TERMINATION OF PARENTAL RIGHTS AS A PRIVATE REMEDY: RATIONALES, REALITIES, AND ALTERNATIVES

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INTRODUCTION

A court order terminating a person's parental rights—permanently and completely severing their legal relationship with their child—is one of the most extreme measures that the state can take against an individual. As Justice Ruth Bader Ginsberg noted: "[T]ermination adjudications involve the awesome authority of the State 'to destroy permanently all legal recognition of the parental relationship,'"[1] rendering former parents as "legal nonentities."[2] Justice John Paul Stevens observed that, while incarceration is a "pure deprivation of liberty," terminating parental rights is a "deprivation of both liberty and property, because statutory rights of inheritance as well as the natural relationship may be destroyed."[3] He added: "Although both deprivations are serious, often the deprivation of parental rights will be the more grievous of the two."[4]

1. M.L.B. v S.L.J., 519 U.S. 102, 128 (1996).

2. *See* MARY ANN MASON, FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 155 (1994).

3. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 59 (1981) (Stevens, J., dissenting).

4. *Id.*

Most people associate such a drastic outcome with public child welfare proceedings, where a state or county child protective services (CPS) agency has removed a child from their home after an investigation into abuse or neglect. In fact, state laws across the country permit private individuals to petition a court to terminate another person's parental rights for many stated reasons.[5] For example, a court can terminate a parent's rights to allow a child's adoption to proceed without that parent's consent.[6] Many jurisdictions also permit a parent or other individual to initiate a termination of parental rights ("TPR" or "termination") action based on allegations of abandonment or serious misconduct.[7] While private termination actions are not uncommon, there has been scant scholarly examination of these matters, their underlying purposes, or their role in contemporary family law.[8] This Article aims to fill that gap.

Private termination actions are drastic in that they implicate "parental rights" not with reference to limits on the exercise of any specific rights, such as the selection of a child's religion or education but, rather, with reference to the *existence* of a legally recognized parent-child relationship.[9] After termination, the former parent has no standing to seek involvement in a child's life in the future.[10] A termination order results in complete deprivation of a fundamental constitutional liberty interest with profound and lasting legal—and potentially, in many cases, emotional—consequences for both the former parent and the child.[11]

I use the term "private" in the Article to refer to TPR court actions initiated by an individual as distinct from a dependency or child protection action initiated by a public CPS agency.[12] While any court

5. *See infra* Part II.

6. *See infra* notes 101-102 and accompanying text.

7. *See infra* notes 110-125 and accompanying text.

8. *See* Elizabeth Barker Brandt, *Concerns at the Margins of Supervised Access to Children*, 9 J. L. & FAM. STUD. 201, 223 n.98 (2007) ("Very little discussion of private termination of parental rights has occurred in the literature. Most termination of parental rights cases arise in the context of public agency interventions in families.").

9. *See infra* notes 43-59 and accompanying text.

10. Santosky v. Kramer, 455 U.S. 745, 749, 759 (1982).

11. *See* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 59 (1981).

12. *See* MARTIN GUGGENHEIM & VIVEK S. SANKARAN, REPRESENTING PARENTS IN CHILD WELFARE CASES: ADVICE AND GUIDANCE FOR FAMILY

order severing a parent's legal relationship is a form of state action, the Article is particularly concerned with contexts in which the public family regulation system, as the party seeking and obtaining TPR under the state's *parens patriae* authority, has no formal role. Private termination actions are brought by individuals to obtain a private remedy, not to serve the public interest. In general, and with relevant and sufficient rationales, providing private remedies is an appropriate core function of law. In the case of private termination proceedings, however, there is little acknowledgment of the most common rationales at play and virtually no examination of the relevance or sufficiency of such rationales.

In most contexts, a private termination serves primarily the petitioners' interests while undermining the rights of the terminated parent and too often disregarding the interests of the child. Collectively, private termination actions contribute to our contemporary legal system's too-hasty inclination to separate families and to sever legal ties between a parent and their child permanently. The availability of termination as a private remedy also extends and reifies the realms in which substance use disorders, incarceration, poverty, disability, and mental illness are stigmatized. In this way, private termination actions disproportionately target parents from vulnerable and marginalized communities, especially parents who are low-income.[13]

This Article begins by defining the legal concept of "parental rights" and commenting on its history and the development of various routes to terminate such rights. Terminations are the result either of actions initiated by public CPS agencies or of petitions by private individuals such as another parent, a relative, or a legal guardian of the

DEFENDERS xix (2015) (noting that proceedings brought by a CPS agency "are variously known as 'dependency,' 'child neglect,' 'child abuse,' or 'child protection,' depending on the locality."). Several commentators have adopted the term "family regulation" to refer to the full system of agencies and interventions, of which dependency proceedings are one part. *See, e.g.*, Ava Cilia, *The Family Regulation System: Why Those Committed to Racial Justice Must Interrogate It*, HARV. CIVIL RIGHTS-CIVIL LIBERTIES L. REV. (Feb. 17, 2021), https://harvardcrcl.org/the-family-regulation-system-why-those-committed-to-racial-justice-must-interrogate-it/; Cynthia Godsoe, *An Abolitionist Horizon for Child Welfare*, LPE PROJECT BLOG (Aug. 6, 2020), https://lpeproject.org/blog/an-abolitionist-horizon-for-child-welfare/; Dorothy Roberts, *Abolishing Policing also Means Abolishing Family Regulation*, THE IMPRINT (June 16, 2020), https://imprintnews.org/child-welfare-2/abolishing-policing-also-means-abolishing-family-regulation/44480.

13. *See* Roberts, *supra* note 12.

child.[14] I examine the current state of private termination law, including the contexts in which private petitions are permitted and the standards that courts apply in these actions. I then review the implications of permitting this substantial interference with a fundamental constitutional liberty interest without the accompanying procedural protections that are afforded to parents in most proceedings initiated by public CPS agencies.

In the major portion of the Article, I analyze and critique three rationales—either stated or implied—for private termination actions: to enable a new parent to be added through adoption; to sever the legal connection between a child's parents in order to protect one of the parents; and to foreclose the possibility of a person's future exercise of parental rights. In each case, I test the assumption that such an extreme remedy is necessary to serve the stated or implied purpose. As I demonstrate, while the rationales for a TPR may be appropriate in theory, the purposes it is claimed to serve can, in many contexts, be served equally well through another route short of termination. I review several such alternatives, including non-exclusive adoption, de facto or equitable parentage, and minor guardianship, and highlight innovative approaches that have been taken by some states.

A common stated purpose for private termination, for example, is to permit a child's adoption by the other parent's new spouse or partner.[15] Such purpose assumes that a child can only have two parents at any time and that the noncustodial parent's rights must be terminated in order that parental rights be granted to the stepparent, itself a potentially appropriate legal outcome. As I point out, however, contemporary approaches to parentage have increasingly eroded the traditional heteronormative conjugal "dyad" model of parentage.[16] Some states' courts can now establish or recognize parentage for more than two people in a child's life. By contrast, in the context of a child's conception resulting from sexual assault, where the purpose is to

14. *See infra* notes 43-59 and accompanying text.

15. *See infra* notes 279-333 and accompanying text.

16. *See* Sacha M. Coupet, "*Ain't I A Parent?": The Exclusion of Kinship Caregivers from the Debate Over Expansions of Parenthood*, 34 N.Y.U. REV. L. & SOC. CHANGE 595, 618–23 (2010). *See infra* notes 322322–329 and accompanying text.

prevent further victimization of the assaulted parent, a termination order may be the only route to secure such outcome.[17]

I conclude the Article by encouraging courts, attorneys, and policymakers to scrutinize private termination laws and proceedings and, in specific cases, to consider whether the stated purpose of a private termination could be served through a less drastic remedy. The analysis presented in this Article indicates that private terminations should be reserved for those cases where the child was conceived by sexual assault or the petitioner demonstrates through clear and convincing evidence that termination will either provide an identifiable affirmative benefit for the child that cannot be achieved otherwise or prevent serious harm to the child that cannot be avoided through a less "grievous" measure. States should amend their family law statutes to ensure that these alternative measures are available and that needed services and supports for families are provided so that, wherever possible, children can safely remain connected with their parents. Finally, courts must ensure that rigorous procedural protections—at least equivalent to those in dependency proceedings—are extended to persons who are the subject of private petitions to terminate their parental rights.

I. DEFINING "PRIVATE TERMINATION OF PARENTAL RIGHTS"

The establishment and termination of the parent-child relationship are aspects of family law, which is largely a creature of state statutory law.[18] While there is a patchwork of terms and standards employed by states in certain family law topics, there are also trends and common approaches.[19] This Article describes both the broad commonalities and the different ways that states' laws address the question of when, if ever, a private individual can petition a court to terminate another person's parental rights. In this first Part, I briefly examine the origins and contemporary significance of each of the three key components of "private termination of parental rights."

17. *See infra* notes 367–378 and accompanying text.

18. *See* United States v. Windsor, 570 U.S. 744, 766 (2013) (noting that subject to constitutional guarantees, "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States.'" (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

19. *See* June Carbone & Naomi Cahn, *Changing American State and Federal Childcare Laws: Parents, Babies, and More Parents*, 92 CHI.-KENT L. REV. 9, 13 (2017).

A. Defining "Parental Rights"

The term "parental rights" can be used to describe two distinct legal conceptualizations: a person's *status* or a person's *authority* over their children.[20] This Article is concerned with parental rights under the first conceptualization: that is, rights bearing on a person's legal relationship to another person (specifically, a child) or, in other words, that person's "parentage."[21] Through such use, the term "parental rights" demarcates the extent of a parent's authority regarding that other person among a defined group of individuals. That is, who, among a child's "parents" or parent-like figures, can exercise control over the child, including having custody of and making decisions regarding them.[22] Defining and terminating parentage also bears on questions of inheritance and legitimacy to determine who can or cannot inherit property by operation of state law on the basis of a familial connection.[23]

Whatever other family relationships may be recognized by the individuals concerned, *legal* relationships among individuals within a family are wholly creations of the state.[24] As Professor Clare Huntington notes: "Without the state, there is no family, legally speaking."[25] People are not "family until the state calls it as such," and the state controls the "entry and exit from the legal status of family."[26]

20. *See* Samantha Godwin, *Against Parental Rights*, 47 COLUM. HUM. RTS. L. REV. 1, 3–5 (2015) (describing "parental rights" as "the special legal powers of parents to control major aspects of their children's lives"). Constitutional principles identify the extent to which the state may interfere with a person's authority with respect to their child with respect to *specific* decisions, such as whether to vaccinate and how to educate a child. *Id.*; *see* MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 37–38 (Harvard Univ. Press 2005).

21. *See* UNIF. PARENTAGE ACT § 102(16) (UNIF. L. COMM'N 2017) (defining "parentage" as "the legal relationship between a child and a parent of the child.").

22. *See* GUGGENHEIM, *supra* note 20, at 49; Tali Marcus, *Cutting Off the Umbilical Cord—Reflections on the Possibility to Sever the Parental Bond*, 25 J. L. & POL'Y 583, 584–88 (2017).

23. *See* UNIF. PARENTAGE ACT § 203, comment (2017) (noting that the provision "Unless parental rights are terminated, a parent-child relationship established under this [act] applies for all purposes, except as otherwise provided by law of this state other than this [act]," can refer to statutes that preclude inheritance by intestate succession after termination of parental rights).

24. *See* CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 59 (Oxford Univ. Press 2014).

25. *Id.*

26. *Id.*

This control extends to the legal status of a marriage and of the parent-child relationship.[27] Although the word "parent" is used in common parlance to describe a genetic relative, state law—not biology—determines a person's legal status as a "parent."[28]

The Uniform Laws Commission's 2017 Uniform Parentage Act (UPA) reflects the many routes through which "parentage" can be established under state law, including genetics, but, also, presumed parentage, acknowledged or intended parentage, use of reproductive technology, adoption, and de facto parenthood.[29] A wide range of outcomes turn on the identification of who a child's legal parents are and on whether a person is determined to be a "parent" versus a "non-parent."[30] Most significantly, a parentage determination confers the legal authority to exercise and enforce the specific powers and to take on the specific responsibilities that accompany the status of "parent."[31]

Today we often emphasize the affectional and psychological aspects of parenting roles, which can translate into the degree of contact and influence a person has in a child's life. In its origins, however, the legal status of "parent" has little to do with family intimacy. Rather, it concerns the need to clarify one person's relationship to another in the contexts of inheritance, property, or labor.[32] The definition of "parentage" in *Black's Law Dictionary* reflects its enduring association with genetic lineage: "The quality,

27. *United States v. Windsor*, 570 U.S. 744, 745–46 (2013) (noting that the "'regulation of domestic relations' is 'an area that has long been regarded as a virtually exclusive province of the States'") (quoting Sosna v. Iowa, 419 U.S. 393, 404 (1975)).

28. *See* Douglas NeJaime, *Who is a Parent?*, 43 FAM. ADVOC. 6, 6–7 (2021).

29. *See* UNIF. PARENTAGE ACT §§ 606–612 (UNIF. L. COMM'N 2017); *see generally* Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L. J. F. 589 (2018) (addressing the revisions made to the Uniform Parentage Act and how these revisions address many of the critical gaps in parentage law). *See also* Carbone & Cahn, *supra* note 19, at 14–15 (noting that the determination of legal parentage under contemporary state laws stems from a foundation of biology, function, and "formalities").

30. GUGGENHEIM, *supra* note 20, at 20 ("[A] myriad of legally significant consequences follow from the formal recognition of parenthood."). Third parties, such as guardians or grandparents, may be able to obtain certain limited rights and powers with respect to a child, but they retain their "non-parent" status at all times.

31. *See* Carbone & Cahn, *supra* note 19, at 14 ("Legal parents are those adults upon whom the law confers recognition, imposes financial obligations, and grants standing to seek visitation and custody.").

32. *See* Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 647–49 (2014).

state, or condition of being a parent; kindred in the direct ascending line.[33]

The contemporary legal conceptualization of "parental rights" is likely related to the evolution of what some have noted as the "rise of the individual" as having a distinct legal status and the corresponding decline of the "family" as having such status.[34] This trend over the last hundred years or so is marked by the recognition—through a series of landmark U.S. Supreme Court cases—of a fundamental liberty interest in an individual's exercise of their role as a parent.[35] Court opinions in the first half of the twentieth century confirmed that the Due Process Clause of the Constitution protects that interest when there is unwanted state intrusion in the family, for example, in enforcing child labor laws.[36] With recognition of this constitutional protection, obtaining and retaining the legal status of parent takes on greater import.[37] As Professor Dana Purvis has observed: "Once the status of legal parent is recognized, it is a profoundly powerful position."[38]

To some extent, family law has also increasingly recognized children as individuals who may themselves have "legal rights as against their own mothers and fathers."[39] The state is limited in its ability to enforce a child's "rights," however, because, as Professor Lawrence Friedman observes: "Law and society clearly recognize that in general the rights of parents are sacred . . . Parental rights are constitutionally protected."[40] Some commentators have noted that "robust protection of parental rights also advances society's interests

33. *Parentage*, BLACK'S LAW DICTIONARY (11th ed. 2019).

34. *See* LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 1 (Harvard Univ. Press 2004).

35. *See* GUGGENHEIM, *supra* note 20, at 18 ("The subject of parental rights has been profoundly shaped by the Constitution of the United States, even though neither the word 'parent' nor 'child' appears anywhere in it.").

36. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (finding no violation of parents' liberty interest in enforcing child labor laws regarding children of Jehovah's Witnesses); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that compulsory public school attendance was a violation of parents' liberty interest); Meyer v. Nebraska, 262 U.S. 390, 399, 402–03 (1923) (holding that law prohibiting teaching children foreign language was a violation of parents liberty interest). *See also* GUGGENHEIM, *supra* note 20, at 25–27.

37. *See* Purvis, *supra* note 32, at 680.

38. *Id.* at 649.

39. FRIEDMAN, *supra* note 34, at 97. *See generally* GUGGENHEIM, *supra* note 20 (arguing that children's rights can serve as a screen for the interests of adults).

40. FRIEDMAN, *supra* note 34, at 97.

. . . [by] ensuring that parents discharge their obligations adequately."[41] Nonetheless, as discussed herein, many jurists are hesitant to make parents' constitutionally protected interests the predominant consideration in either public dependency proceedings or intra-family disputes, and those interests are too frequently subordinated to the questionably determined consideration of a child's "best interest."

B. Defining "Termination of Parental Rights"

"Termination of parental rights" refers, in this Article, to the permanent severing of the legal relationship between a parent and child: that is, to the undoing of legal parentage, for all purposes, throughout the life of both. The parent forever loses their legal status as a parent to that child and all the privileges and rights that flow therefrom.[42] These rights and privileges include the standing to petition the court to have access to the former child or to exercise some role in their life.[43] It means losing not only the prospect of contact rights, but, also, the status to make or participate in decisions about the

41. Clare Huntington & Elizabeth S. Scott, *Conceptualizing Legal Childhood in the Twenty-First Century*, 118 MICH. L. REV. 1371, 1417 (2020).

42. Some states permit former parents (or the state CPS agency) to petition a court to reinstate the parent's rights after termination. But such laws, where they exist, strictly limit the circumstances under which this can occur, and generally only when the termination occurred in a dependency case and the child was never adopted. Thus, it is not likely to be a remedy in the contexts in which a parent's rights are terminated as the result of private action. Where reinstatement is not permitted, some former parents seek to adopt their own former children. *See generally* Lashanda Taylor Adams, *Backward Progress Toward Reinstating Parental Rights*, 41 N.Y.U. REV. L. & SOC. CHANGE 507 (2017) (examining how bias against parents whose rights have been terminated is reflected in reinstatement statutes); Child Welfare Info. Gateway, *Reinstatement of Parental Rights*, https://www.childwelfare.gov/topics/permanency/reunification/parental-rights/ (last visited Mar. 26, 2022).

43. The Idaho termination statute includes as a ground that the termination would serve the best interest of the child and the parents. IDAHO CODE ANN. § 16-2005 (West 2021). However, an Idaho appeals court has held that a court need not find that a termination is in the best interest of a parent in every case. Hofmeister v. Bauer, 719 P.2d 1220, 1222 (Idaho Ct. App. 1986). The court reasoned: "The notion that involuntary termination benefits the parent causes us some disquietude. Parenthood confers long-term benefits of comfort and support that ordinarily outweigh the immediate demands of childrearing. *Even a parent of limited capability may be aggrieved by the loss of these potential benefits.* We cannot indulge in a facile assumption that a mother who neglects her children is better off without them." *Id.* (emphasis added).

child's upbringing, including their education, religion, and medical care.[44]

A termination order can also mean that a child no longer has the protections and benefits that accompany a legal tie to the former parent, including, in most cases, ongoing child support.[45] Where a parent-child legal relationship exists, it continues into adulthood in terms of inheritance,[46] priority for appointment of an adult guardian or conservator, hospital visitation, and countless other contexts where such next-of-kin legal relationship confers access and authority.[47]

By extension, these legal consequences from termination may also have a direct impact on the child's identity and relational rights. Research of the public child protection system has demonstrated the negative psychological effects on children from losing a parent, even one with whom they had only sporadic contact or who was neglectful

44. *See* Marcus, *supra* note 22, at 583–84.

45. *See, e.g.*, State Dep't of Hum. Servs. ex rel. Overstreet v. Overstreet, 78 P.3d 951, 955 (Okla. 2003) (holding that "termination of parental rights also terminates parental duties" consistent with the approach of a majority of states); Beasnett v. Arledge, 934 So. 2d 345, 348 (Miss. Ct. App. 2006) (holding that "it is an inherent aspect of voluntary termination of parental rights that, just as the entire parent-child relationship terminates, so too does the responsibility to pay child support"); *but see* Ex parte M.D.C., 39 So. 3d 1117, 1120 (Ala. 2009) (holding that "a parent's obligation to pay child support is not extinguished under the CPA when the parent's parental rights are terminated"). *Cf.* Monmouth Cnty. Div. of Soc. Servs. for D.M. v G.D.M., 705 A.2d 408, 410, 412 (N.J. Super. Ct. Ch. Div. 1997) (holding that a private agreement between two parent to terminate the rights of one was void on the basis of public policy, in part of because of a parent's duty of child support). A termination order usually does not terminate a child support debt accrued prior to the termination, and some statutes preserve a terminated parent's ongoing obligation to pay child support, such as where the child was conceived from a sexual assault. ARK. CODE ANN. § 9-10-121(d) (West 2021).

46. Some statutes specifically preserve a child's right to inherit from a parent whose rights were terminated. *See, e.g.*, § 9-10-121(d); Demetrius L. v. Joshlynn F., 365 P.3d 353, 357 (Ariz. 2016). *See* Richard Lewis Brown, *Undeserving Heirs?—The Case of the "Terminated" Parent*, 40 U. RICH. L. REV. 547, 549 (2006).

47. *See* Marcus, *supra* note 22, at 588–604 (discussing symbolic and legal implications of the fact that "[p]arenthood is conceived [of] as a status for life and beyond"). For example, under many states' laws, a parent would be in line of priority for the appointment as the guardian or conservator of an adult child. *See* Nina A. Kohn, *Matched Preferences and Values: A New Approach to Selecting Legal Surrogates*, 52 SAN DIEGO L. REV. 399, 405–06 (2015).

in some way.[48] Further, unless a court order or statute provides otherwise, an order terminating a parent's relationship to a child also severs the child's legal relationship with all other relatives of the terminated parent, including their grandparents, aunt and uncles, and even their siblings.[49] In some instances, the child may continue to have contact with the former relatives—either informally or through an "open adoption" arrangement—but that is not always the case, and there are usually limitations on the enforceability of such arrangements.[50]

The termination of a parent's rights differs from the appointment of a legal guardian for their child, the child's placement in foster care, or an award of exclusive parental rights and responsibilities regarding the child to another parent. All of these allow an estranged or noncustodial parent to seek relief from the courts, based on changed circumstances, to increase their rights and access to the child.[51] By contrast, as Justice Blackmun wrote in *Santosky v. Kramer*: "Termination denies the natural parents physical custody, as well as the rights ever to visit, communicate with, or regain custody of the child . . . [T]erminating parental rights is *final* and irrevocable. Few forms of state action are both so severe and so irreversible."[52] The Supreme Court of Ohio recently referred to termination of parental rights as "the family law equivalent of the death penalty."[53]

Although there are several routes—some quite simple and others requiring more effort—to *establishing* legal parentage, termination

48. *See* GUGGENHEIM & SANKARAN, *supra* note 12, at 311–14; Pamela Laufer-Ukeles, *The Relational Rights of Children*, 48 CONN. L. REV. 741, 762–68 (2016); Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 461–74 (1983).

49. *See* M.L.B. v S.L.J., 519 U.S. 102, 121 (1996) ("In contrast to loss of custody, which does not sever the parent-child bond, parental status termination is 'irretrievably destructive' of the most fundamental family relationship.") (citing Santosky v. Kramer, 455 U.S. 745, 753 (1982)). *See also* GUGGENHEIM, *supra* note 20, at 37 (discussing how "parental rights doctrine" should be seen more broadly to include the protection of children's relationships with their parents and family).

50. *See* JOAN HEIFETZ HOLLINGER, *Overview of Legal Status of Post-Adoption Contact Agreements*, *in* FAMILIES BY LAW: AN ADOPTION READER 159–62 (Naomi R. Cahn & Joan H. Hollinger eds., 2004); HUNTINGTON, *supra* note 24, at 85–86, 130.

51. *See* Garrison, *supra* note 48, at 445; LINDA D. ELROD, CHILD CUSTODY PRACTICE AND PROCEDURE, § 17:01 (1994) ("In all states custody awards are modifiable to protect and further the best interests of a child.").

52. Santosky v. Kramer, 455 U.S. 745, 749, 759 (1982).

53. *In re* Adoption of Y.E.F., 171 N.E.3d. 302, 310 (Ohio 2020).

can only occur through a court's order pursuant to state law.[54] As Professor Huntington notes: "Just as the state decides when a parent-child relationship begins, it also decides when it ends . . . In this way, the state can end a parent-child relationship, both with the parent's permission and without it."[55] As a result of the constitutional dimensions of one's status as a parent, once parentage is attained, it cannot be easily removed, at least in theory. Huntington explains: "[T]he law places legal parents in the most privileged position vis-a-vis children, and many of these rights are rooted in the Constitution and thus highly protected. The most fundamental protection is that children cannot be taken away from a legal parent without showing that the parent is unfit."[56]

Historically, the legal mechanisms to terminate parentage have the same original purpose as the mechanisms for its establishment: the clarification of legal relationships between individuals. While there is nothing new about children being raised by people other than their genetic parents, until recent decades there was little need or drive to sever the legal ties with the child's original parents to enable such arrangements.[57] Today, although parental rights are still recognized as constitutionally protected interests, termination of those rights in a range of contexts is remarkably common, especially for families of color through the public family regulation system.[58]

C. Distinguishing "Public" Versus "Private" Termination of

54. *See M.L.B.*, 519 U.S. at 116 n.8 ("[N]o power other than the State can" issue an "official decree extinguishing . . . parent-child relationships"); *In re* A.J.S., 492 S.W.3d 674, 676 (Mo. Ct. App. 2016) ("[T]he power of the State to terminate the parental rights of a parent are strictly construed and derive solely from the statute. There is no common law right of a parent to just terminate the parental rights of the other parent.").

55. HUNTINGTON, *supra* note 24, at 59.

56. *Id.* at 61.

57. *See* MASON, *supra* note 2, at 109; FRIEDMAN, *supra* note 34, at 101.

58. *See* DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 150–51 (2002); Christopher Wildeman et al., *The Cumulative Prevalence of Termination of Parental Rights for U.S. Children, 2000–2016*, 25 CHILD MALTREATMENT 32, 39–40 (2020); Christina White, *Federally Mandated Destruction of the Black Family: The Adoption and Safe Families Act*, 1 NW. J. L. & SOC. POL'Y 303, 313–27 (2006).

Parental Rights

As noted earlier, *private* termination actions are initiated by an individual rather than a public CPS agency in a dependency action.[59] The proceeding is "private" in the same sense as an express or implied "private right of action" in the context of enforcing one's civil rights.[60] While the court's decision to sever the parent's legal relationship is a form of state action,[61] the petitioning party seeking and obtaining the termination of parental rights is not the state family regulation system.[62] More significantly, in TPR proceedings, one or more individuals is seeking termination as a *private remedy* of some kind, that is, to obtain a benefit to that petitioner, rather than to serve a broad public interest, even if the applicable legal standard refers to "the best interest of the child."[63]

When a child's situation comes to the attention of a CPS agency, public employees, usually social workers, will investigate the concerns or allegations.[64] If they find indications of abuse or neglect,

59. I will refer to all child protection services (CPS) agencies as "the state" in this context.

60. *See, e.g.*, Caroline Bermeo Newcombe, *Implied Private Rights of Action: Definition, and Factors to Determine Whether a Private Action Will Be Implied from a Federal Statute,* 49 LOY. UNIV. CHI. L. REV. 117, 120 (2017) ("A private right of action allows a private plaintiff to bring an action based directly on a public statute, the Constitution, or federal common law.").

61. *See, e.g.*, *In re* Adoption of Y.E.F., 171 N.E.3d 302, 311 (Ohio 2020); *In re* Adoption of J.E.V., 141 A.3d 254, 261 (N.J. 2016).

