

CONTROLLING FOR KIN: GHOSTS IN THE POSTMODERN FAMILY

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“Amid the many transformations that have reshaped the study of kinship over time, the question of the significance of biological facts has remained a persistent quagmire – as easy to fall into as it is difficult to leave behind.”²

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2. Sarah Franklin, *Biologization Revisited: Kinship Theory in the Context of the New Biologies*, in *RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES* 302 (Sarah Franklin & Susan McKinnon eds., 2001).

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ABSTRACT

This Article illustrates a paradox in the regulation of families. On the one hand, jurisprudence sanctions biological connection to promote liberty and the private production of value and culture, including the protection of the freedom of non-normative parents to parent. At the same time, however, this regulation serves as a restrictive paradigm for family composition, rigidly adhering to a biologically-evocative two parent maximum that fails to reflect the intricacies of private ordering or political constructions of biological connection. The legal and social disruption of these connections exposes their structural and subjective materiality to individual and group identity and challenges conventional notions of the two-parent family that continue to dominate postmodern family doctrine and theory.

The Article deploys the gendered and racial history and development of adoption law and the lived experience of adoption's constituents to illustrate the perils and promise of the new postmodern families. Although this critique commends the new regulatory schemes for legitimating lesbian and gay family formation, assisted reproduction, and stepparent-child relationships, it problematizes the exclusive bionormativity of this regulation and suggests that the law should recognize and even legitimate the porousness of these new families. The article proposes a unique and perhaps controversial approach to kinship that pushes against current regulatory trends that privilege social relations at the expense of biological connections.

INTRODUCTION

The meaning and structure of family have changed over time and continue to be contingent on culture, class, and place. The "modern" family, which dates

from the nineteenth century and the Industrial Revolution, refers generally to a “nuclear household unit made up of a married, heterosexual couple and their biological or adopted children.”³ Just as social, economic, legal, and scientific conditions produced the modern family, this process of modernization has ferried the postmodern family, which is itself surely a way station before another set of family norms dominate. The postmodern family is not as easily defined as the modern family, but it can be characterized by a decline in paternal (and patriarchal) authority, marital instability in fact and in concept, and a less distinct division of labor outside the home between husband and wife.⁴ In this stage, families can be nuclear or extended, divorced, reconstituted, blended, marital or non-marital, homosexual or heterosexual, and multiple people may play a role in the production and parenting of a child.

These changes have helped fuel cultural, political, and legal debates regarding the values underlying and the rules for family structure, functioning, and regulation. The legal academy, lawyers, and lawmakers are engaged in responding to these changing family formations and to a rise in a view of children as subjects and rights holders. These responses are varied and wide-ranging, but at their core sits a tension between biological and social ordering. This tension raises many questions regarding family formation, dissolution, constitution, rights, and responsibilities, including whether and to what extent biology should be the basis of parent-child relationships (and relatedly sibling and extended family relationships); what the balance should be between biological and social relationships; whether and how social relationships and individual intentions should establish family status; and whether physical intimacy is necessary for family status.⁵ A central, but overlooked, issue in this discourse is the role of biological and social ordering in a child’s identity and personhood.⁶

The limitations of biological ordering, and heterosexual marriage as a basis for many family relationships, are significant and have led to calls for abandonment, or at least diminution, of biological normativity and privilege.⁷ Often viewed as a progressive challenge to patriarchy and all that is embedded in and flows from it, the increasingly visible and diverse postmodern family has

3. JUDITH STACEY, *IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE* 38 (1996).

4. *See id.* at 2-8. Stacey, however, characterizes the postmodern family not with a “next stage” but as a signal of a “moment in . . . history when our belief in a logical progression of stages has broken down.” *Id.* at 8.

5. Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (arguing that family law should recognize friendships as family relationships); Melissa Murray, *The Networked Family: Reframing the Legal Understanding of Caregiving and Caregivers*, 94 VA. L. REV. 385 (2008) (arguing for removing the parental monopoly on caregiving and affording greater recognition of non-parental caregiving).

6. *See infra.*, Part II (illustrating the role of biological connection and kinship in identity formation and social ordering).

7. *See* Annette Ruth Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 714-58 (2001) (rehearsing doctrinal and theoretical critiques).

prompted commentators to promote changes in family law that would maximize the social aspects of parenting and minimize biological connections and the biological aspects of the parental rights doctrine.⁸ While these proposals and the freedom and possibility that the postmodern family offers are important and needed, they also have the potential to undermine maternal-child relationships, to disconnect disadvantaged women from motherhood, and to obscure the importance of biological connections to those whose own connections have been disrupted. This nation's experience with adoption bears lessons both about the persistence and depth of biological connections and the coerciveness and corrosiveness of attempts to create the perfect family.

Adoption represents a bridge between the modern and postmodern family. It is modern in its nuclear, bionormative structure, but it is postmodern in its deviations from biological ordering and displacement of the patriarch. Institutionalized during the rise of the modern family (beginning in the mid-nineteenth century),⁹ adoption contradicts and mimics family law norms by discarding and then mirroring biological connections while seeking to replicate the nuclear, marital, heterosexual family. Rooted in the modern family form, with its patriarchal and racialized norms, adoption showed signs of strain as women and children gained voice and status in relation to law and social ordering, and other postmodern families became more normative.¹⁰ These changes challenged the rebirth paradigm and its extirpation of birth connections, pushing adoption to become more open and more diverse. In response to these changes, adoption law has continued to hew toward broader changes in family law, and in some ways, family law has hewed toward adoption.¹¹

As it attempts to respond to a stunning array of non-biological familial relations, family law has not absorbed the lessons of adoption; instead, its

8. *E.g.*, Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11 (2008) (assessing the multiple parents arguments and suggesting that a more nuanced view of parenting might be in order); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809 (2006) (arguing for a continuum of parental rights and disaggregating parental rights from biology); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47 (2007) (arguing for legal recognition and protection of the widespread phenomenon of community parenting); Emily Buss, "Parental" Rights, 88 VA. L. REV. 635 (2002); Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors are Not Fathers*, 2 GEO. J. GENDER & L. 57 (2000) (advocating for limiting the sperm donor's role to contact in lesbian families); James G. Dwyer, *A Child-Centered Approach To Parentage Law*, 14 WM. & MARY BILL RTS. J. 843 (2006) (proposing that a child's best interests dictate the identity of a child's parents); David D. Meyer, *The Constitutionality of "Best Interests" Parentage*, 14 WM. & MARY BILL RTS. J. 857, 879 (2006) (suggesting that other standards, such as an assessment of benefits to the child, could replace current, biologically-based rules for establishing parenthood).

9. *See infra* text accompanying notes 33-43.

10. *See infra* Part I.B.2.

11. *See* Appleton, *supra* note 8, at 16-17 (family law embraced anonymous sperm donation); Polikoff, *supra* note 8 (lesbian and gay civil unions and marriage, which followed second-parent adoption).

trajectory is toward favoring social, at the expense of biological, ties.¹² Despite social and political changes and increasingly plural parentage, family law has clung to the nuclear family form, just as adoption did a century before. In the meantime, and in contrast, adoption law and practice have come to embrace biological ties while protecting social ties (i.e., the relations created through adoption). These more profound changes in adoption law and practice have gone almost unnoticed, even though these changes include a rise in ongoing contact adoption¹³ and a relatively new legal form of adoption, “cooperative adoption” or “adoption with contact,” that legitimates and regulates post-adoption contact among adoptive and biological family members.

Both adoption with ongoing contact and adoption with contact have grown out of the experiences of adoptees, adoptive parents, birth relatives, and adoption professionals who found the anonymity and rigid closure of adoption to be unsatisfactory and harmful.¹⁴ These experiences have made open adoption the norm in practice¹⁵ and prompted states to enact statutes that enable members of the birth and adoptive family to enter into enforceable agreements for ongoing contact after adoption as part of the adoption itself.¹⁶ Such adoption anticipates the ongoing interconnectedness of the birth and adoptive families, and the desire for communication among the family members. This new adoption model holds lessons for other postmodern and post-biological families

12. Although parental rights continue to privilege biological connections, *see infra* Part I.A.3, increasing methods have evolved to privilege social relations when adults determine whether they want a relationship with the child. *See* Appleton, *supra* note 8, at 16-22 (describing these changes).

13. By “ongoing contact adoption,” I refer to adoptive families that have ongoing contact after adoption with members of the adopted child’s birth family.

14. E. WAYNE CARP, *FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 196-222* (1998); Mardell Groth, Deborah Bonnardel, Donald A. Devis, Jennifer C. Martin & Helen E. Vousden, *An Agency Moves Toward Open Adoption of Infants*, 66 *CHILD WELFARE* 247 (1987).

15. Susan M. Henney, Ruth G. McRoy, Susan Ayers-Lopez & Harold D. Grotevant, *The Impact of Openness on Adoption Agency Practices: A Longitudinal Perspective*, *ADOPTION Q.*, 2003, at 31, 33.

