

2012

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Recommended Citation

Sanger, Carol (2012) "Bargaining for Motherhood: Postadoption Visitation Agreements," *Hofstra Law Review*. Vol. 41 : Iss. 2 , Article 2.

Available at: <https://scholarlycommons.law.hofstra.edu/hlr/vol41/iss2/2>

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BARGAINING FOR MOTHERHOOD: POSTADOPTION VISITATION AGREEMENTS

*Carol Sanger**

I. INTRODUCTION

This Article is about the use of contract in family formation. More specifically, I want to look at how contract is now used by parents in the process of acquiring children and, as we shall see, also as a means of retaining interests in those same children under the developing regime of open adoption.

In thinking about the contractual acquisition of relatives, the more familiar example is probably marriage. We know that historically, marriages, particularly among the propertied, were often the result of bargaining between families, if not ministers of state when diplomatic or dynastic concerns were at stake. Over time, individual men and women contracted their own marriages with one another. By the nineteenth century, couples were regarded as contractually bound to one another by virtue of their engagement alone; thus the lively nineteenth-century cause of action for breach of the promise to marry.¹ There were also less congenial examples of the contractual acquisition (and de-acquisition) of

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1. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 34-37 (G. Edward White ed., 1985); SASKIA LETTMAIER, BROKEN ENGAGEMENTS: THE ACTION FOR BREACH OF PROMISE OF MARRIAGE AND THE FEMININE IDEAL, 1800-1940, at 19-20 (2010).

spouses.² Both in England and in the colonies, husbands could sell their wives, and some did.³

Of course, things have changed over the last few centuries. While money still changes hands to bring about marriages in certain parts of the world, for the most part brides are no longer bartered.⁴ Similarly, although arranged marriages still exist, the modern practice increasingly takes the form of parental *brokering*, with ultimate approval for the match residing in the couple.⁵ Consent of the parties is now accepted not only as a desirable social practice, but importantly, as a legal prerequisite to marriage under both domestic law and human rights regimes.

Of course, aspects of private contracting still surround and sometimes structure a marriage even if contract no longer creates it. Prenuptial agreements are a good example. The assurance of a background regime of enforceable contracts is understood to bring about marriages which might otherwise not have been entered. In 1990, the Pennsylvania Supreme Court upheld a prenuptial agreement between a twenty-four-year-old unemployed nurse and a thirty-nine-year-old neurosurgeon, observing that “[p]arties would not have entered such agreements, and, *indeed, might not have entered their marriages*, if they did not expect their agreements to be strictly enforced.”⁶ More recently, in the 2010 case of *Granatino v. Radmacher*,⁷ the Supreme Court of the United Kingdom recognized that an important factor in the enforceability of prenuptial agreements is “whether the marriage would

2. See CORNELIA HUGHES DAYTON, *WOMEN BEFORE THE BAR: GENDER, LAW, AND SOCIETY IN CONNECTICUT, 1639–1789*, at ch. 3 (1995).

3. See generally Julie C. Suk, *The Moral and Legal Consequences of Wife-Selling in The Mayor of Casterbridge* (Benjamin N. Cardozo Sch. of Law Jacob Burns Inst. for Advanced Legal Studies, Working Paper No. 327, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1777555 (discussing a novel’s account of the moral consequences of the wife-sale); Peter T. Leeson, Peter J. Boettke & Jayme S. Lemke, *Wife Sales* (unpublished manuscript), available at http://www.peterleeson.com/Wife_Sales.pdf (claiming that wife sales show how well the marriage market works).

4. Significant exceptions include parts of India, Pakistan, Afghanistan, and a number of African countries. The practice is not specifically prohibited by the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”). See U.N. Convention on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 21: Equality in Marriage and Family Relations (13th Session, 1994), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm#recom21>.

5. See Prashina J. Gagoomal, Note, *A “Margin of Appreciation” for “Marriages of Appreciation”: Reconciling South Asian Adult Arranged Marriages with the Matrimonial Consent Requirement in International Human Rights Law*, 97 GEO. L.J. 589, 596–97 (2009).

6. *Simeone v. Simeone*, 581 A.2d 162, 166 (Pa. 1990) (emphasis added) (observing that a rule “invoking inquiries into reasonableness [severely undermines] the functioning and reliability of prenuptial agreements”).

7. [2010] UKSC 42 (appeal taken from Eng.).

have gone ahead without an agreement, or without the terms which had been agreed.”⁸

This Article focuses on the use of contract not to acquire a spouse, but for the purpose of obtaining a child. As with wives, children too were acquired contractually in the past. In the United States, enslaved children were sold outright, and the custody of free children was regularly subject to contractual transfer. During the colonial and republican periods, poor children were often indentured and children in general often were “placed out” by their parents as apprentices or domestics with other families.⁹ These arrangements were highly contractual; the terms of obligation set out on both sides.¹⁰ Actions for breach of contract were brought by apprentices against masters for failing to teach them the promised craft and by masters against parents for harboring runaway apprentices (their own children).¹¹ Masters may have agreed to certain parent-like obligations—feeding, housing, and moral education in the case of apprentices. They did not, however, understand themselves to be acquiring a *relation* but rather an employee (in the case of indenture) or a trainee (in the case of apprenticeship). While such arrangements sometimes resulted in “a familylike legal tie,” the child did not by virtue of the agreement become a member of the master’s legal family.¹² The transfer of custody was temporary and largely for vocational purposes.

In this Article, I consider the modern use of contract to transfer the custody of children, and not for educational or training purposes but instead, to create the legal relationship of parent and child. In so doing, I move us out of the early nineteenth century and into the early twenty-first, where the use of contract to create and acquire children is now familiar as adults contract to buy both genetic material (eggs, sperm, or embryos) and gestational services. And not all contracting for children involves reproductive technology. Foster parents, for example, contract with the state to raise children, and special “fost-adopt” programs aside, their parental duties are a contractual form of temporary parenting.

Here, however, I investigate the use of contracts for *permanent* parenting. I focus on adoption and, within that context, on a new category of contract: the postadoption visitation agreement. I have

8. *Id.* at para. 72.

9. See 1 CHILDREN AND YOUTH IN AMERICA: A DOCUMENTARY HISTORY, VOLUME I: 1600–1865, at 103-05 (Robert H. Bremner et al. eds., 1970); JOHN DEMOS, A LITTLE COMMONWEALTH: FAMILY LIFE IN PLYMOUTH COLONY 70-71 (1970).

10. See DEMOS, *supra* note 9, at 71-72; MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS 39 (1994).

11. See, e.g., DEMOS, *supra* note 9, at 71, 113.

12. See GROSSBERG, *supra* note 1, at 259-60.

chosen this topic in part because I teach both contracts *and* family law, and so connections between the two—private ordering in the quasi-public realm—have become part of my world view. There is no telling what intimates will get up to with one another when you put the possibility of a deal in front of them. But in this area of truly private ordering—family creation—I am concerned not only with the use of contract but with the integrity of its use. It is precisely where law intersects intimacy, with its constitutional implications, that the legal system must be particularly careful about the seemingly straightforward application of contract doctrine.

II. ADOPTION TRANSFORMED

To understand how contract has made its way into adoption, it helps to understand how in the last few decades adoption practices in the United States have evolved from a regime of closed and confidential proceedings into the more transparent process known as open adoption. In a traditional closed adoption, the unmarried birth mother surrendered her parental rights (and where known, the birth father his) to the state or to a licensed private adoption agency.¹³ The agency then selected an appropriate married couple from its applicant pool to become the infant's new parents. Following a satisfactory home study, the family or probate court then issued an order declaring the adoption to be in the baby's best interest, and the childless couple was transformed into legal parents with a baby of their very own.

The combination of termination of the birth mother's parental rights—"the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and the child's parent or parents"¹⁴—and the final adoption decree—"[a]ll rights, duties and other legal consequence of the biological relation of child and parent shall thereafter exist between the adopted person and the adopting parent"¹⁵—created a new legal family and obliterated the old. The birth mother would have no idea where her child had gone or who the adoptive parents were, and they, in turn, knew very little about her. Indeed, the baby's original birth certificate was sealed, and a new one issued with the adoptive parents' names filled in as the parents from the date of birth. Under prevailing mid-century ideology, this process was

13. Some states also permit private adoptions brokered through attorneys. See JOAN H. HOLLINGER ET AL., *ADOPTION LAW AND PRACTICE* § 5.04[1] (1991). States also sometimes permit adoption by single people. See *id.* at § 3.06[5].

14. CONN. GEN. STAT. ANN. § 45a-707(8) (West Supp. 2012).

15. CONN. GEN. STAT. ANN. § 45a-731(1) (West 2004).

understood as a domestic trifecta. The birth mother could move on with her own life free from the burdens and stigma of unwed motherhood. The adoptive parents could proceed with a facsimile (legal and often physiological) of biological parenthood, their reproductive secrets safe and their domestic privacy protected. And the child himself would be raised by loving and enthusiastic parents whose dominion over their child was as complete as any natural parent.