62. *See, e.g.*, Barnes v. Gorman, 536 U.S. 181, 185 (2002) (discussing express and implied rights of action for disability discrimination claims). Permitting private citizens to sue an individual in order to obtain a court order depriving another person of their constitutional rights in a context normally reserved for the state, such as TPR, is somewhat analogous to the statutory scheme enacted by Texas in "Senate Bill 8," the anti-abortion law at the center of the pending U.S. Supreme Court litigation in *U.S. v. Texas* (Docket No. 21-588) and *Whole Women's Health v. Jackson* (Docket No. 21-463). That law enables private citizens to bring civil actions against and recover damages from abortion providers and others who are found to violate the state's ban on abortions after six weeks of pregnancy. This approach is seen by some commentators as a troubling new variation on private enforcement actions. *See* Jeannie Suk Gersen, *The Manifold Threats of the Texas Abortion Law*, THE NEW YORKER (Sept 5, 2021), https://www.newyorker.com/news/our-columnists/the-manifold-threats-of-the-texas-abortion-law. Private TPR actions differ in that the target of the claim is the individual whose rights would be compromised, whereas actions brought under SB8 are not filed against individuals seeking abortions.

63. *See, e.g.*, CAL. PROB. CODE § 1516.5 (West 2021); see also *infra* notes 259–272 and accompanying text.

64. *See* Josh Gupta-Kagan, *America's Hidden Foster Care System*, 72 STAN. L. REV. 841, 843 (2020).

or a significant risk of the same, the agency may take any of a wide range of actions based on an assessment of the situation.[65] At the least severe end of the spectrum, they may refer the family to social services or develop a safety plan to address a specifically identified problem.[66] At the other end, the agency may initiate a dependency proceeding in state court and, if warranted, seek a court order to remove the child from the parents' home and place the child in foster care or another form of state custody.[67]

The aim of state public dependency proceedings—as set by federal child welfare laws—is to arrive at some kind of a "permanency" outcome that ends the child's dependence on the state and the court sooner rather than later.[68] Under federally-guided policy principles, the preferred outcome is the child's reunification with the parent.[69] Accordingly, a CPS agency is required to use "reasonable efforts to restore children to the family after removal," including the provision of supports and services targeted to the family's needs.[70]

Under federal policy, where reunification cannot be achieved after removal of the child from the family, the next ideal permanency outcome is adoption,[71] which requires severing the child's legal

65. *See id.*

66. *See id.* 848–54.

67. *See* Elizabeth Fassler & Wanjiro Gethaiga, *Representing Parents During Child Welfare Investigations: Precourt Advocacy Strategies*, 30 ABA CHILD. L. PRAC. 17, 24 (2011); NAT'L CONF. OF STATE LEGISLATURES, *The Child Welfare Placement Continuum: What's Best for Children?* (Nov. 3, 2019), https://www.ncsl.org/research/human-services/the-child-welfare-placement-continuum-what-s-best-for-children.aspx.

68. *See* 42 U.S.C. § 675(5)(E) (2018); Jim Moye & Roberta Rinker, *It's A Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?* 39 HARV. J. ON LEGIS. 375, 380 (2002). Federal mandates enacted through the 1997 Adoption and Safe Families Act require that a permanency plan is put in place before the child has been in state custody for fifteen out of the previous twenty-two months, with a few exceptions.

69. GUGGENHEIM & SANKARAN, *supra* note 12, at xxii ("[T]he state's purpose in virtually all [child protection] cases is to help families find ways to be able to raise their children safely.").

70. MASON, *supra* note 2, at 155.

71. *See* Garrison, *supra* note 48, at 442–46. The Adoption and Safe Families Act of 1997 imposes requirements that promote adoption, not reunification, as a permanency outcome, which can undermine the efficacy of reunification efforts in many instances. *See* Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637, 643–73 (1999).

relationship with their existing parents.[72] Because such severing would deprive each parent of a constitutionally protected interest, if one of the parents does not consent to the adoption, the state must bring a TPR petition.[73] In these instances, the state, acting pursuant to its *parens patriae* authority, asks the court to terminate one or more person's parental rights in the name of child welfare, "freeing" the child for adoption.[74] Importantly, the court may grant the petition only if the state has proven parental unfitness, usually by clear and convincing evidence.[75]

In the "private" TPR context, by contrast, there is no formal role for a state agency in the proceeding even though there may have been a CPS investigation or involvement in the family in the recent past.[76] In some states, the court may order a public CPS agency to do an assessment or play some other limited role,[77] but the agency is not the driving force behind the TPR petition. Rather, the petition is filed by one or more private individuals. Most commonly, the petitioner is the child's other parent, either acting alone to seek exclusive parental rights over the child or acting jointly with the parent's new partner who wishes to adopt the child.[78] Alternatively, such a private petition may be brought by a child's legal guardian or another person in the context of a contested adoption.[79]

Clearly, these privately initiated proceedings involve a set of competing interests differing from those in the public dependency context. Here, the case is a fight between or among individual adults seeking their own status and authority with respect to a child, rather

72. *See infra* notes 259–428 and accompanying text.

73. GUGGENHEIM & SANKARAN, *supra* note 12, at 305–06.

74. *Id.*

75. *See id.* at 293–96, 307–08. There need not be an identified adoptive family in order to grant a petition for TPR. In some instances, a child will continue to be a state "ward" for some period of time after the TPR, potentially the remainder of their minority. Garrison, *supra* note 48, at 475–76.

76. *See, e.g.*, Darla D. v. Grace R., 382 P.3d 1000, 1004 (N.M. Ct. App. 2016); In the Interest of L.F., No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at 2–3 (Tex. Ct. App. May 7, 2020); Zockert v. Fanning, 800 P.2d 773, 777–78 (Or. 2000); Gupta-Kagan, *supra* note 64, at 852–60 (discussing the "hidden foster care system" through which a family changes a child's residence as a result of a CPS agency's threat of more formal intervention in the family).

77. *See, e.g.*, E.K. v. TA., 572 S.W.3d 80, 84 (Ky. Ct. App. 2019).

78. *See, e.g.*, *In re* Adoption of K.L.P., 735 N.E.2d 1071, 1073 (Ill. App. Ct. 2000).

79. *See, e.g.*, *In re* Guardianship of Robert S., No. F060073, 2011 WL 2152626, at *2 (Cal. Ct. App. June 2, 2011).

than the state acting against an individual pursuant to its *parens patriae* authority to protect children.[80] In private termination proceedings, the court's role is akin to that in contested child custody cases, including third-party proceedings: awarding relief to individuals while ensuring that the result is in the child's best interest.

In private TPR litigation, the absence of the state and of the constituent obligations that accompany its presence can have a substantial impact on the proceedings and outcome. As discussed in Part IV below, some courts conclude that unless the TPR litigation can be considered a form of "state action," fewer procedural protections, including the right to appointed counsel,[81] need to be afforded the parents involved.[82] Further, petitions brought by individuals are not required to comply with federal policy goals of family preservation.[83] A person's parental rights can be severed without any showing of

80. Some states permit a public dependency proceeding to be converted to a private TPR action by individuals who have been awarded custody of the child. *See, e.g.*, A.F. v. L.B., 572 S.W.3d 64, 67 (Ky. Ct. App. 2019); *In re* L.C.R., 739 S.E.2d 596, 597 (N.C. Ct. App. 2013). *See also* GUGGENHEIM, *supra* note 20, at 48–49 ("One of the most deeply contentions issues in American family law a struggle among adults over who gets the bundle of rights parents possess . . . Precisely because of the extraordinary authority over children that the law cedes to parents, it is exceedingly important to ascertain who gets to be counted as a 'parent' under the law and who, as a result, obtains the bundle of rights that parents enjoy.").

81. *See, e.g., In re* G.J.P., 314 S.W.3d 217, 219, 222–24 (Tex. App. 2010) (father had appointed counsel in a dependency TPR proceeding but lost that right when the proceeding was converted into a private TPR action brought by grandparents).

82. *See, e.g.*, *In re* K.L.P. v. R.P., 763 N.E.2d 741, 753 (Ill. 2002) (holding that a parent's right to counsel in private TPR matter stemmed from the "significant state action" from the child's initial placement with a non-parent by a CPS agency); A.W.S. v. A.W., 2014 MT 332, ¶ 17–18, 337 Mont. 234, 339 P.3d 414; *compare with In re* Adoption of Y.E.F., 171 N.E.3d. 302, 311 (Ohio 2020) (noting that private TPR is still state action because "only the state has the power to extinguish the parent-child relationship"). *See infra* notes 235–256 and accompanying text.

83. *See, e.g.*, 25 U.S.C. § 1912(d) (2018). The federal Indian Child Welfare Act (ICWA) requirements, however, apply in all termination proceedings involving parental rights "to an Indian child." The broad language of that statute provides: "[a]ny party seeking to effect . . . termination of parental rights to, an Indian child under State law shall satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful." *Id.* S*ee also* S.S. v. Stephanie H., 388 P.3d 569, 573–74 (Ariz. Ct. App. 2017) (applying ICWA in a TPR case between parents based on allegations of abandonment).

failed efforts to reunify or repair the relationship between that parent and their child.[84]

II. THE CONTEXTS IN WHICH A PARENT'S RIGHTS CAN BE TERMINATED WITHOUT DIRECT STATE INVOLVEMENT

This Part will provide a brief overview of the contexts in which the termination of parental rights can happen outside of state-initiated dependency proceedings. The predominant one is adoption, which can involve either voluntary or involuntary termination of a parent's rights in the context of the proceeding. Some state laws—or courts' interpretations of the same—allow a parent or other private individual to file a termination petition outside of the adoption context, usually under specific circumstances, such as when a child was conceived from a sexual assault.[85]

A. Termination as Part of Adoption Proceedings

The most common context in which a parent's rights may be terminated outside of a public dependency proceeding is adoption. A person can seek to adopt another person in a range of scenarios. There may be an arrangement made at or before the child's birth that someone other than the child's genetic parents will raise the child. Alternatively, the spouse or partner of a child's existing parent may seek to establish a formal legal relationship with a child for any number of reasons.[86] A child's guardian or other long-term caregiver may seek to adopt the child.[87] In all contexts, an adopting parent is replacing an existing parent.[88]

84. *See, e.g.*, A.K.H. v. J.D.C., 619 S.W.3d 425, 431 (Ky. Ct. App. 2021); Darla D. v. Grace R., 2016-NMCA-093, ¶ 56, 382 P.3d 1000; *In re* Caroline, 638 N.Y.S.2d 997, 999–1000 (N.Y. App. Div. 1996).

85. *See, e.g.*, ALASKA STAT. ANN. § 25.23.180 (West 2021); N.H. REV. STAT. ANN. § 170-C:5-a (2021); IND. CODE ANN. § 31-35-3.5-3 (West 2021).

86. 1 THOMAS A. JACOBS, CHILDREN AND THE LAW: RIGHTS & OBLIGATIONS § 4:50 (2018); Margaret M. Mahoney, *Family Boundaries: Symposium on Third-Party Rights and Obligations with Respect to Children, Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 88–89 (2006).

87. *See* Guardianship of Ann S., 202 P.3d 1089, 1094–95, 1104, 1106–07 (Cal. 2009); *see also In re* Adoption of L.E., 2012 ME 127, 5–6, 56 A.3d 1234, 1236.

88. BARBARA ANN ATWOOD, CHILDREN, TRIBES, AND STATES: ADOPTION AND CUSTODY CONFLICTS OVER AMERICAN INDIAN CHILDREN 143 (2010); Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1125 (2003); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506–07 (1998) (noting that adoption creates a new family unit while "annihilat[ing] the pre-existing unit").

By operation of law, an adoption severs the legal relationship between any existing parent and the adoptee, unless the existing parent is an adoption co-petitioner or, under some state laws, married to the petitioner.[89] Adoption "create[s] a new family and destroy[s]—obliterate[s]—the old one."[90] For this reason, the status of existing parents and the impact of any adoption on their rights must be addressed before the adoption is finalized.[91] State laws take a few different approaches to this inquiry, but they all operate in essentially similar ways and with similar outcomes.[92]

Adoption laws have long recognized that, so long as the parent retains some residual rights, they have standing to refuse to consent to the child's adoption.[93] A parent may consent to the adoption of their child, allowing the adoption to sever their legal relationship with the adoptee upon the issuance of the adoption decree.[94] Such consent must be knowing, informed, and intentional because of the constitutional rights implicated.[95] An existing parent may not only consent to another person's adoption of their child, but also join the adoption petition, essentially becoming an adopting parent themselves so that the severance has no actual effect on their rights.[96] This can occur in an

89. *See, e.g.*, Wright v. Howard, 711 S.W.2d 492, 495 (Ky. Ct. App. 1986) ("[T]he adoption judgment itself terminates parental rights by virtue of the provisions of" the adoption statute).

90. FRIEDMAN, *supra* note 34, at 115. *Cf.* Rybolt v. Brooks, 884 N.E.2d 931, 937 (Ind. Ct. App. 2008) (affirming denial of grandparents' petition to adopt child because of likelihood of continued contact with former parents and noting "It is well known that one of the purposes of adoption is 'to assure that the severance of family ties by adoption be complete so as to protect the 'new family union which the law had created.'") (quoting Handshoe v. Ridgway, 870 N.E.2d 517, 521 (Ind. Ct. App. 2007)).

91. *See* JENNIFER FAIRFAX, ADOPTION LAW HANDBOOK: PRACTICE, RESOURCES, AND FORMS FOR FAMILY LAW PROFESSIONALS 138–40 (2011); Joan Heifetz Hollinger, *State and Federal Adoption Laws, in* FAMILIES BY LAW: AN ADOPTION READER 37, 38 (Naomi R. Cahn & Joan H. Hollinger eds. 2004).

92. *See* FAIRFAX, *supra* note 91, at 138.

93. Cahn, *supra* note 88, at 1118–26 ("The necessity of parental consent to adoption was a critical component in the early adoption statutes.").

94. FAIRFAX, *supra* note 91, at 146. Although a parent may consent to the termination of their rights through adoption, a parent may not initiate a proceeding to sever their legal relationship to a child. *See* Marcus, *supra* note 22, at 610.

95. *See* FAIRFAX, *supra* note 91, at 147.

96. *See* Mahoney, *supra* note 86, at 89–90.

adoption by the existing parent's spouse or partner, which I will refer to generally in this Article as "stepparent adoption."[97]

If one of a child's existing parents does not consent to the adoption, a court may allow the adoption to proceed only if that parent's status is addressed through formal adjudication, based on that state's adoption law.[98] States take two different routes to enable an adoption to proceed in the absence of a parent's consent. The court may determine that the parent's consent is unnecessary or has been waived by the parent due to their actions or inactions with respect to the child, most commonly "abandonment" or a failure to support the child.[99] A court's finding dispensing with the need for the parent's consent allows the adoption to be finalized, severing that parent's relationship with their child when the adoption decree is issued.[100]

Alternatively, a state's law may require an adoption petitioner to petition the court to terminate the non-consenting parent's rights as a predicate to the adoption.[101] If the petition to terminate is granted, the former parent loses any power to consent or object to the adoption because they no longer have legal status as a "parent." In this Article, I will refer to both routes as "termination" because, even if the adjudication paths differ somewhat, the legal effect is identical.[102]

Parental consent to adoption is related to the development of requirements for a "putative" father to be recognized as the legal father

97. *See, e.g.*, Adoption of Isabelle T., 2017 ME 220, 175 A.3d 639, 646 (Me. 2017); Adoption of I.M., 180 Cal. Rptr. 3d 818, 820–21, 823 (Cal. Ct. App. 2014); A.J. v. K.A.O., 951 So. 2d 30, 32 (Fla. Dist. Ct. App. 2007).

98. *See* MASON, *supra* note 2, at 150; *see also* JACOBS, *supra* note 86, at § 4:05.

99. *See, e.g.*, Copeland v. Todd, 715 S.E.2d 11, 16–17 (Va. 2011); Dale Margolin Cecka, *Terminating Parental Rights Through a Backdoor in the Virginia Code: Adoptions Under Section 63.2-1202(H)*, 48 U. RICH. L. REV. 371, 371–73 (2013). *See infra* notes 132–153 and accompanying text.

100. *See generally* JOAN HEIFETZ HOLLINGER, ADOPTION LAW AND PRACTICE § 2.10 (describing exceptions to the requirement of parental consent); 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES § 14:14 (3d ed. 2009).

101. *See, e.g.*, MICH. COMP. LAWS ANN. § 710.51 (West 2021) ("If the parents of a child are divorced, or if the parents are unmarried but the father has acknowledged paternity or is a putative father who meets the conditions in section 39(2) of this chapter, and if a parent having custody of the child according to a court order subsequently marries and that parent's spouse petitions to adopt the child, the court upon notice and hearing may issue an order terminating the rights of the other parent . . ."). *See also* HOLLINGER, *supra* note 100, at § 4.04[1]; *see also* A.K.H. v. J.D.C., 619 S.W.3d 425, 431 (Ky. Ct. App. 2021) (noting distinction between terminating a parent's rights in a specific proceeding and permitting an adoption to proceed without a parent's consent).

102. HOLLINGER, *supra* note 100, at § 4.04[1][d].

of a child. If a man is precluded from establishing his parental rights, then his consent to adoption is not needed.[103] In their historical overview of adoption, Christine A. Adamec and Laurie C. Miller observe that, before the 1972 U.S. Supreme Court opinion in *Stanley v. Illinois*:

> [N]o consideration was given to the desires of a birthfather not married to a child's birthmother. If the birthmother chose adoption for "her" child, then the adoption could go forth.
>
> After the *Stanley* decision and several other subsequent U.S. Supreme Court decisions, states passed a variety of laws designed to protect the paternal rights of the birthfather.[104]

As it became easier for a man to claim parental rights as an unmarried father, however, an expanding number of adoption petitioners were in the position of needing a route to ask a court to terminate a father's rights if he did not consent to the adoption.[105] As described by Adamec and Miller: "Today, a crazy quilt of laws nationwide provide for what actions, if any, must be taken" to address the need for consent by unmarried fathers.[106]

The "crazy quilt" characterization applies to all aspects of termination in the context of adoption, as states have varied approaches to the proceedings.[107] But the objective of any route is the same: insuring that a parent is unable to block their child's adoption by withholding their consent.

103. *See, e.g.*, *In re* Adoption of J.E.V., 141 A.3d 254, 260 (N.J. 2016); *In re* Adoption of Tobias D., 2012 ME 45, ¶ 10, 40 A.3d 990, 993–94.

104. Christine A. Adamec & Laurie C. Miller, *Brief History of Adoption*, *in* THE ENCYCLOPEDIA OF ADOPTION, at xxxii (3d ed. 2007).

105. *See* Serena Mayeri, *Foundling Fathers: (Non-)Marriage and Parental Rights in the Age of Equality*, 125 YALE L.J. 2292, 2334–35 (2016) (discussing the impact of *Stanley* on adoption practice).

106. Adamec & Miller, *supra* note 104, at xxxii.

107. Some laws include termination or dispensing with the need for consent as procedural step within the adoption proceeding itself. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(b)(1) (Deering 2021) ("Terminate the rights of the parent or parents and order that the child be placed for adoption and, upon the filing of a petition for adoption in the juvenile court, order that a hearing be set. The court shall proceed with the adoption after the appellate rights of the natural parents have been exhausted."), while others set the termination and adoption as separate proceedings. *See, e.g.*, *In re* A.A.B., 2016 SD 22, ¶ 4–5, 877 N.W.2d 355, 358.

B. Termination Petitions Filed by One Parent Against Another

A less common context for termination of parental rights outside of public dependency proceedings is when one parent seeks to obtain exclusive parental rights to the child by terminating the rights of another parent from whom they are separated. In these contexts, rather than replacing an existing parent with a "new" parent through an accompanying adoption, the termination proceeding only eliminates the parental status of one of a child's parents.[108] There is even greater variation among courts for this kind of termination proceeding than in adoption contexts, and many states do not permit private termination of parental rights outside of the adoption context at all.[109]

Courts generally construe termination statutes strictly; if there is no basis to find jurisdiction over a petition for private termination brought by a parent or other individual, a court will likely reject the petition.[110] For example, in states where a TPR statute refers only to the state as a potential petitioning party, courts will not allow parents or any private parties to initiate such proceedings.[111] Similarly, if such a statute includes clear categories of petitioners, including private parties, but does not include parents among them, a court will construe such categories as excluding parents and reject a parent's termination petition.[112]

For example, in a 2014 opinion in a termination action brought by a child's mother, the Montana Supreme Court held that that state's TPR statute allowed termination only in the context of an adoption or in a proceeding initiated by the state.[113] Similarly, a Louisiana appeals court noted prior authority interpreting that state's TPR statute narrowly to hold: "[T]here is no private right of action to terminate another parent's parental rights, and there are no circumstances under

108. However, court opinions reveal that parents often bring these petitions as a precursor to a stepparent adoption. *See, e.g.*, Demetrius L. v. Joshlynn F., 365 P.3d 353, 354–55 (Ariz. 2016).

109. HARALAMBIE, *supra* note 100, at § 13:4. *See, e.g.*, *In re* Termination of Parental Rights of P.A.M., 505 N.W.2d 395, 397–98 (S.D. 1993).

110. *See, e.g.*, *In re* John, 605 A.2d 486, 488 (R.I. 1992).

111. *See, e.g.*, *In re* A.J.S., 492 S.W.3d 674, 676 (Mo. Ct. App. 2016); Bergsing v. Cardona, 2014 MT 237, ¶14, 377 Mont. 270, 274, 339 P.3d 824, 827. *Cf.* D.S. v. R.S., 717 N.E.2d 557, 560 (Ill. App. Ct. 1999) (noting that while statute 705 ILL. COMP. STAT. ANN. 405 / 2 (West 1998) appears to permit a private party to file a termination petition, only the state may "prosecute" it).

112. *See, e.g.*, Osborn v. Marr, 127 S.W.3d 737, 740 (Tenn. 2004).

113. *See Bergsing*, 2014 MT at ¶ 11, 377 Mont. at 273, 339 P.3d at 826.

which one parent may file a petition to terminate the parental rights of another parent."[114] The court reasoned:

> Because termination of parental rights is recognized as one of the most drastic actions a state can take against a citizen . . . [a]bsent a clear indication from the Louisiana Legislature that one parent may seek to revoke the parental rights of the other parent . . . we decline to do so.[115]

Among those states that do allow one parent to petition to terminate the rights of another, some specifically include a child's parent among the categories of individuals who can bring a termination petition against a parent.[116] For example, Alabama amended its termination statute in 2009 to expand the list of those who can file a TPR petition to include not only public CPS or private adoption agencies but also: "[a] parent, child, or any interested person."[117] Similarly, in states with statutes that have broad standing language regarding termination petitions, some state court opinions interpret the categories of potential TPR petitioners to include parents or other individuals even if they are not expressly mentioned.[118] A

114. *In re* T.E.R., 43, 145, p. 6 (La. App. 2 Cir. 03/19/08); 979 So. 2d 663, 667. However, in a later opinion, a Louisiana appeals court recognized that a juvenile court has the discretion to appoint a private attorney to pursue a TPR action. State *ex rel*. C.E.K., 2017-0409, p. 8 (La. App. 4 Cir. 12/21/17); 234 So. 3d 1059, 1065.

115. *C.E.K*., 2017-0409 at p. 8, 234 So. 3d. at 1065.

116. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1103(a)(1) (West 2021); Thomas R. Young, *Termination of Parental Rights: Who May File a Petition*, *in* N.C. JUVENILE CODE PRACTICE & PROCEDURE § 3:8 (2021).

117. ALA. CODE § 12-15-317 (2021) ("The Department of Human Resources, any public or private licensed child-placing agency, *parent*, child, or any interested person may file a petition to terminate the parental rights of a parent or parents of a child.") (emphasis added). *See* IOWA CODE ANN. § 600A.5(1)(a) (West 2021) ("The following persons may petition a juvenile court for termination of parental rights under this chapter if the child of the parent-child relationship is born or expected to be born within one hundred eighty days of the date of petition filing: a. A parent or prospective parent of the parent-child relationship."). Like Alabama's law, some other state statutes appear to allow a child to be among the petitioners in a termination action. There is a dearth of caselaw on such petitions, but some practitioners have had success at least establishing the standing of children to seek termination of their parents' rights. *See also* HARALAMBIE, *supra* note 100, at § 13:4; Priscilla Day, *Should Children Be Able to Divorce Their Parents?*, 11 J. CONTEMP. LEGAL ISSUES 652, 653 (2000).

118. *See, e.g., In re* Austin T., 2006 ME 28, ¶ 4, 898 A.2d 946, 948 (holding that mother qualified as a "custodian of the child" and therefore had standing to bring

Florida statute provides that "any [] person who has knowledge of the facts alleged or is informed of them and believes that they are true" may bring a termination petition.[119]

Some states limit termination petitions filed by a parent to specific circumstances.[120] For example, Tennessee amended its TPR statute to permit one parent to file a termination petition against another under only three grounds: extreme child sexual abuse; conviction of rape resulting in the child's conception; or attempting to murder the petitioning parent.[121] As discussed further in the next part, many states permit one parent to petition to terminate the rights of another specifically where the child's conception resulted from a sexual assault.[122] Other states permit a parent to petition to terminate the other on the basis of abandonment or a failure to support the

a TPR petition against child's father); T.P. v T.W., 120 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2011). *See also* Ex parte Johnson, 474 So. 2d 715, 717 (Ala. 1985) ("[T]here is no logical reason to allow only the state to file a petition to have parental rights terminated. Why should a parent, who has direct knowledge and familiarity with a situation, be required to go to the state to obtain such a result, when it would be more direct for the parent to file the petition?").

119. FLA. STAT. ANN. § 39.802 (West 2021). *See also* CAL. FAM. CODE § 7841(a) (West 2021) ("An interested person may file a petition under this part for an order or judgment declaring a child free from the custody and control of either or both parents."); *T.P.*, 120 Cal. Rptr. 3d at 480–81 (interpreting such language to confer standing on mother to bring TPR petition against father). This language has nonetheless been interpreted strictly by Florida courts in "single-parent termination" cases. *See, e.g.*, *In re* A.L.R., 918 So. 2d 395, 399 (Fla. Dist. Ct. App. 2006) (vacating TPR order on petition brought a mother against the father based on several errors including not analyzing all of the statutory factors and also a lack of assessment of whether the context fit one of the enumerated circumstances under which "the parental rights of one parent may be severed without severing the parental rights of the other parent").

120. *See, e.g.*, ALASKA STAT. ANN. § 25.23.180 (West 2021); IND. CODE ANN. § 31-35-3.5-3 (West 2021); N.H. REV. STAT. ANN. § 170-C:5 (2021).

121. *See* TENN. CODE ANN. §§ 36-1–113 (West 2021); *see also* ALASKA STAT. ANN. § 25.23.180I(2) (West 2021) ("parent committed an act constituting sexual assault, sexual abuse of a minor, or incest").

122. *See, e.g.*, IND. CODE ANN. § 31-35-3.5-3 (West 2021) ("[I]f a child was conceived as a result of an act of rape, the parent who is the victim of the act of rape may file a verified petition with the juvenile or probate court to terminate the parent-child relationship between the child and the alleged perpetrator of the act of rape"). *See generally* Judith Lewis, *The Stability Paradox: The Two-Parent Paradigm and the Perpetuation of Violence Against Women in Termination of Parental Rights and Custody Cases*, 27 MICH. J. GENDER & L. 311 (2021) (examining how courts have interpreted parental rights statutes where a child is conceived as a result of rape).

child.[123] In many respects, these one-parent termination proceedings are "extreme" custody cases proceedings, in that they resemble custody disputes between parents in terms of the allegations and evidence but with far higher stakes.[124]

III. THE GROUNDS FOR PRIVATE TERMINATION OF PARENTAL RIGHTS

This part provides an overview of the statutory grounds on which a court may base a termination order against a parent in a case initiated by a private individual. Most state TPR laws require a two-step determination: first, there must be specific findings demonstrating the "unfitness" of the parent due to their conduct, condition, or circumstances;[125] second, there must be a specific finding that the termination of that parent's rights would be in the best interest of the child.[126] Such findings, as a matter of constitutional law, must be based on at least clear and convincing evidence.[127] The requirement of

123. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1111(a) (West 2021) (allowing a parent awarded legal custody of a child to petition to terminate the rights of another parent who "has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, and education of the juvenile, as required by the decree or custody agreement."); IOWA CODE ANN. § 600A.8 (West 2021).

