

# PARENTAL RIGHTS VS. BEST INTERESTS OF THE CHILD: A FALSE DICHOTOMY IN THE CONTEXT OF ADOPTION

ANNETTE R. APPELL\* AND BRUCE A. BOYER\*\*

## I. INTRODUCTION: IDENTIFYING THE CONTROVERSY

The mythology of adoption involves a scenario in which a teenage girl gets pregnant, and neither she nor the father is ready to raise a child. Upon birth, these young parents voluntarily relinquish the baby to an upwardly mobile couple who have been waiting years to adopt. The adoptive parents become, in essence, the birth parents to the baby who grows up happy and well-adjusted. The birth parents vanish from the picture, perhaps eventually marrying and having additional children. No one looks back. But what happens to this myth when the birth mother changes her mind or misidentifies the father, when the adoptee is not a baby but a ten-year-old foster child, when the adoptive parents abuse the child, when the adoptive parents are the baby's grandparents, or when the adoptee begins asking questions about her family of origin?

If ever the reality of adoption fit this myth, it certainly does not today. Adoption, as with every issue involving families, is much more complicated and diverse than the above scenario suggests. Indeed, most adoptions do not even involve infants, but instead concern older children who have lived with multiple families.<sup>1</sup> Moreover, it is now widely recognized that even children

---

\* Clinical Instructor and Staff Attorney, Children and Family Justice Center, Northwestern University School of Law. Ms. Appell has represented children and adults in termination of parental rights and adoption proceedings and is herself an adoptee.

\*\* Clinical Instructor and Supervising Attorney, Children and Family Justice Center, Northwestern University School of Law. Ms. Appell and Mr. Boyer represented the father of "Baby Richard" in the Illinois and United States Supreme Courts. The authors wish to thank Bernardine Dohrn for her helpful comments on an earlier draft of this Article.

1. Joan H. Hollinger, *Introduction to Adoption Law and Practice*, in 1 ADOPTION LAW AND PRACTICE § 1.05[2] (Joan H. Hollinger ed., 1988 & Supp. 1994). More than half of the adoptions consummated each year in this country are relative or step-parent adoptions. *Id.* Another 20% are adoptions of foster children. UNIF. ADOPTION ACT, *Prefatory Note* at 1 (1994). A slightly larger percent are adoptions of infants by unrelated adults. *Id.* Because the Uniform Adoption Act of 1994 (UAA) does not appear to account fully for the diversity and complexity of adoptions, groups such as the Child Welfare League of America, the National Association of Social Workers, American Families for Adoption, and American Adoption Congress have criticized the UAA for, *inter alia*, being focused primarily on infant adoptions. For more on the debate surrounding the passage of the UAA, see James H. Andrews, *Cleanup of United States Adoption Laws Irks Many Advocates for Children*, CHRISTIAN SCI. MONITOR, Sept. 7, 1994, at 2, and Mark Hansen, *Fears of the Heart*, A.B.A. J., Nov. 1994, at 58.

adopted as infants do not have just one family, but are always physically and existentially related to their birth families.<sup>2</sup> It is against this backdrop of contemporary adoption that courts are increasingly being called upon to resolve contested adoptions involving competing adults. These troubling and highly visible cases raise difficult questions about both the court's role in determining when state intervention in normal family decision-making processes is appropriate, and how the court's task should be defined once intervention has occurred.

The court's function has traditionally involved the balancing of sometimes competing purposes: the protection of family integrity and the protection of children. On the one hand, limiting the state's freedom to intervene coercively in family relations reflects a societal value placed on family autonomy and preservation of family relations. This value underlies a historical understanding that freedom of choice in family matters warrants a significant degree of constitutional protection. Deference to the family is based on an acknowledgment of the complexity and variety of human relationships. Standards of parenting vary greatly, and parents generally are given liberty to make decisions about how best to raise, educate, and nurture their children, even when such decisions run counter to widely-held societal norms.

Accompanying this concern for family autonomy, however, is the state's interest as *parens patriae* in ensuring the safety and well-being of children unable to care for themselves. When a parent's care falls beneath minimally adequate standards or jeopardizes the well being of the child, deference to the family must yield to the state's interest in protecting its most vulnerable citizens.<sup>3</sup> Thus, when necessary, "the state has a wide range of power for limiting parental freedom and authority in things affecting the child's welfare."<sup>4</sup> Stated broadly, in the exercise of its child protection function, the state's goal is initially not to ensure the best possible end for the child, but rather to ensure that the child's basic needs are met by the parent.<sup>5</sup> In implementing this goal, courts face substantial pressure to compel conformance with societal standards of parenting. Judges must be careful to distinguish

---

2. Kenneth W. Watson, *The Case for Open Adoption*, PUB. WELFARE, Fall 1988, at 24 ("[A]dopted children are forever members of two families—the one that gave them life and the one that nurtured them through the process of adoption."). See also Fernando Colon, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 301 (1978) ("There is no question about the value of adoption. . . . However, . . . all children should have not only adequate parenting but also access to information about, and perhaps eventual contact with, their biological families."). See generally DAVID M. BRODZINSKY ET AL., BEING ADOPTED—THE LIFELONG SEARCH FOR SELF (1992) [hereinafter BEING ADOPTED] (detailing the special needs of adoptees relating to their unique situations as members of two families).

3. The scope of the state's child protection function, as contemplated in this article, encompasses not only juvenile court proceedings involving neglected, abused, and dependent children, but also involuntary adoption proceedings in family or domestic relations courts where the initial task of the court remains the judgment of the parent's fitness.

4. *Prince v. Massachusetts*, 321 U.S. 158, 167 (1944).

5. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 268 (Summer 1975) ("Implicitly, we have a shared assumption that the court's child-protection function is to enforce *minimum* social standards, not to intervene coercively in an attempt to do what is best or least detrimental.").

cultural or value-based differences in child-rearing practices from parental conduct that falls beneath minimally acceptable parenting standards and raises a legitimate concern about the health, safety, or welfare of the child. Existing constitutional standards provide a mechanism for resolving the tensions between these interests by allowing state intervention only where there is a showing of parental unwillingness or inability to provide basic care for the child.

In the wake of several highly publicized and unusual cases, public pressure has mounted to reform threshold standards for family intervention. The plights of "Baby Jessica,"<sup>6</sup> "Baby Richard,"<sup>7</sup> and, more recently, "Baby Emily,"<sup>8</sup> though they differ in many important respects, share several critical elements. These children were all taken into the custody of would-be adoptive parents without a proper finding that the father was willing to relinquish his child for adoption or was unfit to be a parent. By the time reviewing courts could conclude that obvious deficiencies in the adoption proceedings precluded recognition of the adoptions, these children had remained with their substitute caretakers long enough to form attachments. Public dissatisfaction with the results of these and a handful of other cases has driven calls for the abandonment of parent-focused standards that require a clear and convincing showing of unfitness before children can be permanently removed against their parents' will.<sup>9</sup> Child advocates have argued with in-

6. These names appear in quotations to denote that they are not the children's given names. Throughout the article, the authors will refer to them by these conventional names. The editors have removed the quotations in subsequent cites.

The familiar story of Baby Jessica involves a little girl named Anna whose mother surrendered her for adoption less than 72 hours after she was born (the statutory minimum). IOWA CODE ANN. § 600A.4(2)(d) (West 1981). Anna's father, who was not initially identified by Anna's mother, was never found unfit and contested the proposed adoption. *In re B.G.C.*, 496 N.W.2d 239 (Iowa 1992). The case wound its way through the courts until finally the U.S. Supreme Court declined to stay the effect of two state supreme court judgments and Baby Jessica was returned to her parents. *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993).

