is to sever the bond because a parent has relinquished care of her child to someone else. It seems, to put it mildly, appropriate to be skeptical that the social and legal remedy developed for the latter situation is the best one for the former. Among the many concerns that arise with the shift to the current practice of allowing courts to sever family bonds because parents fail to complete government-designed plans are: (1) the behavior modification goals are inherently value-laden; (2) assessing whether those goals have been met involves subjective determinations; and (3) many of the issues parents are required to address are related to poverty, mental health disorders, and other challenges that are not equitably distributed.[374] Certainly, the constitutional stakes are higher in

371 Those issues most commonly involve drug and alcohol misuse, mental health, domestic violence, and other struggles that are correlated with poverty. Erin Cloud, Rebecca Oyama & Lauren Teichner, *Family Defense in the Age of Black Lives Matter*, 20 CUNY L. REV. FOOTNOTE F. 68, 83 (2017). At times, social services are not available to assist parents in addressing these issues or there are waitlists to get into them. Emma S. Ketteringham, Opinion, *Live in a Poor Neighborhood? Better Be a Perfect Parent*, N.Y. TIMES (Aug. 22, 2017), https://www.nytimes.com/2017/08/22/opinion/poor-neighborhoods-black-parents-child-services.html [https://perma.cc/XBH2-5NXC].

372 Anne Crick & Gerald Lebovits, *Best Interests of the Child Remain Paramount in Proceedings to Terminate Parental Rights*, N.Y. ST. BAR J., May 2001, at 41, 44 ("The permanent-neglect cause of action is the most commonly used of the four causes of action."). Of course, the question of what constitutes being unable to care for a child is often contested. Advocates have noted that once a child goes into foster care, whether the parent is deemed capable of resuming custody is based more on how "compliant" they are to caseworker directives than any objective measure of parenting ability. *See, e.g.*, TINA LEE, CATCHING A CASE: INEQUALITY AND FEAR IN NEW YORK CITY'S CHILD WELFARE SYSTEM 144–45 (2016).

373 *See, e.g.*, LEE, *supra* note 372.

374 Of course, those who lived in poverty and who had mental health issues were more likely than other parents to have relinquished their children at the time termination proceedings were introduced. However, even when those challenges led them to relinquish their children to someone else, they could typically preclude a termination of their parental rights simply by staying in touch with their children. They were allowed to receive help raising their children without entirely losing their relationships with them, which the current structure often does not allow.

termination of parental rights cases today given that the parent-child separations at issue result from government intervention rather than voluntary decisions by parents.[375]

Two trends characterize the modern child welfare field: (1) a dramatic expansion of the use of state power to remove children coercively from their families and place them in state-supervised foster care, and (2) the systematic severance of parent-child relationships on an inflexible timeframe. In stark contrast to the foster children described at midcentury as "children for whom no one battles,"[376] parents are fighting for these children—and often losing them to the state. Even if creating a stand-alone legal proceeding to terminate parental rights was reasonable in the 1950s because it was the easiest way to acknowledge legally that parent-child bonds had dissolved, the justifications at that time are anachronistic in the modern world of child welfare. It is nearly inconceivable that anyone would propose, let alone embrace, this approach today had it not preexisted the current child welfare system. At a minimum, recognizing how dramatically the relevant ground has shifted should prompt reassessment of the use of a legal tool that severs meaningful relationships when a less extreme measure—transferring the right to consent to adoption—could achieve the outcome sought.

B. *A New World of Adoption*

A second significant shift in the landscape occurred before the second and largest push to increase the number of children whose parents' rights are terminated. The timing of this shift has largely been

375 Taking a child into state custody is itself a significant intrusion into the constitutionally protected realm of parent-child relationships. *See* Duchesne v. Sugarman, 566 F.2d 817, 825 (2d Cir. 1977). But, as the Supreme Court has said, termination of parental rights is a more extreme intrusion that merits greater constitutional precautions. Santosky v. Kramer, 455 U.S. 745, 753 (1982) ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life."). Indeed, separate from the issues discussed in this Article, an important question is whether the types of terminations of parental rights discussed can survive as-applied constitutional challenges given that less invasive measures could serve the government interest in protecting children's well-being. *See* Sankaran & Church, *supra* note 9, at 17–19. My focus here is on the wisdom of the ongoing policy choice of continuing to pursue terminations of parental rights in light of the changes in child welfare practice since termination statutes were enacted. I leave the important constitutional question to another day.