16. ARIZ. REV. STAT. ANN. § 8-116.01 (2007); CAL. FAM. CODE § 8616.5 (West 2004 & Supp. 2010); CONN. GEN. STAT. ANN. § 45a-715 (West 2009); FLA. STAT. ANN. § 63.0427 (West 2009); IND. CODE ANN. §§ 31-19-16-1 to -8 (West 2005); LA. CHILD. CODE ANN. arts. 1269.1-7 (West 2008); MD. CODE ANN., FAM. LAW §§ 5-308, -3A-08, -3B-07 (2006); *see also* MD. CODE ANN., FAM. LAW §§ 5-331, -345; MASS. ANN. LAWS ch. 210 §§ 6C-E (LexisNexis 2003 & Supp. 2009); MINN. STAT. ANN. § 259.58 (West 2007); MONT. CODE ANN. § 42-5-301 (2007); NEB. REV. STAT. ANN. §§ 43-162 to -165 (LexisNexis 2005); Nev. Rev. Stat. Ann. §§ 127.187-127.1895 (LexisNexis 2004 & Supp. 2007); N.M. STAT. ANN. § 32A-5-35 (LexisNexis 2009); N.Y. DOM. REL. LAW § 112-b (McKinney 1999 & Supp. 2010); N.Y. SOC. SERV. LAW § 383-c(5)(b)(ii) (McKinney 2003 & Supp. 2010); OR. REV. STAT. § 109.305 (2009); R.I. GEN. LAWS § 15-7-14.1 (2003); S.D. CODIFIED LAWS § 25-6-17 (2004); VT. STAT. ANN. tit. 15A § 4-112 (2002); WASH. REV. CODE ANN. § 26.33.295 (West 2005 & Supp. 2010); W. VA. CODE ANN. § 48-22-704(e) (LexisNexis 2009).

that are facing many of the same experiences regarding the pull of biological connection.¹⁷

This Article presents adoption as both a cautionary tale and an exemplar of and for postmodern families. For in some ways, adoptive families anticipate and replicate the postmodern family—the various couplings, uncouplings, and new couplings along with the non-sexual reproduction of children, which nevertheless cannot escape the pull of biology and an association with the often gendered and racialized coercive disruption of biologically-based kinships. Open adoption, particularly as it is regulated through adoption with contact, illustrates the preciousness of biological connections and the various types of parenting relationships adults can have with children that are both non-exclusive but also deeply protective of family privacy and autonomy.¹⁸ The open adoptive family preserves the connection between parents and their children while creating at least one new non-biological parent in the child's life. Adoption with contact formalizes these connections by granting primary parental status to the adoptive parents while preserving consensual contact rights to birth parents and other family members.¹⁹

As legal theory and doctrine struggle to account for the range and complexity of biological and social connections that increasingly compose families, they should examine lessons from family law's own progeny, adoption law—an area of law and practice that has come to resist viewing family connections as exclusive and binary. Adoption presents three useful lessons for postmodern families. The first is historical and follows adoption's failed attempt at legal and social banishment of biological family connections. The second is sociological and relates the existential roles of biology in social ordering through lessons lived by those individuals and families who have experienced disruption of biological connections. The third lesson is doctrinal and regards adoption law's recognition and regulation of these relationships through adoption with contact, which is itself a response to the persistence of these biological connections and presents a model for shared parenting in other postmodern families.

This Article proceeds in three parts. Part I illustrates a paradox of the regulatory primacy of biological connection in that it promotes liberty by privatizing the propagation of value and culture, including the protection of the freedom of non-normative²⁰ parents to parent. But it also serves as a restrictive

17. See *infra* Part III.

18. See *infra* Part III.A.

19. See *infra* notes 117-120 and accompanying text.

20. By non-normative, I refer to those families who do not possess at least one of the following attributes: White, English-speaking, natural citizen, middle-class, heterosexual, or married. See, e.g., Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CAL. L. REV. 1647, 1654 (2005) (describing the United States "heteronormative ideal of the nation's perceived national familial identity—the self-sufficient American family with a working husband and a dependent wife and children"); Amy L. Wax, *Norm Change or Judicial Decree? The Courts, the Public, and Welfare Reform*, 32 HARV. J.L. & PUB. POL'Y 45 (2009) (noting contested

paradigm for family composition, rigidly adhering to a biologically-evocative, two-parent maximum that fails to reflect the intricacies of private ordering or political constructions of biological connection. In light of biological connection's foundational roles in law and society, Part II traces the sometimes nefarious, but persistent, construction of biological connection and its role in the formation and experience of individual and group identity. Illustrating how the legal and social disruption of these connections exposes their structural and subjective materiality, Part II surfaces important phenomena that the legal regulation of and commentary regarding postmodern families undervalue: the identitarian aspects of biological connection which challenge conventional notions of the two-parent family that continue to dominate doctrine and theory. Part III illustrates how adoption law and practice have begun to recognize and accommodate those disruptions and connections, and suggests how adoption may model reconceptualization and perhaps regulation of second-order postmodern families, which are now experiencing these same phenomena.

I. BIONORMATIVE REGULATION OF FAMILIES AND THE PRODUCTION OF LIBERTY

American family law is based on the modern family form and primarily employs biological connection and marriage²¹ to define family relationships and regulate rights, privileges, and benefits among family members and against the state. Nevertheless, the lived relations that constitute postmodern families are much more expansive and include adult-child relationships that do not hold the sanction of marriage or carry biological connection. Family relationships are increasingly formed around adult relationships that are not biologically linked to their children. These families may have only one parent who is, and even no parents who are, biologically related to the children: the parents may be stepparents, adoptive parents, lesbian and gay parents, or a single parent.²² In these cases, children experience a missing parent (or two) even while they have two parents in the home. The doctrine all but ignores those connections, even while the family members interact with each other on imaginary and physical planes.

views about family values, protection, and desert); Annette R. Appell, *"Bad" Mothers and Spanish-Speaking Caregivers*, 7 NEV. L.J. 759, 761 (2007) (describing dominant norms).

21. States are also adopting civil unions or enhanced domestic partnership schemes to provide benefits akin to marriage for lesbian and gay couples. See *infra* text accompanying notes 174-176.

22. Kinship care, the venerable and ongoing shared parenting or complete rearing of children by grandparents and other close kin, is another family relationship that does not fit the modern family form. I do not address it here primarily because it is constructed and in fact usually is a biological relation. For descriptions of kinship care as viable, prevalent, and important family structures, see, e.g., Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence"*, 34 CAP. U. L. REV. 405 (2005); see also Carol B. Stack & Linda M. Burton, *Kinscripts: Reflections on Family, Generation, and Culture*, in MOTHERING: IDEOLOGY, EXPERIENCE, AND AGENCY 33, 33-44 (Evelyn Nakano Glenn et al. eds., 1994).

As family law approaches a postmodern phase in which it seeks to accommodate these complex and unstable family constellations, the rules of family formation and dissolution are changing to reflect and protect extralegal relationships that are formed intentionally and consensually among adults. At the same time, family law continues to privilege and protect the liberatory autonomy features that characterize regulation of family in America. This part sets this regulation in political context and provides a brief overview of the evolution of family since the founding. First, it outlines the theoretical contours of the parental rights doctrine, surveying the moral and political values it promotes and the flexibility of this seemingly archaic doctrine. This portion underscores the liberatory roots and aspects of the doctrine. Next it turns to how the parental rights doctrine, within these constitutional family norms, has adapted over the years to regulate postmodern families, beginning with adoptive families and then turning to other families in which at least one biological parent is not a member of the legal family. This part illustrates that these adaptations are consistent with important individual and family autonomy norms, but also remain mired in a modern family model.

A. The Constitutional Family and the Parental Rights Doctrine

At the time of the founding of the United States, the family was a place for moral, political, and economic production.²³ While the composition of the family and the power of its constituents changed over time, central to the family's role was the production of the next generation of democratic citizens and republican leaders.²⁴ It would not be until well after Reconstruction that the nuclear, biological family became normative and the family would explicitly become a constitutionally protected organization.²⁵ This protection of the biological parent-child relationship is situated, at least in part, in Reconstruction, which outlawed slavery—the ownership and sale of human

23. See, e.g., LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* (1999) (portraying urban and Western family life during the nineteenth century); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND FAMILY IN NINETEENTH-CENTURY AMERICA* (1985) (exploring the role of the family, and its transformation from public to private entity, during and after the founding of the Republic); MARY ANN MASON, *FROM FATHER'S PROPERTY TO CHILDREN'S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES* (1994) (tracing the legal status of parent-child relationships from colonial times through the last century); STEVEN MINTZ, *HUCK'S RAFT* (2004) (identifying regional and temporal differences and developments in family life from colonial times through the twentieth century).

24. See GROSSBERG, *supra* note 23, at 4-7.

25. Arguably, it took the Reconstruction Amendments to democratize individual and family liberty and to create or extend notions of liberty and privacy to state action. See PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 91-92, 98, 108-17 (1997) (illustrating the connections between abolition, Reconstruction, and family autonomy, particularly, the connection between freedom and the right to parent one's children).

beings, including other people's children.²⁶ After Reconstruction, both productive and reproductive labor (in theory) belonged to laborer.²⁷ Thus, parental rights are rooted in ancient patriarchal norms as well as more liberatory norms flowing from the abolition of slavery. In keeping with its ancient origins, family law continues to be heteronormative and limited, but in following its liberatory underpinnings, family regulation has proven to be flexible enough to afford recognition and protection to adult choices about intimacy and child rearing. This part illustrates that the doctrine remains important politically, but through its adherence to a maximum of two parents and a corresponding absolutist view of parenthood, it may be pushed to a point of undermining the very values the constitutional family reflects.