Beginning in the 1970s, the logic of this system of secrecy began to unravel as adult adoptees, acting individually and through fledgling organizations such as the Adoptees' Liberty Movement Association ("ALMA"),¹⁶ began to challenge the view that they were better off not knowing anything about their birth families. Adoptees were supported in their efforts by research findings identifying "genealogical bewilderment" and "identity lacunae" in adopted children, particularly during adolescence.¹⁷ There was also an uncanny cultural phenomenon: the widespread popularity of Alex Haley's *Roots*.¹⁸ Both the book and the subsequent television program sparked great interest in the pursuit of one's origins; *Roots* "diminished [adoptees'] sense of marginality" in seeking *their* roots.¹⁹ Best-selling confessional books such as Betty Jean Lifton's *Twice Born: Memoirs of an Adopted Daughter*²⁰ added to the interest in the lot of adopted people and contributed to a cultural rethinking of closed adoption.²¹ Adoptee rights campaigns were not entirely successful as a matter of law; courts rejected constitutional claims that confidentiality provisions violated an adoptee's fundamental right to personhood.²² Nonetheless, legislatures began to authorize states to collect and adult adoptees to retrieve at least non-identifying information about birth parents such as their ethnicity and medical histories.²³

16. ALMA SOC'Y: ADOPTEES' LIBERTY MOVEMENT ASS'N, <http://www.almasociety.org/> (last visited Mar. 29, 2013). The more radical Bastard Nation has since joined ALMA. BASTARD NATION: ADOPTEE RTS. ORG., <http://www.bastards.org/> (last visited Mar. 29, 2013).

17. See Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, FUTURE CHILD., Spring 1993, at 119, 120 (internal quotation marks omitted) (noting that adopted children "live with the knowledge that an essential part of their personal history remains on the other side of the adoption barrier"). But see E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 219 (1998) (noting a contrary view that both "open and closed adoption advocates marshaled pseudoscience to advance their positions").

18. ALEX HALEY, *ROOTS* (Doubleday 1976) (1974).

19. JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 35 (2002); see also CARP, *supra* note 17, at 163-64.

20. BETTY JEAN LIFTON, *TWICE BORN: MEMOIRS OF AN ADOPTED DAUGHTER* (1975).

21. See CARP, *supra* note 17, at 138-39.

22. See generally, e.g., *In re Roger B.*, 418 N.E.2d 751 (Ill. 1981) (upholding confidentiality statute against constitutional challenge).

23. See Marci J. Blank, Note, *Adoption Nightmares Prompt Judicial Recognition of the Tort*

At about the same time, women who had placed children for adoption in the past began to step forward and identify themselves, at least to one another. As a social group, birth mothers have been a largely invisible category of mother. As birth mother Jan Waldron observed, "There are millions of birthmothers in this country, yet most people will tell you they've never met *one*."²⁴ In the pre-Internet days of the 1980s, when supportive communities were hard to identify and to mobilize, birth mothers began to meet in living rooms and church basements under the auspices of fledgling support groups, such as Concerned United Birthmothers ("CUB").²⁵ These groups offered a welcome forum for birth mothers who wanted to discuss feelings of loss and regret and their dissatisfactions with their treatment in law. CUB founder Lee H. Campbell acknowledged a debt: "[W]e're grateful to you Adoptees for waking us up. If you hadn't come out of the closet, we birth mothers would be in pain forever."²⁶ As with adult adoptees, birth mothers rarely prevailed in court in their efforts to open sealed adoption records.²⁷ Yet states began to create official registries where birth parents and adult children could inquire about one another, and if both agreed, there was the possibility of reunion.²⁸

These early forms of adoption activism by adoptees and birth mothers took place against a perfect demographic storm regarding the availability of eligible newborns. The decriminalization of abortion in 1973, the advent of the contraceptive pill in the 1960s, and the reduced social and legal stigma of unwed motherhood resulted in a significant decrease in the number of infants placed for adoption. As the National Committee for Adoption stated in 1989, "[m]ore than a million couples are chasing the 30,000 white infants available in the country each year."²⁹ In consequence, the market power of birth mothers increased,

of Wrongful Adoption: Will New York Follow Suit?, 15 CARDOZO L. REV. 1687, 1725 n.225 (1994) (compiling state statutes providing access to various types of adoption information).

24. JAN L. WALDRON, *GIVING AWAY SIMONE: A MEMOIR* xvii (1995).

25. CONCERNED UNITED BIRTHPARENTS, <http://www.cubirthparents.org/> (last visited Mar. 29, 2013).

26. CARP, *supra* note 17, at 204.

27. *See, e.g., In re Christine*, 397 A.2d 511, 513 (R.I. 1979) (noting the "heavy burden" birth mothers must bear to establish a claim for access to sealed records). Birth mothers also failed in later efforts to keep adoption records secret retroactively. *See, e.g., Does v. State*, 993 P.2d 822, 836 (Or. 1999).

28. *See, e.g., Adoption Registry*, ST. N.J. DEP'T CHILD. & FAMILIES, <http://www.nj.gov/njfosteradopt/adoption/registry/> (last visited Mar. 29, 2013); *Central Adoption Registry*, TEX. DEP'T ST. HEALTH SERVICES, <http://www.dshs.state.tx.us/vs/reqproc/adoption/registry.shtm> (last visited Mar. 29, 2013).

29. Cynthia Crossen, *In Today's Adoptions, the Biological Parents Are Calling the Shots*, WALL ST. J., Sept. 14, 1989, at A1; *see also It's a Seller's Market*, LIFE, Sept. 1988, at 80 (noting that 100 couples vie for each healthy Caucasian infant).

and adoption agencies began to pay serious attention to what it would take to get mothers to place their newborns for adoption.

The answer was understood to be greater control over the adoption process. This power manifested itself in two ways. The first concerned the selection of the adoptive parents which within a relatively short period of time, moved from agency social workers to birth mothers themselves. Agencies began to act more as brokers, compiling and presenting the carefully drafted letters and resumes received from their childless clients to pregnant women and girls considering adoption.³⁰ As birth mothers began to know the identity, background, and location of the adoptive parents—after all, they had chosen them—the confidentiality and secrecy of adoption records became relics in a collapsing regime.

III. EARLY POSTADOPTION AGREEMENTS

In addition to giving birth mothers primary control in choosing the adoptive parents, the second incentive for placement was the possibility of ongoing communication and even contact between birth mothers and adoptive families. That is, birth mothers wanted to know not only where and with whom their child was placed, but how he or she was doing over time. With the help of agency social workers, birth parents and adoptive families began to negotiate the extent and form that post-adoption contact might take. The resulting agreements typically included the promise of photographs and progress reports to the birth mother and sometimes even scheduled visits between the birth mother and the adopted child.

And the legal status of such agreements? The question arose most often when the adoptive parents decided that the arrangement was not working and discontinued visitation. In such cases, the birth mother would sue to have the agreement specifically enforced. The earliest cases seeking birth mother visitation in the days of closed adoption were quite clear about the outcome: nothing doing. Because adoption is a legal status completely created by statute, parties could not, by agreement, add to or detract from whatever rights and duties the state had fixed. Recall that closed adoption statutes provided for the comprehensive and mandatory substitution of adoptive parent for birth parent.³¹ As the Oregon Supreme Court explained in the early 1950s, “[w]hen the

30. See LINCOLN CAPLAN, *AN OPEN ADOPTION* 49 (1990).

31. For an account of “outlaw” open adoption in the days of closed adoption, see Barbara Yngvesson, *Negotiating Motherhood: Identity and Difference in “Open” Adoptions*, 31 L. & SOC’Y REV. 31, 39-48 (1997).

adoption took place, a new status in the life of the child was created; its care, nurture, well-being, and all the incidents of parenthood . . . devolved upon the adoptive parents. Old ties were severed and it was off with the old, and on with the new, so to speak.”³²

The policies behind the total severance between birth mother and child were two-fold: to advance the well being of adoptive children and to secure the authority of adoptive parents. As a 1937 Maryland decision explained, without this finality “an adoptive infant would be subject . . . to the conflicting authority or custody of the natural and adoptive parents.”³³ In the 1980s, however, courts began to take account of developing shifts in law and in sentiment regarding open adoption, and they began to reassess the nonenforceability of visitation agreements. Most of the cases from the period involved mothers who had existing relationships with their children prior to the adoption; the adopted children were children, not newborns, who had lived with their birthmothers for some time.

Consider a 1983 Maryland decision, which upheld a written agreement between the natural mother, Sally, and her former husband and his new wife, Shirley.³⁴ Sally had consented to Shirley’s adoption of the children on the understanding that “SALLY’s right to visitation is an integral part of this Agreement.”³⁵ When Shirley later withheld visitation, Sally sought to have the arrangement enforced.³⁶ Characterizing the agreement as “unusual,” the court noted that “[b]eing unusual . . . does not make it illegal, against public policy, or contrary to the best interests of the child.”³⁷ Nothing in Maryland’s adoption statute “purport[s] to mandate that the adoptive parents and the natural parents may not under any circumstance agree to visitation privileges by the natural parents.”³⁸

A Connecticut court reached the same conclusion in 1988, upholding a visitation agreement between the natural mother of a four-year-old child and his adoptive parents.³⁹ The court found that the agreement had been “openly and lovingly negotiated, in good faith, in order to promote the best interest of the child” and that the child herself thought the agreement between her mother and her soon-to-be adoptive

32. *Whetmore v. Fratello*, 252 P.2d 1083, 1083 (Or. 1953).

33. *Spencer v. Franks*, 195 A. 306, 310 (Md. 1937).

34. *Weinschle v. Stroppe*, 466 A.2d 1301, 1306 (Md. Ct. Spec. App. 1983).

35. *Id.* at 1303.

36. *See id.*

37. *Id.* at 1305.

38. *Id.* at 1306.