7. Baby Richard was also relinquished for adoption by his mother without the knowledge or consent of his father. However, in that case, the adoption was granted and the father appealed. *In re Doe*, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994). The case slowly wound its way through the Illinois court system for the first three years of Richard's life until the Illinois Supreme Court reversed the finding of unfitness as a patent fiction, overturned the adoption, and ordered that Richard be returned to his father. *In re Doe*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994). Subsequently, pursuant to an original action in the Illinois Supreme Court, the child's father was granted a writ of habeas corpus entitling him to take immediate custody of the child. *In re Kirchner*, No. 78101, 1995 WL 80012, at \*1 (Ill. Feb. 28, 1995).

8. The adoption of two-year-old Baby Emily by a Florida couple was originally set aside by a Florida Appeals Court, which found the child's father had never consented to the adoption. *In re Adoption of Baby E.A.W.*, No. 93-3040, 1994 Fla. App. LEXIS 6137 (Fla. Dist. Ct. App. June 22, 1994), *withdrawn*, 647 So. 2d 918 (Fla. Dist. Ct. App. 1994) (en banc). On rehearing en banc, the court recently reversed, reinstating the trial court's decision approving the adoption on the ground of abandonment by the biological father. *In re Baby E.A.W.*, 647 So. 2d 918 (Fla. Dist. Ct. App. 1994). Although the appeal was expedited, the decisions were not issued until the child was nearly two years old and the case still continues, leaving her in limbo.

9. See *In re Doe*, 638 N.E.2d at 182-83; *Guardian ad litem's Petition for Writ of Certiorari at 19-20*, *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994) (No. 94-236) (*cert. denied*) [hereinafter

creasing forcefulness that in place of these standards, the termination of parental rights of a fit and willing parent should rest on a showing that the "best interests" of the child lie apart from the parent or evidence that the child has formed attachments to others.<sup>10</sup>

In our view, the replacement of traditional parent-focused standards for court intervention by a purportedly child-focused standard would represent a disturbing erosion of critical due process protections that serve the interests of both parents and children. As a vehicle for judging when state intervention is appropriate, a "best interest" standard offers little guidance in determining which families and children should be subject to judicial scrutiny. Although it is important for courts to consider children's interests, this standard is exceptionally vulnerable to arbitrary decisionmaking. The lack of a uniform understanding of the term "best interests," coupled with the uncertainty inherent in its use, raises significant concerns about "social engineering."<sup>11</sup> Furthermore, such ambiguity will have the greatest impact on the least visible and respected population of families whose racial and economic status already place them at great risk of destructive state intervention. Most importantly, a threshold intervention standard purportedly based on the child's interest does not protect children from decisions based on the conflicting interests of unrelated adults; rather, it simply serves in practice to shift responsibility for making decisions about children among adults.

We contend that the constitutional standards allowing parents to determine what is in the best interest of their children, so long as parents are willing and able to make those decisions, assure an optimal balance between the interests of family integrity and child protection. At the same time that they safeguard children in real need of protection, parent-focused threshold standards for state intervention protect children's inherent need to know their birth families and recognize the unique relationship between birth parents and their children.<sup>12</sup> In the sections that follow, this Article first will explore current constitutional standards for family intervention. Next, the Article will analyze the presumptions underlying the movement to modify existing standards, critique proposed alternative standards, and suggest how those standards fail to provide answers for the complexity of children's

---

Guard. Cert. Petition]; George H. Russ, *Through the Eyes of a Child, "Gregory K.": A Child's Right to be Heard*, 27 FAM. L.Q. 365, 384-386 (1993); Barbara B. Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 B.Y.U. J. PUB. L. 321, 338-41 (1994); Virginia M. Swindell, Comment, *Children's Participation in Custodial and Parental Right Determinations*, 31 HOUS. L. REV. 659, 670 (1994).

10. See Guard. Cert. Petition, *supra* note 9, at 16-21.

11. See *In re B.G.C.*, 496 N.W.2d 239, 241 (Iowa 1992) ("[W]ithout established procedures to guide courts in such matters, they would 'be engaged in uncontrolled social engineering.' This is not permitted under our law; '[c]ourts are not free to take children from parents simply by deciding another home offers more advantages.'") (citations omitted), *cert. denied sub nom.*, *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993).

12. See Christine A. Bachrach et al., *On the Path to Adoption: Adoption Seeking in the United States, 1988*, in 1 CHILD WELFARE RESEARCH REVIEW 250, 251 (Richard Barth et al. eds., 1994) ("Biological relatedness carries with it the certainty of similarity in background and the likelihood of similarity in genetically transmitted characteristics; it also confers upon the child an unequivocal basis for integration into the family . . .").

needs and interests. Finally, the Article will conclude with general observations about creating court processes that are truly "child centered."

## II. LIMITATIONS ON STATE INTERVENTION IN THE FAMILY

The United States Supreme Court's delineation of the constitutional parameters controlling state intervention in family relationships is commonly traced back to a series of decisions involving educational liberties. Beginning with *Meyer v. Nebraska*,<sup>13</sup> these decisions guarantee a significant degree of autonomy to families in making decisions about the raising and education of their children,<sup>14</sup> as well as about a variety of other aspects of family life.<sup>15</sup> Protection of family integrity has been found to derive from the Due Process Clause of the Fourteenth Amendment,<sup>16</sup> in addition to the Equal Protection Clause of the Fourteenth Amendment,<sup>17</sup> the First Amendment,<sup>18</sup> and the Ninth Amendment.<sup>19</sup>

The decisions in *Meyer* and its progeny consistently reflect the notion that the autonomy of the family should not be disturbed absent some showing that the parent's conduct places the child's health, safety, or welfare at significant risk of harm.<sup>20</sup> Laws governing parent-child relationships require that state intervention rest on a showing that the parent's conduct has fallen below minimum parenting standards. The wide range of such laws affect everything from the temporary removal of children from their parents based

13. 262 U.S. 390 (1923).

14. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down compulsory education law compelling Amish families to educate children in formal high schools); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (striking down Oregon statute requiring attendance at public schools).

15. See *Moore v. City of E. Cleveland*, 431 U.S. 494 (1977) (striking down zoning restriction prohibiting extended family members from residing together); *Smith v. Organization of Foster Families for Equality & Reform*, 431 U.S. 816 (1977) (holding that procedures for providing review of foster care placement decisions to aggrieved foster parents were constitutionally adequate and could not be expanded without infringing rights of natural families); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974) (holding that mandatory school board rules requiring pregnant school teacher to take maternity leave violated due process); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (upholding right of married couples to use contraceptives); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (striking down statute authorizing the sterilization of certain habitual criminals).

16. *Meyer v. Nebraska*, 262 U.S. at 399.

17. *Skinner v. Oklahoma*, 316 U.S. at 541.

18. *Wisconsin v. Yoder*, 406 U.S. at 232-34.

19. *Griswold v. Connecticut*, 381 U.S. at 496 (Goldberg, J., concurring).

20. *Meyer* and *Pierce* have been depicted critically by one prominent commentator as reflecting a "narrow tradition-based vision of the child as essentially private property." Barbara B. Woodhouse, "Who Owns the Child?": *Meyer and Pierce and the Child as Property*, 33 WM. & MARY L. REV. 995, 997 (1992). Whatever may have been the constitutional understanding of parent-child relationships held by the *Lochner* era court that decided these cases, in the view of the authors, *Meyer*, *Pierce*, and their progeny stand today as continuing safeguards protecting legitimate interests in family integrity and family autonomy shared by children and parents alike.

on allegations of neglect or abuse,<sup>21</sup> to the more permanent placement of children in foster care,<sup>22</sup> to the ultimate termination of parental rights.<sup>23</sup>

The relatively limited number of Supreme Court decisions concerning parental rights outline two distinct sets of constitutional standards, applicable on the one hand to the legal recognition of the parent-child relationship, and on the other hand to the termination of recognized parental rights. These decisions consistently reflect a threshold focus on the conduct of the parent.