1. The Evolution of the Constitutional Family

Although far from nuclear, secluded, or fully voluntary, colonial and post-colonial families were private, but publicly regulated.²⁸ Even in the early days of the nation, free fathers controlled and were responsible for the support and education of their offspring²⁹ as well as those children bounded out to³⁰ or owned by them, with the exception that parents who were slaves generally did not have legal rights to their children.³¹ This was the family of the founding, but within a century, social, economic, and constitutional developments produced the modern constitutional family.³²

These material and ideological changes following the formation of the Union gave rise to legally and morally secluded families even while the

26. *See id.* at 136 (noting that the conception of liberty from slavery and the right to moral freedom included the right to rear one's children).

27. *Id.* at 112.

28. GROSSBERG, *supra* note 23, at 4-6, 18-19. Even outside of slavery, it was not unusual for children to be bounded out to masters who then became responsible for their care and empowered to profit from their work. *See id.* at 4-5 (describing the familial patriarch's obligations for bounded-out youth and other dependents); MINTZ, *supra* note 23, at 1-74 (reporting on the various family formations); *see also* MASON, *supra* note 23, at 2-6 (also reporting on the various family formations).

29. Although during colonial times, children born outside of marriage were *filius nullius* (in effect, legal orphans), the law evolved slowly after the founding to require fathers to support and educate them. MASON, *supra* note 23, at 24-25; GROSSBERG, *supra* note 23, at 196-233.

30. GROSSBERG, *supra* note 23, at 259.

31. MASON, *supra* note 23, at 2-13; MINTZ, *supra* note 23, at 46. Fathers were responsible for educating their children and their apprentices. MASON, *supra* note 23, at 8. Often educating a child meant sending him out to be apprenticed. *Id.* Mason notes that a "very large proportion" of colonial children spent portions of their childhood living with and indentured to others. *Id.* at 30.

32. *See infra* text accompanying notes 33-43. These include the end of slavery, the industrial revolution, and the Reconstruction Amendments.

regulation of families became more formal and more public.³³ The notions of contract that undergirded the formation of the Union³⁴ slowly superseded more rigid and hierarchical family norms, eventually leading to family units characterized by individual rights and obligations. During the first century after the founding, mothers and children began to gain agency—the former as parents and the latter as having interests and value outside of their role as economic producers.³⁵ Both mothers and fathers had rights and obligations regarding their children,³⁶ although patriarchal power remained supreme.³⁷ The abolition of slavery and reconstruction of the Union extended the liberty of biological connection and moral identity to all citizens.³⁸ In addition, freer agency, greater value placed on the maternal-child bond, and the evolution of childhood into a special status of leisure for middle-class children helped shape the nuclear family and make it normative, even while poor children and families experienced family lives and regulation that diverged from this model.³⁹

Alongside and reflecting these changes, constitutional jurisprudence enshrined a doctrine of parental rights, itself rooted in conceptions of liberty⁴⁰ and beliefs about the place of children and families in a liberal, republican democracy.⁴¹ This constitutional family is a private place of value and economic production in which family relations are framed as natural—that is to

33. See GROSSBERG, *supra* note 23, at 13 (noting the rise in judicial power and passage of general statutes that “transferred authority over what had been private legislation such as . . . divorces to individuals and the courts . . .”).

34. See HOLLY BREWER, *BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY* (2005) (exploring the ideological shift from divine to empirical knowledge and from birth right to consent that formed the political organizing tool for the United States).

35. MASON, *supra* note 23, at 50-73; see also GROSSBERG, *supra* note 23, at 7 (describing some of these changes, which were animated by a new and domestic orientation toward individualism and autonomy).

36. MASON, *supra* note 23, at 71-72, 76-83 (describing the increased legal recognition of mothers along with fathers and the decline in apprenticeships and “placing out”); see also MINTZ, *supra* note 23, at 75-93 (describing the nineteenth century ascendancy of the middle class along with changing notions of childhood and parental responsibility for the moral shaping of children).

37. GROSSBERG, *supra* note 23, at 236.

38. U.S. CONST. amends. XIII, XIV.

39. See GROSSBERG, *supra* note 23, at 259-68; MASON, *supra* note 23; GORDON, *supra* note 23; see also MINTZ, *supra* note 23, at 75-93 (noting the rise in this modern family form in the nineteenth century as the large-scale bounding out and enslavement of children decreased, large multigenerational and multi-relational households receded, and work and home became increasingly separate).

40. DAVIS, *supra* note 25 (illustrating the centrality of parental rights through the use of abolition discourse and slave narratives).

41. See Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 TEX. L. REV. 1195 (1999) (exploring the political conception and role of family during the time of the founding and particularly with regard to liberty and authority and the centrality of family to John Locke’s political theory).

say, privately created and, normally, biologically ordered⁴²—but which also perform political functions.⁴³ This interplay of private and public ordering establishes a delicate and complicated balance between autonomy and authority through rules that are neither purely biological nor purely social, forming a combination that has proven to be quite malleable and even protective of women and subordinated groups.⁴⁴

2. The Matrifocal Construction of Parenthood

While parenthood as a legal and constitutional matter is primarily rooted in biological connection, biology is merely a starting point—a foundation on which functional or intentional conduct gains meaning and legal relevance. The parental rights doctrine establishes a model for parenthood that privileges and protects biological mother-work and those associated with this work. Parents hold that status unless and until they voluntarily relinquish it or prove to be unfit.⁴⁵ Although parenthood is biologically-based, it must be earned. “Mothers” earn it through the nurturing biological acts of gestation and birth.⁴⁶ “Fathers” earn it in one of two ways: men who are biologically (genetically) related to the child can earn the status by caring for the child after birth;⁴⁷ biological and non-biological fathers (and even biological and non-biological mothers) may earn parental status by making a commitment to the child’s mother (or father), generally, but not exclusively, through marriage or a civil union.⁴⁸ For example, caring for a child or showing commitment to the child or

42. See *id.* at 1203-06, 1208-09, 1226-29 (exploring the unique social conditions of American colonial families and the political role of family, and particularly mothers and fathers, in American constitutional theory).

43. See *infra* Part I; see also GROSSBERG, *supra* note 23, at 1 (“In the eyes of the law, the family was as John Adams had visualized it: the primary institution of American society.”). Grossberg refers to this process—the “consolidation, refinement, and revision . . . in a continuing effort to use the law to produce families of the sort that Adams had envisioned” as the “republican family.” *Id.* at 4, 6. These political functions of the family include economic distribution. Annette Ruth Appell, *The Pre-political Child of Child-Centered Jurisprudence*, 46 HOUS. L. REV. 703, 750, 754-55 (2009).

44. Appell, *supra* note 7, at 765-87.

45. *Id.* at 703-05.

46. *Id.* at 691.

47. *Caban v. Mohammed*, 441 U.S. 380 (1979); *Stanley v. Illinois*, 405 U.S. 645 (1972). Establishing legal paternity also affords fathers parental rights. *Quilloin v. Walcott*, 434 U.S. 246 (1978).

48. California (domestic partnerships); Connecticut (marriage); District of Columbia (domestic partnerships); Iowa (marriage); Maine (marriage); Massachusetts (marriage); New Hampshire (marriage); New Jersey (civil unions); Nevada (domestic partnerships); New Jersey (civil unions, 2007); Oregon (domestic partnerships); Vermont (marriage); Washington (domestic partnerships). Human Rights Campaign, *Marriage Equality & Other Relationship Recognition Laws*, Apr. 2, 2010, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf.

mother includes financial support.⁴⁹ In any event, neither marriage nor other type of civil union is essential to maternity or to biologically-based paternity.⁵⁰

Under this matrifocal construction of parenthood, the legal category of “father” is more variable than “mother” and includes both biological and non-biological relationships to the child.⁵¹ Thus, the father category is a paradigm for other domestic partners, including women.⁵² This construction of fatherhood establishes routes to parenthood in postmodern families, a construction that maintains the doctrine’s utility and relevance. At the same time, the constitutional family continues to be heteronormative in that it countenances just two parents at any given time.⁵³ The United States Supreme Court’s inability to embrace three parents in *Michael H. v. Gerald D.*⁵⁴ suggests that the Court may continue to privilege monogamous, heteronormative, modern family forms.⁵⁵

3. The Rights of Parenthood

Those who achieve parental status⁵⁶ have a constitutional right to direct the child’s care and upbringing, absent proof that the parent is abusing or

49. Indeed, parental support and rights often become conflated as an affective, if not legal, matter. See I-Fen Lin & Sara S. McLanahan, *Parental Beliefs About Nonresident Fathers’ Obligations and Rights*, 69 J. MARRIAGE & FAM. 382 (2007) (reporting on study showing that mothers believe that paternal decision making and visitation rights are positively tied to the father’s support of the child).

50. See e.g., *Stanley*, 405 U.S. at 645 (upholding non-marital father’s right to a hearing before the state could remove from him the biological children he co-parented with their deceased mother).

51. For a thorough exploration of the legal construction of unmarried fathers, see Laura Oren, *The Paradox of Unmarried Fathers and the Constitution: Biology ‘Plus’ Defines Relationships; Biology Alone Safeguards the Public Fisc*, 11 WM. & MARY J. WOMEN & L. 47 (2004).

52. In fact, state courts have held that women can establish fatherhood (though it is called motherhood) when the act of maternal creation is split between egg donation and childbearing, *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2003); *Elisa B. v. Superior Court*, 117 P.3d 660 (Cal. 2005), or when a woman is involved in the conception of the child of her partner and holds herself out as a parent, *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); see also *McDonald v. McDonald*, 608 N.Y.S.2d 477 (N.Y. App. Div. 1994) (gestational mother married to the father is mother, despite her lack of genetic connection to the baby).