124. *See, e.g., In re* A.L.R., 918 So. 2d 395, 397 (Fla. Dist. Ct. App. 2006) (vacating termination order in case filed by one parent against another when trial court treated proceedings as a custody matter); S.S. v D.L., 944 So. 2d 553, 557 (Fla. Dist. Ct. App. 2007) (noting that TPR cases filed by divorced parents "invit[e] caution to avoid second challenges to custody determinations"). *See generally* D. Marianne Brower Blair, *Parent-Initiated Termination of Parental Rights: The Ultimate Weapon in Matrimonial Warfare*, 24 TULSA L. J. 299 (1988) (examining parent-initiated proceedings to terminate the parental rights of the other parent and how such proceedings are conducted in Oklahoma).

125. *See, e.g.*, COLO. REV. STAT. ANN. § 19-5-105 (West 2021) (listing several different grounds for TPR in adoption context).

126. *See, e.g., In re* A.U.D., 832 S.E.2d 698, 700 (N.C. 2019) ("Our Juvenile Code provides for a two-stage process for the termination of parental rights—an adjudicatory stage and a dispositional stage . . . If a trial court finds one or more grounds to terminate parental rights under N.C.G.S. § 7B-1111(a), it then proceeds to the dispositional stage. N.C.G.S. § 7B-1110(a) states, in pertinent part, as follows: 'After an adjudication that one or more grounds for terminating a parent's rights exist, the court shall determine whether terminating the parent's rights is in the juvenile's best interest . . .'").

127. *See* Santosky v. Kramer, 455 U.S. 745, 768–70 (1982); Hofmeister v. Bauer, 719 P.2d 1220, 1224 (Idaho Ct. App. 1986) (applying clear and convincing evidence standard in private termination context and reasoning, "We see no reason

finding "unfitness" before consideration of a child's best interest reflects not only constitutional requirements[128] but also a policy determination that termination should be reserved only as a last resort, when a parent is found unable to function in the role of parent.

Laws concerning these requirements vary greatly across states in two important respects. First, they specify a wide range of grounds for a finding under the initial step in the analysis.[129] Second, while some state laws provide universal termination standards that apply in public dependency, adoption, and one-parent termination cases, other states have enacted standards that apply only in specific kinds of proceedings.[130] Where there is a universal standard or something close to that, a private termination case can be based on the same problematic grounds developed and applied in the public family regulation system. These grounds are effectively based on the stigmatization of substance use, poverty, disability, and incarceration, all of which have been employed against families of color in particular.[131] As discussed in Parts IV and V below, standards based on these grounds were developed to serve purposes different from those commonly seen in private termination cases and to be applied with different procedures.

A. Abandonment and Non-Support

From the case law, it appears that the most common grounds on which private termination petitions are based are abandonment, non-support, or other conduct that is deemed an abdication of the role as "parent." States describe "abandonment" in different ways.[132] For example, an Alabama law defines abandonment in the termination context as:

why the parental interest should receive less protection from the risk of fact-finding error in a 'private' termination case than in a 'public' case."). *But see* Guardianship of Ann S., 202 P.3d 1089, 1101–03 (Cal. 2009) (holding that a parent's rights can be terminated based only on "best interest of the child" grounds without running afoul of the constitution); *In re* H.J., 200 A.3d 891, 894 (N.H. 2018) (termination of parental rights requires findings "beyond a reasonable doubt").

128. *Santosky*, 455 U.S. at 760 n.10.

129. *See* HARALAMBIE, *supra* note 100, at § 13:7.

130. *See, e.g.*, ARK. CODE ANN. § 9-9-220 (West 2021) (permitting TPR in adoption "on any ground provided by other law for termination of the [parent-child] relationship"); CAL. FAM. CODE § 7822 (West 2021).

131. *See* ROBERTS, *supra* note 58, at 33–46.

132. *See* HARALAMBIE, *supra* note 100, at § 13:10.

> A voluntary and intentional relinquishment of the custody of a child by a parent, or a withholding from the child, without good cause or excuse, by the parent, of his or her presence, care, love, protection, maintenance, or the opportunity for the display of filial affection, or the failure to claim the rights of a parent, or failure to perform the duties of a parent.[133]

Statutes may require evidence of specific conduct (or inaction) for a court to infer that a person has intentionally foregone the rights and responsibilities of parenthood.[134] A statute may, for example, permit a finding of abandonment based on a parent's lack of contact or communication with the child.[135] Many statutes include specific time frames for a failure to have contact with the child without justifiable cause—some as short as six months—as prima facie evidence of abandonment.[136] Courts vary in terms of what they consider to be justifiable cause for the lack of contact,[137] such as interference by the petitioning parent.[138] In some cases, a parent had limited rights under an existing court order to visit the child, and such

133. ALA. CODE § 12–15–301(1) (2021).

134. *See, e.g.*, C.C. v. L.J., 176 So. 3d 208, 211 (Ala. Civ. App. 2015) ("[A] juvenile court may premise a finding of abandonment only upon evidence indicating that a parent voluntarily, intentionally, and unjustifiably committed the actions or omissions set out" in the statutory standard for abandonment); Darla D. v. Grace R., 2016-NMCA-093, 41, 382 P.3d 1000, 1012 ("Abandonment, in its purest form, requires a complete renunciation of responsibility."); *In re* Adoption of Female Child, No. 23229, 2003 Haw. App. LEXIS 189, at *7–8 (Haw. Ct. App. June 18, 2003) (noting requirement for "a separate inquiry into the parents' intent as evinced by such action or from the totality of circumstance" for a finding of abandonment).

135. *See, e.g.*, David S. v. Jared H., 308 P.3d 862, 868, 873 (Alaska 2013) (affirming TPR based on father's failure to "meaningfully communicate" with child for more than a year) (applying ALASKA STAT. ANN. § 25.23.050 (West 2021)).

136. *See, e.g.*, N.C. GEN. STAT. ANN. § 7B-1111(a)(7) (West 2021); ARIZ. REV. STAT. ANN § 8-531(1) (2021).

137. *See* Ainsworth v. Nat. Father, 414 So. 2d 417, 421 (Miss. 1982) (Lee, J., dissenting) (criticizing statutory definition of abandonment because "[t]he phrase, 'made no contact with a child under the age of three (3) for six (6) months or a child three (3) years of age or older for a period of one (1) year' is meaningless because as many explanations and excuses may be made to the reason for no contact within such short periods as there are broken homes").

138. *See David S.*, 308 P.3d at 868–73 (rejecting a number of arguments advanced by father to support justifiable cause for not communicating with his daughter for more than a year); *see also* Margaret Y. v. John Y., No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *5–8 (Ariz. Ct. App., Sept. 17, 2019) (rejecting mother's argument that father "alienated" children against her as the basis for her lack of contact).

terms may have been sought by the parent now petitioning to terminate the parent's rights.[139] How a court can assess a parent's true intent in such contexts is questionable. As discussed in Part IV.B, applying the concept of abandonment in the context of private TPR cases can be problematic when, unlike many public dependency cases, there is no predicate requirement of reunification services.[140]

A failure to provide financial support to the child can be evidence of abandonment or a distinct ground on which to terminate a parent's rights.[141] Many state laws set out a specific period of time for such non-support as a basis for the finding.[142] While some courts require a complete absence of payments to find non-support, some of these laws allow termination if a parent has not made *all* of the child support payments due under a court order, even if the parent had made some payments in the recent past.[143] A parent's ability to pay support is often considered by courts,[144] but the case law reveals little consideration of whether the parent had access to legal assistance to modify a child

139. *See, e.g.*, Calvin B. v. Brittany B., 304 P.3d 1115, 1120 (Ariz. Ct. App. 2013) ("A parent may not restrict the other parent from interacting with their child and then petition to terminate the latter's rights for abandonment."); *see also* S.S. v. Stephanie H., 388 P.3d 569, 576 (Ariz. Ct. App. 2017) (affirming dismissal of father's TPR petition against mother on the basis of abandonment where he obtained court orders precluding any contact between her and the children).

140. *See Margaret Y.*, 2019 Ariz. App. Unpub. LEXIS 1021, at *9.

141. *See* HARALAMBIE, *supra* note 100, at § 13:10.

142. *See id.; see also, e.g.*, OHIO REV. CODE ANN. § 3107.07(A) (West 2021) (failure "to provide for the maintenance and support of the minor as required by law or judicial decree for a period of at least one year" does not require the parent to consent to the adoption).

143. *See, e.g.*, GA. CODE ANN. § 15-11-310(a)(3) (2021) ("The parent has wantonly and willfully failed to comply for a period of 12 months or longer with a decree to support his or her child that has been entered by a court of competent jurisdiction of this or any other state."); *In re* Adoption of A.C.B., 159 Ohio St. 3d 256, 259, 2020-Ohio-629,150 N.E.3d 82, 85 ("Whether father has provided the necessary support under the statute [to avoid a finding of non-support] is measured by the terms of the judicial decree.").

144. *See, e.g.*, *In re* Adoption of B.R.H., 823 P.2d 383, 387 (Okla. Civ. App 1991) (vacating TPR order for nonsupport because there was "no evidence in the record of the natural father's willful failure to support his son according to his financial ability"); *In re* Swanson, 2 S.W.3d 180, 188 (Tenn. 1999) ("The federal and state constitutions require the opportunity for an individualized determination that a parent is either unfit or will cause substantial harm to his or her child before the fundamental right to the care and custody of the child can be taken away."); HARALAMBIE, *supra* note 100, at § 13:10.

support order earlier to accurately reflect their financial circumstances.[145]

Some courts are wary of applying these grounds too liberally or inferring abandonment where a parent has taken steps to place the child in the care of another person because of the parent's limited ability to provide parental care. For example, the Court of Appeals of Kansas affirmed the denial of termination petition brought by a mother against the father alleging abandonment.[146] The court reasoned that abandonment means "to cease providing care for the child . . . combined with a failure to provide substitute care for the child."[147] In that case, the father "did not leave [the child] without financial or emotional support; he left [the child] with Mother."[148]

Use of abandonment and non-support grounds is prevalent in the adoption-consent context,[149] as, under many states' laws, a court's finding that a parent has abandoned a child is an acceptable basis on which to waive the requirement of their consent to the adoption or to terminate that parent's rights. For example, Vermont's adoption statute, based on the Model Adoption Act, permits termination of a non-consenting parent's rights based on abandonment, and it sets forth factors that a court must consider, which include non-support and lack of communication.[150] These grounds create a termination presumption, which may be rebutted by the parent, triggering yet another list of factors that must be found by clear and convincing evidence before the parent's rights may be terminated.[151]

145. *See* LEGAL SERVS. CORP., THE JUSTICE GAP: MEASURING THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 9 (2017), https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf (noting that "95% of parents in child support cases were unrepresented in [state] courts in 2013.").

146. *In re K.G.*, No. 112115, 2015 WL 3514169, at *12. (Kan. Ct. App. May 22, 2015).

147. *Id.* at *6.

148. *Id.*

149. *See supra* notes 87–107 and accompanying text.

150. *See* VT. STAT. ANN. tit. 15A, § 3-504(a)(1)–(2) (2021). The grounds for TPR include clear and convincing evidence that: (1) the child is under six months of age and the parent "did not exercise parental responsibility once he or she knew or should have known of the minor's birth or expected birth" or (2) the child is six months or older and the parents "did not exercise parental responsibility for a period of at least six months immediately preceding the filing of the petition." *Id.*

151. *See id.* § 3-504(b).

Abandonment and non-support may also be grounds in parent-initiated termination petitions outside of the adoption context.[152] However, the case law reveals that many of these cases are adoption-adjacent, meaning that there is a potential adoption petitioner in the picture, and the termination proceeding is a likely precursor to an adoption filing by that person.[153]

B. Abuse of the Child or Other Parent

In addition to abandonment and non-support—that is, a parent's failure to act in certain ways—many private termination laws include categories of specific conduct as a basis for a private TPR petition. Some laws or court opinions, using standards the same as or similar to those applied in dependency proceedings, permit termination of parental rights based on findings of abuse or neglect of the child,[154] which essentially creates a private right of action for such conduct.[155]

152. *See, e.g.*, T.P. v. T.W., 120 Cal. Rptr. 3d 477, 483 (Cal. Ct. App. 2011) (holding that mother has standing to seek termination of father on basis of abandonment outside of the adoption context). *See generally* Wendee M. Hilderbrand, *When One Parent Goes and the Other Parent Stays: The Inconsistency and Inequality of Guaranteeing Absent Parents Permanent Parental Rights*, 56 VAND. L. REV. 1907 (2003) (identifying the inconsistency and inequality present in existing parental rights laws, which prevent a natural parent from terminating the other natural parent's rights after prolonged abandonment).

153. *See, e.g.*, *In re* Angellica W., 714 A.2d 1265, 1268 (Conn. App. Ct. 1998) (noting in review of facts that stepmother "would be in a position to adopt" the child if mother's parental rights were terminated); Margaret Y. v. John Y., No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *10–11 (Ariz. Ct. App. Sept. 17, 2019) (mentioning children's bonds with stepmother who wishes to adopt them as part of "best interest" analysis); *In re* H.J., 200 A.3d 891, 893 (N.H. 2018) (petitioning mother sought TPR so that her husband could adopt children).

154. *See, e.g.*, KY. REV. STAT. ANN. § 199.502(1)(b), (c) (West 2021) (permitting waiver of a parent's consent to adoption based on findings that the parent "had inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury" or "continuously or repeatedly inflicted or allowed to be inflicted upon the child, by other than accidental means, physical injury or emotional harm"); GA. CODE ANN. § 15-11-310(a)(2) (2021) ("The parent has subjected his or her child to aggravated circumstances"). *See* HOLLINGER, *supra* note 100, at § 4.04[1][a][i], [iii].

155. *See, e.g.*, MISS. CODE. ANN. § 93-17-7(1) (2021) (cross-referencing public dependency termination standard as grounds for waiving a parent's objection to adoption); CAL. FAM. CODE § 7823(a)(1) (West 2021) (allowing termination based on evidence that the "child has been neglected or cruelly treated" by one or both parents, including sexual abuse); IDAHO CODE § 16-2005(1)(b) (2021) ("The parent has neglected or abused the child."); KY. REV. STAT. ANN. § 199.502(1)(b) (West 2021) ("the parent . . . inflicted or allowed to be inflicted upon the child, by other than accidental means, serious physical injury"). *See In re* Austin T., 2006 ME 28,

Private termination proceedings on such grounds appear to be far less common than those alleging abandonment, likely because conduct rising to the level of abuse or neglect frequently results in intervention by a CPS agency and a dependency proceeding.

Some state statutes permit private termination based on a finding that the parent was convicted of abuse or other violence towards the child's other parent, a sibling, or another family member, even if the child at issue in the case was not harmed or involved.[156] Courts tend, however, to be wary of terminating a parent's rights based solely on allegations of their abuse of the petitioning parent.[157]

One category of TPR statutes that is framed a bit differently from the others described here is the laws that permit petitions based on allegations that the child at issue was conceived from a sexual assault.[158] In such contexts, a statute may even dispense with the requirement to consider a child's best interests, addressing only the narrow question about the circumstances of the child's conception.[159] As discussed in Part V.B,[160] this basis for private termination has a distinct policy basis and rationale.[161]

C. Other Grounds for Proving Parental "Unfitness"

Finally, some statutes and court opinions allow termination orders on the basis of the condition or circumstances only of the parent at issue and are not directly related to the child or to other parent.[162]

¶ 12, 898 A.2d 946, 950 (mother had standing to bring TPR petition under statute applying in dependency proceedings); *see also In re* Adoption of K.A.S., 499 N.W.2d 558, 560 (N.D. 1993) (noting that TPR in an adoption proceeding may be based on any ground under the Juvenile Act or Parentage Act).

156. *See, e.g.*, S.S. v. D.L., 944 So. 2d 553, 557 (Fla. Dist. Ct. App. 2007) (father allegedly committed sexual abuse of daughter's friend).

157. *See, e.g.*, *In re* Termination of Parental Rights of P.A.M., 505 N.W.2d 395, 397–98 (S.D. 1993).

158. *See, e.g.*, VT. STAT. ANN. tit. 15A, § 3-504(a)(4) (2021); ME. REV. STAT. ANN. tit. 19-A, § 1658(2)(A) (2021); ALASKA STAT. ANN. § 25.23.180(c)(2) (West 2021); IND. CODE ANN. § 31-35-3.5-3 (West 2021).

159. *See, e.g.*, tit. 19-A, § 1658(3-A)(A).

160. *See infra* notes 367369–378380 and accompanying text.

161. *In re* Adoption of A.F.M., 15 P.3d 258, 267 (Alaska 2001).

162. *See* Fairfax, *supra* note 91, at 147–48 (2011) (noting that grounds for involuntary termination of parental rights of a non-consenting parent may include "mental illness, deficiency, or chronic substance use" and conviction of a felony); HARALAMBIE, *supra* note 100, § 14:14 (noting that grounds for waiving a parent's

Such allegations are often asserted in conjunction with those of abandonment and non-support.[163] These grounds have their origins in the Progressive Era's conceptualization of "neglect" as encompassing not only a parent's failure to care for a child but also their "unfitness" to occupy the role of a parent, due, for example, to their "immoral behavior" or "drunkenness."[164] In contemporary laws, such conditions or circumstances of a parent could include their substance use, mental illness, moral character, criminal history, or current incarceration.[165]

For example, Vermont's adoption statute permits termination of a parent's right to consent if they committed a "crime of violence" or violated a protection order and such crime or violation indicates that the parent is "unfit to maintain a relationship of parent and child with the minor."[166] Florida's statute allows a parent's rights to be terminated for criminal conduct based on the length of incarceration—

consent can include "mental unfitness," "judicial determination of incompetence," and incarceration); HOLLINGER, *supra* note 100, § 4.04[1][a][v]–[viii] (discussing grounds for termination of parental rights other than abuse, neglect, and abandonment).

163. *See, e.g.*, K.S.B. v. M.C.B., 219 So. 3d 650, 654–55 (Ala. Civ. App. 2016) (allegations of mental illness and use controlled substances); Margaret Y. v. John Y., No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *3 (Ariz. Ct. App. Sept. 17, 2019) (allegations of abandonment, mental illness, and substance use); *In re* Angellica W., 714 A.2d 1265, 1271 (Conn. Ct. App. 1998) (allegations of abandonment and substance use); *In re* Interest of L.F., No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *19 (Tex. Ct. App. May 7, 2020) (allegations of substance use and criminal behavior).

164. MASON, *supra* note 2, at 104; *see* ROBERTS, *supra* note 58, at 59–67 (noting how state intervention in families of color is often based on "cultural prejudice" and stereotypes of "Black maternal unfitness"); *In re* Adoption of W.K., 163 N.E.3d 370, 375 (Ind. Ct. App. 2021) ("Termination cases [based on allegations of parental unfitness] have considered factors such as a parent's substance abuse, mental health, willingness to follow recommended treatment, lack of insight, instability in housing and employment, and ability to care for a child's special needs.").

165. *See, e.g.*, CAL. FAM. CODE § 7824 (Deering 2021) (setting for grounds for termination of rights of "[p]arents suffering from disability due to alcohol, or controlled substances, or moral depravity"); MISS. CODE. ANN. § 93-15-121 (2021) (including as potential grounds for TPR a parent's "severe mental illness or deficiency," "habitual alcoholism or other drug addiction," an conviction of any of an enumerated list of felonies); NEV. REV. STAT. ANN. § 128.106 (LexisNexis 2021) (listing several "condition[s]" a court may consider when determining "neglect by or unfitness of a parent" including "[e]motional illness, mental illness or mental deficiency," "[e]xcessive use of intoxicating liquors, controlled substances or dangerous drugs," and conviction of a crime "of such a nature as to indicate the unfitness of the parent.").

166. VT. STAT. ANN. tit. 15A, § 3-504(a)(3) (2021).

"a significant portion of the child's minority"[167]—and a finding that the parent has been convicted one of a list of specific serious violent crimes or falls into one of several enumerated categories of serious "offenders."[168]

While a parent's failure to visit, contact, or support a child may be due to the parent's incarceration,[169] courts nonetheless allow findings of "abandonment" or "non-support" in such circumstances.[170] In some state statutes, incarceration alone is a ground for termination, even if the charge involved is unrelated to the parent's relationship to their child and regardless of the parent's efforts to contact the child.[171] These statutes imply that incarceration in itself is deemed to be an extended failure by the parent to exercise their parental role.[172] Florida's termination statute, which includes a catchall "harmful to the child" finding for incarcerated parents, suggests that even if the incarceration is not lengthy or for a serious violent offense, it could still be the basis for a termination order.[173]

Substance use is another basis asserted frequently by petitioners in private TPR cases, as revealed in the case law.[174] For example, an Arkansas Appeals Court affirmed the termination of parental rights of a mother who did not consent to her child's adoption based on her

167. *See, e.g.*, FLA. STAT. ANN. § 39.806(d)(1), (2) (West 2021).

168. *Id.* ("The incarcerated parent has been determined by the court to be a violent career criminal as defined in s. 775.084, a habitual violent felony offender as defined in s. 775.084, or a sexual predator as defined in s. 775.21; has been convicted of first degree or second degree murder in violation of s. 782.04 or a sexual battery that constitutes a capital, life, or first degree felony violation of s. 794.011 . . .").

169. David S. v. Jared H., 308 P.3d 862, 870 (Alaska 2013) (affirming finding that father's incarceration did not excuse his failure to communicate with his daughter for more than a year); *In re K.S.*, No. 16-0605, 2016 Iowa App. LEXIS 1088, at *7–9 (Iowa Ct. App. Oct. 12, 2016) (vacating TPR order based on abandonment due to father's incarceration).

170. *See, e.g.*, *In re* H.J., 200 A.3d 891, 894–95 (N.H. 2018).

171. *See, e.g.*, IDAHO CODE § 16-2005(1)(e) (2021).

172. *See, e.g., id.* ("The court may grant an order terminating the relationship where it finds that termination of parental rights is in the best interests of the child and . . . (e) The parent has been incarcerated and is likely to remain incarcerated for a substantial period of time during the child's minority."). *See* HARALAMBIE, *supra* note 100, § 13:16.

173. FLA. STAT. ANN. § 39.806(d)(3) (West 2021).

174. *See, e.g., In re* Interest of L.F., No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *17–18 (Tex. Ct. App. May 7, 2020) ("Mother's drug use was the most significant danger to the girls' well-being.").

alleged neglect of the child resulting from her chronic alcoholism.[175] Given the potential for recovery from substance use disorders, some courts consider the parent's efforts to undergo available treatment in their determination.[176] Such considerations by a court, however, sometimes reflect stigma and a judgmental attitude toward substance abuse rather than an informed understanding of either the disorders involved or the challenges of recovery.[177] For example, the Supreme Court of North Dakota affirmed the termination of a father's rights on the basis of his "deprivation of the children" due to his failure to follow the requirements of his recovery program.[178] While, in fact, a person's "relapse" is likely to be indicative of the non-linear nature of recovery,[179] the court reasoned that it "demonstrates an indifference toward one's obligations and responsibilities as a parent."[180]

D. The Best Interests of the Child

As a predicate to terminating a parent's rights, a court must find that the parent's conduct, condition, or circumstances demonstrate their "incompetence" or "unfitness" as a parent.[181] Most state laws also

175. Ducharme v. Gregory, 435 S.W.3d 14, 18–19 (Ark. Ct. App. 2014).

176. *See* A.S. C.N.D. v. C.M.A.S., 920 N.W.2d 301, 304–05 (N.D. 2018).

177. *See* ROBERTS, *supra* note 58, at 154–57 (discussing the termination of parental rights in public child welfare cases because of the conflict between the short timeline for achieving "permanency" often conflicts with the "clock of parental recovery from substance use" and that courts "sometimes base the decision to terminate parents' rights based on an erroneous understanding of addiction and the recovery process"); Richard C. Boldt, *Evaluating Histories of Substance Abuse in Cases Involving the Termination of Parental Rights*, 3 J. HEALTH CARE L. & POL'Y 135, 142 (1999); *see also* Jun Sung Hong et al., *Termination of Parental Rights for Parents with Substance Use Disorder: For Whom and Then What?* 29 SOC. WORK IN PUB. HEALTH, 503, 512–14 (2014) (noting the role of compliance with substance use treatment as a factor in termination orders in dependency cases).

178. *A.S. C.N.D.*, 920 N.W.2d at 305.

179. Boldt, *supra* note 177, at 143 ("Often relapses, when identified and addressed, represent a phase in the process of recovery, from which a parent can learn and advance toward the ultimate goal of abstinence.").

180. *A.S. C.N.D.*, 920 N.W.2d at 304 (quoting Johnson v. Cass Cnty. Soc. Servs. (*In re* E.R.), 688 N.W.2d 384, 388 (N.D. 2004)); *see* Alyssa W. v Justin G., 433 P.3d 3, 5–6 (Ariz. Ct. App. 2018) (holding where one parent seeks to terminate the parental rights of another based on substance use, the petitioner must show that treatment options were offered to the parent "but the parent's alcohol abuse was not amenable to rehabilitative services, or that providing such services would be pointless.").

181. *See, e.g.*, *In re* Adoption of Tobias D., 2012 ME 45, ¶ 16, 40 A.3d 990, 996 ("[T]he court may not even contemplate the child's best interest until it has found at least one ground of parental unfitness"); *see also* MASON, *supra* note 2, at 104.

require a further, distinct analysis of whether the termination would be "in the best interest of the child."[182] As Professor Jessica Feinberg has explained, "[t]he best interests analysis does not come into play in involuntary termination actions unless the parental unfitness standard is satisfied, and even then it serves only as a safety net to prevent termination of parental rights where it would be contrary to the child's best interests despite the parent's unfitness."[183]

The two standards are, however, often conflated in opinions, and many courts, failing to parse the distinction, appear to give short shrift to the best interest analysis if a finding of "unfitness" is made. Rather, given the flexibility and subjectivity of the standard, as many of its critics note, most courts readily find that, if a parent is determined to be unfit under the first step in the analysis, termination would be in the child's best interest.[184] But such a finding does not necessarily follow. Courts often use the standard, which is a staple of custody determinations, to transform what should be an analysis of the adequacy of a factual basis to sever a parent's constitutionally protected interest into a comparison of the adults in a child's life.[185] A court can easily confuse the crucial question in a termination case ("Is this parent unfit?") with the central question in a custody case ("Which home is better for the child?").[186]

182. *See supra* note 126 and accompanying text. *See* JACOBS, *supra* note 86, at § 3:01 ("Some state courts will not enter a termination order without a separate finding of 'best interest.' In other jurisdictions, the 'best interest' requirement seems implicit in the findings of grounds for severance.").

183. Jessica Feinberg, *Restructuring Rebuttal of the Marital Presumption for the Modern Era*, 104 MINN. L. REV. 243, 294 (2019).

184. *See, e.g.*, Janet L Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 2 (1996) ("[I]nvoking children's interests as the guiding principle in such cases can disguise other agendas that serve neither the particular children at issue nor children in general."); GUGGENHEIM, *supra* note 20 at 38–40 ("A best interests inquiry is not a neutral investigation that leads to an obvious result. It is an intensely value-laden inquiry. And it cannot be otherwise." or "The best interest standard necessarily invites the judge to rely on his or her own values and biases to decide the case in whatever way the judge thinks best.").