The Court initially examined the rights of unmarried fathers<sup>24</sup> in *Stanley v. Illinois*.<sup>25</sup> *Stanley* involved a challenge to the application of a statute presuming unmarried fathers to be unfit for purposes of assigning custody to the state in a neglect, abuse or dependency case. The petitioner, Mr. Stanley, had lived out of wedlock with his children's mother for many years, and when the mother died, the children were summarily removed from Mr. Stanley's custody and care pursuant to the challenged statute. In ruling that the statute violated the Due Process Clause of the Fourteenth Amendment, the Court found that the existing relationship between Mr. Stanley and his children warranted constitutional protection.<sup>26</sup> The Court rejected the state's argument that unmarried fathers are so infrequently fit parents that the state need not undergo the "administrative inconvenience" of an individualized inquiry.<sup>27</sup> Rather, because of the compelling nature of the interests at stake in the parent-child relationship, it held that all parents "are constitutionally entitled to a hearing on their fitness before their children are removed from their custody."<sup>28</sup> Although the decision does not explore the meaning of "fitness," it nevertheless establishes that the inquiry must encompass individualized consideration of the status and conduct of the parent.

Although *Stanley* focuses on the constitutional limits of a state's freedom to disrupt an existing parent-child relationship, the opinion also informs the processes by which states recognize and sanction those relationships. Regard-

---

21. See, e.g., ILL. ANN. STAT. ch. 705, para. 405/2-10 (Smith-Hurd 1992) (temporary assignment of custody of child to the state, based on an allegation of neglect or abuse, requires *inter alia* a showing that there is probable cause to support the charge that the parent has neglected or abused the child).

22. See, e.g., ILL. ANN. STAT. ch. 705, para. 405/2-21 (Smith-Hurd 1992) (continued jurisdiction of the Juvenile Court dependent on finding at adjudicatory hearing that child has been neglected or abused); ILL. ANN. STAT. ch. 705, para. 405/2-27 (Smith-Hurd 1992) (stating that parent is unfit or unable to care for child prerequisite to placement of child in permanent foster care at dispositional hearing); see also *In re B.T.*, 561 N.E.2d 1269, 1272 (Ill. App. Ct.) (finding the fact that child was adequately cared for by relatives was not relevant to judgment of whether child was neglected, which requires focus on whether parent failed to discharge her duty of care).

23. See *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley v. Illinois*, 405 U.S. 645 (1972).

24. Because states have traditionally measured the legitimacy of paternal rights by the vehicle of marriage, and because the birthing process is evidence of the mother's natural relationship with the child, these decisions have necessarily revolved around the treatment of the rights of unmarried fathers. See *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J. dissenting).

25. *Stanley v. Illinois*, 405 U.S. at 645.

26. *Id.* at 651-52.

27. *Id.* at 656.

28. *Id.* at 658.

less of a parent's marital status, the states must recognize existing parent-child relationships when custody clearly establishes the presence of such bonds. *Stanley* defines an outer limit imposed by the Constitution on a state's freedom to decline to recognize a parent-child relationship and to preclude an unmarried father from receiving the protection of statutes applicable to the termination of existing parental rights and the freeing of children for adoption.

It is notable that in identifying the constitutional requirement of an individualized hearing on the father's fitness, the Court recognizes that this protection benefits both father and child. The Court states: "[W]hen, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child."<sup>29</sup> Thus, while threshold inquiries may focus on the parent, the protections embodied by such procedural requirements safeguard the reciprocal interests that parents and children share in preserving their relationships against undue interference.

The Supreme Court subsequently addressed the extent of constitutional protections afforded an unmarried father in *Quilloin v. Walcott*.<sup>30</sup> That case involved the constitutionality of a Georgia statute authorizing the adoption of a child born out of wedlock upon the consent of the child's mother, but permitting an unmarried father to acquire the right to consent only by legitimating the child through a court petition. The father argued that the differential treatment of married and unmarried fathers violated the Equal Protection and Due Process Clauses. In affirming the adoption of the child by his stepfather over the natural father's objection, the Court distinguished between the standards applicable to the state's effort to break up an existing family and the process for affording legal recognition to the parent-child relationship. In the latter, the state has greater freedom to apply strict rules.<sup>31</sup> With respect to the former, Justice Marshall, writing for a unanimous Court, stated that:

We have little doubt that the Due Process Clause would be offended "[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."<sup>32</sup>

Where the father had failed to take advantage of the opportunity to legitimate his relationship with his son, however, the state properly refused to recognize his right to consent to adoption and authorized the adoption on the mother's consent, based only on a showing that adoption was in the child's best interests.

---

29. *Id.* at 657 (emphasis added).

30. 434 U.S. 246 (1978).

31. *Id.* at 255.

32. *Id.* (quoting *Smith v. Organization of Foster Families for Equality and Reform*, 431 U.S. 816, 862-63 (1977) (Stewart, J., concurring in judgment)).

The following year, the Court decided *Caban v. Mohammed*,<sup>33</sup> the appeal of an unmarried father whose relationship with his children had been established through the recording of his name on birth certificates and through regular involvement with the children. It concluded that the father's relationship with his children had been improperly severed by the trial court's allowance of the stepfather's adoption request. The Court upheld the father's Equal Protection challenge to the application of a statute that permitted an unmarried mother, but not an unmarried father, to block an adoption by withholding consent. Although decided under the Equal Protection Clause rather than the Due Process Clause, the decision in *Caban* mirrors the decision in *Stanley* to the extent that it requires a showing of unfitness against an unmarried father with an established relationship with his children before the father's rights may be involuntarily terminated.<sup>34</sup>

Ten years after *Stanley*, the Court addressed unanswered questions regarding the meaning of the parental unfitness requirement necessary to any termination of parental rights. *Santosky v. Kramer*<sup>35</sup> involved a challenge to the process by which New York permitted the permanent severance of parent-child relationships. Stated most broadly, the decision in *Santosky*, authored by Justice Blackmun, requires that termination of parental rights must rest on a showing that clear and convincing evidence supports the allegations of unfitness.<sup>36</sup> More fundamentally, however, the Court outlines the constitutionally acceptable minimum components of an inquiry into whether grounds exist to terminate parental rights. The opinion describes a bifurcated test under which a court must first focus on the conduct of the parent. Only after clear and convincing evidence has proven the parent unfit may a court consider whether circumstances, including the "interests of the child," warrant the termination of parental rights.<sup>37</sup>

Justice Blackmun explains that the purpose of requiring a threshold inquiry into parental fitness is to protect the fundamental liberty interest shared by parents and children in preserving the integrity of their relationship against undue interference. Although significant to the ultimate judgment of whether to terminate parental rights, the interests of the child and of other affected parties—including potential adoptive parents—have no bearing on the threshold question of whether the parent's conduct falls short of accepted minimum standards:

We do not deny that the child and his foster parents are also deeply interested in the outcome of that contest. But at the factfinding stage of the . . . proceeding, the focus emphatically is not on them.

---

33. 441 U.S. 380 (1979).

34. Notably, in a dissenting opinion joined by Justice Rehnquist, Justice Stevens disputes the majority's conclusion that the relationship between Mr. Caban and his children was entitled to be recognized, but accepts the essential premise that a parent-child relationship, once recognized under law, is entitled to constitutional protection. *Id.* at 414 (Stevens, J., dissenting).

35. 455 U.S. 745 (1982).

36. *Id.* at 769.

37. *Id.* at 759-60.