53. *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); see also *Johnson*, 851 P.2d at 776 (permitting only one mother); but see *Jacob v. Shultz-Jacob*, 2007 PA Super. 118) (holding that a child can have three legal parents, two of whom are women).

54. *Michael H.*, 491 U.S. at 110;

55. In this Article, I generally use “heteronormative” to reflect monogamous, exclusive two-parent families that replicate biological reproduction of children and “bionormative” to reflect invocation of norms and practices that evoke or mimic biological parent-child relationships.

56. References to “parent” refer to persons who have attained parental status through legally valid and completed adoptions.

neglecting the child or has failed to establish legal parenthood.⁵⁷ This presumption of parental authority provides a private zone around families, a place for the creation and propagation of diverse values regarding the good life, morality, culture, language, and religion, all within liberal norms.⁵⁸ Although states may act to protect individual children or children more generally, the constitutional liberty interest in the parent-child relationship cabins the state's ability to legislate regarding child welfare and child rearing.⁵⁹ In other words, the state cannot coercively intervene in, or interfere with, family governance because it has a difference of opinion with the parent about what is best for the child, but may intervene to protect the child.⁶⁰ And when the state, in its *parens patriae* role, does seek to diminish or terminate this relationship without parental consent, the state must have adequate cause and utilize heightened process.⁶¹

The privilege that law and society afford biological ordering is, of course, not necessary, essential, or inevitable. It is, however, deeply embedded in our moral, political, economic, and existential constructs.⁶² In fact, the valuation and protection of biological connections were of a piece with the realization of moral liberty for adults in the United States through the abolition of slavery. As "an aspect of human self-definition and moral choice,"⁶³ families are intimate associations created and controlled by autonomous adults. Families, in turn, support self-definition and moral autonomy by providing an environment semi-secluded from state control of socialization and value production.⁶⁴ Whether this intimacy is an end in itself or a means through which people produce or

57. *E.g.*, *Lehr v. Robertson*, 463 U.S. 248 (1983); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Stanley v. Illinois*, 405 U.S. 645 (1972).

58. Peggy Cooper Davis, *Contested Images of Family Values: The Role of the State*, 107 HARV. L. REV. 1348, 1349 (1994); *see also Moore v. E. Cleveland*, 431 U.S. 494, 503-04 (1977) (noting the role of families in value propagation).

59. *E.g.*, *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944).

60. *Reno v. Flores*, 507 U.S. 292, 304 (1993); *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000). Of course the line between protection and best interests is not sharp.

61. *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996); *Santosky v. Kramer*, 455 U.S. 745 (1982); *Stanley*, 405 U.S. at 645; *but see Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (due process does not require appointment of counsel for an incarcerated mother in state proceedings to terminate her parental rights against her will).

62. *See Brandon*, *supra* note 41, at 1227; Anne C. Dailey, *Constitutional Privacy and the Just Family*, 67 TUL. L. REV. 955, 1021-22 (1993); William A. Galston, *The Legal and Political Implications of Moral Pluralism*, 57 MD. L. REV. 236, 236-40 (1998) (family autonomy protects liberalism by fostering value pluralism); *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534-35 (1925) (noting the threat to liberty if the government were to "standardize" children); *Meyer v. Nebraska*, 262 U.S. 390, 402-03 (1923) (critiquing state laws that seek to "foster a homogeneous people with American ideals"); *see also Appell*, *supra* note 7, at 709-10, 779-87 (connecting biological ordering to the integrity of family roles in creating and maintaining pluralistic liberal democracy).

63. DAVIS, *supra* note 25, at 168.

64. Davis, *supra* note 58, at 1349.

exercise moral value, family relationships are the ultimate exercise of the positive freedom to form and protect intimate associations.⁶⁵

This matrifocal doctrine, in keeping with its grounding in liberal notions of autonomy, provides relatively definite rules for family membership and relations. These rules are adult-centered and grounded in biological reproduction and theoretically consensual adult relationships, such as marriage or its relative equivalent.⁶⁶ The content and precision of these rules limit the state's role in making assessments of who is in and who is out of the family.⁶⁷ The parental rights doctrine's private, biological, creative, and decisional aspects constitute a progressive organizing tool that features and often protects women as mothers⁶⁸ while, in theory and increasingly in practice, neuters fatherhood.⁶⁹

In these ways, parental autonomy is morally and instrumentally valuable because it promotes a dynamic democracy that relies on autonomous citizens to govern.⁷⁰ As a political and legal matter, families constitute a private zone of

65. See, e.g., Brandon, *supra* note 41, at 1226-27; Dailey, *supra* note 62, at 958-59; Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy—Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 473-84 (1983) (each suggesting the important role families play in caring for youth and preparing them to be future democratic citizens); DAVIS, *supra* note 25, at 168; Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy by Valuing Connection*, 59 OHIO ST. L.J. 1523, 1541-42 (1998); Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635-37 (1980).

66. See *infra* Part I.C.

67. Appell, *supra* note 7, at 709-11.

68. *Id.* at 758-79. This is not to say that biology has not been and is not used in ways that blame and demonize mothers and their children, Ellen K. Feder, *The Dangerous Individual(s) Mother: Biopower, Family, and the Production of Race*, 22 HYPATIA, Spring 2007, at 60, or that maternal privacy is not compromised (see Carol Sanger, *Infant Safe Haven Laws: Legislating in the Culture of Life*, 106 COLUM. L. REV. 753, 812-28 (2005) (noting how mothers are surveilled and controlled).

69. In other words, fathers may be men or women because the male (traditional paternal) gametic contribution to parenthood is not always sufficient to establish parenthood. See *supra* text accompanying notes 47-54. The regressive aspects of this privacy include economic isolation, which functions to maintain wealth and poverty. Appell, *supra* note 43, at 753-55. This distributive feature of parental rights doctrine makes the moral privacy aspects of the doctrine all the more important for subordinated families whose legitimacy is often contested. Appell, *supra* note 7.

70. Brandon, *supra* note 41, at 1227-28; Jeb Rubinfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 805 (1989). This biologically-based definition also affords women some protection against relegation to reductive and restrictive social scripts regarding maternal devotion and behavior and permits women to be recognized as mothers even if they diverge from gender norms, such as feminine, white, and heterosexual. See Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 54 (Barrie Thorne & Marilyn Yalom eds., 1982); Davis, *supra* note 58, at 1365-66; Lisa C. Ikemoto, *The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law*, 53 OHIO ST. L.J. 1205, 1258-59 (1992) (noting the ideology of motherhood as selfless child giving); Michelle Oberman, *Turning Girls into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM. L. & CRIMINOLOGY 15, 64-67 (1994) (noting

value production in which children are raised and nurtured to become mature adults who are able to exercise political choice. In this way, families both protect children and help them become adult citizens who are morally independent from the state and can, therefore, exercise their constitutional sovereignty.⁷¹ By rearing children in private, morally autonomous settings, families maintain and create moral diversity and restrain the moral authority of the state.⁷²

B. Early Postmodern Families: The Birth and Evolution of Adoption

Although constitutional family norms were informed by and developed around a heteronormative, biological nuclear family,⁷³ that family was as transitory and mythic as other family forms and it was not long before lived relationships demanded legal regulation of adult-child relationships that were not developed through biological reproduction. In contrast to modern family law, which rests the parent-child relationship on biological coupling and lineage, adoption law is a purely legal construct creating families where at least one biological connection is absent. Indeed, family and adoption law present mirror trajectories: one biologically based and moving to accommodate lived relationships; while the other, adoption law, is legally based and moving to accommodate biological relationships. Adoption law, itself a modern creation, has evolved over its relatively short life from a simple way to legally recognize de facto parent-child relationships to a rigid, almost mythic, imitation of the birth family and now toward a more organic and expansive system.⁷⁴ This evolution is instructive.

1. The Creation of Adoption

Adoption was not part of the law the United States inherited from England, but was a new addition to the Anglo-American lexicon, first through private legislative acts legalizing specific de facto parent-child relationships,

compulsory maternal altruism norms for mothers); Nancy Chodorow & Susan Contratto, *The Fantasy of the Perfect Mother*, in *RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS* 54, 63-67 (Barrie Thorne & Marilyn Yalom eds., 1982) (noting the constrictive psychological constructs of motherhood).

71. MINTZ, *supra* note 23, at 71; A. Kristen Foster, "A Few Thoughts in Vindication of Female Eloquence" *The Case for the Education of Republican Women*, in *CHILDREN AND YOUTH IN A NEW NATION* 129, 131 (James Marten ed., 2009).

72. Appell, *supra* note 7, at 705-14. It is also true that family privacy has existed alongside and served as justification for great social and economic disparities, but the distribution of resources is a public function, masked by privacy. *See* Appell, *supra* note 43, at 753-57 (noting how the privatization of childhood reifies socioeconomic status for children and their caregivers and suggesting that enhanced notions of liberal justice could work toward eradicating these inequalities).

73. *See* *Troxel v. Granville*, 530 U.S. 57 (2000) (affirming by a shattered plurality the bounded right of a parent to exclude grandparents from the family).