185. *See* Dolgin, *supra* note 184, at 3 ("By focusing on the traits of potential custodians, the needs and interests of children can become secondary to those of contending adults. In consequence, courts can inadvertently focus on the 'best interests' of adults rather than of children.").

186. *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978) ("We have little doubt that the Due Process Clause would be offended '[if] a State were to attempt to force

Particularly in the context of a contested stepparent adoption, courts tend to frame the best interest analysis not in terms of the impact on the child of severing a parent's legal relationship with them but in terms of the benefits to the child *of being adopted* by one of their current caregivers.[187] As a result, courts may overlook the potential impact on the child's short- and long-term interests from the termination, such as those noted earlier.[188] Further, any comparison between an "old" versus "new" parent is inherently disadvantageous to the existing parent, given that the potential adoptive parent is most likely in an active caretaking and co-parenting role with the person who was already awarded physical custody of the child.[189] While federal and state policy around family preservation purport to limit termination in dependency cases even if another family, such as a foster family, might provide a "better" home for a child, this restraint is not prevalent in the private context.[190] I explore the implications of this trend further in Part V.

IV. PROCEDURAL DISPARITIES IN PUBLIC VERSUS PRIVATE

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.'" (quoting Smith v. Org. of Foster Families for Equity & Reform, 431 U.S. 816, 862–63 (1977) (Stewart, J., concurring in judgment)).

187. *See, e.g.*, Sanders v. Savage, 468 S.W.3d 795, 801 (Ark. 2015) (indicating potential adopting father was a regular part of the children's lives); *see also, e.g.*, T.W. v. M.C. (*In re* Interest of Baby A.), 363 P.3d 193, 206–08 (Colo. 2016) (holding that adoptive parents may present evidence of their suitability for placement as part of the child's best interests).

188. *See supra* notes 45–50 and accompanying text.

189. *See, e.g.*, *In re* Noreen G., 105 Cal. Rptr. 3d 521, 543 (Cal. Ct. App. 2010) (noting children's "deep attachment to [their legal] guardians and a secure home with them" as part of best interest analysis in termination of parental rights petition brought by the guardians as part of their adoption petition); *see also, e.g.*, *In re* Adoption of K.L.P., 735 N.E.2d 1071, 1075 (Ill. App. Ct. 2000) (noting that trial court's best interest determination in a termination proceeding was based in part on expert testimony that the adoption would be in the children's best interest).

190. Justice Potter Stewart observed in his concurrence in *Smith v. Org. of Foster Families for Equality & Reform*:

> [A]ny case where the foster parents had assumed the emotional role of the child's natural parents would represent not a triumph of the system, to be constitutionally safeguarded from state intrusion, but a failure. The goal of foster care . . . is not to provide a permanent substitute for the natural or adoptive home, but to prepare the child for his return to his real parents or placement in a permanent adoptive home by giving him temporary shelter in a family setting.

Smith, 431 U.S. at 861–62 (Stewart, J., concurring in judgment).

TERMINATION PROCEEDINGS

Courts must follow demanding standards and ensure robust procedural protections before terminating a parent's rights. States have greater latitude in limiting claims of parentage than in severing a recognized parent-child legal relationship.[191] Once someone is deemed a "parent" under state law, constitutional protections limit interference with or deprivation of the rights associated with that legal status.[192] The U.S. Supreme Court spelled out the constitutional implications of termination of parental rights in the 1982 opinion in *Santosky v. Kramer*.[193] The Court held that, in line with the "historical recognition that freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment," a "clear and convincing evidence" level of proof is required to terminate a parent's rights.[194] Justice Harry Blackmun explained in the majority opinion:

> [T]he 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.[195]

Thus, the Court reasoned, "When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures."[196] Private termination cases, especially when brought by one parent against the other, are often litigated and adjudicated much

191. *See supra* note 54 and accompanying text.

192. Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1485–86 (2018).

193. 455 U.S. 745, 747–48 (1982).

194. *Id.* at 753–56 (first citing Quilloin v. Walcott, 434 U.S. 246, 255 (1978); then citing *Smith*, 431 U.S. at 845; then citing Moore v. E. Cleveland, 431 U.S. 494, 499 (1977); then citing Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); then citing Stanley v. Illinois, 405 U.S. 645, 651–52 (1972); then citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944); then citing Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); and then citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

195. *Santosky*, 455 U.S. at 753; *see* M.L.B. v. S.L.J., 519 U.S. 102, 116–17 (1996) ("[T]he State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.").

196. *Santosky*, 455 U.S. at 753–54.

like a child custody dispute between parents. The potential outcome—and often the grounds—in such cases, however, are more like those in a dependency proceeding, the far more common context for termination petitions, than those in a custody case.[197] Statutes do not always provide clear guidance for courts regarding which kind of proceeding should serve as the model for a private TPR matter, which is essentially a hybrid of the two.[198] In the absence of clearly mandated procedures, the private nature of the petition leads many courts to provide fewer procedural protections for the parent who is the subject of the proceeding. This is significant in two key respects: (1) whether, before a parent's rights can be terminated, the parent is entitled to support and opportunity for rehabilitation and for reunification with their child; and (2) whether the parent is entitled to court-appointed counsel.

A. Opportunities for Rehabilitation and Reunification

When a court conducts a TPR proceeding in a dependency case brought by a public CPS agency, in most instances there has already been a removal proceeding involving "reasonable efforts" at family reunification, a judicial review of the proposed out-of-home placement, and one or more further hearings in which the court has determined that such efforts should not continue.[199] These actions and determinations are prerequisites to a termination order in public dependency cases.[200] Such proceedings, which may involve multiple

197. *See* JACOBS, *supra* note 86, at § 3.02.

198. *See, e.g.*, *In re* Austin T., 2006 ME 28, ¶8, 898 A.2d 946, 950 (holding that a court should apply the dependency statute's requirements in post-judgment termination of parental rights action brought by one parent against another); *Ex parte* Beasley, 564 So. 2d 950, 955 (Ala. 1990) (court divided on whether a parent petitioning to terminate other parent's rights must establish that child is "dependent.").

199. *See* Darla D. v. Grace R., 382 P.3d 1000, 1015 (N.M. Ct. App. 2016) (quoting Thomas-Lott v. Earles, 2002-NMCA-103, 9, 132 N.M. 772, 777, 55 P.3d 984, 989).

200. *Id.* ("[T]he path to permanency in an abuse and neglect case—whether that means reunification, or alternatively, termination of parental rights and adoption—is staked out by a statutory scheme that contemplates [CPS] involvement at every stage, overseen by the court."); GUGGENHEIM & SANKARAN, *supra* note 12, at xxii–xxiii ("[C]hild welfare professionals seek to assist families to overcome the obstacles to the safe return of their children and to do so quickly. Only when the parents fail to change their ways or prove unable to raise their children safely for the foreseeable future do the state's interests and that of parents' truly diverge [leading to a termination proceeding]."); 42 U.S.C. § 671(a)(15)(B) (2018); *see generally* JACOBS, supra note 86, at § 2 (describing the dependency process).

court dates and guardian ad litem reports, may last for several months or even longer.[201] During this time, the state's reunification efforts may consist of a range of services and supports, such as treatment for problems relating to the parents' mental health or substance use or provision of professionally supervised contact between the parents and their child.[202] The lengthy and detailed record that results from these efforts, especially the outcome of opportunities provided to parents to rehabilitate and reunify with their children, can assist the court in its termination determination.[203]

Private termination determinations, by contrast, are made in a procedural context that lacks most or all of these preliminary steps and findings. Because the state CPS agency is not a party to the petition and the private petitioners are not in a position to provide or arrange services to the parent subject to it, a court cannot, as a practical matter, order "reasonable efforts" at reunification[204] as a prerequisite to the TPR—even if such requirement were included in a private termination statute.[205] This means that a court may apply an abandonment standard, for example, to a parent who was not provided any opportunity or resources to engage in their child's life. It is all the more questionable to apply an abandonment standard if a parent has never played a role in the child's life but now states that they wish to do so. In some cases of estrangement between the parents, the notification of

201. *See, e.g.*, *Darla D.*, 382 P.3d at 1005.

202. *See, e.g.*, *id.* at 1015 (quoting N.M. STAT ANN. § 32-4-21(B)(10) (West 2009)).

203. *See* Josh Gupta-Kagan, *Filling the Due Process Donut Hole: Abuse and Neglect Cases Between Disposition and Permanency*, 10 CONN. PUB. INT. L.J. 13, 13–14 (2010).

204. 42 U.S.C. §§ 671(a)(15)(B), 672(a)(2)(A)(ii).

205. *See, e.g.*, *In re* Adoption of L.E., 2012 ME 127, ¶ 13, 56 A.3d 1234, 1238 (holding that a court is not required to order attempts at reunification before granting termination of parental rights petition filed in conjunction with an adoption); *In re* T.S.T., 571 S.E.2d 416, 418 (Ga. Ct. App. 2002) (holding that father, who petitioned to terminate mother's parental rights to their three children, was not required to comply with the termination of parental rights statute's reunification plan requirements because the statute provided that a reunification plan was only required when the court removed a child from the home and placed it in the custody of the Department of Human Resources); *In re* Bush, 749 P.2d 492, 496 (Idaho 1988) (trial court was not required by statute to make a finding "as to whether the parents could or could not have been rehabilitated prior to a termination of their parental rights" in an action brought by private parties). *See also* Gupta-Kagan, *supra* note 64, at 875–82 (discussing the disadvantages and risks to the child and family when a CPS agency does not work with a family and provide services under court supervision).

an adoption and TPR proceeding may be the first time a parent has learned of the current location of their child.[206]

In a 2017 opinion in an adoption case in which the mother of the child and her current husband had successfully petitioned to terminate the father's rights, *Adoption of Isabelle T.*,[207] the Maine Supreme Judicial Court summarized its concerns about the disadvantages for a parent in a private termination proceeding:

> There is no state assertion of parental unfitness in private termination/adoption proceedings, and the Adoption Act provides fewer protections for parents than those provided in . . . child protection proceedings. Individuals facing the loss of their rights in [dependency] termination of parental rights proceedings are nearly always provided opportunities for rehabilitation and reunification before a court even considers the termination of their parental rights.
>
> The Adoption Act, on the other hand, does not require—or even authorize—the court to consider rehabilitation or reunification efforts prior to terminating parental rights. A termination action litigated as part of a "private adoption," where the adoption petitioner—often one parent—seeks to terminate the parental rights of a nonconsenting parent to facilitate an adoption, requires only that the petitioner prove that the grounds for termination have been met in order for the court to permanently terminate that parent's legal rights to his or her child.
>
> In a . . . child protection proceeding, the question of termination is addressed only after a court has decided that the parent's unfitness is so dire that the children must be removed from his or her care. And, even in those circumstances, the parent is nonetheless usually offered multiple opportunities to better his or her parenting abilities and reunify with the children through court-ordered and state-provided services.[208]

206. *See* FAIRFAX, *supra* note 91, at 123–36.

207. Adoption of Isabelle T., 2017 ME 220, ¶ 1, 175 A.3d 639, 643.

208. *Id.* at ¶ 11–13, 175 A.3d at 645 (first citing *In re* Heather C., 2000 ME 99, ¶ 4, 751 A.2d 448, 450; then citing *In re* Thomas D., 2004 ME 104, ¶ 26, 854 A.2d 195, 203; and then citing Adoption of L.E., 2012 ME 127, ¶ 13, 56 A.3d 1234, 1238). The Maine Supreme Judicial Court vacated the probate court's order terminating a father's rights in that case because he "had no opportunity to receive rehabilitative services, and . . . he has been prohibited from having contact with his children." *Id.* at ¶ 35, 175 A.3d at 649.

While other courts similarly identify the disadvantages to parents in private versus public termination cases, most of them have not found a *constitutional* dimension to such differences. Rather, courts regard the protections in child protection statutes that give rise to rights to reunification opportunities and the services needed to support them as *statutory* benefits granted to parents involved in dependency matters.[209] If a private TPR petition is brought under a different statute—even one that cross-references the statutory grounds for termination in a dependency statute—or the action is one is converted from a dependency to private termination proceeding, there is no entitlement to the same opportunities and services as parents in dependency cases.[210]

Some courts or statutes allow consideration of the extent of opportunities for rehabilitation and reunification in private termination cases, but such allowances are still short of what is *required* in dependency cases. For example, an Arizona appeals court reasoned that because "[s]everance proceedings implicate the same fundamental constitutional liberty interests of a parent, whether commenced by DCS or a private party," the petitioning party in any TPR proceeding must prove that the parent was offered "reunification services" before the parent's rights may be terminated.[211] Nevertheless, an individual petitioner has no obligation to do the "offering." Instead, in a private termination matter, the petitioner must prove that the "parent whose rights are to be severed has either already received or been offered the necessary rehabilitative services from some provider to no avail or that engaging the parent in rehabilitative services would be futile."[212] The court held in that case that the petitioning mother had satisfied the burden of proof because the father's alcoholism was an issue in an earlier parental rights and responsibilities case, as a result of which his rights were already

209. *See, e.g.*, *In re* Adoption of Riahleigh M., 2019 ME 24, ¶ 27–36, 202 A.3d 1174, 1183–85; *In re* Infant Child Skinner, 982 P.2d 670, 675 (Wash. Ct. App. 1999).

210. *See, e.g. In Re* Adoption of M.P.J., No. W2007-00379-COA-R3-PT, 2007 Tenn. App. LEXIS 724, at *14 (Tenn. Ct. App. Nov. 28, 2007) (holding that father had no right to rehabilitation services after custody of child was transferred from the state to the child's aunt who later petitioned to terminate father's rights); *In re* D.C., 737 S.E.2d 182, 184–85 (N.C. Ct. App. 2013).

211. Alyssa W. v. Justin G., 433 P.3d 3, 5 (Ariz. Ct. App. 2018).

212. *Id.* at 5–6.

limited, and he had not sufficiently addressed his alcohol use by the time of the termination proceedings.[213] In a more recent opinion, that court limited its earlier holding by stating that there is no entitlement to consideration of reunification services if the alleged grounds for severance of parental rights is abandonment.[214]

Similarly, in response to the concerns raised in *Isabelle T.*, the Maine Legislature amended the state's adoption statute to include language to require a court reviewing a termination petition in the context of an adoption to consider "the extent to which the parent who is the subject of the petition had opportunities to rehabilitate and to reunify with the child or to maintain a relationship with the child, including actions by the child's other parent to foster or to interfere with a relationship between the parent and the child or services provided by public or nonprofit entities."[215] Even here, however, as in the statutes discussed above that recognize the disadvantages to a parent who is the target of a private TPR petition, no path to reunification or guarantee of services is provided.

California's adoption statute is another example of the far more limited protections for parents subject to TPR orders in the context of a private adoption than those available in a dependency proceeding.[216] A court may terminate a parent's rights to enable a legal guardian to adopt a child if the guardianship order has been in place for two years or longer and the TPR order is found to be in the child's best interest.[217] Once the two-year period has passed, the guardian need not prove any specific parental "unfitness" to obtain a TPR order.[218] As in

213. *Id.* at 7.

214. *See* Margaret Y. v. John Y., No. 1 CA-JV 19-0051, 2019 Ariz. App. Unpub. LEXIS 1021, at *3 (Ariz. Ct. App. Sept. 17, 2019) (citing Toni W. v. Ariz. Dep't of Econ. Sec., 993 P.2d 462, 465–67 (Ariz. Ct. App. 1999).

215. ME. REV. STAT.. tit. 18-C, § 9-204(3-A) (2021); *see* Adoption of Tobias D., 2012 ME 45, ¶ 23, 40 A.3d 990, 998 (holding that a court should consider the extent of a parent's opportunity to form a relationship with the child).

216. CAL. PROB. CODE § 1516.5 (a)(1)–(3) (West 2021).

217. *Id.*; *see, e.g.*, Guardianship of Ann S., 202 P.3d 1089, 1094 (Cal. 2009).

218. *See, e.g., In re* Noreen G., 105 Cal. Rptr. 3d 521, 543 (Cal. Ct. App. 2010) ("Nothing more must be proved than that termination of parental rights and adoption by the guardian are 'in the 'best interests of the child.'"") (quoting *Guardianship of Ann. S.*, 202 P.3d at 1129); *In re* Guardianship of Robert S., No. F060073, 2011 WL 2152626, at *20–21 (Cal. Ct. App. June 2, 2011) (the Supreme Court of California rejected a due process challenge to the statute in a 2009 opinion and reasoned: "[T]he parental fitness standard, which protects parents' interest in child custody, is not necessarily required at a [termination] hearing. By that stage, the parent-child family unit has ceased to exist and the parent's entitlement to custody is not at issue. It

a dependency proceeding, the parent is given a deadline to "fix" the circumstances leading to the child being in the care of another.[219] In the private guardianship-to-termination context, however, the parents are provided no opportunities or services to make the changes required to terminate the guardianship and stop the clock.[220] The disparity is explicitly noted by the California Supreme Court in a 2009 opinion, *Guardianship of Ann S.*:

> Unlike dependency cases, [guardianships] are not regularly supervised by the court and a social services agency. No governmental entity is a party to the proceedings. It is the family members and the guardians who determine, with court approval, whether a guardianship is established, and thereafter whether parent and child will be reunited, or the guardianship continued, or an adoption sought . . .[221]

Acknowledging this disparity, some courts have held that, prior to a TPR order in a private action, there must be a report or referral to a CPS agency regarding the child at issue.[222] Such a report or referral

would be anomalous to require proof in every case, by clear and convincing evidence, that a mother or father who has had no custodial responsibilities for two or more years is currently an unfit parent."); *see also Ann S.*, 202 P.3d at 1094–95 (Cal. 2009). In that case, the mother struggled with substance use and enrolled in rehabilitation programs while the guardianship was in place. *Id.* Further, the court wrote that it "would make little sense" to apply a parental unfitness standard there because "[a]s guardianship continues for an extended period, the child develops an interest in a stable, continuing placement, and the guardian acquires a recognized interest in the care and custody of the child." *Id.* at 1094 (citing PROB. § 1516.5).

219. PROB. § 1516.5 (a)(1)–(3).

220. *Id.*

221. *Ann S.*, 202 P.3d at 1096–97. The Court also noted that there is "no periodic court review of the placement" nor is "the parent given the rehabilitation services that the county provided to parents of dependent children." *Id.* at 1098 (first citing Guardianship of Stephen G., 47 Cal. Rptr. 2d 409, 415 (Cal. Ct. App. 1995); and then citing Guardianship of Kaylee J., 64 Cal. Rptr. 2d 662, 664–66 (Cal. Ct. App. 1997)). *See generally* Deirdre M. Smith, *Keeping it in the Family: Minor Guardianship as Private Child Protection*, 18 CONN. PUB. INT. L. J. 269, 310–13 (2019) (discussing implications of using minor guardianship as a form of "child protection" outside of the public child welfare system). *See also Noreen G.*, 105 Cal. Rptr. 3d at 534–36 (rejecting mother's due process challenge to guardianship-to-termination statute on the basis that the statute is unconstitutionally vague because it "fails to give a parent adequate notice as to what actions he or she must take to avoid the termination of his or her parental rights"; the court concluded that the statutory language "in the physical custody of the guardian for a period of not less than two years" provides sufficient notice to parents).

222. *See, e.g., In re* Vincent D, 65 Conn. App. 658, 661 (Conn. App. Ct. 2001).

could transform a private case into a quasi-dependency proceeding or, if the allegations against the parent are serious enough, into a full dependency proceeding initiated by the state. For example, two years after the *Ann S.* opinion, a California appeals court vacated a TPR order based in part on the trial court's "critical error" in failing to refer the family to the county CPS agency for an investigation and determination of whether, given the guardian's allegations of parental unfitness, a dependency petition should be filed or "the family offered services."[223] Such error, the appeals court reasoned, "affected the entire proceeding" because:

> It deprived the parents of the opportunity to gain custody of their children through dependency proceedings and deprived them of all the attendant safeguards in those proceedings not available in guardianship proceedings. It allowed the guardianship proceeding to move forward without providing the parents an adequate opportunity to regain custody of their children.[224]

A New Mexico appeals court raised similar concerns about parental rights being terminated for adoption by a guardian with no involvement by a public CPS agency.[225] In *Darla D. v. Grace R.,* the court stated that, without such involvement, such private termination petitions "would be ripe for abuse."[226] The court held that the only construction of the state's adoption statute consistent with the policy aims of the state's overall public child welfare scheme is the

223. *In re* Guardianship of Robert S., 2011 WL 2152626, at *6, *20–21, *24. The court also interpreted *Ann S.* and the statute narrowly as applying only where a parent consents to the guardianship and does not seek to terminate the guardianship prior to the hearing. *Id.* at *20. The court vacated the termination order against both parents, as well as the underlying guardianship, in that case because they had objected to the guardianship "from the outset," gave up custody for only a brief time "in order to find suitable housing" to the family member who became the guardian, and "continued on their path to rehabilitation and were successful at it." *Id.* at *23.

224. *Id.* at *24. The mother asserted in her appeal that the court's failure to make such referral:

> deprived her and the agency of a dependency court proceeding, thereby depriving mother and children of all the rights afforded to a family in a dependency proceeding. Mother asserts that if this case had proceeded in the dependency court, she would have been successful in having her children returned to her. She was prejudiced by not having the opportunity to have social services determine if the case should proceed under the dependency law.

Id. at *18.

225. Darla D. v. Grace R., 382 P.3d 1000,1005 (N.M. Ct. App. 2016).

226. *Id.* at 1016.

requirement that such a case be referred to the CPS agency and, so that the parents whose rights would be terminated could have the benefit of the resulting "procedural safeguards," that the agency make reasonable efforts to reunify a child with their parents "whenever possible." [227]

In neither the California nor the New Mexico cases, however, was it clear that the required referrals to CPS agencies would in fact lead to the provision of appropriate services for the parent and child. Due to limited resources, many CPS agencies or the nonprofits with which they contract only provide services and supports to families who are or likely could be the subject of a dependency proceeding; and, even for those families, the services provided often fall short of what is needed for rehabilitation and reunification.[228]

While the disparities discussed here are significant, I do not suggest that private TPR cases should be prosecuted by public agencies. On the contrary, given limits and harms that can result from the full intervention of a child welfare agency into a troubled family situation, such public prosecution is *not* a positive alternative to a private TPR action. There is already far too much state intervention in families; the services provided to parents and children are woefully inadequate; state agencies are too quick to seek orders for the termination of parents' rights; and courts are too quick to grant such orders. These trends have created a culture in which the United States justice system has become a means of discarding a child's parents quickly in the name of "permanency," often for the convenience of agencies seeking to lighten their caseload and of courts themselves

227. *Id.*

228. Martin Guggenheim, *General Overview of Child Protection Laws in the United States*, *in* GUGGENHEIM & SANKARAN, *supra* note 12, at 2 (noting that a common problem in the operation of child protection laws is parents are required "to secure services that are either unavailable to them or are not needed" in order to regain custody of their children) [hereinafter Guggenheim II]; Jeanne M. Kaiser, *Current Issues in Public Policy: Finding A Reasonable Way to Enforce the Reasonable Efforts Requirement in Child Protection Cases*, 7 RUTGERS J.L. & PUB. POL'Y 100, 103–04 (2009) (noting that CPS reasonable efforts "routinely contain a mix of parenting classes, anger management workshops, and individual therapy, which when looked at in the context of the needs of the parents involved, appear to have little to no chance of providing any actual help.").

seeking to get cases off their dockets.[229] Severing a parent-child relationship for the sake of bureaucratic expedience has only a tenuous connection to securing a child's "welfare."

The accelerated timelines for termination to "free" a child for adoption in the public child protection context, as driven by federal law,[230] has likely had a spillover effect in the private termination realm, especially where a state uses a common standard. The impact of the rush to permanency on families of color and on those in poverty or otherwise assigned and held to the margins of our society is especially dire.[231] Incarceration is a basis for both public and private termination, as are substance use, untreated mental illness, and poverty (often framed as failing to support a child).[232] In all TPR petitions, parents' difficult situations tend to be described in stigmatizing narratives of blame.[233] In the context of a private TPR, the impact is compounded by the fact that parents receive no mandated opportunity or support to avoid the extreme outcome of permanently losing their child. Financial resources, professional supports, compassion, and patience are what lead to the effective rehabilitation and reunification of a parent-child relationship.[234] It is these measures—not intervention and separation—that children and families need and deserve.

B. Right to Court-Appointed Counsel

The context in which courts struggle most conspicuously with the public versus private nature of TPR proceedings is when appeals are brought by parents asserting that they had a right, in such proceedings, to court-appointed counsel. As a California appeals court observed in one such appeal:

229. See ROBERTS, *supra* note 58, at 223; GUGGENHEIM & SANKARAN, *supra* note 12, at xxiii ("Many who have worked in the field . . . do not believe that the intentions of state officials are a sufficient protection against state over-reaching.").

230. Guggenheim II, *supra* note 228, at 4–6; Garrison, *supra* note 48, at 443–46.

231. *See* ROBERTS, *supra* note 58, at 109.

232. *See* CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), childwelfare.gov/pubPDFs/groundtermin.pdf.

233. Matthew I. Fraidin, *Changing the Narrative of Child Welfare*, 19 GEO. J. ON POVERTY L. & POL'Y 97, 98–99 (2021*); see In re* Interest of L.F., No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *23 (Tex. Ct. App. May 7, 2020) (holding that evidence mother's "persistent drug abuse" and "related jail confinement" was sufficient to support best interest finding).

234. Fraidin, *supra* note 233, at 105–08.

> A stepparent adoption differs from other parental termination cases in that it is not an action brought by the state and argued by state attorneys. But neither is the adoption proceeding a purely private dispute. The state is called upon to exercise its exclusive authority to terminate the legal relationship of parent and child and establish a new relationship, in accordance with an extensive statutory scheme.[235]

Although most states, either through statutes[236] or through courts' holdings based on constitutional principles,[237] now provide that parents targeted by private TPR petitions are entitled to court-appointed counsel, these rules are only recent developments.[238] Several states continue to follow the holding in *Lassiter v. Department of Social Services of Durham County, North Carolina*[239] that due process principles *do not* require appointment of counsel in all civil matters, including private TPR cases.[240] A Texas appeals court, for example, ruled as recently as 2020 that, pursuant to *Lassiter*, courts have discretion whether to appoint counsel for parents in private termination actions even though parents in public dependency actions have a statutory right to counsel.[241]

235. *In re* Jay R., 197 Cal. Rptr. 672, 680 (Cal. Ct. App. 1983).

236. *See, e.g.*, ME. STAT. tit. 18-C, § 9-106(2) (2021) (broad right to counsel for indigent parents in adoption proceedings); ME. STAT. tit. 19-A, § 1658(1-A)(F) (2021) (right to counsel in private termination proceedings brought by another parent).

237. *See, e.g., In re* Adoption of Meaghan, 961 N.E.2d 110, 112 (Mass. 2012) (citing Dep't of Pub. Welfare v.B., 393 N.E.2d 406, 408 (Mass. 1979)) (holding that, notwithstanding absence of statutory right, parents are entitled to counsel in adoption and termination proceedings because of the fundamental constitutional right at stake in proceeding).

238. *In re* Adoption of Y.E.F., 171 N.E.3d 302, 306, 308 (Ohio 2020).

239. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31–32, (1981).