39. *Michaud v. Wawruck*, 551 A.2d 738, 738, 742 (Conn. 1988).

parents would be “the best world that she could imagine.”⁴⁰ Noting that Connecticut had a general statute authorizing third party visitation when in the best interests of a child, the court concluded that “[i]t would be elevating form over substance to allow the plaintiff to obtain visitation rights by filing an appropriate ‘application’ in the Superior Court, but to deny her the opportunity to seek such rights under a contractual umbrella.”⁴¹

Similarly, in *Groves v. Clark*,⁴² the Montana Supreme Court made clear that “natural parents and prospective adoptive parents may contract for post-adoption visitation and that,” when in the best interests of the adopted child, “such agreements should be enforced.”⁴³ In that case, Debbie Groves had consented to the adoption of her four-year-old daughter Laci by Lonn and Lorelee Clark upon the express condition that the Clarks sign a visitation agreement.⁴⁴ This they did: “We, Lon and Lorelee Clark, are willing to honor Debbie Groves’ wishes regarding her requests for contact with Laci Lee Groves.”⁴⁵ When the Clarks cut off visitation, Debbie sought enforcement.⁴⁶ In remanding the case for a best interests determination, the court carefully underscored the nature of Debbie’s claim.⁴⁷ It was “not premised on an ongoing *genetic* relationship that somehow survives a termination of parental rights and an adoption,” but rather on a continued *contractual* right to visit a child with whom she had an ongoing relationship.⁴⁸

Such decisions took a broader, more contemporary view of the best interests of adopted children and of the nature of American families. The Connecticut Supreme Court observed that it was “not prepared to assume that the welfare of children is best served by a narrow definition of those whom we permit to continue to manifest their deep concern for the child’s growth and development.”⁴⁹

Courts further acknowledged a relationship between postadoption visitation and a birth mother’s decision to place her child in the first place:

[visitation agreements do] not appear to run counter to public policy inasmuch as [they] will not ordinarily impede adoptions, but might

40. *Id.* at 742 (internal quotation marks omitted).

41. *Id.* at 741.

42. 920 P.2d 981 (Mont. 1996).

43. *Id.* at 985.

44. *Id.* at 982.

45. *Id.* (internal quotation marks omitted).

46. *Id.* at 982-83.

47. *See id.* at 985.

48. *Id.* (emphasis added) (quoting *Michaud v. Wawruck*, 551 A.2d 738, 740 (Conn. 1988)).

49. *Michaud*, 551 A.2d at 742.

even foster them in those cases where the natural parent and adoptive parent are known to each other and the natural parent is reluctant to yield all contact with his or her child.⁵⁰

This concern has also had implications for interracial adoption.⁵¹ In 1992, the Hartleys, a non-Indian couple, adopted two-year-old F.H., an Indian child.⁵² F.H.'s birth mother had relinquished her parental rights to the Hartleys upon the condition that she and the birth family retain contact and visitation rights with F.H.⁵³ The Native Village of Noatak, a registered Indian tribe, sought to have the adoption set aside as a violation of the Indian Child Welfare Act of 1978 (the "ICWA"),⁵⁴ which provides a hierarchy of adoption placement preferences, starting with members of the child's extended family, then other members of the child's tribe, and finally with any other Indian family.⁵⁵ Nonetheless, the trial court found that on these facts there was good cause to deviate from the ICWA placement preferences.⁵⁶ Not only was there an established bond between the Hartleys and F.H., but also because the adoption was open in character, the arrangement gave the birth mother access to F.H., thereby "possibly giving F.H. exposure to her Native American heritage."⁵⁷

Yet not all courts were convinced about enforcing visitation agreements. In 2000, the Rhode Island Supreme Court determined that a postadoption visitation agreement—"one visit a year with the mom"—was *not* specifically enforceable.⁵⁸ Because open adoption legislation had been enacted shortly after the adoption in question, the court agreed that such agreements were "not necessarily repugnant to public policy."⁵⁹ Nonetheless, the court concluded that because the new legislation was unambiguously non-retroactive in application, "all the respondent's parental rights were obliterated and any alleged agreement vanished."⁶⁰ The New Jersey Supreme Court similarly declined to uphold a visitation agreement, finding that the agreement was intended only to "enable" the birth mother to be a part of the baby's life, but it did

50. *Weinschel v. Stroppe*, 466 A.2d 1301, 1306 (Md. Ct. Spec. App. 1983).

51. Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, RES. L. & SOC'Y, no. 1, 1978 at 265, 267.

52. *In re Adoption of F.H.*, 851 P.2d 1361, 1362 (Alaska 1993).

53. *Id.*

54. 25 U.S.C. §§ 1901–63 (2006); *see In re Adoption of F.H.*, 851 P.2d at 1363.

55. 25 U.S.C. § 1915.

56. *In re Adoption of F.H.*, 851 P.2d at 1363.

57. *Id.*; *see also* *Adoption of Vito*, 728 N.E.2d 292, 304–06 (Mass. 2000).

58. *In re Alicia S.*, 763 A.2d 643, 645, 647 (R.I. 2000) (internal quotation marks omitted).

59. *Id.* at 646.

60. *Id.* at 647.

not *require* an on-going relationship between the two.⁶¹ In so holding, the court observed that the New Jersey legislature had recently declined to enact a postadoption visitation statute, noting further that “[c]ourts have differed with respect to the clarity and strength of public policy on the issue of ‘open adoptions’ under their respective statutory schemes.”⁶²

IV. POSTADOPTION VISITATION STATUTES

In the last twenty years, states have significantly revised their statutory schemes regarding open adoption in general and postadoption visitation in particular. By 2011, twenty-six states and the District of Columbia had enacted laws providing for some form of enforceable agreement between birth parents and adoptive parents.⁶³ While the statutes differ in interesting ways, each provides that postadoption visitation agreements are legal so long as the agreement is in writing and approved by the court, most often by being incorporated into the final order of adoption. The statutes also specify the type of contact to which the parties may agree. These include actual visitation, the sharing of information (identifying or non-identifying), and other forms of communication, such as letters and photographs. Information may be exchanged directly or through an adoption agency.

The statutes further clarify who may seek visitation with an adopted child. All include the birth parents, but several include other birth relatives, such as siblings and grandparents, aunts and uncles. Minnesota permits visitation by foster parents.⁶⁴ When the adopted child is an Indian child, three states—California, Minnesota, and Oklahoma—provide that members of the child’s tribe may seek visitation.⁶⁵ States also specify which children can be the subject of a postadoption visitation agreement. While most statutes apply to any adopted child, Connecticut and Nebraska permit visitation only with children adopted from foster care; Indiana limits coverage to foster children who are two and over.⁶⁶ In this way, some states distinguish between older children

61. *In re Adoption of Child by D.M.H. & S.H.*, 641 A.2d 235, 245 (N.J. 1994).

62. *Id.* at 244-45.

63. For an overview of each state, see generally CHILD WELFARE INFO. GATEWAY, POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES (2011), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf.

64. MINN. STAT. ANN. § 259.58 (West 2007).

65. CAL. FAM. CODE § 8616.5 (Supp. 2013); MINN. STAT. ANN. § 259.58; OKLA. STAT. ANN. tit. 10, § 7505-1.5 (West 2009).

66. CONN. GEN. STAT. ANN. § 45a-715 (West 2004); IND. CODE ANN. § 31-19-16.5-1 (West 2008); NEB. REV. STAT. ANN. § 43-162 (LexisNexis 2011).

who are more likely to have known their birth families and newborns who are not.

Anticipating that visitation may not always go smoothly, a number of statutes require the parties to participate in mediation before they may seek specific performance of a postadoption visitation in court. Importantly, at the time enforcement is sought, the court must determine whether visitation is in the child's best interests,⁶⁷ and a few provide that the court may consider the wishes of older children, if twelve years or older—Arizona and Louisiana; in New Hampshire, Oregon, and Virginia, if over fourteen.⁶⁸

A 2010 Louisiana case highlights how this is all supposed to work. The postadoption visitation agreement "clearly and unambiguously" stated that the grandparents were granted permanent care and custody of the children "*subject to reasonable, supervised visitation* by [the birth parents], to be supervised by the court should the parties be unable to agree to the visitation schedule."⁶⁹ Noting that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, the intent of the parties is to be determined by the words of the contract," the court ordered that the provisions of the consent judgment be enforced according to its terms.⁷⁰

These new contractual arrangements reflect new family structures. For example, in *Adoption of S.K.L.H.*,⁷¹ an Alaska teenager agreed to the adoption of her new baby by her own father and stepmother, having bargained with them for liberal postadoption visitation.⁷² In upholding the adoption, the court noted that:

the child's living situation will tend to foster the kind of open adoption that must have been contemplated: (1) the parties live in a small community; (2) the child will be raised by her biological

67. See, e.g., *State ex rel. C.S.*, 2010-0687, pp. 6-9 (La. App. 1 Cir. 9/10/10); 49 So. 3d 38, 42-43 (holding that "[w]hen the words of a contract are clear and explicit and lead to no absurd consequences, the intent of the parties is to be determined by the words of the contract" and that "[t]herefore, the provisions of the consent judgment should be enforced according to its terms"); see also *In re Heidi E.*, 889 N.Y.S.2d 762, 763-64 (App. Div. 2009) (remanding the case to the family court for determination on whether or not an annual visit was detrimental to the child).

68. ARIZ. REV. STAT. ANN. § 8-116.01 (2007); LA. CHILD. CODE ANN. art. 1269.5 (Supp. 2013); N.H. REV. STAT. ANN. § 170-B:14 (Supp. 2012); OR. REV. STAT. ANN. § 109.305 (Supp. 2012); VA. CODE ANN. § 63.2-1220.3 (2012).