74. *See infra* Part I.B.1-2.

and next through general adoption statutes starting in the 1850s.⁷⁵ These new adoption statutes established the hallmark of adoption: judicial termination of one family and creation of another, when in the interests of the child.⁷⁶ Adoption law maintained this core characteristic, but became confidential and anonymous after World War I in response to an increase in infant adoptions that was, in turn, spurred by several forces, including a growth in infertility, the availability of more reliable infant formula, and the changing psychological theories that began to view environment as more important in child development than genes.⁷⁷ By late mid-century, fictive birth became the adoption paradigm, such that the adoption was equated with a new birth, and even called for substitution of the adoptive parents for the birth parents on the birth certificate.⁷⁸ Eventually, the original birth certificates were sealed from all eyes, including those of the adoptee.⁷⁹ The unitary view of adoption became that of anonymous infants, even for related adoptions and adoptions of older children.⁸⁰ In substance, this unitary approach provided solely for confidential, static adoptive relationships, which terminated all pre-birth connections and sealed all birth records.⁸¹ Even while challenging the biological basis of kinship, this form of adoption embodies traditional family law norms. It instantiates these norms in obvious ways: two parents, generally of the

75. CARP, *supra* note 14, at 6-7; Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1102-54 (2003) (tracing history of adoption law in the United States); Chris Guthrie & Joanna L. Grossman, *Adoption in the Progressive Era: Preserving, Creating, and Re-Creating Families*, 43 AM. J. LEGAL HIST. 235, 236-37 (1999). These early adoption statutes had two important and progressive characteristics: first, they made adoption accessible by establishing uniform standards and rules for judicial adoption; and second, they required a particularized inquiry into the propriety of the placement. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465-66 (1972); Annette R. Appell, *Legal Intersections*, ADOPTION Q., 2000, at 85, 88.

76. CARP, *supra* note 14, at 5; E. Wayne Carp, *Introduction to ADOPTION IN AMERICA* 1, 4-5 (E. Wayne Carp, ed., 2002). Guthrie and Grossman's study of adoptions in Alameda County during the Progressive Era revealed that, in practice, adoptions received virtually no scrutiny from the court. Guthrie & Grossman, *supra* note 75.

77. Burton Z. Sokoloff, *Antecedents of American Adoption*, 3 FUTURE OF CHILDREN 17, 22 (1993); RICKIE SOLINGER, WAKE UP LITTLE SUZIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1992).

78. See Cahn, *supra* note 75, at 1148-50 (describing rise in infant adoption and matching); Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 376-78 (2001) (between 1930 and 1947, states began to amend birth certificates to reflect the adoptive parents as the birth parents).

79. Samuels, *supra* note 78, at 369-70.

80. Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995).

81. See Samuels, *supra* note 78, at 385-400 (rehearsing these changes designed to protect the adoptee and the adoptive parents by subverting the birth connections).

“opposite sex” to mirror sexual reproduction and monogamous coupling;⁸² marital, when there are two parents;⁸³ and parenting that is exclusive.⁸⁴

Historically and structurally, adoption is rooted in oppressive patriarchal and racial norms. It privileges the social aspect of parenting, which the father traditionally performs, and devalues the biological mother work, as if the act of bearing and birthing were a commodity.⁸⁵ The legal default to closed adoption, the sealing of adoption and birth records, and complete termination of parental and all derivative relationships, reflects a legal system that did not recognize the subjectivity of women (or children).⁸⁶ As Drucilla Cornell explains, adoption law reflects and encodes male subjectivity, contemplating woman through her duties as wife and mother, not as her own subject.⁸⁷ Although law has changed in many ways, it continues to define women as either mothers or not mothers.⁸⁸ This dichotomy does not permit a woman to be both a mother and not a mother—to be allowed to “come to terms with [her] own life-defining decisions about sexuality and family.”⁸⁹

This regime is not surprising in light of the historic context of adoption, the legal regulation of which evolved during a time when poor, racially marginalized children were placed for adoption as a method of socializing them into White middle-class, Protestant norms.⁹⁰ Adoption has continued to be a

82. Although this heterosexual mandate is changing rapidly, the two-parent, monogamous aspect endures. Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption*, 22 B.Y.U. J. PUB. L. 289 (2008).

83. Although, this too is changing. For example, a number of states permit same sex couples in domestic partnerships, civil unions and even in de facto relationships to adopt children together. Still, the case law reveals very normative families: middle class (often professional), monogamous, long term, shared home and resources. Annette R. Appell, *Lesbian and Gay Adoption*, ADOPTION Q., 2001, at 75, 78-79.

84. Adoption is effected by the termination of birth or legal parents' rights and transfer of those rights to the adoptive parent. Cahn, *supra* note 75, at 1125.

85. See *supra* text accompanying notes 47-69 (exploring the construction of fatherhood around caring for and supporting the mother or child); Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN'S L.J. 163, 194-95 (2002) (describing the unique and affective aspects of motherhood).

86. See Drucilla Cornell, *Adoption and its Progeny: Rethinking Family Law, Gender and Sexual Difference*, in ADOPTION MATTERS, PHILOSOPHICAL AND FEMINIST ESSAYS 19, 22-28 (Sally Haslanger & Charlotte Witt eds., 2005) (noting that the law's refusal to recognition the status of both birth and adoptive mothers denies the subjective experience of birth mothers who do not, upon adoption, lose that experience of carrying a feature to term and birthing a child); Barbara Yngvesson, *Placing the "Gift Child" in Transnational Adoption*, 36 L. & SOC'Y REV. 227, 239 (2002) (noting how the erasure of the child's birth ties does not reflect the subjectivity or humanity of adoptees).

87. Cornell, *supra* note 87, at 22-25.

88. The law contemplates two mothers only when they reflect heteronormative families—as intimate domestic partners. See *supra* text accompanying notes 177-181.

89. Cornell, *supra* note 87, at 28.

90. Italian, German, and Irish children saved during the child-saving and progressive eras in the late nineteenth and early twentieth centuries were considered not white. GORDON, *supra* note 23, AT 76-77, 98-106.

mechanism to regulate race, and women's sexuality and reproductive choices, imposing or prohibiting the right to place a child for adoption depending on the mother's race⁹¹ and affording pregnant girls more freedom to relinquish their babies for adoption than to obtain an abortion.⁹² More recently, adoption has been presented as an antidote to single, Black motherhood.⁹³

In addition, the movement to seal adoption records coincided with an unprecedented rise in non-marital births among women of color.⁹⁴ The closure and sealing of adoption excised birth mothers to avoid tainting the new legitimate family.⁹⁵ Adoption historian E. Wayne Carp attributes this closure to the psychological theories of John Bowlby⁹⁶ and Sigmund Freud.⁹⁷ Yet, the timing of this closure along with the racialized origins of psychology⁹⁸ may suggest a more critical reading of the rebirth narrative, a narrative that is, as the next section illustrates, in rapid decline.

2. The (re)Opening of Adoption

Beginning with the rise of postmodernism in the last quarter of the twentieth century, the rebirth model of adoption has become dated as parties to adoption experience less secrecy and value it less. A series of social and legal changes have led to this devaluation of secrecy and myth and to a loosening of the patriarchal caste in adoption. For example, a decrease in the number and percentage of infant adoptions along with an increase in older child adoption by stepparents, relatives, and foster parents made the rebirth theme of adoption

91. In the pre-*Roe* days, adoption was imposed on white women and prohibited for African American women who were charged with abandonment if they tried to relinquish their child. SOLINGER, *supra* note 77, at 20-40.

92. Today, minor mothers can relinquish a child for adoption in most states without parental or judicial consent or involvement, but they cannot obtain an abortion without such consent in most states. Jennifer Durcan & Annette R. Appell, *Minor Birth Mothers and Consent to Adoption: An Anomaly in Youth Law*, ADOPTION Q., 2001, at 69.

93. See Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 457-62 (2004) (reviewing RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003)) (noting simultaneous and racialized discourse surrounding the promotion of color-blind adoption, cutbacks on support for single mothers and children, and reduced protections of maternal-child bonds in child welfare policy).

94. See E. Wayne Carp, *How Tight was the Seal? A Reappraisal of Adoption Records in the United States, England and New Zealand, 1851-1955*, in INTERNATIONAL ADVANCES IN ADOPTION RESEARCH FOR PRACTICE 17, 20-23 (Gretchen Miller Wrobel & Elsbeth Neil eds., 2009) ("[t]he largest increase in the number of out-of-wedlock births occurred among non-white mothers, climbing two and a half times, from 46[,]700 in 1938 to 130[,]900 in 1957" (p. 20) and demand for adoption greatly exceeded supply, state governments and adoption agencies blocked access to birth information, the former by sealing adoption records and the latter by refusing to share information among adoption triad members).

95. See Samuels, *supra* note 78, at 506; CARP, *supra* note 14, at 113-17.

96. Carp, *supra* note 94, at 22.

97. *Id.* at 23.

98. CAROLINE F. LEVANDER, *CRADLE OF LIBERTY: RACE, THE CHILD, AND NATIONAL BELONGING FROM THOMAS JEFFERSON TO W.E.B. DU BOIS* 134-38 (2006).

less tenable.⁹⁹ There has been a rise of openness even in infant adoption as birth mothers have gained more autonomy through increased reproductive choice and changing legal and social mores that produce less shame in the tangible incarnations of women's sexuality.¹⁰⁰ Armed with this moral authority, birth mothers began to seek adoptive parents who would be willing to engage in open adoption in which birth and adoptive parents meet each other and might even have ongoing contact.¹⁰¹

Similarly, several generations of adoptees who had been adopted under the post-war anonymous infant adoption model came of age and sought information about their birth history.¹⁰² Their adoptive parents, too, recognized the importance of this information and sought it along with, or on behalf of, their adopted children.¹⁰³ Finally, adoption has become more public as the federal government has embraced adoption as an option for foster children.¹⁰⁴ These events and the creation and rise of the children's bar since *In re Gaul*¹⁰⁵ and the Child Abuse Prevention and Treatment Act¹⁰⁶ have combined to promote more child-centered approaches to adoption that take account of children's ties to their birth families.¹⁰⁷

As a result of these social and legal movements, open adoption has become the norm in adoption practice, even for infant adoptions wherein the fiction of rebirth is more tenable than in stepparent, relative, and foster child adoptions.¹⁰⁸ Open adoption refers to a range of relationships including the exchange of information or a meeting between the adoptive and birth parents before adoption, to ongoing participation of the birth family in the life of the adoptive family; such contact could be mediated, direct, in person or via letter, phone, or other electronic exchange.¹⁰⁹ Post-adoption contact ranges from

99. See Appell, *supra* note 80, at 1001.

100. CARP, *supra* note 14, at 201-203.

101. Appell, *supra* note 80, at 1008-09.

102. Henney et al., *supra* note 15, at 32-34.

103. Groth et al., *supra* note 14.

104. Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (1982) (codified in scattered sections of 42 U.S.C.).