The factfinding does not purport—and is not intended—to balance the child's interest in a normal family home against the parents' interest in raising the child. Nor does it purport to determine whether the natural parents or the foster parents would provide the better home. Rather, the factfinding hearing pits the State directly against the parents.<sup>38</sup>

Like the earlier opinion in *Stanley*, *Santosky* treats the inquiry of fitness not as a function of the parent's right to the company of the child, but rather as a function of the interests that the child and the parent share in preventing the "erroneous termination of their natural relationship."<sup>39</sup> For this reason, the Court holds that the best interests of children are presumed to coincide with the interests of their parents until the parents' conduct has been proven to be deficient.<sup>40</sup> In the absence of deficient parental conduct, the use of a "best interest" test as a basis for terminating parental rights would effectively set parents and their children against each other. The Court concludes that the shared interest in the integrity of the parent-child relationship prohibits states from treating children and parents as adversaries in the termination process until a finding of unfitness has been made.<sup>41</sup>

In counterpoint to *Santosky*, *Lehr v. Robertson*<sup>42</sup> focuses on the constitutional limitations on the processes by which states may restrict the recognition of parental rights. *Lehr* involved a decision authorizing the adoption of a child over the objections of a natural father who had failed to follow any of the statutorily proscribed steps for asserting paternity. The father sought to assert his paternity through court proceedings, but failed to follow any of the procedures recognized under state law. A divided opinion of the Court upheld the adoption of the child pursuant to the application of a strict statutory presumption against paternity, notwithstanding the father's unmistakable efforts to assert a claim of paternity through means outside the scope of the statute.

By upholding the adoption of Mr. Lehr's child, the Court evidenced its willingness to permit states to establish strict rules for establishing paternity that embody presumptions un rebuttable by even the most compelling evidence. The "grudging and crabbed approach to due process"<sup>43</sup> reflected in *Lehr* may seem, at one level, to be at odds with the requirement of individualized treatment of unmarried fathers required in *Stanley*. These cases may be reconciled, however, by recognizing that they treat two distinct aspects of the overall process of defining parental rights, and understanding that distinct rules apply to these different aspects. In considering the constitutional

38. *Id.* at 759 (citations omitted).

39. *Id.* at 760; see also *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987) ("The companionship and nurturing interests of parent and child in maintaining a tight familial bond are reciprocal, and we see no reason to accord less constitutional value to the child-parent relationship than we accord to the parent-child relationship.").

40. *Santosky v. Kramer*, 455 U.S. at 760.

41. *Id.*; see also *Parham v. J.R.*, 442 U.S. 584, 604 (1979) ("[A]bsent a finding of neglect or abuse . . . the traditional presumption that the parents act in the best interests of their child should apply.").

42. 463 U.S. 248 (1983).

43. *Id.* at 275.

limits on a state's authority to deny recognition of parental rights, the Court has permitted sensible distinctions in the treatment of unmarried fathers and unmarried mothers, requiring fathers whose relationship with the child is not always readily apparent to take affirmative steps to assert paternity and assume the protections afforded to existing parent-child relationships.<sup>44</sup> The Court's willingness to sanction strict rules defining how fathers may legitimize a relationship with the child in the first instance reflects the public policy interest in assuring that children may be placed quickly and finally for adoption by their mothers when fathers express no interest in the child. Provided that such rules afford an unmarried father with a reasonable opportunity to assert his interest in the child,<sup>45</sup> several courts have sanctioned not only gender and status-based distinctions, but also essentially un rebuttable presumptions against fathers who fail to follow prescribed steps for asserting paternity, in the interests of assuring permanence for children in adoption.<sup>46</sup> Limited only by the notion that the rights associated with an existing parent-child relationship must vest through a longstanding custodial arrangement,<sup>47</sup> the states retain great flexibility to decide when and how to recognize parent-child relationships.<sup>48</sup>

Once such relationships are clearly established, however, the state's interest in maintaining unfettered freedom to interfere is vastly diminished. In the absence of a finding that a father with established rights is unfit, the state "registers no gain towards its declared goals when it separates children from the custody of fit parents."<sup>49</sup> For this reason, the U.S. Supreme Court, and state courts more generally, have consistently held that once a relationship has been recognized, ir rebuttable presumptions must give way to individualized judgments regarding the fitness of the parent. A showing that

44. *Id.* at 256-63; see also *Quilloin v. Walcott*, 434 U.S. 246 (1978).

45. *Lehr v. Robertson*, 463 U.S. at 262-63 ("The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship. If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie. . . . We are concerned only with whether New York has adequately protected his opportunity to form such a relationship.").

46. *Shoecraft v. Catholic Social Servs. Bureau*, 385 N.W.2d 448, 451 (Neb. 1986) (upholding strict application of statute requiring father who had notice of the child's birth to come forward and declare his status within five days of birth); *Robert O. v. Russell K.*, 604 N.E.2d 99, 103 (N.Y. 1992) (applying strict limitation to time within which father may grasp his opportunity to become a parent); *Sanchez v. L.D.S. Social Servs.*, 680 P.2d 753, 755 (Utah 1984) (upholding adoption against claim of putative father who filed claim with a paternity registry one day after adoption).

47. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972) (discussing the deference that states must give unwed father who has sired and raised his children).

48. See *United States v. Yazell*, 382 U.S. 341, 352 (1966) ("Both theory and the precedents of this Court teach us solicitude for state interests, particularly in the field of family and family-property arrangements."). See also *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (upholding statute establishing a presumption that the mother's husband was the father of child born in

wedlock, over the claim of putative father who established clear proof of his paternity).

49. *Stanley v. Illinois*, 405 U.S. at 652.

adoption is in the best interests of the child, by itself, is constitutionally insufficient to support the termination of parental rights.<sup>50</sup>

The crucial distinctions between processes addressing the recognition of a parent-child relationship and those concerning the termination of an existing relationship are often lost in the heat of advocacy. Confusion of these two processes appears to have driven much of the criticism of existing parent-focused standards for terminating parental rights.<sup>51</sup> Child advocates have increasingly challenged the wisdom of limiting the state's authority to sever parent-child relationships through the parent-focused inquiry described in *Stanley* and *Santosky*. Such critics depict these cases as favoring "parents' rights" over the "best interests" of children; yet this criticism overlooks the strict procedural protections for children sanctioned in *Lehr* and its companion cases. The cases offer essential safeguards ensuring that long-absent or disinterested fathers, with little other than a blood connection to a child, cannot wield undue power to disrupt adoptions. Indeed, the characterization of *Santosky* as a "parents' rights" decision is something of a misnomer. The fact that constitutional due process protections require an initial focus on the conduct of the parent does not compel the conclusion that such protections only benefit the parent. In fact, the mistaken belief that children's interests are not served by such protections significantly contributes to the false dichotomy erected between "parental rights" and the "best interests of the

---

50. See, e.g., *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993) (denying request for stay of enforcement in Baby Jessica case); *Reno v. Flores*, 113 S. Ct. 1439, 1448 (1993) (stating that the best interests of the child are not the only criteria for making a custody decision: "Even if it were shown, for example, that a particular couple desirous of adopting a child would best provide for the child's welfare, the child would nonetheless not be removed from the custody of its parents so long as they were providing for the child adequately."); *In re Doe*, 638 N.E.2d 181 (Ill.), cert. denied, 115 S. Ct. 499 (1994) (vacating finding of unfitness, termination of parental rights, and adoption of Baby Richard); *In re B.G.C.*, 496 N.W.2d 239, 245 (Iowa 1992) (refusing to bypass termination requirement of consent or finding of unfitness and granting adoption on the grounds that it would be in the child's best interests); *In re Adoption of S.E.*, 755 P.2d 27, 29 (Mont. 1988) (stating that "[t]he 'best interest' test is applied . . . after the parental rights have been terminated, in determining whether the adoption should be allowed"); *In re Adoption of Eder*, 821 P.2d 400, 411 (Or. 1991) (affirming two-stage termination test bifurcating issues of parental fitness and best interests adoption: "The reason for terminating parental rights ought to be related to the parent's conduct as a parent" (quoting *Simons v. Smith*, 366 P.2d 875, 875 (Or. 1961))); *Hawk v. Hawk*, 855 S.W.2d 573, 580-81 (Tenn. 1993) (striking down statute permitting grandparent visitation against parents' will, court adhered to bifurcated termination process, holding that an initial showing of parental unfitness is necessary before the state may intervene to determine the "best interests of the child"); *Harris v. Herbers*, 838 S.W.2d 938, 942 (Tex. Ct. App. 1992) (stating that termination of a parent-child relationship may not be based solely upon what the trial court determines to be in the best interests of the child); *In re Adoption of R.H.A.*, 702 P.2d 1259, 1264 (Wyo. 1985) (deeming the best interests of a minor irrelevant until resolution of issue of whether father's consent was unnecessary due to his unfitness).