376 Polier, *supra* note 364, at 310.

overlooked in the legal literature.[377] Recall that for the first hundred and thirty years of adoption, the majority of adoptions in the United States were private adoptions.[378] Most of these were voluntary adoptions and some were private adoptions that were granted without the consent of the parents.[379] The exact number of public adoptions was not officially tracked at the time, but it is estimated that until the 1970s, less than 10% of foster children were adopted.[380]

Beginning around 1970, the number of babies available for adoption in the United States dropped substantially.[381] Because of the growing acceptability of single parenthood, increased availability of contraception, and the legalization of abortion, there began to be far fewer babies born to women who wanted to put them up for adoption.[382] The number of babies surrendered for adoption dropped by forty-five percent between 1971 and 1974 alone.[383] By 1995, fewer than one percent of babies born to single women were voluntarily placed for adoption.[384] The number of adoptions in the United States reached its highest point in 1970. That number fell in each of the following five years. Then the federal government stopped tracking the adoption count. By 1975, approximately 41,000 fewer adoptions occurred annually than had occurred at the beginning of the decade.[385]

This drop in the supply of babies available to adopt led to substantial unmet demand because interest in adopting remained high. In the final decades of the twentieth century, some waitlists to adopt were three to five years long, and some adoption agencies stopped taking requests for

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377 A notable exception is Marsha Garrison's piece, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 443 (1983).

378 *See supra* Section I.B.

379 *See supra* Section I.B.

380 Wald, *supra* note 18, at 627 n.10.

381 *See* ALFRED KADUSHIN, CHILD WELFARE SERVICES 314 (3d ed. 1980).

382 Carp, *supra* note 46, at 1; GAILEY, *supra* note 79, at 83; *see also* E. Wayne Carp & Anna Leon-Guerrero, *When in Doubt, Count: World War II as a Watershed in the History of Adoption*, *in* ADOPTION IN AMERICA, *supra* note 46, at 181, 190 ("[B]etween 1895 and 1973, the most frequent reason for surrendering a child [for adoption] . . . was out-of-wedlock birth . . . .").

383 Sribnick, *supra* note 180, at 181; *see also* JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 140 (2002) (noting that between 1973 and 1988, the percentage of babies born to single mothers who were given up for adoption dropped from nine percent to two percent).

384 Anjani Chandra, Joyce Abma, Penelope Maza & Christine Bachrach, *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, 306 ADVANCE DATA 1, 1 (1999). This is in large part because single mothers—the demographic that had previously been most likely to surrender children for adoption—are no longer under as much pressure to do so. *See* GABRIELLE GLASER, AMERICAN BABY: A MOTHER, A CHILD, AND THE SHADOW HISTORY OF ADOPTION 271 (2021) ("The crushing pressures that made surrendering a newborn seem like the only rational choice have largely vanished.").

385 MELOSH, *supra* note 39, at 4.

healthy, white babies.[386] The most dramatic expansion in the use of termination of parental rights began in the 1990s. In 1998, the first year after ASFA passed, there were approximately 37,000 adoptions from foster care. [387] That number quickly climbed to approximately 50,000 adoptions from foster care per year.[388] With only minor variations, that number has trended upward ever since. In 2019, over 66,000 children were adopted from foster care and 71,000 more were in foster care with their legal connection to their parents terminated.[389] At a minimum, it seems worthy of note that the precipitous drop in the number of babies voluntarily surrendered for adoption has been more than matched by the number of children made available for adoption over their parents' objection since the passage of ASFA.

So how did so many more foster children come to be made available for adoption beginning in the late 1990s? There are many possible answers to that question.[390] By the end of the 1970s, the number of

386 *See* Carp, *supra* note 46, at 16; *see also* Sribnick, *supra* note 180, at 181 (explaining that, around the country, adoption agencies reported significant decreases in the availability of white infants to adopt).