105. 387 U.S. 1 (1967).

106. Child Abuse Prevention and Treatment Act, Pub. L. No. 93-247, 88 Stat. 4 (1974) (codified at 42 U.S.C. §§ 5101-5106, 601, 620) (provisions for child representative in child abuse and neglect proceedings).

107. See Jerica M. Berge, Tai J. Mendenhall, Gretchen M. Wrobel, Harold D. Grotevant & Ruth G. McRoy, *Adolescents' Feelings about Openness in Adoption: Implications for Adoption Agencies*, 85 CHILD WELFARE 1011, 1014 (2006); Gretchen Miller Wrobel, Harold D. Grotevant & Ruth G. McRoy, *Adolescent Search for Birthparents: Who Moves Forward?*, 19 J. ADOLESCENT RES. 132, 134-35 (2004) (describing change in adoption practice).

108. Appell, *supra* note 80, at 1008-12.

109. Chris Jones & Simon Hackett, *Communicative Openness Within Adoptive Families: Adoptive Parents' Narrative Accounts of the Challenges of Adoption Talk and the Approaches Used to Manage These Challenges*, ADOPTION Q., 2007, at 157, 158-59.

occasional or regular correspondence to actual in-person visits to full family interrelationships with shared space and shared parenting.¹¹⁰

Generally, these relationships are privately ordered and maintained. In other words, open adoption arrangements are informal, premised upon the agreement of those people involved, but without the force of legal sanction should any of the parties choose to discontinue or otherwise stray from the terms of the agreement.¹¹¹ The adoptive parents, as legal parents, retain the right to determine with whom their children have contact and the terms of that contact. And, of course, the birth family members are not bound to continue the relationship.

Two types of regulatory schemes for open adoption have evolved out of concerns for different constituencies—even as unregulated open adoption continues to be the predominant practice.¹¹² One scheme permits post-adoption contact over the adoptive parents' objection (court-imposed open adoption); the other is voluntary and based solely on a pre-adoptive agreement among birth relatives and adoptive parents for ongoing contact after adoption (adoption with contact).¹¹³ Both types of regulation present significant incursions into the legal and social paradigm of adoption as rebirth, but they afford different levels of autonomy to the legal parents.

Court-imposed open adoption statutes do not aim to create a model for cooperative relationships, but instead to preserve pre-adoptive relationships between grandparents or other relatives and the adoptee, generally in related- or stepparent-adoptions.¹¹⁴ These statutes empower the court to maintain pre-adoptive visitation rights after adoption or order post-adoption contact upon request of persons who may not be parties to the adoption; these statutes are more common and far more varied than adoption with contact statutes, but defy easy categorization or a unified sense of preservative or child-centered purpose.¹¹⁵ This type of regulation, although not without value, stands in opposition to family autonomy because it substitutes judicial authority for parental authority to assess and determine what is in the child's best interests.

In contrast, the adoption with contact statutes, which began to emerge in the last decade of the twentieth century,¹¹⁶ create a mechanism for legalizing increasingly normative open adoptive relationships, which exist in the shadow of, but mostly outside, the law. Adoption with contact, a consensual

110. *Id.*

111. *E.g.*, *Birth Mother v. Adoptive Parents*, 59 P.3d 1233 (Nev. 2002) (refusing to uphold visitation agreements not entered into under specific statute or entered into in the absence of a statute providing for enforcement).

112. Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, ADOPTION Q., 2003, at 75 [hereinafter Appell, *Survey*]; Annette R. Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, ADOPTION Q., 2000, at 101 [hereinafter Appell, *Enforceable*].

113. Appell, *Enforceable*, *supra* note 112.

114. *Id.*

115. *See id.*

116. Appell, *Survey*, *supra* note 112, at 76.

arrangement among birth and adoptive parents or relatives, both acknowledges the child's pre-adoptive birth ties and brings these connections forward into the adoption, often as a very part of the adoption decree itself.¹¹⁷ Approximately twenty states have enacted adoption with contact statutes.¹¹⁸ This legislation allows adoptive parents and birth relatives or others at, or before, the time of adoption to enter into enforceable agreements for post-adoption contact, such as visitation or correspondence.¹¹⁹ The statutes do not permit approval or enforcement of post-adoption contact plans unless the adoptive parents and the biological relative who will have contact agree to such a plan at, or before, the time of adoption.¹²⁰ In this way, the statutes, in effect, create a new type of adoption because from the start, the parties are committed to ongoing cooperation around the child. This type of adoption legally recognizes a range of consensual legal rights and relationships among parents, biological kin, and children that bear lessons for the new postmodern families.¹²¹

C. *Second-order Postmodern Families: Balancing Consent and Connection*

Adoptive families are being joined by a new order of postmodern family in which at least one biological relation to the child is outside the legal family.

117. *E.g.*, IND. CODE ANN. §§ 31-19-16-1 to -8 (LexisNexis 2007); MASS. ANN. LAWS ch. 210 §§ 6C-E (LexisNexis 2003 & Supp. 2009); NEV. REV. STAT. ANN. §§ 127.187 to 127.1895 (LexisNexis 2004 & Supp. 2007); N.M. STAT. ANN. § 32A-5-35 (LexisNexis 2009); R.I. GEN. LAWS § 15-7-14.1 (2003) (each requiring the contact agreement to be attached to or part of the adoption decree).

118. ARIZ. REV. STAT. ANN. § 8-116.01 (2007); CAL. FAM. CODE § 8616.5 (West 2004 & Supp. 2010); CONN. GEN. STAT. ANN. § 45a-715 (West 2009); FLA. STAT. ANN. § 63.0427 (West 2009); IND. CODE ANN. §§ 31-19-16-1 to -8 (West 2005); LA. CHILD. CODE ANN. arts. 1269.1-7 (West 2008); MD. CODE ANN., FAM. LAW §§ 5-308, -3A-08, -3B-07 (2006); *see also* MD. CODE ANN., FAM. LAW §§ 5-331, -345; MASS. ANN. LAWS ch. 210 §§ 6C-E (LexisNexis 2003 & Supp. 2009); MINN. STAT. ANN. § 259.58 (West 2007); MONT. CODE ANN. § 42-5-301 (2007); NEB. REV. STAT. ANN. §§ 43-162 to -165 (LexisNexis 2005); Nev. Rev. Stat. Ann. §§ 127.187-127.1895 (LexisNexis 2004 & Supp. 2007); N.M. STAT. ANN. § 32A-5-35 (LexisNexis 2009); N.Y. DOM. REL. LAW § 112-b (McKinney 1999 & Supp. 2010); N.Y. SOC. SERV. LAW § 383-c(5)(b)(ii) (McKinney 2003 & Supp. 2010); OR. REV. STAT. § 109.305 (2009); R.I. GEN. LAWS § 15-7-14.1 (2003); S.D. CODIFIED LAWS § 25-6-17 (2004); VT. STAT. ANN. tit. 15A § 4-112 (2002); WASH. REV. CODE ANN. § 26.33.295 (West 2005 & Supp. 2010); W. VA. CODE ANN. § 48-22-704(e) (LexisNexis 2009). In addition, the United States Department of Health and Human Services Children's Bureau (DONALD N. DUQUETTE & MARK HARDIN, DEP'T OF HEALTH AND HUMAN SERVICES, GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN (1999)) and the Evan B. Donaldson Adoption Institute (EVAN B. DONALDSON ADOPTION INSTITUTE, SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 5 (2006), http://www.adoptioninstitute.org/publications/2006_11_Birthparent_Study_Executive_Summary.pdf (last visited May 17, 2010)) have recommended that states enact these statutes.

119. Appell, *Survey*, *supra* note 112. *See* Annette R. Appell, *Reflections on the Movement toward a More Child-centered Adoption*, 32 W. NEW ENG. L. REV. 1, 27-32 (2010), for an updated list and comparison of the statutes.

120. *Id.*

121. *See infra* Part III.