69. *State ex rel. C.S.*, 2010-0687, p. 9; 49 So. 3d at 43.

70. *Id.* at pp. 8-9, 49 So. 3d at 43.

71. 204 P.3d 320 (Alaska 2009).

72. *Id.* at 322.

grandparents; . . . and (4) Donna will be the child's adoptive sister as well as biological mother.⁷³

The court noted that, in this case, the adoptive parents were keeping two baby books for the child, one reflecting the child's biological parents and the other, the child's adoptive family.⁷⁴

The fairly widespread enactment of these statutes, the variety of contracts entered under their auspices, and the developing case law make clear that open adoption is now a familiar and expected part of adoption practice and culture. It is the subject of workshops and continuing education programs put on by lawyers who specialize in the area, and it is a ubiquitous feature on adoption agency websites.⁷⁵ Indeed, most adoptions in the United States are now open in some respect. Details from a set of actual agreements give the individualized flavor of the bargains: "The Adopting Parents . . . shall provide the Maternal Aunt . . . with a 'letter of update' two times each year describing the minor's adjustment, developmental progress and any significant achievements;" the parties "shall utilize 'skype' as a method of contact every other month for the first seven (7) years of the Child's life;" "Birth Mother agrees to not put any photos, now or forever . . . on Facebook or other public website without the express written permission of the Adoptive Parents."⁷⁶

To review, open adoption provided a way to formally secure the interests and preferences of birth mothers and of adoptive parents. The birth mother, often unmarried, recognizes that the demands of motherhood are too much for her at present; at the same time, she does not want to abort (or perhaps it is too late to do so legally). Adoption is at once sensible, maternal (doing what is best for the baby), and altruistic (making the adoptive couple very happy). Even so, to reject motherhood

73. *Id.* at 332-33.

74. *Id.* at 333.

75. *See, e.g.,* MICHAEL S. GOLDSTEIN & DEBBIE S. WOLF, POST-ADOPTION CONTACT AGREEMENT (PACA) CAN LEAD TO SHORTER TIME IN FOSTER CARE 1 (2011), *available at* <http://www.nysccc.org/wp-content/uploads/PACA-Presentation-Goldstein-2011.pdf> (including a PowerPoint presentation at the New York State Citizens' Coalition for Children's 2011 conference).

76. ATTACHMENT: ADOPT-310, ITEM 3—OTHER TYPES OF CONTACT, *available at* <http://www.nysccc.org/wp-content/uploads/PACA-A.pdf>; POST ADOPTION CONTACT AGREEMENT B, *available at* <http://www.nysccc.org/wp-content/uploads/PACA-B.pdf>; POST ADOPTION CONTACT AGREEMENT D, *available at* <http://www.nysccc.org/wp-content/uploads/PACA-D.pdf>. Four redacted contracts are available at the New York State Citizen's Coalition for Children's website, labeled as PAC Agreement Examples A, B, C, and D. *See* ATTACHMENT: ADOPT-310, ITEM 3—OTHER TYPES OF CONTACT, *supra* (noting Example A); POST ADOPTION CONTACT AGREEMENT B, *supra*; POST ADOPTION CONTACT AGREEMENT C, *available at* <http://www.nysccc.org/wp-content/uploads/PACA-C.pdf>; POST ADOPTION CONTACT AGREEMENT D, *supra*.

and become a “legal stranger” to one’s child, knowing that the child is out there somewhere, is for some women, a hard bargain indeed.

Postadoption visitation agreement statutes soften the situation. With an agreement in place, the birth mother may no longer be the child’s legal mother, but neither is she a stranger at law. She can provide her child with loving and able parents while preserving a bond for herself that while no longer legally parental, is still meaningful. Even so, her decision is understood as difficult, and she herself is understood to be doing something close to heroic. This sense of valor is emphasized by adoption agencies. As one birth mother testimonial on the Catholic Charities USA adoption website states, “Giving up my little angel for adoption was the hardest thing I’ve ever done.”⁷⁷

Adoptive parents are also understood to benefit from the arrangement. As already noted, the practice of open adoption is understood to contribute to an ongoing supply of desirable newborns. Open adoption may also benefit the adoptive parents and their child from a developmental perspective. The adoptive parents accept, as evidenced by their willingness to open adoption, that transparency about origins is good for their child and that it will not threaten their own status as legal parents.⁷⁸ Finally, open adoption provides the adoptive parents with a keen understanding of the birth mother’s regard for her child. After watching the birth mother of his adoptive son “crumple into a ball sobbing” when adoptive father Dan Savage and his partner left the hospital with their new baby, Savage explains “the logic of open adoption, its absolute necessity”:

In a closed adoption, we wouldn’t have witnessed the moment our son’s mother gave him up. . . . Because of open adoption, we’ll be able to sit him down and tell him about this day; we’ll be able to describe the moment Melissa gave him to us, and how hard it was for her. We won’t have to guess at what it was like, or tell him that we’re sure his mother loved him. We know she loved him; we saw it.⁷⁹

77. *Catholic Charities USA*, PARENTFINDER (Feb. 27, 2012), <http://www.parentfinder.com/m/sites/view/Catholic-Charities-USA> (internal quotation marks omitted); see also *Adoption*, CATH. CHARITIES USA, <http://www.catholiccharitiesusa.org/what-we-do/programs/adoption/> (last visited Mar. 29, 2013).

78. See Baran & Pannor, *supra* note 17, at 122-23 (noting that birth parents benefit by being able to cope after the adoption, the adopted child benefits by experiencing diminished feelings of rejection, and adoptive parents benefit by being able to provide the child with background knowledge based on first-hand knowledge). But see CATHERINE MACASKILL, *SAFE CONTACT?: CHILDREN IN PERMANENT PLACEMENT AND CONTACT WITH THEIR BIRTH RELATIVES* 136-37 (2002) (concluding that the majority of “children were resolute in their wish to see their birth relatives” but that contact can also provoke painful, dormant feelings).

79. DAN SAVAGE, *THE KID (WHAT HAPPENED AFTER MY BOYFRIEND AND I DECIDED TO GO*

The law, too, is fairly satisfied. Postadoption visitation agreement statutes facilitate the preferences of birth parents and adoptive parents while retaining the court's traditional supervisory role over the welfare of the child. To return to the idea of acquiring children, the agreements both create and preserve parent-child relationships. Indeed, the preservation appears to be what makes the creation possible by providing a background legal regime against which the mother's voluntary relinquishment and her assurance of contact take place.⁸⁰ One might say that the agreements are to adoption what prenuptial agreements are to marriage: a species of contract that facilitate the primary relationship—whether wedlock or parenthood—and that make the acquisition of relatives—whether spouses or children—possible. If the adoptive parents renege, the birth mother can seek specific performance, unless, of course, the court finds visitation is not in the child's best interest. This all sounds very good and very promising.

Yet, things are seldom what they seem. Postadoption contact agreements may not be skimmed milk but neither, on closer inspection, are they always cream. That is because it turns out that unwed pregnant girls who are not quite ready for motherhood—young women regarded sympathetically, even perhaps gratefully—are not the *only* women who enter into postadoption visitation agreements. This is where our story becomes more complicated and my celebration of contract as the special relational glue that only law can provide becomes somewhat messier.

V. A HARDER LOOK

Although the imagined poster girl for open adoption may be the white, unwed, college-bound student who struggles with her decision but ultimately does the right thing by her baby, it turns out that many of the cases seeking enforcement of postadoption visitation agreements are brought by women with a very different profile. These are women who never wanted to relinquish their children for adoption in the first place, but whose children have been removed by the state on account of abuse or neglect. These are women whose parental rights the state seeks to terminate *involuntarily*.

And here, a shadow set of legal rules surfaces and comes into play. The first and crucial rule is this: involuntary termination *permanently*

GET PREGNANT): AN ADOPTION STORY 216 (1999). For a fictional account of the problems created when the adoptive parents have nothing to tell their child, see generally ELYSE GASCO, *Mother: Not a True Story*, in CAN YOU WAVE BYE BYE, BABY? 191 (1999).

80. See Carol Sanger, *Developing Markets in Baby-Making*: In the Matter of Baby M, 30 HARV. J.L. & GENDER 67, 80-81 (2007) (discussing the role of contract attempting to stabilize the market in the case of children acquired through reproductive surrogacy).

and comprehensively severs the legal parent-child relationship. However, if a negligent or abusive mother agrees to terminate her parental rights *voluntarily*, then she, too, can bargain for some form of contact under the postadoption visitation statutes. Indeed, it turns out that many mothers facing involuntary termination are advised by their social workers or attorneys to do exactly that. In her study of parental termination cases over a ten-year period in St. Joseph County, Indiana, law professor Hillary Baldwin concludes that “[k]nowing that a termination petition is imminent, and feeling as if they probably will not win,” many parents decide to “give up their children for adoption” rather than have them taken away.⁸¹ “[V]oluntary termination gives the parent his only chance to work out a post-adoption visitation agreement. If the termination proceeds involuntarily, the parent risks never seeing the child again.”⁸² In Professor Baldwin’s study, in only three of 303 termination cases brought by the state did the parent retain his or her child.⁸³ Professor Baldwin observes that “[i]f statistically a parent’s chance is less than one percent that the court will dismiss an open termination case, word will get around.”⁸⁴

This presents a more complicated set of cases—more complicated because there is a longer familial history, because the state is more directly involved, and because the voluntariness of consent becomes more suspect against these facts. As might be expected, in such cases visitation does not always work out as planned, and adoptive parents may cut off or suspend visitation. Reasons have included ongoing maternal drug problems,⁸⁵ missed visitation,⁸⁶ or simply because visitation is no longer thought to be in the child’s best interests. In a 2006 Massachusetts case, a court found that because “[u]nexpectedly (and happily)” an adoptive home had been found for the children and because they were adjusting well to the adoptive home and parents, it was not in their best interests to continue visitation with their biological mother.⁸⁷

The remedy this new category of birth mother tends to seek, however, is not specific enforcement of the visitation agreement, but

81. Hilary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 269, 274 (2002).

82. *Id.* at 274.