51. For an overview of the conflict and controversy surrounding the standards for adoption decisions, see the pleadings filed with the U.S. Supreme Court in the Baby Richard case, including Guard. Cert. Petition, *supra* note 9, Brief of the Governor of the state of Illinois as *Amicus Curiae* in Support of Writ of Certiorari, *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994) (No. 94-236) (cert. denied), and *Amicus* Brief of DeBoer Committee for Children's Rights, *Baby Richard v. Kirchner*, 115 S. Ct. 499 (1994) (No. 94-615) (cert. denied).

child." The following section explores the best interests standard and the problems associated with the use of this standard, as opposed to parental unfitness or unwillingness, as a tool for measuring when court intervention is appropriate.

### III. IMPLICATIONS OF CHOOSING THE BEST INTERESTS OF THE CHILD AS A JURISDICTIONAL STANDARD

It is difficult to dispute the general proposition that legal processes should be child-centered and responsive to the needs of children. Yet in the context of termination of parental rights, pursuit of this laudable objective has increasingly led to calls to implement new legal devices for determining when severance of the parent-child relationship is appropriate—devices that themselves have significant disturbing ramifications. Two of the leading contentions now pressed by some child advocates are that (1) children should have a "right" to define who their families should be,<sup>52</sup> and (2) termination of parental rights should turn exclusively on judgments as to the child's best interests.<sup>53</sup> However, these devices would not only subvert the nature of contested adoption proceedings, which are at bottom disputes between competing adults with their own interests and agendas,<sup>54</sup> but also

---

52. See Russ, *supra* note 9, at 384 (arguing that a child should have the power to bring a cause of action to terminate parental rights on his or her behalf); See also Swindell, *supra* note 9, at 689. Although Russ' argument arises in the context of a child dependency case, he does not distinguish between adoptions arising from neglect, abuse, and dependency actions and other involuntary adoption proceedings. The distinction is important because in the former type of proceeding, the parent's conduct has already been found to have been deficient at the outset of the case. See *supra* note 3.

Some advocates claim the child has a "liberty interest" in remaining with the surrogate family but offer no parameters as to when or how that liberty interest develops. See Guard. Cert. Petition, *supra* note 9, at 19-21. It is unclear under this theory, however, how long the child need be with the alternate family for a liberty interest to attach, how the child would come to be in a position to be with the surrogate family, or how to balance the child's liberty interest in the birth family.

In a different context, some note that there may be a trend in family law away from treating families as private, inviolable units toward treating families as collections of individuals, each entitled to privacy, and thus choice, in family matters. See Janet L. Dolgin, *The Family in Transition: From Griswold to Eisenstadt and Beyond*, 82 GEO. L.J. 1519, 1562-70 (1994). This trend serves to undermine the inherent inequality in families, by empowering children, for example, to choose their own ties, but it also undermines the increasingly slender sense of community experienced in contemporary society, for if family relationships can be "chosen, negotiated, and effected, . . . such ties are not enduring, solidaristic, or diffuse . . ." *Id.* at 1667.

53. See *In re Doe*, 627 N.E.2d 648, 654 (Ill. App. Ct. 1993). Best interests inquiry is supposed to address where the child's principal attachments lie, and birth parents who seek to assert parental rights against third-party attachments are frequently accused of treating their children like property. *Id.* at 652-54. However, it is at times difficult to understand why third-party claimants are not similarly charged with applying archaic principles of property law to legal disputes over children. *Id.* at 664 (Tully, J., dissenting).

54. Indeed, the child is treated like a prize in a zero sum game between the two sets of parents. See, e.g., Martin Guggenheim, *The Best Interests of the Child: Much Ado about Nothing?* in CHILD, PARENT & STATE 27, 29 (S. Randall Humm et al. eds., 1994) (stating that custody cases are entirely about adults—that is—which one will get the child).

beg significant questions regarding who shall determine the child's interests and how those interests should be determined. A legal standard for the destruction and creation of state-sanctioned families which purports to be based on children's interests or wishes must be scrutinized to determine who decides what the child's wishes or interests are, how those decisions are made, and why it is that those decisions should be made outside of the family.

As applied to termination of parental rights, existing standards presume that a child's interests are aligned with those of the parent unless and until the parent relinquishes the child or falls below accepted minimum parenting standards. Only when a parent fails to meet those minimal requirements may the court step in to protect the child, balancing the child's shared interests in the family and the child's then divergent interests in being safe and protected. Alternative standards such as the empowerment of children in the legal process or the best interest of the child do not provide satisfactory guidance for determining when court intervention is appropriate, when the parent's and children's interests diverge, why the court should isolate and assess the child's interests, or which of those interests the court should protect. The following sections address the vagaries of the proposed alternatives to existing rules for termination of parental rights.

#### A. The Child's Right to Decide

A rule granting children the right to dissolve their families without a finding of parental unfitness, though superficially appealing because it acknowledges children's rights, runs counter to the complexity of what it means to be a child.<sup>55</sup> As dependents, children are almost universally incompetent under the law until they reach majority.<sup>56</sup> They are not permitted to make basic decisions about their lives;<sup>57</sup> such decisions are the responsibility of adults, usually the parents. If children were capable of protecting themselves and making good decisions, they would not need their parents. Asking children, "who is your parent?" begs the question because children of any age will be subjected to the influences of the adults surrounding them.<sup>58</sup> Moreover, parenting issues are uniquely adult questions. Although children need a consistent, safe home, they should not be forced to choose which adult will provide that home and which adult the child will never see or hear from again. It is adults who are responsible for drawing lines of parental authority.

---

55. There is no doubt that viewing children as human beings to be visible and respected is a propitious advancement from their historical status as chattel of their fathers, but being human is not equivalent to being an adult.

56. Jonathan O. Hafen, *Children's Rights and Legal Representation-The Proper Roles of Children, Parents, and Attorneys*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 423, 438-39 (1993).

57. *Id.*; see also John E. Coons et al., *Deciding What's Best for Children*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 465, 476 (1993) ("The problem is that children are frequently too immature to decide what is best for themselves.").

58. See Coons et al., *supra* note 57, at 473.

In recognition of the fact that children cannot speak for themselves, the court may appoint a legal representative, usually in the form of a guardian ad litem (GAL). That process, however, in itself constitutes the removal of the decisionmaking from the child. Although a GAL may assist in bringing information pertinent to the child's interests to the court's attention, permitting that representative to determine the proper parents merely injects another adult into the contest.<sup>59</sup> As one noted child welfare scholar queried: "how can there be any assurance that the advocate is responsive to the children's interests, and is not simply pressing for the advocate's own vision of those interests, unconstrained by clients?"<sup>60</sup> Moreover, there are no uniform standards for children's attorneys or GALs.<sup>61</sup> In some locales, there are no standards or guidelines whatsoever.<sup>62</sup> Thus, there is no assurance that a child's legal representative will be trained in child development, separation and loss, cultural competence, or other areas necessary to make informed decisions about children. Nor are there guidelines as to what sort of investigation GALs should undertake and what factors they should consider in making a determination. Instead, the legal representative may be just another minimally informed adult in the equation, basing a decision on personal opinions, biases and experiences, or short-term interests.