240. *In re* E.K.S., 387 P.3d 1032, 1037 (Utah 2016) (citing *Lassiter*, 452 U.S. at 26) (holding that court must undertake *Lassiter* analysis on case-by-case basis to determine right to counsel in privately initiated termination proceedings).

241. *In re* L.F., No. 02-19-00421-CV, 2020 Tex. App. LEXIS 3879, at *33 (Tex. Ct. App. May 7, 2020) (citing *Lassiter*, 452 U.S. at 32) (holding that due process "did not demand" appointment of counsel in that case because the termination petition "contained no allegations against Mother upon which criminal charges could be based; the case presented no complicated legal issues; and no expert witnesses testified"); *see In re* J.C., 250 S.W.3d 486, 489 (Tex. Ct. App. 2008) (earlier case before statutory change noting that parents did not have the right to discretionary appointment of counsel in a privately-initiated termination action).

Where there is no clear statutory right to counsel in a private termination case, courts' determinations of whether to find such right often turns on the extent to which they conclude that the proceeding involves state action, thereby implicating the parents' constitutional rights.[242] Some courts conclude that the potential for a termination order pursuant to a statute is sufficient to find there is state action, giving rise to an analysis of the right to counsel under the U.S. Constitution.[243] Such conclusions may be based on the Supreme Court precedent in *Troxel v. Granville*,[244] which struck down a grandparents' visitation law, or *M.L.B. v. S.L.J.*,[245] an appeal arising from a stepparent adoption case in which the Court held that an indigent parent was entitled to a fee-waived transcript of termination proceedings.[246] Other courts conclude there is state action in a private TPR case when a public CPS agency has a specific role in the case, such as conducting an investigation before or during the termination proceedings.[247] If state action is found, then courts generally hold that a parent is entitled to court-appointed counsel either on the basis of due process principles[248] or, given that parents who are the subject of

242. *See In re* Application to Adopt H.B.S.C., 12 P.3d 916, 920–21 (Kan. Ct. App. 2000) (first citing *In re* K.L.J., 813 P.2d 276, 283 (Alaska 1991); then citing O.A.H. v. R.L.A., 712 So. 2d 4, 6 (Fla. Dist. Ct. App. 1998); and then citing *In re* Adoption of K.A.S., 499 N.W.2d 558, 565–66 (N.D. 1993)).

243. *See*, e.g., *id.* (first citing *K.L.J.*, 813 P.2d at 283; then citing *O.A.H.*, 712 So. 2d at 6; and then citing *K.A.S.*, 499 N.W.2d at 565–66)); A.W.S. v. A.W., 2014 MT 322, 377 Mont. 234, ¶ 14, 339 P.3d 414, 417–18 (Mont. 2014) (first citing MONT. CONST. art. II, § 4; then citing *K.A.S.*, 499 N.W.2d at 566); *In re* Adoption of Y.E.F., 171 N.E.3d 302, 311 (Ohio 2020) (citing *In re* L.T.M., 824 N.E.2d 221, 230 (Ill. 2005)).

244. 530 U.S. 57, 73 (2000).

245. 519 U.S. 102, 107 (1996).

246. *Id.*

247. *See*, e.*g.*, *In re* Jay R., 197 Cal. Rptr. 672, 680 (Cal. Ct. App. 1983) (basing state action finding on both the "extensive statutory scheme" and the requirement for a CPS investigation of every stepparent adoption petition); *K.A.S.*, 499 N.W.2d at 566 (first citing N.D. CENT. CODE § 14-15-09(1)(i) (2021); then citing N.D. CENT. CODE § 14-15-11(5) (2021)) (state is required to be a named party, although it is not obligated to participate in the proceeding); Zockert v. Fanning, 800 P.2d 773, 777–78 (Or. 1990).

248. *See*, e.g., *In re* Adoption of J.E.V., 141 A.3d 254, 264 (N.J. 2016) (basing holding on the New Jersey Constitution). Applying *Matthews* and *Lassiter*, the court noted: "Both the public and the State have a strong interest in seeing that children are adopted in appropriate cases. Because an adoption terminates parental rights, N.J.S.A. 9:3–50(c)(1), the public, the State, and the parent also share an 'interest in an accurate and just decision.'" *Id.* at 265–66 (citing Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

a dependency termination action are entitled to counsel, on the basis of an equal protection analysis.[249]

The Illinois courts' examination of the right to counsel in private termination proceedings provides a good example of the variation among courts on the right to counsel in such cases. An appeals court held that a privately-initiated TPR proceeding in an adoption case involved state action because "respondent's parental rights could be terminated only pursuant to a comprehensive statutory scheme" and "a specific procedure of the state is being challenged."[250] On appeal, the Illinois Supreme Court rejected that conclusion, holding that "the mere fact that the state court is the forum for the dispute" was an insufficient basis to find state action.[251] Instead, based on a fact-specific inquiry of *that* case, the court found state action because the children had been placed in the adoption petitioners' care as the result of an earlier removal proceeding initiated by the state under the dependency statute.[252] The court upheld the appeals court's conclusion that the parents' equal protection rights were violated because they would have been entitled to counsel if the termination proceeding had been brought under the dependency statute.[253] The Illinois Supreme Court extended its holding three years later to require the appointment of counsel for any parent who is the subject of a termination

249. *See*, e.g., *In re* S.A.J.B., 679 N.W.2d 645, 651 (Iowa 2004); *A.W.S.*, 339 P.3d at 419; *Y.E.F.*, 171 N.E.3d at 313; *Zockert*, 800 P.2d at 779 (quoting Hale v. Port of Portland, 783 P.2d 506, 515 (Or. 1988)).

250. *In re* Adoption of K.L.P., 735 N.E.2d 1071, 1077 (Ill. App. Ct. 2000).

251. *In re* Adoption of K.L.P., 763 N.E.2d 741, 751 (Ill. 2002) (first citing People v. Brown, 660 N.E.2d 964, 970 (Ill. 1995); then citing People v. DiGuida, 604 N.E.2d 336, 346 (Ill. 1992); and then citing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1698 (2d ed. 1988)).

252. *Id.* Justice Freeman issued a concurring opinion questioning the basis for finding state action on that fact and noting: "The fact that children may have been removed from a parent's custody is legally irrelevant to the question of whether his or her parental rights should be terminated in a subsequent adoption action." *Id.* at 755 (Freeman, J., concurring). Quoting the Supreme Court's holding in *Blum v. Yaretsky*, 457 U.S. 991, 1005 (1982), he reasoned: "Regardless of motivations, state action may be found where 'the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'" *Id.* at 756 (Freeman, J., concurring).

253. *See id.* at 754. The court held that the only state interest served in the different treatment of parents depending on whether the termination proceeding was brought under the dependency statute or the adoption state was the cost savings of not providing counsel in the latter, which interest is not "compelling" under a constitutional analysis. *K.L.P.*, 763 N.E.2d at 753.

proceeding brought under the adoption statute, regardless of the factual context.[254]

Of course counsel can be a crucial factor in any case but, even if a parent has the right to counsel specifically during the termination proceedings, such right may be of little help to a parent in a disadvantaged position at the start of the proceedings because they lacked access to legal representation in a prior proceeding, for example, a guardianship or custody case in which all of their parental rights were suspended or were allocated to the person now petitioning for a permanent termination of those rights.[255] The parent's unfavorable position here is equivalent to having consequences, such as a greater punishment, imposed based on a prior uncounseled plea in a criminal matter.[256] Avoidance of such jeopardy is why it is essential that access to counsel be provided to parents well before the proceeding in a TPR case. It ensures the full protection of the parents' rights and may even minimize the risk of a petition being filed.

V. THE PRIVATE REMEDY RATIONALES FOR PRIVATE TERMINATION AND ALTERNATIVES WORTH CONSIDERING

As described above, termination of parental rights is an extreme remedy that eliminates a constitutionally protected interest and permanently severs a legal relationship between two people. The legal relationship between a parent and their child can have power and significance in a range of contexts. This Part examines three explicit or implicit rationales for permitting the severance of this relationship when it is sought by an individual as a private remedy: to allow a non-parent to acquire a legal relationship to a child; to sever the custodial parent's link to the other parent; and/or to foreclose any potential exercise of parental rights in the future. While providing private

254. *See In re* Adoption of L.T.M., 824 N.E.2d 221, 231–32 (Ill. 2005) ("[A] parent who stands to lose his rights under the Adoption Act if he is found unfit is in a very similar situation to a parent who stands to lose the very same constitutional right, based on the very same finding, in proceedings under the Juvenile Court Act.").

255. *See, e.g.*, *In re* Guardianship of Robert S., No. F060073, 2011 WL 2152626, at *19 (Cal. Ct. App. June 20, 2011) (noting when vacating termination order in adoption case brought by her children's legal guardian that the mother did not have counsel when the guardianship order was entered that removed the children from her custody, which was the basis of the later termination order).

256. *Cf.* Nichols v. United States, 511 U.S. 738, 748 (1994) (holding that there is no due process violation for a defendant's prior uncounseled misdemeanor conviction is used to enhance his sentence in a subsequent conviction).

remedies is an appropriate function of law generally, there is little acknowledgment or examination of the role of these rationales in termination of parental rights proceedings outside of the public dependency context.

To understand the underlying policy rationales at work, we need to consider whose interests are served when a parent's rights are terminated. In the public dependency context, the most common rationale for terminating a parent's rights is framed as "permanency" for the child.[257] The termination order facilitates a conclusion to the proceeding itself; it ends the state's obligation to support reunification of the family; and it "frees" the child for adoption or for other lasting arrangements.[258] In private cases, by contrast, "permanency" of this kind is likely not needed for the child, as the child likely already has a home with a custodial parent or legal guardian.[259] Rather, the objective is to render one of the child's parents a legal stranger. While the outcome is often framed in terms of a child's best interest, the primary beneficiary of this result is the petitioner. Therefore, in TPR cases brought by private individuals, the termination order functions more as a remedy for the petitioners than as an exercise of the state's *parens patriae* role towards a child.[260] For this reason, the rationales articulated by petitioners or the courts involved here differ from those in the public dependency context, even where the legal effect of the termination order is the same.

The timing of a petition for TPR needed for adoption, for example, reflects the interests served by the termination as a private

257. *See* Richard Cozzola & Lee Shevell, *Representing Parents at Disposition and Permanency Hearings in* GUGGENHEIM & SANKARAN, *supra* note 12, at 209, 212; CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), childwelfare.gov/pubPDFs/groundtermin.pdf.

258. *See* ROBERTS, *supra* note 58, at 106-107; CHILD WELFARE INFO. GATEWAY, GROUNDS FOR INVOLUNTARY TERMINATION OF PARENTAL RIGHTS 1 (2021), childwelfare.gov/pubPDFs/groundtermin.pdf.

259. *See, e.g.*, Adoption of Isabelle T., 2017 ME 220, ¶ 36 175 A.3d 639, 649 ("In the private adoption setting, the permanency concerns that are typically present in state-initiated termination proceedings are not at issue. Here, the children are in a permanent living situation with their mother and stepfather, which, as all the parties testified, is not going to change regardless of the outcome of the termination and adoption processes.").

260. *See* Blair, *supra* note 124, at 300–01 ("When families break apart, it is not uncommon for parents to harbor feelings of pain, bitterness, and anger toward their former partners . . . For some parents, the opportunity to terminate the parental rights of their ex-spouse provides the ultimate weapon in the arsenal of matrimonial warfare.").

remedy. In a dependency case, state intervention in the family and a subsequent TPR petition are triggered by the alleged abuse or neglect by parents and the corresponding risk of harm to a child.[261] By contrast, in an adoption case, the petitioners alone choose when to file for adoption and seek termination.[262] As noted earlier, the nonconsenting parent in a contested termination proceeding in an adoption is almost always at a disadvantage because they are being compared with the members of the petitioning family who have been caring for the child.[263]

Clare Huntington critiques American family law for having a "reactive approach to family well-being," which she refers to as "negative family law."[264] She argues that, when the U.S. family law system addresses problems that arise within a family, it favors a "dispute resolution" framework.[265] The state does not "nurture strong, stable, positive relationships to help families avoid conflict, and then, when conflict does occur, the state fails to resolve family disputes in a way that would maintain strong, stable, positive relationships."[266] The private remedy rationales examined below are consistent with the pattern Huntington describes. The reactive-negative orientation is evident throughout private termination petitions and proceedings, and especially in the requirement of termination in adoption. The scenarios, standards, and rationales confirm her observation: "When the current legal system is used for family conflicts, it both freezes the relationship at the moment of breakdown and fuels the conflict with the adversarial process, doing nothing to help repair relationships."[267]

As discussed above, the availability of termination as a private remedy is also consistent with trends in the law that shift focus from the family as a legal entity to the prominence of individual rights.[268] Barbara Ann Atwood has observed: "A singular feature of Anglo-American law that contrasts sharply with the approach of many American Indian tribes is the characterization of parenthood as a

261. *See supra* notes 64–67 and accompanying text.
262. *See supra* notes 86–88 and accompanying text.
263. *See supra* note 189 and accompanying text.
264. HUNTINGTON, *supra* note 24, at 83.
265. *Id.*
266. *Id.*
267. *Id.* at 84.
268. *See supra* notes 34–38 and accompanying text.

rights-based exclusive status."[269] The private remedy rationales fit right in with this rights-based orientation, which encourages legal mechanisms, procedures, and standards that are divisive rather than promoting strong, stable relationships. Termination of parental rights represents a zero-sum victory: the rights enjoyed by the petitioner are expanded through the elimination of another person's rights.[270]

Among other aspects of TPR as a private remedy that need examination is the role played by racial, cultural, and socioeconomic factors in determining whether an individual decides to pursue termination as a remedy and even whether they have it available to them as an option. Families in communities of color are less likely to seek the termination of a family member's parental rights and more likely to be satisfied with an informal caregiving agreement.[271] For such families, extreme and adversarial measures such as termination may be associated with public CPS agencies as the result of prior intervention and family separation, which target families of color inequitably.[272] Further, because private termination proceedings and adoption outside of the public child protection system generally require the use of an attorney, those without means to retain counsel may be less aware of the possibility of terminating another's parental rights or less likely to pursue it.[273]

In addition to examining the rationales at work in private termination cases, this Part also considers whether, in light of the potential adverse consequences of a TPR for the child as well as the parent discussed in Part I.B.,[274] there are alternative ways that the

269. ATWOOD, *supra* note 88, at 134. Tribal courts, for example, take a far more inclusive view of the role of multiple adults and "the voice of the collective" in a child's life and upbringing, and "traditions of kinship care necessarily inform the decision-making of tribal judges" when making custody determinations, including those involving claims by non-parents. *Id.* at 136–39.

270. *See* Laufer-Ukeles, *supra* note 48, at 744–50 (noting distinction between "individualistic rights" and "relational rights" in family law). GUGGENHEIM, *supra* note 20, at 48–49 ("One of the most deeply contentions issues in American family law is a struggle among adults over who gets to enjoy the bundle of rights parents possess.").

271. Smith, *supra* note 221, at 320–25.

272. *See* ROBERTS, *supra* note 58, at 6–10; Gilbert A. Holmes, *The Extended Family System in the Black Community*, *in* FAMILIES BY LAW: AN ADOPTION READER 119 (Naomi R. Cahn & Joan H. Hollinger eds. 2004); ELISA MINOFF, ENTANGLED ROOTS: THE ROLE OF RACE IN POLICIES THAT SEPARATE FAMILIES 15–19 (2018), cssp.org/wp-content/uploads/2018/11/CSSP-Entangled-Roots.pdf.

273. *See* ROBERTS, *supra* note 58, at 11, 13.

274. *See supra* notes 43–58 and accompanying text.

identified rationales could be served. In particular, it considers whether there are measures that could support and enhance relationships or at least reduce conflict, short of a permanent severing of the legal parent-child relationship. These existing and proposed alternative measures include de facto parentage, non-exclusive adoption, minor guardianship, and recognition of degrees of parenthood, along with measures to prevent the abuse of family law litigation. Many of the alternative measures discussed below could serve multiple rationales, while others would address only specific ones.

A. Severance of a Parent's Relationship to a Child to Clear the Way to Add a New Parent Through Adoption

1. The Rationale and Its Origins and Limitations

The most prevalent rationale for a TPR as a private remedy applies in the context of an adoption: to allow a non-parent**,** such as an existing parent's new spouse or partner, to acquire a legal relationship to a child. Adoption itself has clear legal benefits for the adopting parent and the child. It not only provides a caregiver formal legal status with respect to a child in their care, but it also imposes parental responsibilities on that caregiver.[275] Most state adoptions laws, however, are based on a "one in, one out" model, meaning that, to achieve these benefits, it is necessary to terminate the rights of one or both of the child's existing parents.[276] To add a parent through an adoption, one must "subtract" a parent in the process. [277] And, with the other parent out of the picture legally, the parent and new partner gain a further benefit in exclusive authority over the child. Since they need not confer with or involve the terminated parent, they can effectively remove that person from the child's life.

The Supreme Court of Arizona describes the many benefits to a child and the adopting family from stepparent adoption in a 2016

275. *See Introduction*, in FAMILIES BY LAW: AN ADOPTION READER 1, 1 (Naomi R. Cahn & Joan H. Hollinger eds. 2004).

276. *See, e.g.*, Savage v. Gomez (*In re* Adoption of Kassandra B.), 540 N.W.2d 554, 558 (Neb. 1995) (observing that "termination of [a biological parent's] parental rights is the foundation of our adoption statutes.").

277. Some parents may attempt to adopt their own child, without adding a new parent, for the sole purpose of seeking termination of the other parent's rights through the adoption. Courts are wary of permitting this use of adoption. *See, e.g.*, *In re* Adoption by Tamra M., 2021 ME 29, ¶ 8, 251 A.3d 311, 313; *In re* Adoption of Xavier K., 268 P.3d 274, 276 (Alaska 2012).

opinion, *Demetrius L. v. Joshlynn F.*, which affirmed a lower court's termination of the parental rights of a non-consenting father.[278] The petitioning stepfather had "a closing and loving relationship" with the child, D.L., for about six years, treating the child as his son.[279] While reviewing the application of the "best interest" standard in that case, the court noted the benefits an adoptee reaps from the adoption:

> Adoption obligates the adopting parent legally and financially to the child. . . . Adoption also solidifies the adopting parent's right to exercise custody and control of the child in the future, serving to advance the child's wellbeing. . . . An adopted child also stands to inherit from the legal, adopting parent, without losing his or her rights to inherit from the other natural parent whose rights are severed.[280]

The court then described the benefits to the child, D.L., specifically:

> [M]aking D.L. adoptable would affirmatively improve his life in that it would add permanency and stability to the de-facto father-son relationship that Stepfather and D.L. already have. . . . Stepfather is married to Mother, has financially provided for D.L. for about half of D.L.'s life, and fulfills the psychological role of a parent. . . . [A]doption would formalize Stepfather's obligations to D.L. If Mother becomes incapacitated or dies, Stepfather would be legally and financially responsible for D.L., whose continued custody with Stepfather would be assured.[281]

Finally, the court noted that terminating the father's rights would "avoid possible negative and psychologically harmful interactions with D.L., who has expressed fear of both Father and Father's family members."[282]

None of these potential benefits to the child, however, require that the existing father's legal relationship to the child *be terminated* to

278. 365 P.3d 353, 358 (Ariz. 2016).

279. *Id.* at 354.

280. *Id.* at 357 (first citing ARIZ. REV. STAT. ANN. § 8-117(A) (West 2021); then citing *In re* Appeal in Pima Cnty., 674 P.2d 845, 847 (Ariz. 1983); then citing ARIZ. REV. STAT. ANN. §§ 14-120(6), (12), -2103(1), -2114(B); and then citing Champagne v. Ryan (*In re* Estate of Ryan), 928 P.2d 735, 738 (Ariz. Ct. App. 1996)).

281. *Id.* at 357–58.

282. *Id.* at 358 (citing *In re* Appeal in Maricopa County Juvenile Action No. JS-500274, 804 P.2d 730, 737 (Ariz. 1990)).

achieve these results. The improvements of the child's relationship to the adopting stepfather are a benefit of the adoption, not of the termination. The only reason those benefits are linked to the termination of the father's parental rights is that state law predicates an adoption on termination if the existing parent does not consent.[283] If such predicate were removed, the added benefits to a child of legal adoption by a caretaker stepparent could be obtained without any need to terminate the existing parent's rights. The final benefit to the child described by the Arizona court—avoiding harm from interactions with the father—is a basis for a court to *restrict contact* between the father and child.[284] Such restriction of contact between a parent and child is already within the authority of the court outside of the termination context, as in a custody order between separated parents.[285]

A serious result of tying termination of a non-consenting parent's rights to an adoption petition is that the merits of the underlying adoption petition, especially the child's benefit from the adoption, can easily influence the determination of whether the parent's rights should be terminated.[286] Essentially, that determination becomes a choice between who would be the "better" parent—old versus new—particularly when applying the "best interest of the child" standard, as noted in Part III.D.[287] Even where statutes appear to require courts to separate the questions, most courts consider the qualities of the proposed new parent when determining if termination is in the child's best interest.[288] This also means that the termination requirement creates a *barrier* to a meritorious and beneficial adoption if the TPR petitioner cannot prove the grounds for termination of the parent's rights by clear and convincing evidence, although, in such cases, the absence of such a determination is wholly separate from whether it

283. *See Demetrius L.*, 365 P.3d at 355–56 (first citing Mary Lou C. v. Ariz. Dep't of Econ. Sec., 83 P.3d 43, 50 (Ariz. Ct. App. 2004); then citing Audra T. v. Arizona Dep't of Econ. Sec., 982 P.2d 1290, 1291 (Ariz. Ct. App. 1998); and then citing Jose M. v. Eleanor J., 316 P.3d 602, 607 (Ariz. Ct. App. 2014)).

284. *See id.* at 358.

285. The court noted that D.L. and the father had had "virtually no contact for years," and it is unclear whether there had been any prior court determinations of father's contact rights. *See id.* at 357.

286. *See, e.g.*, *In re* Adoption of Syck, 562 N.E.2d 174, 186 (Ill. 1990) (reversing lower court's termination of parent's rights because court had considered child's best interests as part of its determination of parental unfitness).

287. *See supra* notes 181–189 and accompanying text.

288. *See supra* notes 187–189 and accompanying text.

would be in a child's best interest for the petitioner to *obtain* parental rights.[289]

Indeed, where the TPR determination for an adoption does not consider the merits of the accompanying adoption petition, it is possible for the TPR to be granted while the adoption petition for which it was a predicate is denied, leaving the child without a legal relationship with either the former parent *or* the proposed new parent.[290] In the public dependency context, the child would still be in state custody, and there would still be judicial reviews and a chance for a new permanency plan, such as the identification of new potential adoptive parents, a permanency guardianship, or even reinstatement of a parent's rights.[291] No such options are available, however, in private adoption-termination cases.

Courts rarely catalog the potential *disadvantages* to a child when a parent's rights are terminated in the context of an adoption. As noted above,[292] a child's feelings of connection with the parent are not necessarily severed by the termination of a parent's legal rights,[293] and termination can undermine a child's need for continuity of

289. *See* Elizabeth J. Aulik, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. REV. 604, 612, 615 (1979); *see also* Jennifer Wriggins, *Parental Rights Termination Jurisprudence: Questioning the Framework*, 52 S.C. L. REV. 241, 262–63 (2000).

290. *See* Adoption of Isabelle T., 2017 ME 220, ¶ 10, 175 A.3d 639, 645 ("[T]he background and qualities of the prospective adoptive parent are essential factors to consider in deciding whether termination of parental rights leading to adoption by that individual is in the best interests of the child or children."). The case law suggests that a failed adoption after private termination is an exceptionally rare occurrence, which is not surprising given that the petitioners likely assume they will prevail on the adoption petition itself when they file.

291. *See, e.g.*, CAL. WELF. & INST. CODE § 366.26(i)(3) (West 2021); 705 ILL. COMP. STAT. ANN. 405/2-28(4)(b) (West 2021); DEL. CODE ANN. tit. 13, § 1116 (b), (c) (West 2021). *See generally* LaShanda Taylor, *Resurrecting Parents of Legal Orphans: Un-Terminating Parental Rights*, 17 VA. J. SOC. POL'Y & L. 318 (2010) (recognizing state and individual initiatives when a child becomes a legal orphan).

292. *See supra* notes 45–50 and accompanying text.

293. *See* Taylor, *supra* note 291, at 352 (noting that research has found that the parent-child bond continues when children are in foster care and after termination of parental rights); *see also* Cynthia R. Mabry, *The Psychological and Emotional Ties That Bind Biological and Adoptive Families: Whether Court-Ordered Postadoption Contact is in an Adopted Child's Best Interest*, 42 CAP. U. L. REV. 285, 293–95 (2014); Annette Baran & Reuban Pannor, *Perspectives on Open Adoption*, *in* FAMILIES BY LAW: AN ADOPTION READER 163, 164, 166 (Naomi R. Cahn & Joan H. Hollinger eds. 2004); HUNTINGTON, *supra* note 24, at 84; Cynthia Godsoe, *Parsing Parenthood*, 17 LEWIS & CLARK L. REV. 113, 129–34 (2013).

relationships not only with a parent[294] but also with members of the extended family related to that parent, such as siblings, grandparents, aunts, uncles, and others.[295] Also, if the child's custodial parent and adopting stepparent divorce, the child may subsequently have limited connection with the adopting stepparent, thus potentially losing their connection with two parents over the course of their childhood.[296]

The justices' opinions in a recent Arkansas stepparent adoption case, *Ballard v. Howard*, provides a glimpse of the possible mismatch between the presumed policy goal of a TPR in the adoption context, that is, to permit an adoption to take place, and its actual impact.[297] Although the petitioners had proven that the non-consenting father had not provided child support in more than twelve months due to his incarceration and substance use, and that the stepfather had helped raise the five-year-old child since the child's birth, the trial court declined to grant the adoption and sever the father's rights.[298] The non-consenting father was sixteen years old at the child's birth and the court observed: "As to what is going to happen in the future, I don't know, nobody here knows what is going to happen."[299] The court also noted that the child had a close relationship with his extended family on his father's side and that it was not in the child's interest to sever that relationship.[300] The petitioners' allegations about the father's

294. Ainsworth v. Natural Father, 414 So. 2d 417, 423 (Miss. 1982) (Lee, J., dissenting) ("[T]he forced adoption now being fostered upon the child has effectively denied his privilege of visitation with his father which is not in the child's best interest.").

295. *In re* Adoption of A.C.B., 159 Ohio St. 3d 256, 2020-Ohio-629, 150 N.E.3d 82, at ¶ 42 (Kennedy, J., dissenting) ("Adoption not only eliminates the noncustodial parent's parental rights and responsibilities—including the right to visitation and to have a say in the child's education and religious affiliation—but also severs the child's legal relationships with the parent, grandparents, and other blood relatives") (first citing OHIO REV. CODE ANN. § 3107.15 (West 2021); and then citing State ex. rel. Allen Cnty. Child. Servs. Bd. v. Mercer Cnty. Ct. of Common Pleas, Prob. Div., 150 Ohio St. 3d 230, 2016-Ohio-7382, 81 N.E.3d 380, ¶ 31); *In re* Interest of Brandon S.S., 507 N.W.2d 94, 108 (Wis. 1993) (holding that trial court should have admitted evidence of the potential impact of termination of father's rights on child's relationship with paternal grandparents).

296. In an opinion affirming the denial of a petition to annul a child's adoption by the parent's domestic partner after the relationship ended, the Maine Supreme Judicial Court observed: "Adoption is a serious and permanent family institution. A child's legal parenthood cannot be subjected to the fleeting and transitory whims of adult relationships." *In re* Adoption of J.S.S., 2010 ME 74, ¶ 13, 2 A.3d 281, 284.