387 CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., THE AFCARS REPORT NO. 12, at 1 (2006), https://www.acf.hhs.gov/sites/default/files/documents/cb/afcarsreport12.pdf [https://perma.cc/NB95-LHK8].

388 *Id.*

389 CHILDREN'S BUREAU, *supra* note 4, at 1. The number of adoptions from foster care dipped during the COVID-19 pandemic, *id.*, and it remains to be seen whether it will return to prepandemic levels.

390 Some critics, myself included, have highlighted that the current explosion in the use of termination of parental rights was first embraced amid the racialized political rhetoric of the mid-1990s, and argue that the motives for and harms of ASFA are intimately connected with the motives and harms of other legislation from the "Contract with America" Congress, particularly the 1994 Crime Bill and the 1996 "End Welfare As We Know It" bill. *See* Gottlieb, *supra* note 368; Gottlieb, *supra* note 12; Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997—The Worst Law Affecting Families Ever Enacted by Congress*, 11 COLUM. J. RACE & L. 711, 727 (2021). Newt Gingrich famously explicitly linked reform of welfare benefits and child welfare, arguing that children would be better off in institutional care than with their single "welfare mothers" and that welfare funding should be redirected to orphanages. Although the proposed provision that would have allowed states to use federal welfare dollars for orphanages dropped out between the first and last versions of the welfare reform bill, the "welfare queen" rhetoric that promoted that legislation prevailed and was closely linked to the rhetoric of "crack mothers" that fueled child welfare discussions at the time. Ultimately, the Clintons found a "third way" in child welfare that seemed warm and fuzzy compared to the Gingrich approach because it eschewed orphanages in favor of promoting adoption through ASFA. Hillary Clinton claimed credit for brokering bipartisan support of the legislation. *See* Somini Sengupta, *Campaigns Soft-Pedal on Children and the Poor*, N.Y. TIMES (Oct. 29, 2000), https://www.nytimes.com/2000/10/29/nyregion/campaigns-soft-pedal-on-children-and-the-poor.html [https://web.archive.org/web/20230308133916/https://www.nytimes.com/2000/10/29/nyregion/campaigns-soft-pedal-on-children-and-the-poor.html]. But the softer rhetoric of finding every child a "forever family" was still dependent on the contemporary tropes of unworthy families.

children in foster care had climbed dramatically to 500,000. Barbara Nelson and others have explained that this rise in the foster care population resulted from the identification in the 1960s of child abuse as a major social problem.[391] The 1974 Child Abuse Prevention and Treatment Act made federal funding contingent on states establishing child abuse hotlines and requiring professionals who interact with children to be "mandated reporters" of suspicions of child abuse and neglect.[392] This federal law encouraged states to define neglect very broadly. The subsequent reporting and investigating of child abuse and neglect allegations led to an explosion in the number of children entering foster care. Between 1974 and 1980, the number of reports investigated by child protective services skyrocketed from 60,000 to over one million reports annually. [393] By the end of the 1990s, that number had tripled, reaching three million investigations a year.[394]

When the foster care population climbed during this period, there were renewed calls to address the problem of children languishing in foster care (reminiscent of the concern about foster care "drift" in the 1950s).[395] These calls led to a renewed push to terminate parental rights and increase the number of children adopted out of foster care. This drive to terminate rights was bolstered by the new theory of psychological parenthood that had been introduced by the influential work of Joseph Goldstein, Anna Freud, and Albert J. Solnit.[396] This theory posited that once children emotionally attach to foster parents, it is harmful to the

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The critiques argue that increasing mass incarceration, slashing welfare benefits, and cutting off foster children from their families are of a piece—both in terms of their harmful impact on low-income, disproportionately Black families, and in their grounding in the same set of racist tropes of the period. ROBERTS, SHATTERED BONDS, *supra* note 10, at 173–74; Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 834–36 (2020). In particular, the era's racialized figures of "welfare queens," "crack mothers," "crack babies," and "super predators" are linked concepts that were used to justify all of these pieces of legislation. *See* Editorial Board, *Slandering the Unborn*, N.Y. TIMES (Dec. 28, 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html [https://web.archive.org/web/20240105185148/https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html]; Vann R. Newkirk II, *What the 'Crack Baby' Panic Reveals About the Opioid Epidemic*, THE ATLANTIC (July 16, 2017), https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763 [https://web.archive.org/web/20230730061458/https://www.theatlantic.com/politics/archive/2017/07/what-the-crack-baby-panic-reveals-about-the-opioid-epidemic/533763].