These families include those reconstituted post-divorce, families created with the assistance of reproductive technologies, and lesbian and gay-headed families created through a variety of methods. These second-order postmodern families are beginning to receive some of the recognition and protections afforded modern families. Families now can have two mothers or two fathers,¹²² sequential fathers or mothers,¹²³ only one legal parent,¹²⁴ parents and gamete donors,¹²⁵ and parenthood, or a limited version of it, can be created by a sort of estoppel.¹²⁶ These families are also receiving recognition and autonomy (including the prerogatives of parenthood), all within a modern family template.¹²⁷

As a formal matter, the parental rights doctrine has been remarkably adaptable to these new family formations. It has generally held to the two-parent model, the voluntariness of these associations, and the procedural protections surrounding dissolution of family relations. In other words, the regulation of families created by or through reproductive technologies, remarriage, and co-parenting between same-sex intimate partners follows the binaries of the modern family: two parents, who are intimate with each other, and children who belong only to those parents.¹²⁸ Many of these families hew to the normal because it is the norm¹²⁹ and because the law sanctions the norm.¹³⁰ Yet, even as these families seek to replicate the modern family, they

122. See *infra* Part I.C.3.

123. See *infra* Part I.C.1.

124. See *infra* Part I.C.2.

125. See *id.*

126. I have omitted discussion of quasi-parental rights created post family dissolution through de facto parent, parenthood by estoppel (Appell, *Virtual Mothers*, *supra* note 7, at 720-24) and the recent ALI recommendations. (AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1)(c) (2000)). Those that relate to the postmodern, new blended families are relevant to this topic, but the regulation occurs after dissolution, making them less central to the subject of this Article, which regards non-legally sanctioned biological connections brought into the social family. In any event, these post-dissolution visitation rights are consistent with the parental rights doctrine. Appell, *supra* note 7, at 720-24.

127. See *infra* Parts I.C.1-3.

128. At least one court has sanctioned three legal parents: two mothers and one father. *Jacob v. Shultz-Jacob*, 2007 PA Super. 118.

129. MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 25-52 (1999); Angela P. Harris, *From Stonewall to the Suburbs? Toward a Political Economy of Sexuality*, 14 WM. & MARY BILL RTS. J. 1539, 1567-71 (2006); Katherine M. Franke, *The Politics Of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 246-247 (2006); Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, COLUM. L. REV. 1399 (2004); Julie Shapiro, *A Lesbian-Centered Critique of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17 (1999).

130. See Appell, *supra* note 82, at 306-19 (rehearsing legal regulation of lesbian and gay families with children that form conventional families).

remain divergent.¹³¹ These postmodern families diverge, as described below,¹³² because they are characterized by a disruption in biological connection and often engage in performances to recapture these relationships, including opening up the family to actively include birth relations.¹³³

The following sections sketch the legal and social organization of these newer postmodern families, families that either no longer comport with, or push against, the nuclear, autonomous family. This review illustrates a set of patchwork and often zero-sum solutions, which cling to a quasi-modern family form similar to the early adoptive families, even while the newest second-order postmodern families are experiencing the same sorts of connections, constellations, and range as adoptive and open adoptive families. At the same time, the legal responses to these postmodern families reflect both the continued primacy of family autonomy, including exclusive parenting, and the flexibility of the modern family form. Like the adoptive family, however, these families push against the exclusivity of the all or nothing heteronormative two-parent family of modern family regulation.

1. The Decline and Rise of Fatherhood: Stepfamilies

The privilege and power of fathers have waxed and waned over time in the United States. Beginning in colonial times and continuing through much of the nineteenth century, fathers were presumptive parents before, during, and after marriage,¹³⁴ but by the late eighteenth hundreds, mothers had gained priority in post-dissolution custody and in presumptions of legal parenthood of non-marital children.¹³⁵ This departure from Blackstonian presumptions of paternity and paternal custody arose alongside adoption.¹³⁶ In fact, stepparent adoptions appear to have predominated early in the adoption era as divorce rates rose and widows with minor children remarried.¹³⁷ The maternal parent priority lasted

131. See Judith Stacey & T.J. Biblarz, (*How*) *Does the Sexual Orientation of Parents Matter?*, 65 AM. SOC. REV. 159 (2001) (noting that the focus on heteronormativity avoids study of positive differences these families may exhibit.)

132. See *infra* Parts I.C.1-3.

133. See, e.g., Appell, *supra* note 82, at 312-19 (describing lesbian and gay families that include gamete donors, surrogate mothers and other relations as part of the family circle).

134. MASON, *supra* note 23, at 1-61. In fact, children whose fathers died were considered orphans, despite having living mothers, particularly when the child had no estate. *Id.* at 20.

135. *Id.* at 61-62, 68-71 (children born outside of marriage), 111-17 (post divorce custody). Divorce proceedings accelerated toward the end of the nineteenth century as did the decline in coverture, which left women with more power to seek post-dissolution custody. See *id.* at 54-68.

136. See *id.* at 54-64 (tracing the rise of divorce in the late eighteenth hundreds and the movement from presumptive paternal custody to various child-centered standards starting in 1809 but accelerating after the mid-nineteenth century).

137. Guthrie & Grossman, *supra* note 75, at 241-42, 250-53.

through the middle of the twentieth century when fathers again became viable candidates for custody.¹³⁸

In keeping with this rise in the value of fatherhood, beginning in 1972 the Supreme Court recognized as legal fathers or potential legal fathers non-marital biological fathers who had developed relationships to their children or the children's mother.¹³⁹ As biological fathers received constitutional status, the parental rights doctrine articulated special protections against terminating parental rights and instituted limitations to the establishment of non-marital fathers' rights.¹⁴⁰ As a result of these legal changes, biological paternity is legally material, though more contingent than maternity. This means that the state and mothers can compel fathers to provide support for their non-marital children and fathers gain additional rights to visitation and custody. In addition, those who remarry after divorce have the option to exchange the new marital parent for the old,¹⁴¹ resulting in the disruption of the alignment between biological and legal relationships, and increasing the number of men and women who law and society recognize as fathers and mothers over time, even if not simultaneously.

These families are dissolved and reformed through consent or legal processes that duly protect parents against involuntary dissolution or termination of parental rights.¹⁴² At the same time, it is not uncommon for parents to remarry and create new families in which a new adult partner (e.g., stepfather or stepmother) resides with the custodial parent but does not have legal parental rights or obligations.¹⁴³ These stepparents have no legal status regarding the child, unless they adopt.¹⁴⁴ In order for them to adopt, however, the non-custodial birth parent's rights must be terminated.¹⁴⁵ There is no in-

138. MASON, *supra* note 134, at 122-33; By 1990, custody was awarded almost evenly to mothers and fathers. *Id.* at 129.

139. Stanley v. Illinois, 405 U.S. 645 (1972); Caban v. Mohammed, 441 U.S. 380 (1979); These changes arose out of civil rights litigation beginning in the 1970s, challenging the designation of non-marital children as "illegitimate" and the correlating denial of paternal benefits to and through these children. Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 181-83 (2007).

140. Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 67-74 (1995).

141. Note that stepparent adoption is also available to non-marital parents in same-sex couple adoptions in many states. National Center for Lesbian Rights, *Adoption by LGBT Parents*, http://www.nclrights.org/site/DocServer/2PA_state_list.pdf?docID=3201 (last visited May 17, 2010).

142. Margaret M. Mahoney, *Stepparents as Third Parties in Relation to Their Stepchildren*, 40 FAM. L. Q 81, 86 (2006). Of course stepmothers also adopt their husband's children.

143. Estimates suggest that 50 percent of children are not living with their fathers. Lin & McLanahan, *supra* note 49.

144. Mahoney, *supra* note 142, at 86.

145. June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 384-85 (2006).

between and scant juridical space for two fathers and a mother (or two mothers and a father).¹⁴⁶

Thus, these postmodern families are still rooted in the basic matrifocal parental rights doctrine arising out of biological connection and care, but they continue to reflect modern family ideals of heteronormativity and recognition of parent-child relationships through biological or marital relations. The law permits these families to have only two parents, even when more than two parent figures may have important connections to the child.

2. Biological Assistance: Families Created with Reproductive Technology

Assisted reproductive technologies (ART) allow single women, single men, same-sex couples, and married couples to produce children with the assistance of genetic materials of men and women who will not be part of the legally recognized family.¹⁴⁷ In the past several decades, reproductive technologies have advanced and proliferated. Non-sexual insemination of sperm is certainly not new and does not require sophisticated technology, but the mass marketing of sperm is of fairly recent vintage. The first sperm bank in the United States appears to have been the California Cryobank, which opened in 1977.¹⁴⁸ The Repository for Germinal Choice (more commonly known as the Nobel Sperm Bank) opened in 1980 for the purpose of passing intelligence genes to subsequent generations.¹⁴⁹ Although maternal surrogacy likely has ancient origins, egg transplant is a relatively recent phenomenon dating back to at least 1978 with the birth of Louise Brown, “the world’s first ‘test-tube baby.’”¹⁵⁰

The various technologies, from the humble and relatively simple sperm donation to the implantation of one woman’s fertilized egg into another’s womb, can construct families with numerous permutations of genetic and social relations. Taking into consideration these technologies and the employment of surrogates to bear children, it is possible that a child could have as many as five parents: two biological mothers, a biological father, and a legal father and

146. Michael H. v. Gerald D., 491 U.S. 110 (1989); Mahoney, *supra* note 144, at 86. It is possible, however, for them to gain status after the relationship dissolves. *Id.* at 99-105. This may be changing, for at least one jurisdiction has recognized two mothers and a sperm donor father. *Jacob v. Shultz-Jacob*, 2007 PA Super. 118.

147. See Angela Campbell, *Conceiving Parents Through Law*, 21 INT’L J. OF L., POL’Y & FAM. 242, 247 (2007) (listing the possible “permutations of conceptual arrangements”).

148. At least, that’s the claim of the Cryobank. California Cryobank, Sperm Banking History, An excerpt from “Sperm Banking: A Reproductive Resource” by Sonia Fader, <http://www.cryobank.com/Learning-Center/Sperm-Banking-101/Sperm-Banking-History/> (last visited May 18, 2010).