Thus, giving children the right to decide which family is in their best interest is probably not a decision they would choose to make, but instead is a way of permitting the adult with the most access or influence to make that decision. That process not only defeats the point of permitting the child to decide, but also leaves open the questions of which adult should be making those determinations and when and why that person should not be the parent.

## B. The Best Interests Standard

Another significant challenge to existing parent-focused standards is the call for the expansion of the ubiquitous "best interests" standard.<sup>63</sup> Once cause for state intervention is established, the best interest standard, despite its indeterminacy, permits and encourages individualized consideration of each child's unique circumstances. As applied to determination of parental

---

59. See Robert H. Mnookin, *Defining the Questions*, in *IN THE INTEREST OF CHILDREN* 15, 43-57 (1985) (discussing problems of client accountability among child advocates); see also David L. Chambers & Michael S. Wald, *Smith v. OFFER*, in *IN THE INTEREST OF CHILDREN*, *supra*, at 67 (contributing original study focusing on *Smith v. Organization of Foster Families for Equality and Reform* litigation as evidence of lack of client accountability among child advocates in foster care context).

60. Mnookin, *supra* note 59, at 43.

61. ANNE M. HARALAMBIE, *THE CHILD'S ATTORNEY* 2-3 (1993); see also Hafen, *supra* note 56, at 455; Sarah H. Ramsey, *Representation of the Child in Protection Proceedings: The Determination of Decision-Making Capacity*, 17 *FAM. L.Q.* 287, 289-91 (1983).

62. Martin Guggenheim, *The Right to be Represented but not Heard: Reflections on Legal Representation for Children*, 59 *N.Y.U. L. REV.* 76, 95-97 (1984).

63. See, e.g., *In re Doe*, 627 N.E.2d 648 (Ill. App. Ct. 1993); *ILL. ANN. STAT.* ch. 705, para. 405 (Smith-Hurd 1992) (inserting the phrase "in the best interests of the minor" into nearly every provision of the Juvenile Court Act).

rights, however, the best interests of the child standard raises two sets of questions for which there are no clear answers: (1) how to determine which children will be subjected to a judicial determination of best interests; and (2) how to decide what is in the best interests of the child. The "best interests of the child" provides neither jurisdictional nor adjudicatory guidance to the decisionmaker, and offers no guarantee that children will experience better outcomes than under the current standards. Accordingly, it is an inadequate alternative to the current standards which allow third party evaluation of a child's best interests only after a threshold finding of parental unfitness or unwillingness.

1. *Circumstances Under Which Best Interests Should Be Determined.* If the best interests of the child itself provided a threshold to court intervention, absent a failing in parental conduct, there would be essentially no limits to court involvement with children. Courts could provide all sorts of relief for children who are, as a class, among the poorest and most disadvantaged persons in this country.<sup>64</sup> Children, their parents, or the state could petition courts for adequate schools and housing, or better neighborhoods.<sup>65</sup> Of course, proponents of the best interest standard do not advocate for such breadth.<sup>66</sup> They instead raise the issue in the context of contested adoption proceedings when the parents are neither unwilling nor unfit to parent. Although the "best interests" of the child may be examined<sup>67</sup> within such proceedings, these advocates do not identify what triggers adoption jurisdiction in those instances beyond the existence of adults competing for the child.<sup>68</sup> But under a jurisdictional threshold based solely on the existence of competing adults, any adult, including a kidnapper,<sup>69</sup> could petition the

64. For general information on the problems presently facing children in our country, see CHILDREN'S DEFENSE FUND, *THE STATE OF AMERICA'S CHILDREN: YEARBOOK 1994* 1-3, 78-79 (1994), and A. Leon Higginbotham, Jr. & Catherine J. Ross, *Introduction* to A.B.A. PRESIDENTIAL WORKING GROUP ON THE UNMET LEGAL NEEDS OF CHILDREN AND THEIR FAMILIES, *AMERICA'S CHILDREN AT RISK: A NATIONAL AGENDA FOR LEGAL ACTION* v-viii (1993).

65. These issues are routinely outside of the purview of courts purportedly addressing the best interests of the children, as was evident in one recent case in the Cook County State Juvenile Court. There, the father, with whom his five children had been placed by the court, was desperate to move his family out of their public housing apartment in Chicago's south side because the children were at serious risk from gang crimes every day. He could not get a paying job because he would lose medical insurance for his children; but without such a job, he could not save the money to move out. The court, instead of addressing those issues, threatened to remove the five admittedly loved and well cared for children from him because he occasionally used marijuana. The irony of the situation was not lost on the father. *In re P.L., L.L., R.L., & L.L.*, No. 89, 1782-96 (1994). This unpublished case was litigated by author Annette Appell in the Juvenile Division of the Circuit Court of Cook County, Illinois.

66. Although there is no doubt that advocates would support better lives for children.

67. However, even the proposition that the child's best interests are at issue in these proceedings is questionable. As Professor Guggenheim points out, if the concern in a particular custody case truly were for the best interests of the child, then a court should not be confined to considering which of the available adults should have custody, but instead should be free to choose other, non-involved adults. Guggenheim, *supra* note 54, at 29.

68. See *Guard. Cert. Petition*, *supra* note 9, at 19-21 (claiming that Baby Richard has a liberty interest in remaining with his adoptive family, even though the father is neither unfit nor willing to consent to his son's adoption).

69. Kidnapping could refer to not only the abduction of a child from a maternity ward

court for a determination of which parent would be best for the child. The repercussions of such a threshold, particularly in light of the vagaries of the best interests standard, discussed below, would lead to great insecurity and unpredictability in family life, as no family would be safe from challenge.

2. *Guidelines for Determining the Best Interests of the Child.* Just as the best interests of the child provides little guidance as to which children's best interest is important, the phrase fails to direct the court's identification of those interests. The two major obstacles to making such decisions are the inability to predict the consequences of alternative outcomes and the lack of consensus on what criteria to use in evaluating the alternatives.<sup>70</sup>

Child welfare professionals are aware that social science does not provide reliable tools to predict outcomes, particularly over the long term.<sup>71</sup> In fact, longitudinal studies have shown that predictions made about the development of particular children were wrong two-thirds of the time.<sup>72</sup> Because life is not like a laboratory, future, and even present, variables cannot be controlled. It is not clear, for example, the extent to which experiences in later years can alter the patterns developed during early childhood, when social scientists believe the personality is formed.<sup>73</sup> Even the facts on which a decision is based can change, such as the decision to place a child with a middle class, two parent family. Divorce, death, illness, or financial disaster can turn that once "preferable" family into the less desirable. In the context of adoption, this fallacy of predictability is particularly challenging as it will be difficult to determine from which loss a child will recover more fully, the loss of the birth family or the loss of the adoptive family. On the one hand, adoption provides safe, nurturing, permanent homes for children,<sup>74</sup> for which they would surely mourn if separated. On the other hand, adoptees are at greater risk for behavioral, emotional, and education problems,<sup>75</sup> and they experience a deep and enduring loss of their birth families.<sup>76</sup> Thus,

---

or parking lot, but also the more genteel forms of kidnapping by a godmother, baby sitter, or hopeful adoptive parents who initiate adoption proceedings under false pretenses (that the parents are willing to consent or are unfit, or in the case of Baby Richard, that the father is "unknown") and then delay legal proceedings until a psychological attachment can be claimed. A best interests standard then could be used to sanction relationships solidified by the passage of time, regardless of the circumstances under which the relationship began.