391 NELSON, *supra* note 279, at 90.

392 Pub. L. No. 93-247, § 4(b)(2), 88 Stat. 4, 6 (1974) (codified as amended at 42 U.S.C. § 5101).

393 Myers, *supra* note 117, at 456.

394 *Id.*

395 *See supra* Section I.D.2.

396 *See* GOLDSTEIN, FREUD & SOLNIT, *supra* note 280, at 17, 19.

children to separate them from those foster parents.[397] Some policymakers were motivated by this theory to believe that it was often in the best interests of foster children to be adopted by their foster parents.[398] With this belief in the background, the renewed push to expand the adoption of foster children culminated in the passage of ASFA, and was far more successful at increasing terminations of parental rights and foster care adoptions than the midcentury effort had been.

Even this brief account of the developments in child welfare during this period indicates that numerous factors were at play when the United States began terminating parental rights at the unprecedented rate that it does today. The assertion here is that one factor that has not been given sufficient consideration is that the policy of sharply increasing the children made available for adoption over their parents' objection served the interests of aspiring adoptive parents for whom children were not otherwise available. As noted, the number of children put up for adoption following termination of parental rights is now similar to the peak in the number of children whose parents voluntarily made them available for adoption in the early 1970s.[399]

Also notable is that this second push to terminate parental rights came following significant changes in attitudes toward transracial adoption, including that white Americans had become less insistent on adopting only white children. As discussed above, the proponents of increasing termination of parental rights in the 1950s had promoted the idea that all children are "adoptable" and particularly encouraged the adoption of nonwhite children by white couples.[400] The 1960s and 1970s, of course, also generally brought more progressive attitudes toward racial

397 *Id.* at 17–19, 25–26; *see also supra* Section II.E.

398 Davis, *supra* note 369, at 560–62.

399 GLASER, *supra* note 384, at 239 (noting that, as the number of babies voluntarily placed for adoption in New York fell following the legalization of abortion there, "[t]o make up for the shortfall [an adoption agency] redoubled its efforts . . . to place children of color with its white clientele").

400 Reid, *supra* note 176, at 383–84; Carp, *supra* note 46, at 14–15. Adoption agencies, which earlier had actively resisted placing nonwhite and disabled children for adoption, now promoted the idea that every child is adoptable. *Compare* Brian Paul Gill, *Adoption Agencies and the Search for the Ideal Family, 1918-1965*, *in* ADOPTION IN AMERICA, *supra* note 46, at 160, 174 ("[A]doption agencies at midcentury are perhaps best understood as guardians of a conventional (white, middleclass) definition of family . . . ."), *with* Carp, *supra* note 46, at 16 (describing "the redefinition of the population of adoptable children, making it more inclusive and less concerned with matching children's physical, mental, racial, and religious characteristics with those of parents"). The waves of adoptions of Asian children by white Americans in the wake of the Korean and Vietnam Wars also had significant effects on the understanding and role of transracial adoption that are beyond the scope of this Article. *See* Carp, *supra* note 46, at 14–15.

integration. Thus, for a variety of reasons, transracial adoption began to rise in the 1970s.[401]

In fact, transracial adoption was embraced by enough white parents looking to adopt that there was pushback from some organizations who were concerned that transracial adoption—virtually all of which involved white parents adopting nonwhite children—might not best serve the interests of adopted Black children. Some of these organizations also worried that having significant numbers of Black children adopted by white people might be antithetical to other interests of Black communities.[402] The National Association of Black Social Workers (NABSW) issued an influential statement against transracial adoption in 1972.[403] The NABSW view was actively opposed by adoptive parent organizations and by politicians who generally favored "race-blind" policies.[404] In the end, the race-blind approach prevailed in federal policy with the passage of the Multiethnic Placement Act of 1994 (MEPA),

401 *See* BEREBITSKY, *supra* note 25, at 168–69; *see* Carp, *supra* note 46, at 14–15.