83. *Id.*

84. *Id.* I will return to the question of why so few mothers prevail in their attempts to keep their children. See *infra* text accompanying notes 153-56.

85. See, e.g., *In re Judicial Surrender of Daijuanna Priscilla M.*, 735 N.Y.S.2d 544, 545 (App. Div. 2002).

86. See, e.g., *In re Adoption of Mya V.P.*, 913 N.Y.S.2d 477, 477-78 (App. Div. 2010).

87. *Adoption of Edgar*, 853 N.E.2d 1068, 1074-75 (Mass. App. Ct. 2006).

rescission of the entire deal. They want to revoke their consent to the adoption itself and have their own parental rights restored. This makes some sense in that these mothers never wanted to have their children adopted in the first place; voluntary termination was a means of avoiding the dire consequences of involuntary termination. Their argument is that the voluntary termination of those rights was expressly conditioned on ongoing visitation, and absent that, the entire arrangement is off. The case is put clearly in *In re Joe C. v. Mary Ann S.*,⁸⁸ a 2005 California case: The natural mother “claims she is entitled to reversal of the order terminating parental rights because she did not receive what she bargained for, namely [an enforceable] postadoption contact agreement.”⁸⁹ The mother argued that she “forfeited her right to a contested hearing as to whether the court should terminate her parental rights in return for a valid and enforceable postadoption contact agreement.”⁹⁰

Here the formation process—the exact circumstances under which the postadoption visitation agreement are entered—becomes key. Under state adoption laws, once an adoption is final, the only grounds for the revocation of parental consent are the traditional equitable defenses of fraud, mistake, undue influence, and misrepresentation. As we shall see, these defenses are seldom successful. But their occasional success seems to depend in part on just what kind of mother is seeking to overturn the adoption. This is made clear in a comparison of two Texas cases, the first involving a good girl gone temporarily wrong; the second involving a mother who failed to protect her baby from abuse.

In *Vela v. Marywood*,⁹¹ Corina, a nineteen-year-old, unmarried birth mother sought to rescind her consent to the surrender of her infant.⁹² While pregnant, Corina had gone to Marywood, a licensed adoption agency, to learn about adoption.⁹³ Her Marywood “maternity counselor” explained that in an open adoption, Corina would “always be the child’s birth mother;” that she would “always have a relationship with . . . [her] child;” that the baby would have “two mothers, both of whom would have input into his life;” “and that that the birth family would be like the child’s extended family.”⁹⁴ Corina and her mother testified that these

88. No. F047570, 2005 WL 2008461 (Cal. Ct. App. Aug. 25, 2005).

89. *Id.* at *2.

90. *Id.*

91. 17 S.W.3d 750 (Tex. App. 2000).

92. *Id.* at 753, 757.

93. *Id.* at 753.

94. *Id.* at 753 n.2, 755 (second alteration in original) (internal quotation marks omitted).

representations were “the only reason she signed” the relinquishment affidavit surrendering her parental rights.⁹⁵

The Texas court held that, as a matter of law, Marywood’s “statements and omissions to Corina constituted misrepresentation, fraud, or overreaching.”⁹⁶ This was so in part because Marywood’s close counseling relationship with Corina created a fiduciary relationship.⁹⁷ Marywood was therefore bound “in equity and good conscience” to act in good faith and to fully disclose that the ‘shared parenting plan’ had no legal effect at all.⁹⁸ Throughout the decision, the court radiates sympathy, even fondness, for Corina and her family. The court introduces Corina in the second line as “an exemplary young woman who made a mistake,” and it devotes a paragraph to her record of community service, her strong and supportive parents, and testimony characterizing Corina as “the envy of all the mothers in the neighborhood.”⁹⁹

But not all birth mothers are regarded so warmly, and it is worth figuring out why and where the boundaries are set. With that in mind, I return to a 2009 Texas case, *In re D.E.H.*¹⁰⁰ D.E.H. was seven months old when she was removed from her unmarried parents on grounds of abuse: the baby had been beaten by her father and suffered “two fractures to each femur, four fractures to each tibia, multiple rib fractures . . . , a liver contusion, and a spleen laceration.”¹⁰¹ D.E.H. was placed in foster care, and the Texas Department of Family and Protective Services (“DFPS”) moved to terminate the parental rights of the father and of the baby’s mother, E.L.¹⁰² The father’s rights were involuntarily terminated, but following a mediation with her attorney and the baby’s pre-adoptive foster parents, E.L. agreed to relinquish her parental rights and entered into a post-termination agreement with the foster parents.¹⁰³ A month later, E.L. sought to have her consent withdrawn on the grounds of fraud, duress, and coercion.¹⁰⁴ Her claim was that she had been told that if the termination case against her went to trial, “the likely outcome would be that she would . . . never see [her child] again” and that her only other option was to sign the affidavit of relinquishment and

95. *Id.* at 755 (internal quotation marks omitted).

96. *Id.* at 763.

97. *See id.* at 760-61.

98. *Id.* at 761.

99. *Id.* at 752-53.

100. 301 S.W.3d 825 (Tex. App. 2009).

101. *Id.* at 826.

102. *Id.*

103. *Id.* at 826 & n.1.

104. *Id.* at 827.

enter into an agreement for limited visitation.¹⁰⁵ As E.L. put it, she “didn’t have any way out.”¹⁰⁶

Each of these defenses proved a loser. After reviewing the evidence, the court concluded that “E.L. failed to demonstrate by a preponderance of the evidence that execution of the affidavit . . . in exchange for an allegedly legally unenforceable promise resulted from fraud, duress, or coercion.”¹⁰⁷ Coercion, the court explained, “occurs if someone is compelled to perform an act by force or threat;” duress occurs when “a person is incapable of exercising her free [will];” and fraud has five elements, which the court then listed.¹⁰⁸ But as the court detailed, E.L. had legal counsel, took advice from her family, and had been told that the visitation agreement was not “a contract that we could take to court.”¹⁰⁹ The process was not rushed; as E.L.’s attorney testified, “The judge spoke . . . Spanish, so . . . we would kind of back off and say, we would kind of rest for a little while and the family would talk. It went really slowly.”¹¹⁰ The affidavit of relinquishment was translated and read to E.L. at least twice before she signed it.¹¹¹ It stated, in part:

I REALIZE THAT I SHOULD NOT SIGN THIS AFFIDAVIT OF RELINQUISHMENT IF THERE IS ANY THOUGHT IN MY MIND THAT I MIGHT SOMEDAY SEEK TO CHANGE MY MIND. . . . BECAUSE I REALIZE HOW IMPORTANT THIS DECISION IS FOR THE FUTURE OF MY CHILD, I HAVE PUT MY INITIALS BESIDE EVERY LINE OF THIS PARAGRAPH SO THAT IT WILL ALWAYS BE UNDERSTOOD THAT I HAVE READ THIS AFFIDAVIT OF RELINQUISHMENT, UNDERSTAND IT, AND DESIRE TO SIGN IT.¹¹²

Although witnesses testified as to E.L.’s anguish and fear at the possibility of losing all contact with her child, E.L.’s own attorney testified that the pressure on her was not “*undue*,” it was “just a very emotional time.”¹¹³

Other attempts in other cases to prove duress, fraud, misrepresentation, or coercion have been similarly unsuccessful.¹¹⁴ In a

105. *Id.* at 830.

106. *Id.* at 831 (internal quotation marks omitted).

107. *Id.* at 832.

108. *Id.* at 828-29.

109. *Id.* at 830-32 (internal quotation marks omitted).

110. *Id.* at 832 (first alteration in original).

111. *Id.* at 831.

112. *Id.* at 831-32.

113. *Id.* at 830-31 (internal quotation marks omitted).

114. See *In re Termination of Parent-Child Relationship of K.V. v. Indiana*, Dep’t of Child Servs., No. 64A04-1004-JT-236, 2011 WL 1565435, *4 (Ind. Ct. App. Apr. 25, 2011) (noting that,

2009 case, the birth mother argued her consent should be set aside on the ground of mutual mistake.¹¹⁵ The state had removed her son on grounds of neglect; when he was eight, the mother agreed to his adoption by her aunt and uncle.¹¹⁶ The parties had agreed that “should” the adoption with the aunt and uncle be finalized, the mother would have continuing contact rights, but their agreement had not been incorporated into the formal relinquishment signed by the mother.¹¹⁷ When the adoption fell through, the mother sought to set aside the termination of her parental rights on the grounds that she would never have agreed to terminate had she known that an open adoption with her aunt and uncle would not follow.¹¹⁸ The court rejected the claim on the ground that her decision “was voluntary and free from force or threat and . . . that she understood her consent could not be withdrawn once . . . accepted by the court.”¹¹⁹ The court also held that there was no evidence that any mistake regarding the conditional nature of the agreement to terminate was mutual; “[a]lthough the parties may have *anticipated* an adoption by the . . . uncle and aunt, the record [did] not support the . . . argument that [the mother’s] consent was” conditional on the existence of open adoption with them.¹²⁰

Claims of fraud based on the failure (of someone) to properly file the postadoption visitation agreement arise with some regularity. In a 2011 California case, *Carla M. v. Susan E.*,¹²¹ the birth mother, Carla, brought an action in fraud to rescind her consent to the adoption and to reestablish her own parental rights.¹²² Carla alleged that the adoptive parents had failed to file the visitation agreement with the court, as required by California law.¹²³ Carla argued that she would not have relinquished the baby without the assurance of visitation, which she

although evidence showed that all parties “contemplated that post-adoption visitation between Mother and K.V. might be a possibility,” postadoption privileges were never guaranteed, and mother’s consent was not obtained under duress nor was her free will overcome at the time she signed the consent); *In re Judicial Surrender of Daijuanna Priscilla M.*, 735 N.Y.S.2d 544, 545 (App. Div. 2002) (finding no fraud because there was no evidence that the adoptive mother never intended to permit visitation by the birth mother and so entered the agreement in bad faith; rather, the adoptive mother withdrew consent to visitation due to the birth mother’s “undisclosed drug abuse”).