70. Mnookin, *supra* note 59, at 16-17; see also Coons et al., *supra* note 57, at 476-82.

71. Theodore J. Stein & Tina L. Rzepnicki, *Decisionmaking in Child Welfare: Current Issues and Future Directions*, in CHILD WELFARE, CURRENT DILEMMAS—FUTURE DIRECTIONS 259, 266-71 (Brenda G. McGowan & William Meezan eds., 1983); Ramsey, *supra* note 61, at 297-98. See generally David M. Brodzinsky, *On the Use and Misuse of Psychological Testing in Child Custody Evaluations*, 24 PROF. PSYCHOL., RES. AND PRACT. 213 (1993) (discussing the lack of validation for the use of psychological tests for such forensic purposes).

72. Stein & Rzepnicki, *supra* note 71, at 267-69.

73. *Id.* at 268-69.

74. David M. Brodzinsky et al., *Psychological and Academic Adjustment in Adopted Children*, 52 J. OF CONSULTING & CLINICAL PSYCHOL. 582, 589 (1984) ("In the majority of cases, adopted children adapt quite successfully both in psychological and academic areas.").

75. *Id.* at 587.

76. BEING ADOPTED, *supra* note 2, at 75 (noting that adoptees experience "[l]oss of both birth parents and of extended birth family; loss of cultural and genealogical heritage; some-



even for children like Baby Emily, Baby Richard, or Baby Jessica, either choice—returning the child to the birth parents or leaving the child with the adoptive parents—entails risks of emotional or psychological trauma.

Furthermore, the United States is extremely heterogenous, without consensus on lifestyle, morality, child-rearing practices, or religion,<sup>77</sup> and consequently we lack agreement on what values should inform the choice of alternatives for a child.<sup>78</sup> For example, should religious and spiritual training, economic status and opportunity, race, culture, a child's sense of belonging, a child's happiness, or some other norms guide the decisionmaking?<sup>79</sup> There is no agreement on which of these standards are most important to a child's best interest or how to weigh competing norms. For these reasons, it is misleading to suggest that the standard is determinative of what is best for any given child, and it is dangerous as a policy matter because of its potential for abuse. This is not to say that the best interest of a child is not an admirable focus and one which decisionmakers should always attain, but given the difficulties in articulating what it means and in applying it, it does not serve as a reliable standard for family intervention in the first place.

Another significant caution regarding the best interests standard is its potentially adverse impact on poor people and people of color. It is widely recognized that poor people and minorities fare worse in our society. The integrity of middle class families is protected but "intervention and intrusion in low-income families [is accepted], and we have discounted the cultural backgrounds and solid parenting skills of low-income parents."<sup>80</sup> The U.S.

times loss of a sense of permanence, sense of connectedness to adoptive family, sense of self, social status"); see also Colon, *supra*, note 2, at 301-02.

77. Coons et al., *supra* note 57, at 480-82 (referring to this diversity as "value pluralism").

78. For example, results from a 1993 conference attended by nearly 400 attorneys, social workers, caseworkers, mental health professionals, juvenile court judges, community members, and child advocates underscore the inevitable disagreement over what constitutes the best interests of a child. *Beyond Rhetoric: Determining the Best Interest of Children*, Northwestern University School of Law (September 7-9, 1993) (summary conference workshops on file at the Children and Family Justice Center of Northwestern University School of Law Legal Clinic). The conference attendees were provided with a single hypothetical and broken down into small, interdisciplinary groups whose task it was to decide what was in the best interests of the children in the scenario. Predictably, these groups of child welfare professionals did not all reach the same answer, nor did any two groups come up with the same criteria for determining best interests. This incident is supported by research which shows that even experienced judges and social workers could agree on less than 50% of the cases and "[w]hen they did agree, they did not identify the same factors as affecting their decision." Stein & Rzepnicki, *supra* note 71, at 262.

79. Mnookin, *supra* note 59, at 18; Coons et al., *supra* note 57, at 487, 480-82; see also Stein & Rzepnicki, *supra* note 71, at 261 ("Unfortunately, consistent decisionmaking principles [regarding best interests] have not been identified.").

80. Carol B. Stack, *Cultural Perspectives on Child Welfare*, 12 N.Y.U. REV. L. & SOC. CHANGE 539, 547 (1983-84); see also *Smith v. Organization of Foster Families*, 431 U.S. 816, 833-34 (1977) (citing statistics regarding the disproportionate number of poor and minority children in foster care and rehearsing studies suggesting bias among middle class social workers that treat the poverty of natural parents as detrimental to the best interests of the child); NAT'L BLACK CHILD DEV. INST., WHO WILL CARE WHEN PARENTS CAN'T? i, 2 (1989) [hereinafter WHO WILL CARE?] (stating that African-American children are disproportionately represented in foster care because they enter the system at younger ages and stay longer); Ramsey, *supra*

Supreme Court has recognized that decisionmakers often reflect a "bias that treats the natural parents' poverty and lifestyle as prejudicial to the best interests of the child."<sup>81</sup> Application of a best interests standard reinforces other forms of discrimination as well.<sup>82</sup> In the context of adoption, where women seeking to adopt may be of higher educational and economic status<sup>83</sup> than the birth parents, the use of the best interests standard can be particularly vulnerable to abuse if the decisionmaker is without expertise or guidance on how to apply it.

Besides its vulnerability to prejudices and biases, the best interests standard provides little guidance on how to weigh the competing and changing interests of individual children. The needs and perspectives of adoptees change over time,<sup>84</sup> making it all the more difficult to determine which of the child's interests should take precedence on the date of decisionmaking. Adoptees' experiences of and attitudes toward adoption will be very different at the age of two, the age of twelve, and the age of twenty. For example, a two year old adopted as an infant is cognizant only of her adoptive family; the child would be devastated to lose that family. By the time she is school age, however, that same child will become aware of her special status as the child of two families.<sup>85</sup> As the child develops emotionally and cognitively, she will have a different reaction to the adoption, and may have some difficulty understanding how or why her adoptive parents could have kept her from her birth parents, especially in the case of a contested adoption where the adoptive parents are successful in prevailing on a challenge to relinquishment or in proving the parents are unfit.<sup>86</sup> Conversely, the adoptee will also struggle with the fact that she was given up—rejected—by

---

note 61, at 296-301 (rehearsing statistics and studies regarding the disproportionate number of poor and minority families in foster care).

Notably, the same type of trauma caused by the separation of children from their parents that has received such widespread attention in a handful of celebrated cases (e.g., Baby Jessica, Baby Richard and Baby Emily) goes largely unremarked in juvenile courts across the country populated by low-income and minority families. Societal inattention to the trauma of these children is indicative of a generally higher tolerance of intervention into the lives of such families.

81. *Smith v. Organization of Foster Families*, 431 U.S. at 834; cf. *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) ("Because parents subject to termination [of parental rights] proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias.").

82. Nanette Schorr, *Foster Care and the Politics of Compassion*, in *FAMILY MATTERS: READINGS ON FAMILY LIVES AND THE LAW* 117, 119 (Martha Minow ed., 1993) (asserting that giving children a "better" life by removing them from poor families overextends the role of the state: "It is not for the state to decide what constitutes an enlightened upbringing but rather to establish threshold criteria for the children above which its intervention is not required."). See also Stein & Rzepnicki, *supra* note 71, at 266, 273-74.

83. See Bachrach et al., *supra* note 12, at 254; see also Richard P. Barth, *Adoption of Drug-Exposed Children* in 1 *CHILD WELFARE RESEARCH REVIEW*, *supra* note 12, at 273, 282 ("Overall, adoptive mothers are highly educated with 62% having some college education or higher.").

84. See generally *BEING ADOPTED*, *supra* note 2 (tracing the continued process of adjustment that adoptees experience throughout their lives).