297. *See* Ballard v. Howard, 560 S.W.3d 800, 804 (Ark. Ct. App. 2018).

298. *Id.* at 801.

299. *Id.* at 801–02.

300. *Id.* at 802.

limited parenting abilities "can be addressed with a lot less drastic remedy than adoption."[301] In other words, while there was no reason *not* to allow the stepfather to adopt the child in his care, the requirement of termination of the father's rights led to its denial.

The Arkansas Court of Appeals affirmed the denial and specifically noted that a court can consider the relationship between a child and a parent's extended family as part of the "best interest" analysis in an adoption case as well as the father's intention to become more involved in the child's life after his release from incarceration.[302] To support his dissenting position that the trial court's best interest analysis had focused on the wrong facts, Judge Kenneth S. Hixson emphasized the positive relationship the child had with his stepfather.[303] He pointed to the evidence that the stepfather's role in raising the child included "changing his diapers, feeding him, teaching him to ride a bicycle, and taking him fishing," and that the stepfather is "for all intents and purposes, the only father the child knows."[304] The child's father, by contrast, was "a nonfactor—in fact, a negative factor" in the child's life.[305]

Supreme Court of Mississippi Justice Dan M. Lee offered another judicial critique of the rationale for termination in the private adoption context as part of his dissent in a 1982 opinion reversing the denial of a petition for a stepparent adoption.[306] Noting the upward trend of divorces and remarriages, he observed:

> When the mother remarries, a third party is injected into the existing hostilities between the natural parents which often leads to violence . . . A stepparent is merely an addition to a family, not a replacement for a child's natural parent. In many cases a child will have close ties to its noncustodial parent, and

301. *Id.*

302. *Ballard*, 560 S.W.3d at 803–04 (first citing Pippinger v. Benson (*In re* Adoption of J.P.), 385 S.W.3d 266, 278 (Ariz. 2011); and then citing Hollis v. Hollis, 468 S.W.3d 316, 322 (Ariz. Ct. App. 2015); *see In re* L.Z., 616 S.W.3d 695, 698 (Ark. Ct. App. 2021) (affirming denial of adoption petition by "dutiful stepparent" because the steps the father had taken demonstrate the "potential for a positive father/child relationship").

303. *Ballard*, 560 S.W.3d at 805 (Hixson, J., dissenting).

304. *Id.*

305. *Id.* at 806.

306. *See* Ainsworth v. Nat. Father, 414 So. 2d 417, 422 (Miss. 1982) (Lee, J., dissenting).

> to deny that child and parent the privilege of companionship and love will not always be in the child's best interest.
>
> Adoption laws were passed to provide homes for destitute, homeless and neglected children. Yet ordinary adoption laws are still applied to cases such as this one where the custodial natural parent seeks to terminate the child's relationship with its noncustodial natural parent.[307]

Other jurists have expressed a similar concern that a parent and new spouse or partner pursue an adoption primarily to cut out the other parent. Justice Sharon L. Kennedy of the Supreme Court of Ohio noted in her dissent from an opinion affirming a TPR in a stepparent adoption case because the existing father fell behind in child support payments: "The majority . . . appears blind to the practical realities of domestic-relations law. Although many people use a stepparent adoption to bring a blended family together, it may also be misused as a tool for removing an existing parent from a remarried parent's life."[308]

The "subtract-a-parent-to-add-a-parent" rationale for termination of a non-consenting parent's rights is vulnerable to other criticisms as well. In many cases, a parent objecting to the adoption is not asking the court to deny the adoption petition or even to remove the child from the petitioners' care. Rather, the parent simply does not want their *own* connection to the child to be severed completely and permanently.[309] Because of the winner-take-all orientation of the one-in-one-out approach to adoption, however, the only way for the parent to have a chance at preventing the termination of their rights is to withhold consent to the adoption itself.

A good example of the reasoning in this critique of the rationale in the stepparent context is the Maine Supreme Judicial Court's opinion in *In re Brandon D.*[310] The child's mother had moved without providing the father her new address, and her actions limited his engagement with the child.[311] The father, who lived in Florida,

307. *Id.* at 423.

308. *In re* Adoption of A.C.B., 159 Ohio St. 3d 256, 2020-Ohio-629, 150 N.E.3d 82, at ¶ 42 (Kennedy, J., dissenting).

309. *See* Mahoney, *supra* note 86, at 90 ("The noncustodial parent who objects to a proposed stepparent adoption is seeking to protect his or her own legal relationship with the child with all of the benefits and obligations for both parent and child associated with this status.").

310. *See In re* Brandon D., 2004 ME 98, ¶ 14, 854 A.2d 228, 232.

311. *See id.* at ¶ 7, 854 A.2d at 231.

testified that "he believed his children were in good hands and that he respected [the mother and stepfather] for the good job that they had done raising the children."[312] He sought only "to be able to telephone the children once or twice a month and write to them."[313] Vacating the probate court's order, the Supreme Judicial Court held that, rather than basing its TPR determination on whether terminating the father's rights was in the children's best interests (regarding which there was "sparse" evidence), the probate court had improperly based it on maintaining the stability of the children's then-current living arrangements.[314] The guardian ad litem testified that granting the adoption would be a good outcome because of the children's relationship with the petitioning stepfather, but also commented: "If there were a way to adopt without terminating, I'd say that would be wonderful. . . ."[315]

A related rationale for terminating an existing parent's rights in an adoption context is to render the child "adoptable" by clarifying the various legal relationships among the parties,[316] thereby providing stability and minimizing the potential for future disruption, conflict, and litigation.[317] However, conflict avoidance alone should not be a sufficient basis to terminate a parent's rights. A TPR petition can in fact inject a high-stakes conflict into a situation where the noncustodial parent may not otherwise object to a stepparent, relative, or guardian obtaining parental rights, such as in *In re Brandon D.*[318]

Given that "the subtract-a-parent-to-add-a-parent" rationale for termination does not withstand even modest scrutiny, one might

312. *Id.* ¶ 13, 854 A.2d at 232 n.3.

313. *Id.*

314. *See id.* at ¶ 11, 854 A.2d at 231–32.

315. *Brandon D.*, 2004 ME at ¶ 14, 854 A.2d at 32.

316. *See* Aulik, *supra* note 289, at 609, 630 ("The presence of a noncustodial natural parent further complicates the role and rights of the stepparent" and "Currently, adoption is the only way in which a stepparent can put to rest any conflict between the stepparent and the noncustodial parent.").

317. *See, e.g.*, Ballard v. Howard, 560 S.W.3d 800, 804–06 (Ark. Ct. App. 2018) (Hixson J., dissenting) (emphasizing that adoption by stepparent would provide "stability" for the child). Mabry, *supra* note 293, at 293 (noting that some believe that "having two mothers or two fathers is too confusing" for an adopted child); Young, *supra* note 88, at 510, 530–31 (noting that the normative argument for the "exclusive family" model is that "authority and responsibility are localized, readily identified, and efficient" and that an "old father" is seen as a "potentially destabilizing influence" and a "threat to the stability of the new unit").

318. *See Brandon D.*, 2004 ME at ¶ 13, 854 A.2d at 232 n.3.

wonder why it is so prevalent and entrenched. Legal scholars have noted and criticized the persistence of family law's near-inflexible "rule of two," which allows recognition of "only two legal parents for each child."[319] It is likely that this rigid rule is the actual, unstated rationale linking a TPR requirement to a stepparent's attempt to obtain legal recognition as a parent through an adoption.[320] While there are a few exceptions, as noted herein, "by and large, family law is reluctant to enlarge the pie of legal parenthood."[321]

The rationale requiring a termination of existing parents' rights in an adoption also reflects an implicit assumption that the ideal family unit is what Professor Sacha Coupet has referred to as the conjugal dyad structure, meaning that a child has only two parents who have (or at one point, had) a commitment to each other.[322] Thus, an existing parent's rights must be displaced to facilitate the creation of a new dyad through adoption.[323] As Lawrence Friedman observes: "Adoption holds up the model: the traditional, two-parent, loving, middle-class family, with stability and permanence."[324] The power of the traditional model, in adoption proceedings as elsewhere, protects heterosexual dyads in particular.[325] Thus, courts are wary when

319. HUNTINGTON, *supra* note 24, at 87.

320. *See id.; see, e.g. In re* Jay R., 150 Cal. App. 3d 251, 263 (Cal. Ct. App. 1983) (describing adoption termination proceedings as an exercise of state authority "to terminate the legal relationship of parent and child and establish a new relationship").

321. HUNTINGTON, *supra* note 24, at 87.

322. *See, e.g.* Coupet, *supra* note 16, at 618–24 (describing family law's "'rule of two,' the operative rule constraining parental claims to an exclusively dyadic model" and how the marriage-based legal concept of parent "privileges conjugality"); Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11 (2008) ("Family law, as part of the larger prevailing culture, has enshrined the number two. By constructing links among sex, marriage and procreation and conceptualizing each as a practice for two, family law takes as its paradigm the couple or pair."); Lewis, *supra* note 122, at 333–38; Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J. L. & FAM. STUD. 309, 309–14 (2007).

323. Mahoney, *supra* note 86, at 97 ("The all-or-nothing model of adoption . . . reflects traditional understandings about family boundaries in the law. Stepparent adoption involves the replacement of one legal parent figure (the noncustodial parent) with another (the stepparent), thus reflecting the general principle that legal parenthood, limited to two adults at one time, must be created by biology or adoption.").

324. FRIEDMAN, *supra* note 34, at 117.

325. *See* Michael H. v. Gerald D., 491 U.S. 110, 118 (1989) (upholding state law marital presumption based in part on reasoning that "California law, like nature itself, makes no provision for dual fatherhood").

petitioners seek to use adoption to support another model, such as when a child's non-parent relative, such as an aunt or grandfather, and one parent seek legal recognition of their co-parenting arrangement.[326]

Over the years, however, due to new reproductive technologies and expanding recognition of equitable or de facto parentage, the two-parent paradigm in U.S. family law has been eroding.[327] Some state laws, using gender-neutral language, now expressly allow a child to have more than two legal parents.[328] The 2017 Uniform Parentage Act, following the trend of some state laws, clarifies the current status of the paradigm: "The court may adjudicate a child to have more than two parents under this [act] if the court finds that failure to recognize more than two parents would be detrimental to the child."[329] This recognition of the reality and benefits of a child having more than two legal parents undermines the "rule of two." It thereby also undermines the rationale for the *necessity* of the termination of one or more parents' rights in the adoption context.

2. Alternatives Worth Considering

A child can obtain a legal connection to a caregiver without adoption, and there are also ways adoption can occur without the termination of existing parents' rights.[330] Such alternatives to common practices are not available in all jurisdictions, and they may not be

326. *See, e.g.*, *In re* Adoption of M.R.D., 145 A.3d 1117, 1118 (Pa. 2016) (holding that maternal grandfather could not petition to adopt minor children while retaining mother's parental rights but terminating father's rights). *See generally* Coupet, *supra* note 16 (discussing how kinship caregivers have increasingly assumed substantial parental responsibilities but have limited opportunities to carry the title of legal parent).

327. *See* Jessica Feinberg, *The Boundaries of Multi-Parentage*, 75 SMU L. Rev. 307, 329 (2022); Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 Fordham L. Rev. 2561, 2573–74 (2022); Tiffany L. Palmer, *How Many Parents? Multiparent Families are Increasingly Recognized by Law and Society*, 40 FAM. ADVOC. 36, 36–37 (2018).

328. *See* Jennifer Peltz, *Courts and 'Tri-Parenting': A State-By-State Look*, BOSTON.COM (June 18, 2017), https://www.boston.com/news/national-news/2017/06/18/courts-and-tri-parenting-a-state-by-state-look/.

329. UNIF. PARENTAGE ACT § 613(c) (Alternative B) (UNIF. LAW COMM'N 2017). *See also* ME. REV. STAT. ANN. tit. 19-A, § 1853(2) (West 2021) ("Consistent with the establishment of parentage under this chapter, a court may determine that a child has more than 2 parents."). Similarly, California enacted a provision to clarify that a court may find that a child has more than two parents, although the Legislative Findings suggested this would be true only in "rare" cases. CAL. FAM. CODE § 3040(3)(d) (West 2021).

330. *See infra* notes 336-362 and accompanying text.

appropriate in all contexts. But Justice Dan M. Lee, in his above-noted dissent, urged his colleagues to "find alternatives to adoption in cases such as this one where a natural parent's relationship with his child is being severed forever."[331] And acknowledgement of the underlying add-a-parent rationale of private TPR in adoption enables policymakers to consider whether this extreme result is always needed simply to allow an adoption to proceed.

A. De Facto Parentage

Many states recognize, through laws or court opinions, that a person without a genetic connection to a child but who has "an actual parent-child relationship and proof that that relationship was formed with the consent and encouragement of the child's legal parent" may be that child's "de facto" parent, and thereby entitled to parental rights and responsibilities.[332] The 2017 Uniform Parentage Act reflects this option.[333] Standards and terminology for these equitable parentage doctrines vary among states,[334] but, generally, an individual seeking such status must prove that they "reside[d] with the child for a significant period of time and . . . formed a bonded and dependent relationship with the child which is parental in nature."[335] Some stepparents can establish legal relationships with the children in their care via adjudication as a de facto parent.[336]

331. Ainsworth v. Nat. Father, 414 So. 2d 417, 423 (Miss. 1982) (Lee, J., dissenting).

332. Courtney G. Joslin, *De Facto Parentage and the Modern Family*, 40 FAM. ADVOC. 31, 32 (2018) [hereinafter *De Facto Parentage*].

333. *See* Joslin, *supra* note 29, at 602.

334. *See* Feinberg, *supra* note 327, at 321; *De Facto Parentage*, *supra* note 332, at 32; Myrisha S. Lewis, *Biology, Genetics, Nurture, and the Law: The Expansion of the Legal Definition of Family to Include Three or More Parents*, 16 NEV. L.J. 743, 748 (2016) ("There are a number of terms in use for individuals who occupy a significant parent-like role in a child's life. These terms include 'de facto parents, parents by estoppel, psychological parents, intent-based parenthood, and in loco parentis status'; these terms have different meanings in different jurisdictions.") (quoting Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1486–87 (2014)).

335. UNIF. PARENTAGE ACT § 609 (comment) (UNIF. LAW COMM'N 2017).

336. *See De Facto Parentage*, *supra* note 332, at 31, 33; *see also, e.g.*, Libby v. Estabrook, 2020 ME 71, ¶ 16–19, 234 A.3d 197, 202–203; *In re* Parentage of J.B.R., 336 P.3d 648, 652–53 (Wash. Ct. App. 2014). *See also* Aulik, *supra* note 289, at 606 (advocating for "stepparent custody" for "formal recognition" of stepparent as an alternative to adoption that would not requirement termination of the other parent's rights); 1 HOLLINGER, *supra* note 100, at § 2.10[3] (noting that legal commentators advocate for "a new kind of legal status" for "blended" family situations "that would be more consensual and would reduce the incidence of hostile litigation.").

This outcome is the legal equivalent of adoption because the court adjudicates the person as the legal parent of the child for all purposes, at least in some states.[337] It affects all existing parents' rights by "expanding the pie" of parentage with respect to a child, but it does not involve termination of any parent's rights.[338] A de facto parent order can be an alternative to the all-or-nothing stakes of termination of parental rights to achieve a result that would address all parties' objectives.[339] Indeed, for this very reason, a parent who would not consent to their child's adoption might consent to an adjunction of the non-parental caregiver as a de facto parent.[340]

B. Minor Guardianship

Minor guardianship provides a way to confer parental authority on a non-parent, but short of a parentage adjudication as in the de facto parent context.[341] Minor guardianship could achieve many of the same objectives as adoption or de facto adjudication, without terminating

337. *See, e.g.*, Pitts v. Moore, 2014 ME 59, ¶ 34, 90 A.3d 1169, 1183 ("The role of a de facto parent is no less permanent than that of any other parent; it is a role that may be surrendered, released, or terminated only in limited circumstances as approved by a court."). *See* Feinberg, supra note 327, at 322–23; *De Facto Parentage*, *supra* note 332, at 33.

338. *De Facto Parentage*, *supra* note 332, at 34–35.

339. Although de facto parenthood was not yet a well-defined concept in 1982, Justice Lee essentially encouraged something along those lines in his dissent. Ainsworth v. Nat. Father, 414 So. 2d 417, 423 (Miss. 1982) (Lee, J., dissenting) ("One alternative would be to award the stepparent equal legal custody of the minor child with the custodial parent, thereby establishing rights of the stepparent while preserving the natural parent's relationship with the child."). Myrisha Lewis has called for recognition of a new but similar form of parentage—what she has dubbed "parentage by *praxi*"—as a better alternative to stepparent adoption "because it focuses on the legal relationship between a previously-recognized legal parent and a possible third parent rather than focusing on the parent-child relationship." Lewis, *supra* note 334, at 768.

340. I have supervised several cases in our law school's clinic in which we resolved contested adoption-termination actions through an agreed-to de facto parentage adjudication.

341. Many jurisdictions provide other routes to "third-party custody" by non-parents in addition to minor guardianship. *See generally* 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 (2008) (arguing that states should enact child custody statutes that would permit a broad set of individuals to seek custody). To keep this discussion brief, I focus on minor guardianship because it is the most prevalent legal mechanism available for non-parents to seek custody.

the existing parents' rights.[342] In some cases, the parents' rights may be suspended or subject to the guardian's authority, but in most jurisdictions, a parent can hold a co-guardian status with the guardian, essentially co-parenting through a shared allocation of parental rights.[343] Indeed, prior to the availability of second-parent adoption by unmarried couples, de facto parentage, and marriage equality, some same-sex couples used co-guardianship as an option to confer some parental right on the other parent.[344]

C. Non-Exclusive Adoption

As noted above, most adoption statutes do not allow an adoption to both add a parent and preserve existing parental rights unless the existing parent is also a co-petitioner. This means an existing parent must join the petition or have their rights terminated, voluntarily or involuntarily. Some states, however, rather than requiring termination of a non-petitioning parent, have enacted adoption statutes that either allow an existing parents' rights to continue while the petitioner for adoption gains status as a parent or provide that a court may recognize more than two parents through an adoption.[345] Such an outcome would achieve the same result as a de facto parent adjudication. Ideally, this "non-exclusive adoption"[346] would result from all parties' consent to such outcome: the prospective adopting parent would sign a consent and waiver before the court, allowing the non-petitioning parent to retain parental rights and responsibilities after the adoption is final.[347]

In 2013, California enacted the first non-exclusive adoption provision to facilitate adoptions by same-sex couples, but the language

342. *See* Smith, *supra* note 221, at 301–09.

343. *See id.* at 349; *see also In re* Justina S., 579 N.Y.S.2d 955, 956 (N.Y. App. Div. 2d Dep't 1992) (child's mother and stepfather petitioned for co-guardianship).

344. *See, e.g., In re* Guardianship of I.H., 2003 ME 130, ¶ 18–20, 834 A.2d 922, 927–28 (mother and her female partner petitioned to be appointed co-guardians of child).

345. *See, e.g.*, CAL. FAM. CODE § 8617 (West 2021).

346. *See generally* Josh Gupta-Kagan, *Non-Exclusive Adoption and Child Welfare*, 66(4) ALA. L. REV. 715 (2015) (arguing that child welfare law should permit the non-exclusive adoption of foster children who cannot reunify with their parents) [hereinafter *Non-Exclusive Adoption*] Some refer to this approach as "third-parent adoption." Palmer, *supra* note 327, at 39.

347. *See* David D Meyer, *Family Ties: Solving the Constitutional Dilemma of the Faultless Father*, 41 ARIZ. L. REV. 753, 815–19, 822 (1999) (advocating for non-exclusive adoption even over the objection of an existing parent as long as the petitioner can demonstrate an existing de facto parent-child relationship).

in the statute has a potentially broader application.[348] Specifically, in the section addressing "existing parents' responsibilities toward child," the statute provides that the existing parent will *not* be "relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child"—that is, their rights will not be terminated—if the existing parent and adoption petitioner execute and file a waiver with the court prior to the finalization of the adoption.[349] Acknowledging the legacy of the "rule of two," California simultaneously enacted a provision to clarify that a court may establish parentage for more than two parents of a child.[350]

Non-exclusive adoption results in the child having an additional parent rather than a "replacement" parent.[351] Waivers such as those allowed under the California law would address the scenario in *In re Brandon D.* where a parent would not object to the adoption itself, only to the severing of their parental status.[352] Similar to the de facto

348. *See* Feinberg, *supra* note 327, at 331–32; *Non-Exclusive Adoption*, *supra* note 346, at 720.

349. CAL. FAM. CODE § 8617 provides in pertinent part:

> (a) Except as provided in subdivision (b), the existing parent or parents of an adopted child are, from the time of the adoption, relieved of all parental duties towards, and all responsibility for, the adopted child, and have no right over the child.
>
> (b) The termination of the parental duties and responsibilities of the existing parent or parents under subdivision (a) may be waived if both the existing parent or parents and the prospective adoptive parent or parents sign a waiver at any time prior to the finalization of the adoption. The waiver shall be filed with the court. CAL. FAM. CODE § 8617 (West 2021).

350. *See* CAL. FAM. CODE § 3040(d) (West 2021). However, the Legislative Findings for such provision suggested this would occur only in "rare" cases. Nevada modified its adoption statute in 2021 to permit "one or more adults" to adopt a child and permitting all existing parents to retain their parental rights as long as they were co-petitioners. NEV. REV. STAT. §127.030(1) (2021) ("Each prospective adopting adult and each consenting legal parent seeking to retain his or her parental rights must be a joint petitioner).

351. In addition to California and Nevada, Alaska, Florida, Oregon, Massachusetts, and Maryland now have adoption laws that permit recognition of three parents. *See* Palmer, *supra* note 327, at 39. These laws are used primary when a man is a sperm donor for two women and all three wish to have parental rights and responsibilities. *See id.*

352. *See supra* notes 310–315 and accompanying text. There have been apparently a few, isolated instances of a court permitting an adoption by a parent's new partner without terminating the rights of the other parent, but these are exceptionally rare and do not provide authority for other courts to follow the same route. *See* Ian Lovett, *Measure Opens Door to Three Parents, or Four*, N.Y. TIMES (July 13, 2012),https://www.nytimes.com/2012/07/14/us/a-california-bill-would-

parentage context, a non-petitioning parent might be more likely to consent to a stepparent adoption if their parental rights were not at stake, thus eliminating the need to adjudicate their "unfitness" to permit the adoption to go forward.[353]

Professor Josh Gupta-Kagan has advocated for the use of non-exclusive adoption in dependency cases.[354] He explains:

> Non-exclusive adoption would respect the lived reality of many foster children by legally recognizing all parents in their lives. Biological parents, even those who cannot reunify with their children, retain an important role for many foster children . . . Moreover, creating an additional legal path for foster children to leave foster care to new permanent families may help many children and families find legal options that minimize unnecessary litigation.[355]

The potential benefits of allowing legal recognition of all parental figures and minimizing litigation apply in the private termination context as well as in the dependency context.

While an outcome similar to non-exclusive adoption can be achieved in many states through de facto parentage, not every stepparent meets the statutory definition of de facto parent, and not every state provides a path to such status. Moreover, even where such status is reflected in state law, the adjudication process for de facto parentage can be difficult for unrepresented litigants to pursue. Thus, wider availability of non-exclusive adoption could extend to more families a mechanism to add a parent without terminating an existing parent's rights.[356]

More analogous to the dependency scenario described by Professor Gupta-Kagan, a non-exclusive adoption option may also make it easier for a long-term legal guardian to adopt the child where the parent is not seeking to regain custody of the child and would

legalize-third-and-fourth-parent-adoptions.html (reporting on such an outcome in an Oregon adoption case); Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. CIV. RTS. & CIV. LIBERTIES 201, 243 (2009) (noting instances of such outcomes in Alaska, Massachusetts, and Washington adoption cases).

353. *See* Wriggins, *supra* note 289, at 263–64. I am unaware of any data confirming my assumption that there would be fewer contested adoptions if non-exclusion adoption were available as an alternative.

354. *See Non-Exclusive Adoption*, *supra* note 346, at 716.

355. *Id.*

356. *See also* Feinberg, *supra* note 327, at 331–32, 335–36, 348, 354–56 (discussing the benefits of non-exclusive adoption and advocating for existing parents' express consent to non-exclusive adoption arrangements).

consent to the adoption but also does not want to give up their parental rights. It could potentially reduce the number of difficult guardianship termination proceedings by providing guardians a more secure legal status that reflects their role as a primary caregiver for the child, without requiring the parents to relinquish their status as parents or requiring the guardian to prove the parent's current unfitness.[357]

Non-exclusive adoption would enable a court to allocate parental rights and responsibilities—including, as appropriate, co-parenting, rights of contact, and child support—among the adults who had legal parent status with respect to the child.[358] Such allocation orders could be modified the same way as any other parental rights and responsibilities order, to reflect a substantial change of circumstances or an agreement of the parties. Of course, as some commentators have noted, a downside to any multi-parent family is the potential for having to re-litigate the allocation of parental rights and responsibilities among the parents if the multiple parties' spirit of cooperation wanes in the years after the adoption takes place.[359]

B. To Sever the Legal Connection Between the Child's Parents

1. The Rationale and Its Origins and Limitations

A second rationale for private termination of parental rights regarding a child is to enable a petitioning custodial parent to sever *their* legal connection to the other parent**,** protecting them from any risk associated with having to engage with the other parent.

This rationale has little to do with the child's interest. A standard child custody order can preclude any contact between the noncustodial parent and the child, protecting the child from harm while leaving the legal parent-child relationship intact.[360] Further, a court can allocate the parental rights of parents such that one parent not only has exclusive custody of the child but also has the right to make all

357. *See* Smith, *supra* note 221, at 336–40.

358. *See* Carbone & Cahn, *supra* note 19, at 42–52 (discussing potential allocations of rights and responsibilities among multiple parents).

359. *See id.* at 39 ("[T]he greater the number of adults holding parental status, the greater the potential for conflict"); *but see* Feinberg, *supra* note 327, at 357–58 (noting that concerns about conflict in multi-parent families as compared with two-parent arrangements may be overstated).

360. Feinberg, *supra* note 327, at 359–60 (noting that all jurisdictions permit courts to structure child custody and visitation orders as needed to protect a child from harm and to serve the child's best interests).

decisions affecting the child, including decisions about their education and health care. Where necessary, a custody order can preclude any form of contact between the noncustodial parent and a child, even the sending of a birthday card.[361]

TPR petitions reflect the fact that, even under such restrictive orders, the relationship with the other parent may nonetheless present ongoing problems for the custodial parent. The noncustodial parent's remaining legal status as a parent means that there is a continuing legal connection between them, even if they have divorced or obtained another formal termination of their relationship. Matters involving children are a rare exception to the legal principle of finality in litigation.[362] So long as a person remains a legal parent, they have standing to seek a modification of a court order either to expand their rights or to assert themselves as the child's parent in contexts in which such role is relevant.[363] There are legal standards to meet—such as demonstrating a "substantial change in circumstances"[364]—but those rarely prevent a noncustodial parent from *initiating* post-judgment proceedings to restore or expand their parent-child contact rights.[365] The filing of such proceedings alone, even if the other parent is unsuccessful, can be disruptive and anxiety-provoking for the custodial parent.[366]

361. ELROD, *supra* note 51, at § 6:15 ("If visitation [by the noncustodial parent] would be inimical to the child's welfare, it can be denied.").

362. *Id.* at § 17:01 ("A tension exists between protecting the welfare of a child and providing a finality to decisions . . . The doctrine of res judicata . . . is limited in child custody actions because of the court's inherent parens patriae power.").