115. *In re Christopher G.*, 984 A.2d 1111, 1114 (Conn. App. Ct. 2009).

116. *Id.* at 1113.

117. *Id.* The mother had signed and faxed the agreement to the aunt and uncle who never returned it. *Id.* at 1113-14.

118. *Id.* at 1114.

119. *Id.* at 1115.

120. *Id.*

121. No. H035781, 2011 WL 2739649 (Cal. Ct. App. July 15, 2011).

122. *Id.* at *1.

123. *Id.* at *1, *2 n.3.

thought she had secured by signing (not filing) the agreement.¹²⁴ The court upheld the trial court's finding that there had been no fraud; there was no evidence that the adoptive parents had reason to believe that the birth mother expected them to file the agreement or that it was important to her.¹²⁵ In addition, the court found that because the adoptive parents were not in a fiduciary relationship with the birth mother, they had no duty to file the agreement.¹²⁶

Yet a closer look at the facts suggests why in this most relational of agreements—the creation of a new family and the dismantling of an existing one—a birth mother might well have plausible, if unactionable, expectations about the bargain she has entered. In *Carla M.*, Carla contacted the adoptive mother Susan after she had read Susan's "prospective adoptive parent profile" at the adoption agency.¹²⁷ The profile stated, in part: "We admire your courage and love in considering open adoption. If you choose to do this, you will . . . become a part of our lives forever."¹²⁸ The parties then met and, over the next two months, developed a close friendship, were in near daily contact with one another, and were even filmed for a program on open adoption for the Discovery Health Channel.¹²⁹ Yet at the same time as all this coziness was shaping up, Susan notified the adoption agency that she and her husband would not sign any visitation agreement that was legally binding and would not go through with the adoption if required to do so.¹³⁰ The agency's adoption counselor then told Susan that if they signed a Preliminary Agreement, they would not have to file the official form.¹³¹ It is not hard to imagine that Carla might have misunderstood the importance of formal filing, especially against the background of the encouraging promise in Susan's "prospective adoptive parent profile."

124. *Id.* at *1. The agreement, signed by both parties, stated in part, "We all understand that: . . . This is not a legally binding document, except . . . when filed with the court . . . at the time of the finalization of the adoption." *Id.* at *2 (internal quotation marks omitted). One section of the agreement set forth the agreed-to contact, which provided for photographs to the birth mother twice a year upon request, an annual visit between the birth parents and the child, and the initiation of phone contact by both the birth parents and the adoptive parents. *Id.*

125. *Id.* at *9-10; see also *In re Termination of Parent-Child Relationship of K.V. v. Indiana, Dep't of Child Servs.*, No. 64A04-1004-JT-236, 2011 WL 1565435, *4 (Ind. Ct. App. 2011) (finding no fraud when the birth mother did not receive visitation, even though she was told she would receive it if she voluntarily relinquished her parental rights).

126. *Carla M.*, 2011 WL 2739649, at *9.

127. See *id.* at *1.

128. *Id.* (alteration in original) (internal quotation marks omitted).

129. *Id.* at *2-3.

130. *Id.* at *2.

131. *Id.*

A 2002 Nevada case similarly turned on the issue of filing.¹³² Here, too, the birth mother relinquished her parental rights, having entered into a “communication agreement” with the adoptive parents drafted by their adoption agency.¹³³ When the birth mother sought to overturn the adoption, the adoptive parents then denied all contact.¹³⁴ The birth mother then sued for specific performance of the communication agreement.¹³⁵ The district court granted the adoptive parents’ motion to dismiss on the grounds that state law, at the time, did not provide for agreements regarding visitation or contact to be enforced independently as contracts.¹³⁶ Unless such a communication agreement was incorporated into the final adoption decree—this one was not—“a natural parent has no rights to the child.”¹³⁷

Yet while holding that the birth mother had no basis for relief, the court paused to note that:

[t]his decision leads to an unsatisfactory result in that natural parents may consent to an adoption because, pursuant to an agreement, they believe they have a right to post-adoption contact with the child. However, what many of these natural parents fail to realize is that, if the agreement is not incorporated in the adoption decree, their rights as to the child are terminated upon adoption and any contact with the child may be had only upon the adoptive parents’ permission, regardless of the agreement.¹³⁸

The dissent put the case even more forcefully. Declaring the result to be “patently unfair,” Justice Robert E. Rose observed that “[t]he enforcement of the adoption agreement without also recognizing the

132. *Birth Mother v. Adoptive Parents*, 59 P.3d 1233, 1234-36 (Nev. 2002); *see also* *Fast v. Moore*, 135 P.3d 387, 388 (Or. Ct. App. 2006) (finding a visitation agreement unenforceable because it was not court-approved at the time of adoption).

133. *Birth Mother*, 59 P.3d at 1234.

134. *Id.*

135. *Id.*

136. *Id.* at 1234-35.

137. *Id.* at 1235. Whether a postadoption visitation agreement is incorporated into the final decree of adoption also has constitutional significance should the adoptive parents relocate from one state to another. In a North Carolina case, the birth mother and adoptive parents entered into an agreement in Florida that was not incorporated in the Florida final decree. *Quets v. Needham*, 682 S.E.2d 214, 216, 218 (N.C. Ct. App. 2009). The birth mother sought to have the agreement enforced in North Carolina, where the adoptive parents had moved, and on appeal for the dismissal of her claim and Rule 11 sanctions, the birth mother argued that North Carolina was required to give full faith and credit to the Florida adoption decree. *Id.* at 218-19, 221. However, since the agreement was not part of the decree, it was regarded merely a private contract entered into in another state and, therefore, entitled to specific enforcement by a North Carolina court only as a matter of comity. *See id.* at 222. Because postadoption visitation agreements were then unenforceable in North Carolina, comity was not required. *Id.* at 223.

138. *Birth Mother*, 59 P.3d at 1235-36 (footnote omitted).

contact provision leaves the biological parent with an adoption she or he never would have agreed to otherwise. We should not permit birth parents to be so misled.”¹³⁹

Some of the problem—mothers not grasping the significance of the incorporation of their agreement with adoptive parents into the final adoption decree—may stem from the somewhat confusing and opaque structure of the entire arrangement. Open adoption is not one transaction, but three, each with distinct, if interrelated, significance. There is the relinquishment of the natural mother’s parental rights to the state or licensed agency; the agreement between the natural mother and the adoptive parents; and the final decree issued by the court, into which the private agreement must be properly folded. Certainly, the first two of these are often executed at or around the same time, though each has its own requirements and protocols. For example, the relinquishment must contain clear and conspicuous language of its irrevocability, often to be separately acknowledged by the mother through her initials or signature. Yet it is not hard to understand how a birth mother might think that the irrevocability that has been so pointedly brought to her attention applies to the obligations undertaken by *all* parties to the transaction. She has foresworn her parental rights forever, but the adoptive parents have also made what might seem to be a binding promise. Civilians—which is to say, most of us most of the time—do not dwell on the technical aspects of our legal decisions, perhaps particularly when the decision is emotionally loaded. In agreeing to terminate their parental rights on the condition that some contact with the child is preserved, we can imagine that birthmothers may not have understood that the consent to termination is really the only thing that will stick.

VII. A BETTER ANALOGY

In light of all this, I want to make a substitution in my earlier analogy. I suggested at the outset that postadoption visitation agreements were rather like prenuptial agreements. Both contracts made the underlying endeavor, whether marriage or parenthood, possible by articulating and settling terms of particular importance to the parties. Having now looked more closely at the case law and roughed out the edges of how this all works in practice, I want to suggest that the more accurate analogy, certainly in the subset of cases involving mothers facing the involuntary termination of parental rights, is not between

139. *Id.* at 1237 (Rose, J., dissenting).

postadoption visitation agreements and prenuptial agreements, but between postadoption visitation agreements and plea bargains.