402 Some described transracial adoption as threatening cultural genocide. Laura Briggs, *Somebody's Children*, 11 J.L. & FAM. STUD. 373, 394 (2009). Others, most prominently Dorothy Roberts, have described how systematically taking Black children from the communities into which they were born reinforces negative stereotypes and undermines the political strength of those communities. Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 176, 179 (2003) ("Family and community disintegration weakens [Black people's] collective ability to overcome institutionalized discrimination and work toward greater political and economic strength."); *see also* ROBERTS, SHATTERED BONDS, *supra* note 10, at 236–48.

403 *See generally* Nat'l Ass'n of Black Soc. Workers, Position Statement on Trans-Racial Adoptions (Sept. 1972), https://cdn.ymaws.com/www.nabsw.org/resource/resmgr/position_statements_papers/nabsw_trans-racial_adoption_.pdf [https://perma.cc/44RR-WZCW].

404 RAZ, *supra* note 20.

which forbids consideration of race in matching children with potential adoptive parents.[405] One term later, Congress passed ASFA.[406]

A full discussion of the debate about transracial adoption is beyond the scope of this paper. The point for present purposes is that at the time ASFA was passed, there were long waitlists to adopt children, and children in foster care who once would have been considered "unadoptable" had become appealing to aspiring adoptive parents. And the narrative around the benefits of race-blind adoption was intimately linked to the ASFA narrative that adoption was the best outcome for many foster children, with a subtext that adoption by white parents would be the best outcome for many Black foster children.

It is important to consider how the narratives around adoption interacted with public dialogue about "the best interests" of foster children during this period. We should bring a critical eye to any policy that transfers rights to children from their parents to other adults, who inescapably have complicated motives for taking those children into their care,[407] and all the more so when the families impacted by the policy are economically disempowered and disproportionately Black and Native American.

In contrast to the explicit discussions at midcentury of matching foster children with aspiring adoptive parents to fill the unmet demand

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405 Pub. L. No. 103-382, §§ 551–554, 108 Stat. 3518, 4056–57 (codified as amended at 42 U.S.C. §§ 5115a, 622(b)); *see also* Carp, *supra* note 46, at 16. MEPA prohibited states receiving federal foster care funding from denying people the opportunity to become foster or adoptive parents on the basis of race, color, or national origin, and from delaying or denying a placement solely based on race. *Id.* § 553(a)(1), 108 Stat. at 4056. When first passed, the statute allowed states to consider the race, color, or national origin of a child when determining what placement was in a child's best interests, so long as other factors were also considered. *Id.* § 553(a)(2), 108 Stat. at 4056. MEPA was amended in 1996 to omit the provision that allowed consideration of race, color, or national origin among other factors. It now categorically prohibits states from "delay[ing] or deny[ing] the placement of a child for adoption or into foster care on the basis of the race, color, or national origin of the adoptive or foster parent, or the child involved." JOAN HEIFETZ HOLLINGER & ABA CTR. ON CHILD. & THE L., A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996, at 22 (1998), https://www.americanbar.org/content/dam/aba/administrative/child_law/GuidetoMultiethnicPlacementAct.pdf [https://web.archive.org/web/20220711020559/https://www.americanbar.org/content/dam/aba/administrative/child_law/GuidetoMultiethnicPlacementAct.pdf].

406 The "child saving" rhetoric of the 1990s push for ASFA certainly merits the kind of scrutiny that has revealed the racism and classicism of earlier efforts to "save" children from their parents. *See, e.g.*, Albert & Mulzer, *supra* note 39, at 10–22.