363. *Id.* at § 17:01 ("In all states, [because of the *parens patriae* doctrine, judges retain the power to modify a custody award] to protect and further the best interests of a child.").

364. *Id.* at § 17:04 ("To further the goal of finality to the litigation, the motion for modification of custody or visitation must allege that a material change of circumstances has occurred since the entry of the original custody and visitation order which makes modification in the child's best interests."); Yitshak Cohen, *Issues Subject to Modification in Family Law: A New Model*, 62 DRAKE L. REV. 313, 315 (2014); HARALAMBIE, *supra* note 100, at § 7:4 ("Most states required a showing of changed circumstances prior to modifying a custody order.").

365. *See* Joan G. Wexler, *Rethinking the Modification of Child Custody Decrees*, 94 YALE L.J. 757, 760 (1985) (criticizing "marked trend toward making custody modifications fairly easy to obtain").

366. *See, e.g.*, Linda D. Elrod & Milfred D. Dale, *Paradigm Shifts and Pendulum Swings in Child Custody: The Interests of Children in the Balance*, 42 FAM. L.Q. 381, 388 (2008); Linda D. Elrod, *Reforming the System to Protect Children in High Conflict Custody Cases*, 28 WM. MITCHELL L. REV. 495, 499 (2001); Richard Wolman & Keith Taylor, *Psychological Effects of Custody Disputes on Children*, 9 BEHAV. SCI. & L. 399, 410–412 (1991).

A noncustodial parent can have an emotional interest in maintaining a legal connection to the child or the custodial parent that has nothing to do with the child. They can use their standing to perpetuate litigation—even if futile—to harass their former partner or simply to be able to have an encounter with them in a courtroom.[367] While the specter of litigation with a former spouse or partner can be unsettling for anyone, avoiding this possibility is particularly desirable where the noncustodial parent has engaged in extreme violence towards the custodial parent.[368]

This rationale is especially prominent when the child was conceived as a result of a sexual assault. Research findings suggest that as many as 32,000 rape-related pregnancies occur each year.[369] Allowing a rapist to pursue visitation rights may cause re-traumatization of the survivor-parent, sometimes referred to as a "second rape."[370] Termination of the perpetrator's parental rights not only ensures that there is no relationship between the perpetrator and the child but also that they have no legal connection with the child's mother; absent termination, the continued "tether" perpetuates the assault.[371] As National Conference of State Legislators observed: "Rape that results in a child is one of the only violent crimes that legally binds victims to their attackers, through the consequences of that violent act."[372] For this reason, most states permit termination of

367. *See* Judith Lewis, *supra* note 122, at 331 n.99; ELROD, *supra* note 51, at § 17:1 ("Custody disputes provide opportunities for control over a former partner.").

368. *See supra* notes 156–157 accompanying text.

369. *See* Melisa Holmes, et al., *Rape-Related Pregnancy: Estimates and Descriptive Characteristics From a National Sample of Women*, 175 AM. J. OBSTET. GYNECOL. 320, 322 (1996) (more than 32,000 pregnancies per year); Felicia H. Stewart & James Trussell, *Prevention of Pregnancy Resulting from Rape: A Neglected Preventive Health Measure*, 19 AM. J. PREV. MED. 228, 228 (2000) (approximately 25,000 pregnancies each year). *See also Understanding Pregnancy Resulting from Rape in the United States*, CENTERS FOR DISEASE CONTROL (June 1, 2020), https://www.cdc.gov/violenceprevention/sexualviolence/understanding-RRP-inUS.html.

370. *See* Moriah Silver, *The Second Rape: Legal Options for Rape Survivors to Terminate Parental Rights*, 48 FAM. L.Q. 515, 516 (2014).

371. *See id.* at 522.

372. *Parental Rights and Sexual Assault*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Mar. 9, 2020) https://www.ncsl.org/research/human-services/parental-rights-and-sexual-assault.aspx.

parental rights when the child was conceived as a result of a sexual assault.[373]

While some laws provide that sexual assault is a ground for termination of parental rights specifically in adoption[374] or public dependency proceedings,[375] most establish TPR as a stand-alone private remedy to be sought by the survivor-parent of the child.[376] Many termination laws involving sexual assault as a rationale were enacted by states in response to a federal law that establishes financial incentives for states to enact laws allowing private TPR in this context.[377] Colorado's statute includes these legislative findings, which make plain its private remedy rationale:

> The general assembly hereby declares that the purpose of this statute is to protect the victim of a sexual assault and to protect the child conceived as a result of that sexual assault by creating a process to seek termination of the parental rights of the perpetrator of the sexual assault . . . The general assembly further declares that *this section creates civil remedies* and is not created to punish the perpetrator but rather to protect the interests of the child *and the victim of a sexual assault*.[378]

Here too, however, a restrictive custody order could protect the *child* from the perpetrator. The important impact of these laws is the relief they provide to the child's custodial parent, the victim of the

373. *See id.* Nearly all states and the District of Columbia have enacted some form of law that specifically addresses the parental rights of perpetrators. Thirty-two states have laws that allow termination for perpetrators and twenty allow a restriction on parental rights short of complete termination. *Id.*

374. *See, e.g.*, ALASKA STAT. § 25.23.180(c)(1) (2021).

375. *See, e.g.*, CONN. GEN. STAT. § 17a-112 (2021).

376. *See, e.g., id.*

377. *See* 34 U.S.C. §§ 21301–08 (2018). The 2015 Rape Survivor Child Custody Act, part of the Justice for Victims of Trafficking Act, expanded grant funding available to states under the Violence Against Women Act who enact laws that enable parents of children conceived through sexual assault to seek termination of parental rights of the perpetrator. *See id.* The Department of Justice Office of Violence Against Women explained in a press release: "To qualify, the state must have a law that allows the mother of a child conceived through rape to seek court-ordered termination of the parental rights of the rapist with regard to that child, which the court is authorized to grant upon clear and convincing evidence of rape." U.S. DEPT. OF JUSTICE, FUNDS AWARDED UNDER THE RAPE SURVIVOR CHILD CUSTODY ACT (2016), https://www.justice.gov/ovw/page/file/1005396/download.

378. COLO. REV. STAT. § 19-5-105.5 (2021) (emphasis added). Arkansas's law, by contrast, is more explicit a form of punishment against the perpetrator in that it provides that the parent's rights are automatically terminated upon their conviction. *See* ARK. CODE ANN. § 9-10-121 (West 2021). The other parent may petition the court to reinstate the perpetrator's rights. *Id.* § 9-10-121(b).

sexual assault, by severing *their* relationship to the offending parent.[379] In fact, Maine's statute goes so far as to provide that if a court finds that the child was conceived from a sexual assault, the court *must* terminate the offending parent's rights; *no* consideration may be given to the child's best interest.[380]

2. Alternatives Worth Considering

In the case of a TPR petition where a child was conceived from a sexual assault, and in contrast to the add-a-parent rationale, there are far fewer alternative routes to protect one parent from harm caused by the other parent having an ongoing legal connection to them through their mutual status as parents of a child. There is, however, an arguable distinction between two possible scenarios: in one, the child was the result of a consensual conception, but their parents' relationship was marked by domestic violence and harassment; in the other, the child's conception resulting from a sexual assault. In the former case, because the conception itself was consensual, the interests of the petitioning parent in the termination are diminished even though the relationship was or became abusive.[381] It is only in the latter instance that the perpetrator's retaining status as a legal parent would perpetuate an assault and, therefore, only in that instance that there is no alternative private remedy equivalent to the termination of parental rights.

As noted above, a court can allocate all parental rights and responsibilities other than child support to one parent, thereby eliminating any co-parenting obligations and minimizing any need for

379. In a recent opinion, the Superior Court of Pennsylvania held that the parent in that case, who was seeking termination of other parent's rights due to conception from sexual assault, was not required to petition for adoption to achieve such outcome. *In re* Interest of Z.E., No. 3577 EDA 2018, 2019 WL 3779711, at *8 (Pa. Super. Ct. Aug. 12, 2019). The court noted that the petitioner was not attempting to establish a new parent-child relationship or punish the father for being a negligent parent. *Id.* at *7. "Rather," the court observed, "Mother is looking to sever Father's parental rights to Children as a result of his criminal and sexually predatory behavior perpetrated against Mother for over 20 years, in an effort to put an end to a cycle of abuse, and to provide Children with a chance to grow up in a loving, supportive and caring home with no fear of reprisal from Father." *Id.* at *7.

380. *See* ME. STAT. tit. 19-A, § 1658(3-A)(A) (2021).

381. *See* Judith Lewis, *supra* note 122, at 364–66 (discussing similarities and distinction in use of termination of a perpetrator's parental rights as a remedy for those who have experienced interpersonal violence generally, including sexual assault).

the parents to have any interactions related to the child.[382] The risk of serial and harassing litigation can also be limited by a court order addressing the same based on a finding of an abuse of process.[383] Such an order could, for example, require an initial screening by the court before the custodial parent is served and obligated to respond to or participate in the proceedings.[384] Restrictions of this kind should be used sparingly, however, and not operate to limit a parent's access to the courts.[385]

Additionally, some scholars, challenging the current all-or-nothing view of legal parentage, have suggested that there could be degrees of parenthood such that not all legal parents would have equal rights.[386] While many state laws are predicated on the assumption that children should have frequent and continuing contact with both parents unless there is a reason not to, based on the child's best interest, at least one scholar has pointed out that this policy goal is not always the best starting point in determining the appropriate level of parental involvement.[387]

What can be emphasized here, is that few state laws reflect any of the proposed approaches to addressing the problems relating to a legal connection between the parents of a child, short of a termination of the parental rights of one of them.

382. *See id.* at 376–77.

383. *See* 42 AM. JUR. 2D *Injunctions* § 80 (2020).

384. *See id.* ("Injunction restricting frivolous litigation").

385. *See, e.g.*, Nolette v. O'Neil, 679 A.2d 1084, 1086 (Me. 1996) (holding that trial court exceeded its authority in limiting a party from filing post-judgment motions in a divorce matter for a period of three years absent a "detailed showing of a pattern of abusive and frivolous litigation").

386. HUNTINGTON, *supra* note 24, at 191 (arguing for "new social norms" are unmarried fatherhood, which will "better reflect [their] abilities and contributions."); Laufer-Ukeles, *supra* note 48, at 797 (advocating for "clearly defined and hierarchical categories of parenting and care relationships"); Jacobs, *supra* note 322, at 332–35 (advocating for legal reforms that recognize "multiple parenthood" with greater rights for parents who contribute more to caretaking role); Carbone & Cahn, *supra* note 19, at 46–52; Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J. L. & FAM. STUD. 231, 246–50 (2007) (discussing various "models of multiple parenthood); Young, *supra* note 88, at 54–55 (advocating a model of parenting that recognizes both a "core" parent-child unit and a "potential network of persons who may play supplementary and complimentary roles").

387. HUNTINGTON, *supra* note 24, at 171 ("[T]he central point is that the state should concern itself with more nurturing strong, stable, positive relationships than with any one particular structure of child and adult relationships.").

C. To Foreclose Any Future Exercise of Parental Rights

1. The Rationale and Its Origins and Limitations

The third private remedy rationale I examine in this Part is termination as a preventive measure to foreclose any possible future exercise of a person's parental rights. This rationale applies when a petitioning parent or guardian seeks termination of a parent's rights primarily as a hedge against significantly changing circumstances. Thus, a legal guardian may want to block the parent from trying to end the guardianship, thereby ensuring the perpetuation of the current custodial arrangement. Alternatively, a parent or guardian may be concerned that, if they were to die or otherwise be unable to care for the child, the other parent would, undesirably, step in to assert their parental status and take custody of the child.

This rationale bears a superficial resemblance to the permanency rationale of termination in the dependency context. In the child protection realm, "permanency" specifically refers to a resolution of the legal matter and to the involvement of the state in the child's life.[388] The child is in limbo—and the ongoing responsibility of the state—when it is uncertain whether the child will be reunified with one or both parents, or cared for in a different setting or family, such as through adoption, permanency guardianship, or some other arrangement.[389]

In the private termination context, however, a goal of "permanency" addresses a different kind of objective. When a parent or guardian is bringing a TPR action, they aim to obtain *exclusive* parental authority, thereby ensuring that, even if circumstances change, the other parent will never be in a position to exercise parental rights, either by seeking a modification of an existing custody or guardianship order or by asserting their parental status in some other context.

388. Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1, 2 (2015) ("Permanency is a pillar of child welfare law . . ."); Mark F. Testa, *The Quality of Permanence - Lasting or Binding? Subsidized Guardianship and Kinship Foster Care as Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499, 501 (2005).

389. Such arrangements could include third-party custody or emancipation. In some instances, children remain in foster care or state care of some kind after the termination of the parents' rights. *See* ROBERTS, *supra* note 58, at 112; *see* Garrison, *supra* note 48, at 426–55.

Where there is a minor guardianship appointment for a child, its perpetuation is contingent on the continuing need for a guardianship or, where the parent is alive with intact parental rights, that parent's ongoing consent. If a parent demands the return of the child and the guardian does not agree, the parent can petition the court to terminate the guardianship, requiring the parties to litigate the question of the parent's *current* parental fitness.[390] The United States Supreme Court held in *Troxel v. Granville* that a "fit" parent is presumed to act in their children's best interests,[391] and that a court order cannot preclude them from re-assuming a parental role.[392] Unless the guardian proves the continued unfitness of the parent, the court must end the guardianship, even if it has been in place for some time.[393] A legal guardian's adoption of the child, however, and the resulting termination of the parent's rights, prevents a parent from later claiming to have addressed the underlying difficulties that led to the guardian's appointment—e.g., substance use, incarceration, youth—and from petitioning to end the guardianship.[394] Therefore, where termination of a parent's rights in the context of an adoption petition is brought by the child's guardian, it is not for the purpose of providing legal authority to a non-parent caregiver, because the guardian, as such, already has such status. Rather, its purpose is to ensure that the guardian's legal status with respect to the child cannot be ended through an action on the part of the parent.[395]

Another concern that may lead to a private termination petition by a legal guardian or a custodial parent is the potential death of the petitioner while the child is still a minor.[396] In all U.S. jurisdictions, the death of one parent results in the automatic "devolution" of *all* parental rights to the surviving parent, regardless of the role they have played in a child's life, so long as their rights were not previously

390. *See* Garrison, *supra* note 48, at 474–76.

391. 530 U.S. 57, 68 (2000).

392. *See id.* at 68–69.

393. *See, e.g., In re* Guardianship of Reena D., 35 A.3d 509, 514–15 (N.H. 2011) (citing Troxel, 530 U.S. at 69).

394. Smith, *supra* note 221, at 335–37.

395. *See, e.g.*, Sidman v. Sidman, 249 P.3d 775, 787 (Colo. 2011); Boddie v. Daniels, 702 S.E.2d 172, 175–76 (Ga. 2010).

396. Few court opinions expressly address this reason for seeking termination. *See, e.g., In re* Appeal in Maricopa Cnty. Juv. Action No. JS-500274, 804 P.2d 730, 732, 736 (Ariz. 1990) (noting that, at trial, the mother "explained that she sought to terminate [the father's] parental rights so she could name her parents in her will as guardians for [the child].").

terminated by a court.[397] A leading treatise on child custody law describes the implications of the devolution of parental rights as follows:

> Where one parent survives, even if that parent was a noncustodial parent, the surviving parent is entitled to custody by operation of law. This is true even if the parents were never married, so long as parentage has been or can be established. The best interests of the child generally are not sufficient to deprive a fit surviving parent of custody by operation of law. The deceased parent's testamentary nomination is ineffective to deprive the surviving parent of custody, without a showing that the parent is unfit, has abandoned the child, or that there are similar extraordinary circumstances present. A third party who wishes to contest parental custody must initiate a custody proceeding.[398]

After the death of a custodial parent, any existing court-ordered allocation of rights between the parents, such as through a divorce or parental rights and responsibilities judgment, is no longer of any effect.[399] Moreover, there are then no legal limitations on a noncustodial parent's access to the child or decision-making authority regarding the child.[400] A guardianship appointment terminates upon the death of the guardian.[401] *In theory*, these provisions mean that a parent who has not exercised or had such rights would, solely as a result of the other parent's or guardian's death (if there is no other parent), thereupon have complete parental authority. This springing authority would include the right to demand that the child come live with that parent, regardless of where they are located and what prior relationship they had (or did not have) with the child.[402] These implied

397. *See* HARALAMBIE, *supra* note 100, at § 10:14.

398. *Id.; see, e.g.*, ME. STAT. tit. 19-A, § 1502 (2021) ("If one of the parents of a minor child is dead or has abandoned the child, all parental rights respecting the child devolve upon the other parent"); Croxford v. Roberts, 509 A.2d 662, 663 (Me. 1986) (applying the same). *See also* Lynne Marie Kohm, *Can a Dead Hand from the Grave Protect the Kids from Darling Daddy or Mommie Dearest?* 31 QUINNIPIAC PROB. L.J. 48, 49–50 (2017).

399. *See* Kohm, *supra* note 398, at 51–52.

400. *See, e.g.*, Stanley v. Penley, 46 A.2d 710, 712 (Me. 1946); *see also* Jay Frederick Wilks, *Right of Surviving Divorced Parent to Custody of Children*, 19 WASH. & LEE L. REV. 123, 125 (1962).

401. *See, e.g.*, UNIF. GUARDIANSHIP, CONSERVATORSHIP, AND OTHER PROTECTIVE ARRANGEMENTS ACT § 112(a) (UNIF. L. COMM'N 2017).

402. *See* Spires v. Bittick, 321 S.E.2d 407, 410 (Ga. Ct. App. 1984).

possible outcomes, however, are not inevitable, as discussed below with "alternatives."[403]

The termination of a parent's rights to prevent the possibility of devolution in the future provides no present-day benefit to the child.[404] Rather, it serves the hypothesis of what the child's future best interest would be if their custodial parent dies. It assumes that, based on present-day evidence, the child would forever *definitely* be better off as a legal orphan than ever *potentially* living with the surviving parent.[405] For that assumption to be appropriate, a court would have to find that the evidence of the noncustodial parent's past and present-day conduct presents a clear indication that they could *never* safely parent the child and that there is no possibility of rehabilitation. But evidence of conduct is not always clear or clearly predictive, and appropriate assumptions about future circumstances are not always easy to make.

In the short term, the true beneficiary of a termination order based on avoidance of devolution is the custodial parent or guardian; it provides them with peace of mind that the child will never end up in the custody of a parent determined to be unfit. In the longer term, the termination *could* also benefit the child if the custodial parent or guardian *does* die. But, under those circumstances, it would more likely benefit a stepparent or other relative who wants to assume care and obtain legal custody of the child without regard to or interference from the noncustodial parent.

A parent's estrangement from a child, for whatever reason, creates an uncertainty about their role if circumstances arise that implicate the legal status of their relationship to the child.[406] Holding the "parent card" could give a parent a particular power or benefit that could be exploited in ways that the other parent or a guardian would want to prevent. The specter of a latent, inequitable, and possibly harmful exercise of an estranged parent's springing parental authority could be a reason to seek the termination of their parental rights.[407] For example, an estranged parent could be entitled to inherit from a child

403. *See infra* notes 410, 412–436 and accompanying text.

404. *In re* Appeal in Maricopa Cnty. Juv. Action No. JS-500274, 804 P.2d 730, 736 (Ariz. 1990) ("[The mother's] wish to make a testamentary nomination of her parents to serve as guardians of [the child] in the event of her own untimely death similarly fails to show any present benefit to [the child].").

405. *See id.* at 735.

406. *See, e.g.*, *id.* at 737.

407. *See* Brown, *supra* note 46, at 556–57.

if the child were to predecease that parent.[408] This is an uncommon scenario, of course, but it can be significant if the child has substantial assets or there is a claim of wrongful death. Under such circumstances, the parent who had cared for the child would need to share the assets or outcome of the claim with the estranged parent, a legal requirement that could seem grossly inequitable. Because kinship relationships can have implications for a lifetime and their legal status can become significant in innumerable contexts, it is understandable that parents or guardians may wish to guard against confusion or results that are absurd or unjust. Termination of a parent's rights is insurance with broad coverage against all such scenarios. This rationale for TPR is understandable, but there may also be less legally drastic alternatives.

D. Alternatives Worth Considering

1. Restrictive Custody Orders

As noted above, most of the immediate concerns about a noncustodial or estranged parent asserting their parental authority in the future can be mitigated or addressed by courts through a restrictive order, such as one that allocates all decision-making authority to the custodial parent.[409] Such orders, while no longer in effect after a child attains adulthood or if a custodial parent dies before the child attains adulthood, could still serve as determinative evidence against a person

408. *Id.* at 557 ("The right to inherit and the portion of the decedent's estate to be inherited are determined solely by mechanical application of the intestate succession statutes and not by any assessment of the worthiness of the various potential heirs.").

409. *See, e.g.*, In re Marriage of Johnson, 245 Ill. App. 3d 545, 185 Ill. Dec. 617, 614 N.E.2d 1302 (3d Dist. 1993) (affirming termination of joint custody arrangement where trial court found that arrangement seriously endangered the physical, mental, moral and emotional health of the children" due to one parent's conduct); Wood v. DeHahn, 571 N.W.2d 186, 189 (Wis. Ct. App. 1997) (stating that "it is the court's responsibility to determine if the noncustodian's actions are inconsistent such that it is necessary and reasonable to fashion a restrictive order to protect the legal custodian's major life choice"). *See generally* ELROD, *supra* note 51, at § 6:15 Nonresidential Parent's Right to Parenting Time (noting that parent's access to a child may be severely restricted based on a risk of harm to the child from the parent's "physical violence, abuse (physical, sexual, or emotional), threats of abduction, sexual misconduct, sexual orientation, religious differences of the parents, mental illness, and substance abuse").

who seeks to exercise their parental status in a way that may be unjust or inappropriate.[410]

2. Limiting the Effects of Devolution Through Minor Guardianship

The potential for devolution of parental rights when the surviving noncustodial parent has abandoned or caused harm to the child is an understandable source of worry for a custodial parent. It is possible for a long-absent surviving parent to demand that their child be delivered to their care; and a child might need to relocate to a distant place to be reunited with a surviving parent with whom they may have had little or no previous relationship.[411] A child's remaining non-parent relatives or caretakers, however, are not without tools and options to prevent a risk of harm to the child from the devolution of parental rights.

If, after the death of the custodial parent, the child is in the informal care of a non-parent who wishes to retain custody, that caregiver can petition to be appointed as the child's legal guardian, generally in a probate proceeding.[412] The guardianship appointment would limit the surviving parent's authority over the child without resulting in or requiring the termination of their parental rights.[413] For example, a stepparent who had raised the child with the deceased parent but has no formal legal relationship with the child could seek such an appointment or, alternatively, de facto parent status.

In fact, most of the reported court opinions discussing devolution arise in the context of contested guardianship, third-party custody, or adoption matters: that is, where a non-parent—most commonly a stepparent[414] or a relative of the deceased custodial parent—petitions

410. *See, e.g.*, *In re* Guardianship of Donovan C., 2019 ME 118, ¶ 14–15, 212 A.3d 851, 844–55; IND. CODE ANN. § 29-3-3-6 (West 2021) (requiring separate proceeding for surviving parent to take custody of a child if "the parent was not granted custody of the minor in a dissolution of marriage decree" and such decree required supervised visitation or suspended "parenting time" entirely).

411. *See, e.g.*, Spires v. Bittick, 321 S.E.2d 407, 410 (Ga. Ct. App. 1984) (explaining that a father who had a "lapse in contact with his son" could get custody of his son after the mother's death and "make arrangements to pick up [his son]").

412. HARALAMBIE, *supra* note 100, at § 10:14. *See, e.g.*, *Donovan C.*, 2019 ME at ¶ 4, 212 A.3d at 853.

413. *See* Smith, *supra* note 221, at 286.

414. *See* Stephen Hellman, *Stepparent Custody Upon the Death of the Custodial Parent*, 14 J. SUFFOLK ACAD. L. 23, 26–28 (2000); *see also, e.g.*, *Spires*, 321 S.E.2d at 410 (denying stepparent's petition to adopt child where surviving parent did not

to be appointed as guardian of the child, or to take custody, or to adopt them,[415] and the noncustodial surviving parent objects and seeks custody.[416]

A guardianship or other third-party custody litigation strategy is not *certain* to succeed in preventing the surviving parent from assuming custody. Indeed, in light of the superior and constitutionally protected rights of the parent, a guardianship petition would not be granted without a parent's consent or a court finding of unfitness or a similar standard in light of the *Troxel* presumption.[417] Many state courts have long recognized "[t]he natural right of a parent to the care and control of a child" even aside from the constitutional considerations that have been the focus of recent case law.[418] Nevertheless, as a practical matter, a factual record sufficient to support the termination of a parent's rights would almost certainly provide a basis for a court to appoint a guardian over a parent's objection, given that the former requires a higher standard.[419]

A few state statutes address disputes between a surviving parent and a non-parent seeking custody of the child.[420] Such laws do not limit the actual devolution of rights or established preference for a

consent to the adoption and although his "conduct has not been exemplary in either the prompt payment of child support nor in the persistence in exercise of his rights to visitation" it was not a sufficient basis to terminate his parental rights on the basis of abandonment).

415. *See, e.g.*, HARALAMBIE, *supra* note 100, at § 10:14 (stating that a Montana statute will allow "the noncustodial parent; the surviving spouse of the deceased custodial parent" or "a person nominated by the will of the deceased custodial parent" to "petition for custody following the death of the custodial parent"); *see also* JACOBS, *supra* note 86, at § 6:8.

416. An estranged parent may choose not to seek custody of the child after the other parent's death. If the child is being cared for by a relative or stepparent, the surviving parent may be content to leave that custodial arrangement in place and even consent to appointment of the caregiver as the child's guardian.

417. *See supra* note 390 and accompanying text. Troxel v. Granville, 530 U.S. 57, 69 (2000) ("traditional presumption that a fit parent will act in the best interests of his or her child.").

418. *See, e.g.*, Merchant v. Bussell, 27 A.2d 816, 818 (Me. 1942). This is sometimes referred to as the "parental preference" doctrine. ELROD, *supra* note 51, at §§ 1:2, 4:6; JACOBS, *supra* note 86, at § 6:8; 4 A. KIMBERLEY DAYTON ET AL., ADVISING THE ELDERLY CLIENT § 37:12.

419. *See, e.g.*, *Donovan C.*, 212 A.3d at 854–55 (affirming appointment of guardian over surviving parent's objection when petitioner proved the parent had abandoned child, applying definition of abandonment from dependency termination statute).

420. *See infra* notes 421–22 and accompanying text.

child to be raised by a parent.[421] Rather, they recognize that, with sufficient evidence of the implications for the child's interest, the presumption favoring the parent in such contexts could be rebutted by the non-parent petitioner.[422] Maine recently amended its guardianship law to add a rebuttable presumption to the standard for appointment over the objection of a surviving parent.[423] The presumption applies if, at the time of the custodial parent's death, there was a highly restrictive court order in effect that had allocated few if any parental rights to the surviving parent.[424]

In short, in assessing the third rationale for a TPR, we should recognize that there are already legal mechanisms in most state laws for addressing the care of a child when there is a risk of harm to the child if the surviving parent asserts their parental rights to custody. While the rationale is based on avoiding the risks of devolution at the death of a custodial parent, it is not *inevitable* that a child will end up in the care of that estranged parent by operation of law unless the parent's rights are terminated *before* the custodial parent's death. Given the existence of such mechanisms along with standard child

421. *See, e.g.*, MONT. CODE ANN. § 40-4-221 (West 2021) (providing that "upon the death of a parent" certain categories of people can "request a parenting plan hearing," including "the natural parent; . . . the surviving spouse of the deceased parent; [and] a person nominated by the will of the deceased parent").