85. *Id.* at 61-91. It is also around this time that the child begins to grieve for the lost birth family. *Id.* at 71-72.

86. See *id.* at 78-79.

the birth parents.<sup>87</sup> A twenty-five year old contemplating marriage and a family will have certain needs,<sup>88</sup> while a forty year old seeking medical information or even an organ donation will have different concerns. Thus, any consideration of the best interests of a child in the context of adoption is necessarily very complex. It must take into account not only the circumstances of the child at the time of the proceedings, but also the needs of the child likely to arise at each future stage of development. Various competing factors must be weighed in determining the best interests of the child, and there is no accepted standard as to which is most important in what circumstances and how to account for the child's future needs.

One example of this factor-balancing dilemma appears in the contest between the importance of psychological versus biological ties to a child.<sup>89</sup> Indeed, it is this attachment which is often considered to be synonymous with best interests of the child.<sup>90</sup> The importance of biological ties has also been noted, however, particularly in the context of adoption where psychologists recognized adoptees' need to know their birth parents.<sup>91</sup> There is no consensus on how to weigh these two often competing factors in a child's life, although the child's sense of attachment is almost universally regarded as one of the most important developmental needs. Strict obeisance to psychological attachments, however, can mask economic and cultural biases and lead to outcomes which favor the more resourceful or powerful person who retains custody of the child long enough for significant attachments to form.<sup>92</sup> In any case, the dominance of either factor will be different depending on the age of the child and who is seeking to adopt.

The lack of understanding and consensus on what is best for children leaves children vulnerable to decisionmaking based on the prejudices, presumptions, and emotions of the decisionmaker,<sup>93</sup> rather than enabling deci-

87. *Id.* at 62.

88. *Id.* at 130-37.

89. For an overview of this topic, see the influential work by JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* (1973).

90. See, e.g., *In re Doe*, 627 N.E.2d 648 (Ill. App. Ct. 1993), *rev'd*, 638 N.E.2d 181 (Ill.), *cert. denied*, 115 S. Ct. 499 (1994); *In re Ashley K.*, 571 N.E.2d 905 (Ill. App. Ct. 1991).

91. See generally *BEING ADOPTED*, *supra* note 2; Colon, *supra* note 2; Robert S. Andersen, *The Nature of Adoptee Search: Adventure, Cure or Growth?*, 68 *CHILD WELFARE* 623 (1989) (explaining the psychological and emotional reasons that adoptees search for their biological parents). In addition, the widespread movement of adoptees to search for their birth families underscores the importance of this connection. See PAUL SACHDEV, *UNLOCKING THE ADOPTION FILES* (1989) (documenting the movement and its motivating rationales).

92. See, e.g., David Fanshel, *Urging Restraint in Terminating the Rights of Parents of Children in Foster Care*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 501, 504 (1983-84) (stating that psychological parenting theory licenses judges to "vent their hostility toward poor and uneducated women"); Martin Guggenheim, *The Political and Legal Implications of the Psychological Parenting Theory*, 12 *N.Y.U. REV. L. & SOC. CHANGE* 549, 551 (1983-84) (noting that case workers who favor the adoptive or foster family can delay a child from returning home).

93. See, e.g., *Santosky v. Kramer*, 455 U.S. 745, 763 (1982) ("Because parents subject to termination proceedings are often poor, uneducated, or members of minority groups, . . . such proceedings are often vulnerable to judgments based on cultural or class bias."); Stein & Rzepnicki, *supra* note 71, at 273 (warning that ambiguous standards "provide[] a framework for indiscriminate social control of behaviors that a community finds distasteful. Under the

sions to arise from respect for or knowledge of the child. Moreover, given the increasing number of non-infant children in the child welfare system, a majority of whom are poor and a disproportionate number of whom are of color,<sup>94</sup> the subjective application of the "best interests" standard is particularly troubling. A rule which permits children to be removed from their parents based on "best interests" instead of inadequate parenting would enable not just private citizens, but also the state to remove children from their parents. The result would be an increase in the number of children in state care, despite the widely acknowledged recognition that the state makes a poor parent.<sup>95</sup>

#### IV. CONCLUSION: RESOLVING THE VERY REAL TENSIONS IN ADOPTION

The privilege of making decisions about how to raise children has historically resided with parents, who, by virtue of their intimate relationships and shared histories with their children, are generally in the best position to evaluate children's best interests.<sup>96</sup> This privilege should not be abrogated unless the parents have demonstrated an unwillingness or inability to function in that role.<sup>97</sup> Utilizing this jurisdictional standard, rather than a best interests standard, acknowledges the difficulty of making accurate predictions about children and protects children from being taken from their families for improper reasons.<sup>98</sup>

Nevertheless, difficult cases will still arise under existing standards, namely due to delays in the system. Preventing these cases lies not in disposing of current standards, but in revisiting the framework in which these cases arise. First, it must be acknowledged that litigation is a no-win solution. Alternatives to full blown court battles should be encouraged so that

---

guise of protecting children, parents are often punished for behaviors that are deemed immoral. Children have been removed from the care of their parents because the court does not approve of their life-style. Thus, children have been placed in substitute care because a mother frequented taverns or had male visitors overnight, because of their religious beliefs or because they lived in a communal setting, or because the parent was a lesbian or male homosexual.").

94. For a good overview on black children in foster care, see *WHO WILL CARE?*, *supra* note 80.

95. Stein & Rzepnicki, *supra* note 71, at 284 ("Evidence gathered in recent years has shown that intervention by child welfare agencies may exacerbate, rather than ameliorate, family difficulties. Some children have been removed from the care of their parents only to be forgotten—allowed to drift from foster home to foster home with no permanent plans for their future."); see also *WHO WILL CARE?*, *supra* note 80, at 2 ("The child's life within the foster care system may not be much better [than a neglectful home]; few black children in placement remain in their original schools, and few are consistently monitored for academic, physical, and emotional development. Most experience multiple placements.").

96. See Coons et al., *supra* note 57, at 489 ("Parents may look attractive as deciders [of the best interests of their children], because they can be expected to have intimate knowledge, as well as a general concern for their children, and will probably suffer along with the child when a bad decision is made. Parents may provide the most appropriate sheltering environment in which children can be gradually empowered and liberated as they are ready to take on responsibility for themselves.").

97. Stein & Rzepnicki, *supra* note 71, at 273.

98. *Id.*

the people with an interest in and knowledge of the child can be assisted to make child-centered resolutions. Second, more flexible methods of defining and maintaining families, both in and out of court, must be developed. Using children as a prize to be won by competing adults is contrary to the interests of children who may have multiple attachments, which children should not be forced to sever for the convenience of the adults. Third, adoption laws should be written for children, not adults. Such laws could encourage informed decisionmaking on the part of both birth parents and adoptive parents, provide for outreach to and adequate support for families to adopt the thousands of foster children in need of homes, and offer mechanisms for adults to plan and execute cooperative adoptions through which a child's ongoing and changing needs can be met with the assistance of all adults involved in the child's life. Finally, in the event that court battles ensue, the delays must be reduced. There is no conscionable reason that a contested adoption should take three or more years to resolve. Every part of the process from the trial through the appeals must be drastically shortened. These cases must be prioritized, and disincentives established to discourage delays by the party with possession of the child so that these matters can be determined in a child-sensitive time period.

Such changes require reconceptualizing adoption policy, practice, and attitudes as a vehicle for meeting the deep and enduring needs of children, rather than as a device for satisfying the needs and desires of adults. Children must be understood as full and unique beings who come into this world with a certain set of profound connections and who will continue to develop connections throughout their lives. Only when we recognize that children are capable of and enriched by developing and maintaining multiple relationships can adoption be transformed into a truly flexible and child-centered practice.