407 Ruth-Arlene W. Howe, *Establishing the Family and Family-Like Relationships, Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L.Q. 677, 680 (1999) (explaining that, in the 1980s and 1990s, "[t]he traditional child welfare agency focus of providing a permanent home for a child in need . . . is eclipsed today, often by efforts to satisfy the desires of adults who wish to parent").

for adoptable children,[408] it has since become uncomfortable to many to talk about a "demand" for and "supply" of children given the suggestion of commodification in these terms. Indeed, Elisabeth Landes and Richard Posner were pilloried when they talked in these terms in a 1978 law review article on adoption.[409] Like the child welfare experts of the 1950s discussed above,[410] Landes and Posner highlighted that there was unmet desire for babies to adopt while babies languished in foster care. Landes and Posner recommended that adoption be deregulated to create a "free market in babies" that would allow their "quality adjusted price" to rise.[411] The negative reaction to their article may have had as much to do with their inflammatory language as their policy position.[412] Yet, whatever one thinks of their language or their position, their recommendations are notable for describing a disconnect between the demand for adoptable babies and "a regulatory pattern that . . . fails to provide effectively for the termination of the natural parents' rights."[413] Ironically, it might be that the unwillingness to view the issue in market terms prevented people from noticing that when ASFA incentivized terminating parental rights, those incentives served the interests of one set of (generally more privileged) parents at the expense of another set of (primarily low-income and disproportionately Black) parents.[414] The financial incentives ASFA provides to states in the form of bonuses for increasing adoptions and

408 *See supra* Section I.D.

409 Elizabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323, 345 (1978). Posner later noted that "[w]henever critics of the law-and-economics movement want an example of its excesses they point to what is popularly known as the 'baby selling article.'" Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 59 (1987).

410 *See supra* Section I.D.

411 Landes & Posner, *supra* note 409, at 339, 341.

412 Landes and Posner recognized that some would be offended because talk of selling babies can "smack of slavery." *Id.* at 344. Indeed, their language seems designed to offend when they describe children in foster care as "comparable to an unsold inventory stored in a warehouse." *Id.* at 327. Posner later said that such terminology was "[f]or heuristic purposes (only!)." Posner, *supra* note 409, at 64.

413 The recommendations in the article are more focused on lifting limitations on independent adoption in order to do away with the monopoly-like dominance of adoption agencies and allowing women to be paid to give up their babies for adoption, but it is clear that they also believe the baby "market" would function better if the number of terminations of parental rights increased. Landes & Posner, *supra* note 409, at 327.

414 At the time ASFA passed, the *New York Times* reported that "[a]bout 63 percent of children in the American foster-care system are nonwhite," and "[a]bout 47 percent are [B]lack, almost three times the percent of [B]lack children in the population at large." Katharine Q. Seelye, *Clinton to Approve Sweeping Shift in Adoption*, N.Y. TIMES (Nov. 17, 1997), https://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html [https://web.archive.org/web/20230316005521/https://www.nytimes.com/1997/11/17/us/clinton-to-approve-sweeping-shift-in-adoption.html].

penalties for failing to terminate rights on the mandated timeframe are relatively transparent. But the ways in which ASFA benefits aspiring adoptive parents have gone largely unnoticed, with the rhetoric about children's best interests distracting attention from the adult interests that are at play.

CONCLUSION

The previous Part argues that we should question policies that take children from their families of origin and place them in more privileged families. The broader point is that twenty-five years ago, in passing ASFA, the United States instituted an unprecedented policy of pressuring states to permanently sever family ties. In doing so, a legal mechanism that had been developed to facilitate the adoption of children whose parents had relinquished them to alternate caregivers—a mechanism originally promoted as an uncontroversial, administrative, virtually cost-free fix—became a central feature of our child welfare system. That system now treats destroying family ties as a routine event. It is difficult to imagine that the way this legal mechanism has been redirected would go unchallenged, let alone be treated as routine, if the civil "death penalty" were imposed on more powerful families.

The costs of unnecessarily cutting off family relationships and making children legal orphans are all too clear to anyone who listens to the parents and children who experience termination of parental rights. To the extent it is challenging to conceive how child welfare law could be structured without this particular legal mechanism, history both reveals that the practice is unnecessary and suggests better alternatives.