422. *See, e.g.,* Watkins v. Nelson, 748 A.2d 558, 568 (N.J. 2000) ("[I]n custody determinations between a fit parent and a third party, as opposed to claims made between two fit parents, the child's best interests become a factor only after the parental termination standard has been met, rather than the determinative standard itself.") (applying N.J. STAT. ANN. § 9:2-5 (West 2021)); *In re* A.R.A., 919 P.2d 388, 392 (Mont. 1996) (holding that statute "does not give the district court authority to deprive a natural parent of his or her constitutionally protected rights absent a finding of abuse and neglect or dependency"). *See also* Dodge v. Dodge, 505 S.E.2d 344, 438 (S.C. Ct. App. 1998); Bailes v. Sours, 340 S.E.2d 824, 827 (Va. 1986); *In re* B.H., 770 N.E.2d 283, 285–87 (Ind. 2002). Some court opinions appear to do a straight "best interest" analysis, but those are of questionable constitutionality. *See, e.g.*, Freeman v. Rushton, 202 S.W.3d 485, 488 (Ark. 2005) (holding that best interest of the child is "paramount" in custody dispute between fit surviving parent and grandparents, while dissenting justice raised concerns about the constitutionality of the majority opinion in light of *Troxel*).

423. *See* ME. STAT. tit. 18-C, § 5-204(2) (2021).

424. *Id.* § 5-204(2)(C)(3) permitting a court to appoint a guardian over the objection of a surviving parent if "[a] prior court order concerning the minor granted another parent, who is now deceased, exclusive parental rights and responsibilities with respect to all aspects of the minor's welfare without reserving for the parent who is now the respondent in the guardianship proceeding any rights to make decisions, to have access to records or to have contact with the minor").

protection laws that would enable the state to seek custody,[425] courts should scrutinize the rationale for terminating a parent's rights for the purpose of precluding any future exercise after a custodial parent's death.

Additionally, a custodial parent could likely strengthen the future position of a nonparent's petition for guardianship in the event of that parent's death by nominating them as a "standby guardian" in a will or other written instrument, as is now permitted under the Uniform Probate Code and several state laws.[426] While such nomination would not guarantee the appointment since, if the surviving parent objects, a court would still have to find that parent unfit,[427] it could serve as evidence of the parents' respective relationships with the child prior to the custodial parent's death. Advance planning of that kind by a parent anxious to avoid the risks of devolution can provide some peace of mind without requiring the parent to successfully petition to terminate another parent's rights.[428]

3. Ordering Post-Guardianship Contact Between the Former

425. If a there is immediate risk of harm to the child or if no adult is willing to assume care of the child, a state CPS agency could of course seek custody of the child through a dependency action, but that scenario is likely to be far less common than a private guardianship action. *See, e.g.*, Webb v. Charles, 125 Ariz. 558, 560, 611 P.2d 562, 563–64 (Ariz. Ct. App. 1980) (father sought habeas corpus order for custody of child who was placed by the state in custody of grandmother after mother's death).

426. As one commentator has advised:

> Putting a clear estate plan in order is absolutely essential [if a parent does not want their child's other parent to assume custody]. A custodial parent should draft and execute a will naming a preferred guardian for the children, setting out the special relationship that individual has with the children, and why that person is most appropriate to act in the best interests of the children. Last will and testament provisions regarding the care of the children might also include facts about how the surviving parent is unfit to gain or regain custody.

Kohm, *supra* note 398, at 57.

427. *Id.* at 52–53. *See also, e.g.*, ME. STAT. tit. 18-C, § 5-203 (2021) (permitting appointment of nominated guardian over objection of other parent if all other requirements for appointment are met).

428. A full discussion of estate planning by parents is outside the scope of this Article, but parents can consider a range of potential tools parents to address the care of a child after the parent's death. *See generally* Richard M. Horwood, *Estate Planning Specifically for the Single Parent*, 25 EST. PLAN. 77 (1998) (examining the estate planning process when a single parent is in the picture); Kohm, *supra* note 398, at 56–61.

Guardian and Child

As noted above, a guardian may seek adoption of the child in their care for the primary purpose of obtaining a termination order to prevent the parent from attempting to resume custody of the child. In a high-conflict guardianship termination case, the guardian may be concerned that a parent resuming care will disallow contact between the former guardian and the child once the guardianship ends. If the guardianship appointment was in place for an extended time, there is a risk that the child will suffer harm or trauma if their contact with a former guardian and caretaker is severed wholly and abruptly.[429] To mitigate potential harm to the child by the termination of a guardianship, states could amend their guardianship statute, as Maine recently did, to grant courts the limited authority to address just that risk by ordering the ongoing rights of contact between the former guardian and the child after the guardianship is terminated.[430]

VI. SHOULD WE TERMINATE PRIVATE TERMINATION OF PARENTAL RIGHTS?

This Article has explored how termination of a parent's rights can be obtained by individuals as a form of legal remedy to allow an adoption to proceed, to sever a legal connection between the parents of a child, and to guard against a parent's future exercise of their parental rights. I have argued that the availability of this remedy through the courts comes at a cost, not only to the parent whose rights have been terminated but also potentially to the interests of the child. This practice also undermines family law policy goals and constitutional principles, both of which place high value on the

429. *See* Jessica Feinberg, *Whither the Functional Parent?: Revisiting Equitable Parenthood Doctrines in Light of Same-Sex Parents' Increased Access to Obtaining Formal Legal Parent Status*, 83 BROOK. L. REV. 55, 66 (2017) ("If the relationship between a child and an adult with whom he or she has formed an attachment relationship is disrupted, it can be very detrimental to the overall well-being of the child. *Id.* at 65. The disruption of attachment relationships can cause significant both short- and long-term psychological and emotional harm to children."); NAT'L CHILD TRAUMATIC STRESS NETWORK, CHILDREN WITH TRAUMATIC SEPARATION: INFORMATION FOR PROFESSIONALS 1–3, https://www.nctsn.org/sites/default/files/resources/children_with_traumatic_separation_professionals.pdf (last visited Apr. 11, 2022).

430. *See, e.g.*, ME. STAT. tit. 18-C, § 5-211(2) (2021) ("The court terminating a guardianship may enter an order at the time of the termination or the expiration of a transitional arrangement. . . providing for communication or contact, including overnight visitation, between a minor and the former guardian after the termination of the guardianship").

preservation of the parent-child legal relationship, even where a parent is no longer a caregiver. Further, the availability of private TPR on grounds of incarceration, substance use, mental illness, failure to pay child support, and the like through private actions between individuals, in addition to dependency proceedings, expands the ways that parents who are already relegated to the margins of society are vulnerable to the destruction of their legal ties to their children.

As noted in Part III, private terminations of parental rights have the same consequences as termination orders in public dependency proceedings but lack many of the procedural protections of proceedings initiated by a public agency, thus creating inequities and risking erroneous outcomes. One might conclude that a solution to these problems would be to change private termination proceedings so that they more closely resemble dependency actions or even to assign public CPS agencies a role in all termination proceedings. Because, however, as many scholars and advocates have observed, the existing public family regulation system is already excessively oriented around child removal and termination of parental rights, [431] that is exactly the wrong direction to pursue if solutions are sought to the various problems created by private TPRs.

Instead, we should consider whether, when, or the extent to which termination of a person's parental rights should be available as a private remedy at all. As this Article has discussed, there are few instances in which a petitioner can demonstrate that *termination*, rather than some alternative, is the necessary way to achieve the family's goals and protect the child's interests. As the analysis of rationales indicates, states should permit termination only if the petitioner demonstrates by clear and convincing evidence that a specific affirmative benefit for the child can be provided or that harm to the child or petitioner can be avoided *only* from severing the legal

431. In fact, as Marsha Garrison has noted, public family intervention law should take a cue from private family law's emphasis on preserving the parent-child relationship when parents are living apart. Garrison, *supra* note 48, at 478. For examples of contemporary family intervention reform advocacy. *See, e.g.*, Vivek Sankaran & Christopher Church, *Rethinking Foster Care: Why Our Current Approach to Child Welfare Has Failed*, 73 SMU L. REV. F. 123, 134 (2020); Vivek Sankaran et. al., *A Cure Worse Than the Disease? The Impact of Removal on Children and Their Families*, 102 MARQ. L. REV. 1161, 1185 (2019); Erin Miles Cloud, *Toward the Abolition of the Foster System*, 15 SCHOLAR & FEMINIST ONLINE (2019), https://sfonline.barnard.edu/unraveling-criminalizing-webs-building-police-free-futures/toward-the-abolition-of-the-foster-system/; Roberts, *supra* note 12.

relationship.[432] For example, where one parent seeks termination of another parent's rights to preclude that parent's access to the child or to avoid co-parenting of the child, the petitioning parent should first demonstrate that a court order already in effect allocating custody and decision-making fully to that parent is inadequate to protect the child from harm.[433]

The no-other-alternative approach would still enable a court to grant a termination petition brought by one parent against another based on proof that the child's conception resulted from a sexual assault. The rationale for these petitions is centered on ending the further victimization of the petitioning parent that exists from the continuing legal connection with the perpetrator. The circumstances of those proceedings are sufficiently unique that nothing short of termination of the perpetrator's rights can serve such rationale. However, where one parent seeks termination of another parent's rights to preclude that parent's access to the child or to avoid co-parenting of the child, the petitioning parent should first demonstrate that a court order already in effect allocating custody and decision-making fully to that parent is inadequate to protect the child from harm.[434]

Several state appellate courts have applied components of the approach for private termination cases I propose here specifically to ensure that termination is a remedy granted only sparingly. The Arizona Supreme Court observed: "[T]ermination of parental rights is not favored and . . . it generally should be considered only as a last resort."[435] The court noted the limitations of the usual best interest

432. *See In re* Appeal in Maricopa Cnty. Juv. Action No. JS-500274, 804 P.2d 730, 733 (Ariz. 1990) ("Several courts have noted that termination of parental rights is not favored and that it generally should be considered only as a last resort."). *Cf.* Gupta-Kagan, *supra* note 64, at 17 (discussing alternatives to termination of parental rights in the dependency context).

433. The Maine Legislature recently enacted such an approach. 2021 Me. Legis. Serv. Ch. 340 (West), *enacting* ME. STAT. tit. 19-A, § 1658(2)(C) (2021) (adding as a ground for termination: "A final order, other than in a protection from abuse matter under chapter 101, that has been in effect for at least 12 months grants the petitioner exclusive parental rights and responsibilities with respect to all aspects of the child's welfare, with the exception of the right and responsibility for support, without reserving for the parent any rights to make decisions, to have access to records or to have contact with the child, and termination of the parent's parental rights and responsibilities is necessary to protect the child from serious harm or the threat of serious harm."). This language is based on a specific recommendation of the Maine Family Law Advisory Commission, for which I have served as a consultant.

434. *See id.* § 1658(3-A)(A).

435. *Maricopa Cnty. Juv. Action No. JS-500274*, 804 P.2d at 733.

analysis in termination cases[436] and that, while a child's best interest could be a reason to deny a petition to terminate, it alone is not a sufficient basis to grant one.[437] Indeed, the court stressed the point, writing, "A determination of the child's best interest [in a TPR case] must include a finding as to how the child would benefit from a severance *or* be harmed by the continuation of the relationship."[438] Termination based on a finding of abandonment alone, for example, cannot be assumed to be in a child's best interest. "Rather," the court explained, "petitioner must prove an affirmative benefit to the child resulting from termination."[439] The court reasoned: "[A] parent, even an inadequate one, is better than no parent at all unless the child can somehow benefit from losing his natural parent."[440]

The Alabama Supreme Court has imposed a "no other alternative" standard in private termination cases as well as in public dependency matters.[441] Specifically, courts must apply a two-prong test in a termination petition brought by a custodial parent.[442] The first

436. *Id.* at 735 ("Petitioner must prove an affirmative benefit to the child resulting from termination . . . This reasoning reflects an unspoken assumption that a parent, even an inadequate one, is better than no parent at all unless the child can somehow benefit from losing his natural parent.").

437. *Id.* at 734 (quoting Santosky v. Kramer, 455 U.S. 745, 760 (1982)) ("[U]ntil the state proves parental unfitness, the child and his parents share a vital interest in preventing erroneous termination of their natural relationship.").

438. *Id.* at 734 (first citing *In re* Appeal in Maricopa Cnty. Juv. Action No. JS-6520, 756 P.2d 335, 343 (Ariz. Ct. App. 1988); then citing *In re* Appeal in Pima Cnty. Juv. Action No. S-111, 543 P.2d 809, 819 (Ariz. Ct. App. 1975); then citing *In re* Adoption of Hyatt, 536 P.2d 1062, 1068 (Ariz. Ct. App. 1975); then citing *In re* Appeal in Cochise Cnty. Juv. Action No. 5666-J, 650 P.2d 459, 463 (Ariz. 1982); and then citing *In re* Appeal in Maricopa Cnty. Juv. Action No. JS-6831, 748 P.2d 785, 788 (Ariz. Ct. App. 1988)).

439. *Id.* at 735 (citing *Juv. Action No. JS-6831*, 748 P.2d at 788).

440. *Maricopa Cnty. Juv. Action No. JS-500274*, 804 P.2d at 735. Several states have adopted post-adoption contact provisions, also known as "open adoption," which apply even in the public dependency context. These recognize that even if a parent's rights are terminated, there may be an underlying emotional or psychological relationship (or the potential for one) that is worth preserving or at least not undermining. Huntington notes that even after a change in legal status "the relationship between former family members typically endures." HUNTINGTON, *supra* note 24, at 85. These measures are beyond the scope of this Article but should be considered as part of a state's overall termination statutory scheme, whether public or private. If private termination is limited to extreme cases, as I discuss here, there will likely be few instances in which continuing contact after termination is appropriate.

441. *Ex parte* Beasley, 564 So. 2d 950, 954 (Ala. 1990).

442. *Id.*

prong is the application of the termination standard itself.[443] The second prong requires the court to "inquire as to whether all viable alternatives to a termination of parental rights have been considered."[444] The court reasoned: "Inasmuch as the termination of parental rights strikes at the very heart of the family unit, a court should terminate parental rights only in the most egregious of circumstances."[445]

Similarly, a Florida appeals court applied the concept of "least restrictive means" drawn from the public dependency statute in a private termination case because the same constitutional interests are implicated.[446] The court explained that constitutional principles require a petitioner to prove that termination "is the least restrictive means of protecting the child based on a totality of circumstances" and also held that "measures short of termination should be utilized if such measures can permit the safe re-establishment of the parent-child bond."[447]

An implicit but significant assumption present in many private termination proceedings is that if someone is not up to the role of being a full-time caregiving parent, they are not worthy of being any kind of legal parent and their children are better off with no parent than with a less-than-ideal parent. Such an assumption is evident from routine comparisons between the petitioner and the parent whose rights are at stake and also from the application of the often specious and always nebulous "best interest" standard. Thus, an "affirmative benefit to the child" inquiry should not consist of comparing the parent whose rights are at stake with the petitioner.

In adoption cases in particular, these comparisons set up a false choice for the court. They are based not on children's interests or the lived reality of what constitutes a child's "family" from an emotional

443. *Id.*

444. *Id.*

445. *Id.* at 952. Intermediate appellate courts, however, have held that standard is waived in cases of abandonment. *See, e.g.*, K.S.B. v. M.C.B., 219 So. 3d 650, 655 (Ala. Civ. App. 2016) ("We note, however, that 'the [father], by abandoning [his] child, 'lost any due-process rights that would have required the juvenile court to explore other alternatives before terminating [his] parental rights.'"") (citing L.L. v. J.W., 195 So. 3d 269, 274 (Ala. Civ. App. 2015)).

446. *See* S.S. v. D.L., 944 So. 2d 553, 557 (Fla. Dist. Ct. App. 2007) (citing B.C. v. Dep't of Child. & Fam., 887 So. 2d 1046, 1050 (Fla. 2004).

447. *Id.* at 558 (first quoting W.R. v. Dep't of Child. & Fam. Servs., 896 So. 2d 911, 915 (Fla. Dist. Ct. App. 2005); and then quoting L.B. v. Dep't of Child. & Fam., 835 So. 2d 1189, 1196 (Fla. Dist. Ct. App. 2002)).

and psychological perspective, but, rather, on a dubious heteronormative, traditional construct of the family as a conjugal dyad.[448] In common situations where a child's existing parents are no longer in a relationship or household with each other but the other parent is in a relationship with the proposed new adoptive parent and the objecting parent is not a primary caregiver, the objecting parent is unlikely to prevail after such comparison.

Further, a court's analysis of the competing harms and affirmative benefits to the child from a termination should encompass not only the child's legal relationship with the parties to the proceeding (that is, their parents and a potential adoptive parent) but the potential impact on the child's identity and relationship with extended family. As Professor Dorothy Roberts reminds us: "Children also have an interest in maintaining a bond with their parents and other family members."[449]

State courts can take a cue here from the approach of many tribal courts applying Native laws, which "consider the children's place in the entire extended family in order to make a judgment."[450] Where a child must live with extended family because "biological parents could not function adequately as parents," such arrangements have traditionally been informal, and practices of "informal adoption," not requiring termination, are now recognized in tribal codes and courts.[451] Two researchers who studied Native child welfare practices found that termination of parental rights is exceptionally rare occurrence in tribal courts, even if the procedure exists on the books

448. *See* discussion *supra* at notes 319–326 and accompanying text.

449. ROBERTS, *supra* note 58, at 108. *See In re* Interest of Brandon S.S., 507 N.W.2d 94, 107 (Wis. 1993) (evidence of impact of severing child's relationship with grandparents was relevant in termination in adoption case).

450. ATWOOD, *supra* note 88, at 124 (2010) (quoting Goldtooth v. Goldtooth, 3 Navajo Rptr. 223, 226 (Navajo 1982)). The *Goldtooth* court explained: "[I]n Navajo culture and tradition children are not just the children of the parents but they are the children of the clan." *Goldtooth*, 3 Navajo Rptr. at 226.

451. ATWOOD, *supra* note 88, at 145, 147–49. Atwood notes that: "Traditional [Native] adoption is often linked to the Native concept of collative responsibility for the welfare of tribal children." *Id.* at 149. A Navajo court observed: "The Navajo Common Law is not concerned with the termination of parental rights or creating legalistic a parent and child relationship because those concepts are irrelevant in a system which has obligations to children that extends beyond the parents." *In re* Interest of J.J.S., 4 Navajo Rptr. 192, 195 (Navajo D. Ct. 1983).

in tribal laws.[452] They observed that "many tribes actively abhor the idea and will not subject their children to this unthinkable act."[453] Several tribal courts permit a form of non-exclusive adoption, under which a parent retains some residual rights after an adoption decree is awarded, rather than requiring a "permanent cancellation" of the parent-child relationship.[454] This is in sharp contrast to the rights-based, "winner-take-all" approach in most U.S. state courts.[455]

For a "no other alternative" approach to be meaningful, states must also take two further indispensable steps in addition to adopting that standard, in some form, for private termination cases.

First, states must provide genuine, workable alternatives to termination, such as those described in Part V, so that this drastic measure is not the only route to addressing the purposes of current termination statutes. For example, a state must provide routes to parentage for a caregiver, such as de facto parentage and non-exclusive adoption, that do not include termination of existing parents' rights as a predicate. Similarly, a guardianship statute can provide courts with the tools they need to address custody on an expedited basis when a child's custodial parent dies.[456] Other than in the context of a conception from sexual assault or cases where there is a true risk of harm to the child from the continuation of the legal parent-child relationship itself, alternatives such as those indicated here can address the underlying policy rationales for private TPRs and serve the

452. Terry L. Cross & Kathleen Fox, *Customary Adoption as a Resource for American Indian and Alaska Native Children*, in CHILD WELFARE FOR THE TWENTY-FIRST CENTURY 423, 428 (2005).

453. *Id.*; *see also* ATWOOD, *supra* note 88, at 145–47.

454. ATWOOD, *supra* note 88, at 146–47.

455. *In re Interest of J.J.S.*, 4 Navajo Rptr. at 193 (describing the "American Law of Adoption" as oriented towards parental "duties" such that "when those duties are breached, then the law will take the children away from the natural parents and given them to other parents.").

456. *See, e.g.*, 2021 Me. Legis Serv. ch. 340 (West), enacting ME. REV. STAT. ANN. tit. 18-C, § 5-204(2)(C) (2021). This new provision allows a court to appoint a guardian over a surviving parent's objection if:

> (3) A prior court order concerning the minor granted another parent, who is now deceased, exclusive parental rights and responsibilities with respect to all aspects of the minor's welfare without reserving for the parent who is now the respondent in the guardianship proceeding any rights to make decisions, to have access to records or to have contact with the minor and:
>
> (a) Such order was in effect at the time of the death of the parent awarded exclusive parental rights and responsibilities; and
>
> (b) There is neither a substantial change in circumstances between the time of the entry of the order and the parent's death nor other facts that would render a finding based on the order to be inequitable or unjust. § 5-204(2)(C).

interests of those involved while also staying true to the principles limiting state interventions in the family, including in private actions.

Second, state laws must ensure that any court applying the no-other-alternative standard follows a set of robust procedural protections throughout the proceedings.[457] The court must ensure that the parent had opportunities for rehabilitation and reunification and a sufficient period to demonstrate that they are prepared to fulfill at least some rights and responsibilities as a parent. To have the effects wanted here, this *opportunity* for rehabilitation and reunification must include appropriate professional assessments and services. The requirement of such assessments and services suggests a role for public CPS agencies, but they should be granted that role only as part of a broader reorientation of the current public "child protection" system away from family intervention and towards a true child welfare mission.[458] The availability of services and supports for children and families should not be restricted to those who are in the CPS caseload based on a report of abuse or neglect. There is no reason why providing these cannot be a part of a CPS general mission rather than solely in connection with family intervention or dissolution. States should be able to access federal child welfare funding for this work as well, consistent with the broader objective of "prevention" services reflected in more recent federal child welfare laws.[459]

457. Adoption of Isabelle T., 2017 ME 220, ¶ 14, 175 A.3d 639, 645–46 ("[A]pplication of the Adoption Act, as written, poses a substantial risk to fundamental parental rights that the court must respect by rigorous application of quality of evidence standards and procedural protections . . .").

458. *See* Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing our Language*, THE IMPRINT (July 28, 2020, 11:45 PM), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586; *see generally* Alan J. Dettlaff, et al., *It is not a Broken System, It is a System That Needs to be Broken: The Upend Movement to Abolish the Child Welfare System*, 14 J. OF PUB. CHILD WELFARE 500 (2020) (describing the upend movement—a collaborative movement aimed at abolishing the child welfare system).

459. *See* Family First Prevention Services Act of 2018, enacted as part of the Bipartisan Budget Act of 2018, Pub. L. No. 115-123, 132 Stat. 64. The Children's Defense Fund has described the new law as follows:

> Family First includes long-overdue historic reforms to help keep children safely with their families and avoid the traumatic experience of entering foster care, emphasizes the importance of children growing up in families, and helps ensure children are placed in the least restrictive, most family-like setting appropriate to their special needs when foster care is needed.

Expanded availability of services and supports would also provide courts with useful evidence of the extent to which something short of termination could address the situation leading to the petition.[460] States could adopt a variation of the Indian Child Welfare Act requirement, for any severance of parental rights in an Indian family, of proof that "active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the . . . family and that these efforts have proved unsuccessful"[461] It is likely that the availability of these resources and adoption of these requirements would reduce the number of TPR petitions filed in dependency matters as well as in private cases.

It is also important, relatedly, that courts and agencies—too often in a hurry to resolve matters—allow time for such services to have an effect before concluding that they are futile.[462] We place a premium on the rapid resolution of disputes in court, and the harsh deadlines in federal child welfare statutes have only contributed.[463] As many commentators have argued, while the uncertainty and adversarial aspect of extended litigation can present its own set of problems for children and families, pushing resolutions too quickly risks outcomes that reflect the expiration of timelines rather than the needs or potential benefits of the family.[464] For any form of active efforts at reunification

Family First Prevention Services Act, CHILDREN'S DEFENSE FUND, https://www.childrensdefense.org/policy/policy-priorities/child-welfare/family-first/ (last visited Apr. 11, 2022).

460. *See* Alyssa W. v. Justin G., 433 P.3d 3, 5 (Ariz. Ct. App. 2018) ("We conclude a private party seeking severance on that ground [substance use] must show that the parent was offered reunification services or that such services would have been futile"). *See also, supra* note 203 and accompanying text.

461. 25 U.S.C. § 1912(d). *See* S.S. v Stephanie H., 388 P.3d 569, 574–76 (Ariz. Ct. App. 2017) (applying ICWA "active efforts" requirement in private termination case between parents); *see generally In re* Adoption of T.A.W., 383 P.3d 492, 503 (Wash. 2016) (also applying ICWA "active efforts" requirement in private termination case between parents).

462. Vivek S. Sankaran, *Innovation Held Hostage: Has Federal Intervention Stifled Efforts to Reform the Child Welfare System?*, 41 U. MICH. J.L. REFORM 281, 281, 283–84 (2007) ("State courts face pressures to move cases through a busy docket rather than spend the time needed to make informed decisions about individual children.").

463. *Id.* at 291 (noting how states must adhere to federal timeline or risk loss of funding for child welfare programs).

464. *See, e.g.*, ROBERTS, *supra* note 58, at 136 ("Existing services often fail at prevention or reunification because they do not address the needs of families, are inadequately funded, and do not last long enough."); JANE WALDEFOGEL, THE FUTURE OF CHILD PROTECTION: HOW TO BREAK THE CYCLE OF ABUSE & NEGLECT 82–87 (1998) (describing criticisms of contemporary child protection systems).

and rehabilitation to be meaningful and effective, it must be accompanied by patience, flexibility, and compassion.[465]

Finally, where private termination of parental rights is allowed to proceed, courts must ensure that all other rigorous procedural protections are enforced in all related matters, especially the right to effective assistance of counsel for parents who are the subject of such petitions. These protections must be clearly set out in statute or rule and be supported with adequate public funds. Among other protections, these should include, at a minimum, access to professional alternative dispute resolution, informed consent for any agreements, and the appointment of a guardian *ad litem* for the child or children involved. The interests of parents, children, and families deserve nothing short of full access to all such measures.

CONCLUSION

My hope is that this Article has directed more daylight on a private legal mechanism that is both extreme and not uncommon but has received little examination by scholars and advocates of law reform. The need to transform the public family regulation system is acute, and it has understandably demanded the attention and energy of child welfare practitioners and reformers. Reform of that system will be incomplete, however, until privately initiated termination cases are addressed as well. We fall short of protecting family bonds when we do not acknowledge and examine the existence of laws that allow those bonds to be severed under questionable circumstances, without meaningful opportunities for rehabilitation and reunification, and without other procedural protections. Another reason for the lack of attention to these cases may be the fact that the persons who are the targets of termination petitions are often not the most sympathetic individuals, particularly in comparison with the petitioners themselves, who are often members of intact blended families seeking legal recognition and may be a custodial parent who has been victimized by the parent whose rights they seek to terminate. Nevertheless, it is due time to reconsider the extent to which the continued endorsement—or at least tolerance—of the severing of a parent-child relationship as a private remedy has a place in our civil

465. *See* Katherine Markey & Vivek Sankaran, *Compassion: The Necessary Foundation to Reunify Families Involved in the Foster Care System*, 58 FAM. CT. REV. 908, 909 (2020).

justice system, what purposes that drastic legal action serves, and whether those purposes can be better served without the destruction of one of the most valued and valuable relationships recognized in the law.