Like plea bargains, postadoption visitation agreements are hard decisions made under hard circumstances.¹⁴⁰ Like prisoners rolling the dice with regard to their liberty, mothers who are about to lose their children have a very small range in which to operate. As one mother testified in her unsuccessful attempt to rescind her consent:

I thought I was . . . actually, I don't know exactly what I was doing. All I know is that I . . . I wanted to see [A.Y.], and that I'm continuing to see . . . I was told if I . . . if I didn't sign them and [the trial court] took my rights I would never see her, and if I did sign them I could. This . . . I wasn't really . . . I don't know. I wasn't thinking right. I just want . . . I just wanted her to be happy, and I wanted her to be with me.¹⁴¹

But in addition to the enormity of what is at stake at the individual level, aspects of plea bargains and postadoption visitation agreements also cut across institutional aspects of family court and the criminal justice systems. To begin, both bargains produce efficiencies that help maintain, if not sustain in the case of plea bargains, the two systems of adjudication. Second, in each the discretionary authority of certain players—prosecutors in one, social workers in the other—contributes to a default regime against which the little guys (defendants and mothers) bargain. Third, there are special concerns about formation and enforcement when the subject of a bargain involves the relinquishment of constitutional rights. In the criminal context, the defendant agrees to waive his right to a jury trial in exchange for the prosecutor's promise of an agreed upon sentencing recommendation to the court.¹⁴² In the family context, the mother consents to giving up her parental rights voluntarily, waiving the hearing that is otherwise required for an involuntary termination.¹⁴³ While the transactions are not identical in every respect, a

140. I specially thank Mark R. Shulman for suggesting this analogy to me in a discussion about this project.

141. *Youngblood v. Jefferson Cnty. Div. of Family & Children*, 838 N.E.2d 1164, 1167 (Ind. Ct. App. 2005) (alterations in original).

142. See generally Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992). For the view that the contractual analysis is small potatoes, see generally Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979 (1992).

143. *Stanley v. Illinois*, 405 U.S. 645, 650-51 (1972); see also *M.L.B. v. S.L.J.*, 519 U.S. 102, 121 (1996) (“[P]arental status termination is ‘irretrievabl[y] destructi[ve]’ of the most fundamental family relationship.” (quoting *Santosky v. Kramer*, 455 U.S. 745, 754 (1982))) (second and third alternations in original). The Supreme Court later addressed the constitutional significance of parallels between criminal justice. In holding that the demands of due process required a standard of at least “clear and convincing” evidence, the Supreme Court observed that in some states “the

comparison along these three interrelated dimensions—scope, participants, and process—shows why plea bargains rather than prenups are more apt for thinking about postadoption visitation agreements.

Looking first at the matter of scope, the criminal justice system is plea bargains all the way down. Guilty pleas account for ninety-seven percent of all convictions in federal court and ninety-four percent of convictions in state courts.¹⁴⁴ Robert Scott and William Stunz put the point clearly: “[Plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system.”¹⁴⁵ From the government’s perspective, the advantages are easy to see. There is the massive savings in administrative money and time. As the Supreme Court has noted, “Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system. . . . Judges and prosecutors conserve vital and scarce resources.”¹⁴⁶ For prosecutors, there is also the win. A plea bargain counts as a conviction, and one does not have to watch *The Wire* to understand the significance of that. Indeed, plea bargaining is a win-win: because prosecutors commonly offer defendants a plea in exchange for testimony against any co-defendants, prosecutors are assured of “at least one conviction while also enhancing the chances of a subsequent conviction.”¹⁴⁷

And what is in it for defendants? Why plead rather than take one’s chances in court? The primary answer is that a plea produces a shorter sentence. On average, those who go to trial get sentences three times longer than those who agree to a plea.¹⁴⁸ This discrepancy—the “trial penalty”—results from legislation requiring judges to impose mandatory minimum sentences following a conviction at trial; the statutory minimums are overly (and intentionally) long precisely to make a plea bargain more attractive.¹⁴⁹ Prosecutors may also overcharge crimes,

factfinding stage of a state-initiated permanent neglect proceeding bears many of the indicia of a criminal trial.” *Santosky*, 455 U.S. at 762.

144. See BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE, at tbl.5.24.2010, <http://www.albany.edu/sourcebook/pdf/t5242010.pdf>.

145. Scott & Stuntz, *supra* note 142, at 1912.

146. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

147. Sherod Thaxton, *Leveraging Death*, 103 J. CRIM. L. & CRIMINOLOGY (forthcoming 2013).

148. Rachel Barkow, *The Problem with Mandatory Minimums*, N.Y. TIMES: ROOM FOR DEBATE (Aug. 19, 2012, 7:00 PM), <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/the-problem-with-mandatory-minimum-sentences>.

149. Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 STAN. L. REV. 989, 1034 (2006). Professor Rachel E. Barkow states:

[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist

again for the purpose of encouraging the defendant to plead guilty to lesser offenses with shorter sentences.¹⁵⁰

How do these features of plea bargaining play out with postadoption visitation agreements? First, cost savings have not gone unnoticed. In enacting its postadoption visitation statute, the State of Maryland noted that avoiding termination hearings through voluntary relinquishment, itself incentivized by the possibility of postadoption contact, might result in:

significant savings in the cost of litigation related to adoption cases. . . . *For illustrative purposes only*, based on the average cost of a permanent placement for a child of \$600 per month, if 100 children achieved placement six months earlier than otherwise would have occurred under current law, the Judiciary could achieve savings of \$360,000 annually.¹⁵¹

The Supreme Court has noted with some approval that states may “wish[] the termination decision to be made as economically as possible and thus want[] to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause.”¹⁵²

Second, mothers do better “taking the plea”—that is, agreeing to relinquish voluntarily—than proceeding with a termination hearing. In the Indiana county studied by Professor Baldwin, only three out of 300 mothers prevailed in preventing the involuntarily termination of their parental rights in actions brought by the state.¹⁵³ Mothers understand these odds. They can risk losing contact with their children forever, or they can negotiate some form of communication under a voluntary relinquishment.

Why mothers do badly at hearings returns us to the matter of institutional players. As we have seen in the criminal system, prosecutors have the discretion to decide how to charge offenses and what sort of plea they will accept. In termination hearings, the discretion is located in social workers or in some jurisdictions, in court appointed guardians ad litem (“GALs”) or court appointed special advocates (“CASAs”). But as Professor Baldwin and others have pointed out, GALs and CASAs are

on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial.

Barkow, *supra*, at 1034 (footnote omitted).

150. See *id.* at 1044-46.

151. DEP’T OF LEGISLATIVE SERVS., FISCAL AND POLICY NOTE: REVISED, S. 710, 2005 Sess., at 5 (Md. 2005).

152. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 28 (1981).

153. Baldwin, *supra* note 87, at 272.

often community volunteers with little or no training in child development.¹⁵⁴ Although their job is to represent the interests of the child, Professor Baldwin suggests that assessments about parental ability are often based on personal opinion or prejudice.¹⁵⁵ In some jurisdictions, GALs rarely meet with the children whose interests they are assigned to represent.¹⁵⁶ Moreover, because GALs are regarded as neutral evaluators, rather than as witnesses for the state, they are not subject to cross-examination by the mother's counsel, and their views are typically accepted by judges as the final word on what is best for any particular child.¹⁵⁷ In this way, the authority of GALs or CASAs, well intentioned as they may be, casts the shadow—the one percent success rate reported by Professor Baldwin—that makes voluntary relinquishment by mothers a rational, if massively constrained, choice.

A third and crucial feature in common between plea bargaining and postadoption visitation agreements are their constitutional implications. This aspect of the bargain has been clearly recognized in the criminal context, where the Supreme Court has invoked both the Sixth Amendment right to jury trial and the Fourteenth Amendment right to due process to uphold a plea bargain.¹⁵⁸ If the state breaches—say, by

154. *Id.* at 281-89; George H. Russ, *The Child's Right to Be Heard*, 5 GEO. J. FIGHTING POVERTY 305, 308 (1998) (“[I]n most jurisdictions these individuals are typically not attorneys, they do not have adequate training, and they often do not have any idea what children are all about or how to deal with them.”); Hollis R. Peterson, Comment, *In Search of the Best Interests of the Child: The Efficacy of the Court Appointed Special Advocate Model of Guardian Ad Litem Representation*, 13 GEO. MASON L. REV. 1083, 1083, 1097-100 (2006) (“[M]any guardians ad litem have very little training or education in children and families, receive little compensation for their work, and often are reported to provide substandard representation to their child clients.”).

155. Baldwin, *supra* note 87, at 281-82.

156. “A 2000 study of Colorado GALs indicated that in forty-one percent of cases, the GAL did not meet with the child,” and a 2007 study of Ohio GALs, showed that while ninety percent of attorneys indicated that they nearly always met with the children face-to-face, only sixty-three percent of them documented these meetings. Barbara Glesner Fines, *Pressures Toward Mediocrity in the Representation of Children*, 37 CAPITAL U. L. REV. 411, 428 (2008) (“Even fewer attorneys observed the child interact[ing] with [his or her] parent[s]: eighty-two percent reported they did so [but] only forty-one percent documented these observations.”)

157. Raven C. Lidman & Betsy R. Hollingsworth, *The Guardian Ad Litem in Child Custody Cases: The Contours of Our Judicial System Stretched Beyond Recognition*, 6 GEO. MASON L. REV. 255, 257-58 (1998) (noting that attorneys warn clients to cooperate with GALs because their recommendations carry such weight with the court).

158. See *Santobello v. New York*, 404 U.S. 257, 261-62 (1971); *Brown v. Poole*, 337 F.3d 1155, 1159 (9th Cir. 2003) (citing *Santobello*, 404 U.S. at 262) (“[The defendant]’s due process rights conferred by the federal constitution allow [him] to enforce the terms of the plea agreement.”). As the Court explained in *Mabry v. Johnson*:

A plea bargain standing alone is without constitutional significance; in itself it is a mere executory agreement which, until embodied in the judgment of a court, does not deprive an accused of liberty or any other constitutionally protected interest. It is the ensuing guilty plea that implicates the Constitution. Only after respondent pleaded guilty was he

failing to make the promised sentencing recommendation—the defendant may either seek specific performance or withdraw his plea.¹⁵⁹ A plea bargain may also be set aside if the bargaining process is found to be sufficiently unfair. In *State v. Nichols*,¹⁶⁰ for example, the court held that:

where the responsible arms of the judicial and law enforcement establishment, together with defendant's own counsel, have misinformed him as to a material element of a plea negotiation, which the defendant has relied thereon in entering his plea, as we conclude was here the case, it would be manifestly unjust to hold the defendant to his plea.¹⁶¹

More typical, however, is *Allen v. State*.¹⁶² There, the Delaware Supreme Court held that a defendant who sought to withdraw a guilty plea because both his public defender and the trial court judge misinformed him about the range of punishment he should expect if convicted at trial—they told him three to thirty years when the range was three to fifteen years—“ha[d] failed to demonstrate that he suffered manifest injustice.”¹⁶³

How do these issues play out in the context of postadoption visitation agreements? A few courts have acknowledged their constitutional dimensions. In *T.B. v. Indiana Department of Child Services*,¹⁶⁴ for example, the state moved for termination of the mother's visitation on grounds of the children's best interests, but the mother received no notice of the hearing.¹⁶⁵ The court held this amounted to a denial of her due process rights and remanded the case for a hearing on the merits.¹⁶⁶ The concern was also raised by the dissent in the Texas *D.E.H.* case.¹⁶⁷ Recall that in that case, unlike the sympathetic Corina, the most unsympathetic E.L. was not able to unwind her

convicted, and it is that conviction which gave rise to the deprivation of respondent's liberty at issue here.

Mabry v. Johnson, 467 U.S. 504, 507-08 (1984) (footnote omitted).

159. See *United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir. 2002) (“[A] plea bargain may be enforced through specific performance or the defendant may be permitted to withdraw her guilty plea.” (citations omitted)).

160. 365 A.2d 467 (N.J. 1976).

161. *Id.* at 468; see also *Missouri v. Frye*, No. 10-444, slip op. at 9 (U.S. Mar. 21, 2012) (holding that defense counsel must at least inform clients of any formal plea offers that may be favorable to the accused).

162. 509 A.2d 87 (Del. 1986).

163. *Id.* at 87-88.

164. 921 N.E.2d 494 (Ind. 2009).

165. *Id.* at 497.

166. *Id.* at 498, 502.

167. *In re D.E.H.*, 301 S.W.3d 825, 832 (Tex. App. 2009) (Livingston, J., dissenting).

relinquishment.¹⁶⁸ But dissenting Judge Terrie Livingston stated that the involuntary termination of parental rights is a decision of constitutional significance.¹⁶⁹ The evidence regarding the knowing and voluntary nature of the consent should therefore be “clear and convincing.”¹⁷⁰ Judge Livingston noted that in *D.E.H.*, E.L.’s Spanish-speaking therapist testified that E.L. “signed the agreement because she thought it was irrevocable and would ensure her lifetime visitation.”¹⁷¹

In that case, there were also indications that DFPS was less than forthcoming regarding its involvement in the process and about who said what when. For example, the DFPS attorney testified, somewhat technically, that “[E.L.] was not misled into believing any promises were given to her from the Department at any point. We were not part of any of the mediation proceedings in that we were not in the room with her.”¹⁷²

Here it is worth remembering that ineffective assistance of counsel in a criminal case may serve as grounds for the defendant revoking the plea.¹⁷³ Indeed, in two recent cases, the Supreme Court extended the right to effective counsel to cover situations in which the defendant’s lawyer gave bad advice about particular pleas that were later rejected by the defendant.¹⁷⁴

Might this be a promising development for mothers who seek to withdraw their consent to termination when the adoptive parents discontinue visitation? Not entirely. To begin, unlike a criminal prosecution where the defendant’s liberty is at stake, there is no entitlement to appointed counsel in termination proceedings, which involve the loss of one’s children, not one’s liberty.¹⁷⁵ As the Court made clear in *Lassiter v. Department of Social Services*,¹⁷⁶ “as a

168. See *supra* text accompanying notes 91-113.

169. *D.E.H.*, 301 S.W.3d at 833.

170. *Id.*

171. *Id.* at 835.

172. *Id.* at 835-36.

173. See *Hill v. Lockhart*, 474 U.S. 52, 57 (1985).

174. See *Lafler v. Cooper*, No. 10-209, slip op. at 14-16 (U.S. Mar. 21, 2012) (allowing challenge to conviction when defendant was advised not to take favorable plea based on incorrect legal advice); *Missouri v. Frye*, No. 10-444, slip op. at 13-15 (U.S. Mar. 21, 2012) (allowing challenge when defendant was not told about a favorable plea he could prove he would have accepted).

175. *Lassiter v. Dep’t of Soc. Servs.*, 452 U.S. 18, 25 (1981) (“The pre-eminent generalization that emerges from this Court’s precedents on an indigent’s right to appointed counsel is that such a right has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation.”).

176. 452 U.S. 18 (1981).

litigant's interest in personal liberty diminishes, so does his right to appointed counsel."¹⁷⁷

Nonetheless, forty-three states have provided for appointed counsel for indigent parents in termination proceedings.¹⁷⁸ In those states, might parents who have been insufficiently advised about the nature of the entire transaction have a claim parallel to the ineffective assistance of counsel in the criminal setting? Like the remedies available to criminal defendants whose plea deals are breached by the state, should not parents too be entitled to either withdraw their consent to the termination of their parental rights or alternatively seek specific performance of the visitation contract?

I have my doubts. Unlike a plea bargain, the state itself has not promised the relinquishing mother continued visitation.¹⁷⁹ That agreement turns out to have been something like a side deal between mother and adoptive parents. The state has neither made nor breached any contractual undertaking; it has, in a sense, simply sponsored the arrangement, providing both the impetus and the forum.

In addition, while both state and criminal defendant have an interest in the integrity of the plea bargaining process, it is well established that the state has an independent interest in the welfare of children that is not necessarily aligned with the parents'.¹⁸⁰ As with other contractual arrangements concerning children, such as custody agreements upon divorce, the best interests of the child dominate over all other concerns and the state retains continuing jurisdiction to secure those interests. For these reasons, when compared with postadoption visitation agreements,

177. *Id.* at 26. To be sure, the Court noted somewhat guiltily that its decision "no way implies that the standards increasingly urged by informed public opinion and now widely followed by the States are other than enlightened and wise." *Id.* at 34.

178. Wendy C. Sotolongo, *The Importance of the Right to Counsel in an Abuse/Neglect/Dependency and Termination of Parental Rights Proceedings in North Carolina*, N.C. OFFICE OF INDIGENT DEF. SERVS. (April 2011), http://www.ncids.org/ParentRepresentation/News_Updates/ImportanceRightToCounsel.pdf; cf. *Table of Civil Right-to-Counsel Statutes*, NAT'L COAL. FOR A CIVIL RIGHT TO COUNSEL, <http://www.civilrighttocounsel.org/pdfs/abelchart.pdf> (last visited Mar. 29, 2013).

179. To be sure, like a postadoption visitation agreement, a plea bargain must also be incorporated into the court's judgment. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984).

180. See *Santosky v. Kramer*, 455 U.S. 745, 766 (1982) ("Two state interests are at stake in parental rights termination proceedings—a *parens patriae* interest in preserving and promoting the welfare of the child and a fiscal and administrative interest in reducing the cost and burden of such proceedings."). In *Lassiter*, the Court also observed:

The State's interests [in a termination hearing], however, clearly diverge from the parent's insofar as the State wishes the termination decision to be made as economically as possible and thus wants to avoid both the expense of appointed counsel and the cost of the lengthened proceedings his presence may cause.

Lassiter, 452 U.S. at 28.

the rights given up contractually in a plea bargain appear more delineated, more susceptible to remedy, and more located in the Constitution's core amendments.

Nonetheless, it would seem that greater judicial awareness of how postadoption visitation agreements connect to the larger scheme of voluntary relinquishment is in order. Maybe the DFPS *should* have been "in the room with the mother" in a case like *D.E.H.* where obtaining the mother's consent to termination is slipstreaming behind a visitation contract which she thinks—justifiably, I would say—is binding.

VIII. CONCLUSION

My focus has been on the circumstances under which postadoption visitation agreements are entered and the circumstances under which they are enforced. Whether an analogy to plea bargains or to prenuptial agreements is more apt may be a matter of maternal circumstance. In cases where adoption is actively, even if reluctantly, sought by the mother—the heroic birth mother doing the best for everyone—the logic of open adoption is clear. In contrast, in cases where a mother's children have already been removed and termination looms, open adoption and the promise of visitation scan quite differently.

Of course, the cases do not fall so neatly into discrete stacks; there are certainly cases where advantage seems to be taken even of heroic mothers. Although good mothers appear more regularly in infant adoption (and certainly in the agency marketing literature that now surrounds it), and bad ones appear more regularly in terminations involving older children, the cases are a mix of both. And while coercion seems apparent in the termination cases, pressure, if not full-out coercion, is often at play in infant adoption, too.

Yet, it seems clear that there are important differences in how postadoption visitation agreements are used and regarded depending where in the tricky constellation of motherhood the birth mother finds herself. These bargains look one way when sought by birth mothers who have considered their options and are satisfied with the slice of relational association that visitation or progress reports provide. They look quite different to mothers for whom open adoption is simply the least worst choice.