149. DAVID PLOTZ, *THE GENIUS FACTORY: THE CURIOUS HISTORY OF THE NOBEL PRIZE SPERM BANK* (2005). Its founder, Robert Graham, not a Nobel Laureate, had eugenic aspirations. *Id.* at 4-38.

150. Sarah Franklin, *Postmodern Procreation: A Cultural Account of Assisted Reproduction*, in *CONCEIVING THE NEW WORLD ORDER* 323, 323 (Faye D. Gnsburg & Rayna Rapp eds., 1995).

mother.¹⁵¹ These are perhaps the most post-modern of the post-modern families.

Estimates of children born each year through sperm and egg donation range from forty thousand to over sixty-five thousand.¹⁵² These relationships, in which gamete donors and surrogates donate their reproductive capacities, are voluntary. Gamete-donation arrangements have traditionally been anonymous, at least when health care professionals are involved, and anonymity continues to be the legal norm in this country.¹⁵³ This anonymity, besides arguably promoting donations,¹⁵⁴ helps maintain a fiction of biological relatedness, which allows families to pass as normative.¹⁵⁵ Indeed, the “[e]laborate devices used to preserve the anonymity of donors highlight the significance attached to genetic ties in western societies and how this is linked to ideas about family, intimacy and social relations more generally.”¹⁵⁶

Beginning in the 1970s, states amended their laws away from biologically-based parenthood when donors were involved.¹⁵⁷ These laws cut off any legal relationship between the donor and the child to further preserve the nuclear family ideal and mask the missing genetic ties. Legal regulation here generally distinguishes between known and unknown donors, reproduction assisted by a doctor or performed at home, and between children born to a marriage and children born to an unmarried person or couple.¹⁵⁸ Generally, a

151. One woman could donate a gamete, which could be fertilized by a donor’s sperm and implanted into the womb of a surrogate who would deliver the baby to a married couple.

152. Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006, at A1, available at <http://www.nytimes.com/2006/01/20/national/20donor.html> (40,000 through sperm and egg donation); Byrn, *supra* note 139, at 174 (65,000 AI births alone). The Center for Disease Control, which has been mandated to report on assisted reproduction since 1992, places live births from embryos implanted at clinics in 2006 at 54,656. SOC’Y FOR ASSISTED REPROD. TECH., AM. SOC’Y FOR REPROD. MEDICINE, CENTER FOR DISEASE CONTROL AND PREVENTION, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES: NATIONAL SUMMARY AND FERTILITY CLINIC REPORTS 11 (2008) <http://www.cdc.gov/ART/ART2006/index.htm>, (follow “2006 ART Report in PDF Format” hyperlink).

153. Naomi Cahn, *Necessary Subjects: The Need for a Mandatory National Donor Gamete Databank*, 12 DEPAUL J. HEALTH CARE L. 203, 210-12 (2009); see also Eric Blyth & Lucy Frith, *Donor-Conceived People’s Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity*, 23 INT’L J. LAW, POL’Y & FAM. 174 (2009) (noting that only a minority of western countries permit donor-conceived people to learn the identity of the donor).

154. One rationale for anonymity is that it encourages donation. See Cahn, *supra* note 153, at 215-16 (citing studies that suggest removal of donor anonymity might dampen donor willingness).

155. *Id.* at 204.

156. Katrina Hargreaves & Ken Daniels, *Parents Dilemmas in Sharing Donor Insemination Conception Stories with Their Children*, 21 CHILD. & SOC’Y 420, 420 (2007).

157. See Byrn, *supra* note 152, at 169-76 (tracing these changes).

158. See Helene S. Shapo, *Matters of Life and Death: Inheritance Consequences of Reproductive Technologies*, 25 HOFSTRA L. REV. 1091 (1997) (providing a thorough rehearsal and analysis of the regulation of paternity in the context of donor-insemination).

child born to a married woman is presumptively the legal child of the husband, no matter how the child is conceived.¹⁵⁹ Anonymous sperm donation through a sperm bank or with the aid of a physician will generally not result in the assignment of parenthood to the donor.¹⁶⁰ The situation of known donors is more complicated, and the law does not easily distinguish between biological fathers who consented to donor-conception and those who had unmediated intercourse; the presumption is that they are legal fathers, at least when the mother does not have a legal domestic partner, such as a husband.¹⁶¹

Similarly, maternal surrogacy also raises questions about which law does and should apply (adoption or contract).¹⁶² For example, disputes have arisen regarding the rights of a gestational surrogate to change her mind about keeping the baby she carried in her womb.¹⁶³ Resolution of these disputes revolves around the durability of the gestational mother's initial intention to relinquish the born child and tends to privilege married couples when deciding which parents to sanction.¹⁶⁴ Legal regulation of the effect of such arrangements is consistent with the bionormativity of the modern family and the voluntariness and autonomy of the parental rights doctrine¹⁶⁵ because it prizes family autonomy, protects the intent of persons involved in the reproduction, and generally recognizes only two parents,¹⁶⁶ despite the variety of people that might perform biological and social parental roles.

3. Same-sex Parents: Lesbian and Gay Families

The most recently and visibly legitimized (though still contested) postmodern families are those headed by lesbians and gays.¹⁶⁷ Lesbians and gay men create families while in prior heterosexual relationships or become parents

159. Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L. Q. 683, 686-88 (2005).

160. Shapo, *supra* note 158, at 1120.

161. *Id.* at 1121-26.

162. E.g., Marsha Garrison, *Law Making for Baby Making: An Interpretative Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835 (2000) (advocating the adoption model).

163. *In re Baby M*, 537 A.2d 1227 (N.J. 1988); *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993); *Belsito v. Clark*, 644 N.E.2d 760 (Ohio Ct. Com. Pl. 1994).

164. E.g., *In re Baby M*, 537 A.2d at 1227 (refusing to enforce the surrogacy contract by terminating parental rights, but remanding for custodial determination); *Johnson*, 851 P.2d at 776 (enforcing the gestational surrogate's pre-birth promise to relinquish the child); see also Shapo, *supra* note 158, at 1171-81 (discussing the law surrounding surrogacy).

165. Naomi R. Cahn, *Parenthood, Genes, and Gametes: The Family Law and Trust and Estates Perspectives*, 32 U. MEM. L. REV. 563 (2002).

166. *But see* *Jacob v. Shultz-Jacob*, 2007 PA Super. 118 (recognizing three legal parents: two mothers and the sperm donor).

167. This section primarily addresses couples because of the two-parent maximum in family law. To the extent that single lesbians and gays create families through adoption or ART and maintain their single-parent status, they share similar legal opportunities with heterosexual singles who create families through adoption or reproductive technology.

while single or in committed relationships, through maternal surrogacy,¹⁶⁸ sperm from anonymous donors,¹⁶⁹ and sometimes using known sperm donors, such as gay male friends¹⁷⁰ or relatives of a same sex partner.¹⁷¹ Lesbians and gay men also form families through adoption, many while openly acknowledging their sexual orientation.¹⁷² It is estimated that in the past few decades, thousands of lesbians and gays have become legal parents through adoption alone.¹⁷³

In addition, courts and legislatures are, with increasing momentum, beginning to give lesbian and gay couples quasi- or actual marital status that entitles these couples to be treated the same as married heterosexual couples under all aspects of family law.¹⁷⁴ The most robust civil union schemes apply marital presumptions to children born to the couple, treating those children as if they were born to the couple in marriage.¹⁷⁵ Like stepparents, these partners can also adopt their partner's child and receive all of the other rights, privileges, and burdens of marriage as well.¹⁷⁶

When these schemes are not available or when lesbians and gays bring children to the family from a prior relationship, adoption law continues to govern their options for establishing mutual parental rights and responsibilities regarding the children. Courts have been openly permitting same-sex couple adoptions to occur at least since the 1980s, generally by finding that the best interests of the children in question militates an interpretation of the adoption statute that would permit the legal parent to add a second, non-marital parent, to the family or allow two intimate, committed adults to adopt a child jointly.¹⁷⁷ Adoption laws reflect remarkably similar norms regarding families and

168. *E.g.*, Judith Stacey, *Gay Parenthood and the Decline of Paternity as We Knew It*, 9 SEXUALITIES 27 (2006) (study of gay male couple who had children with the aid of an egg donor and surrogate mother).

169. *E.g.*, *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995).

170. *E.g.*, *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994); For a discussion of these cases, issues and solutions for better regulation, see Polikoff, *supra* note 8.

171. *E.g.*, *In re Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993).

172. *E.g.*, *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

173. Laura M. Padilla, *Flesh of My Flesh but Not My Heir: Unintended Disinheritance*, 36 BRANDEIS J. FAM. L. 219 (1998).

174. *E.g.*, California Domestic Partner Rights and Responsibilities Act of 2003 (AB 105), CAL. FAM. CODE § 297 (Supp. 2010) (domestic partnerships); CONN. GEN. STAT. §§ 46b-38aa to -38pp (2009) (marriage); N.H. REV. STAT. ANN. § 457:1-a (2010) (marriage); N.J. STAT. ANN. § 37:1-a (West Supp. 2009) (civil unions); Oregon Family Fairness Act, OR. REV. STAT. § 106.300-340 (2009) (domestic partnerships); Act to Protect Religious Freedom and Recognize Equality in Civil Marriage (Vermont, SB 115, 2009) (marriage); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009) (marriage); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (marriage).

175. Just as adoption legally constructs birth.

176. See statutes and cases cited *supra* note 174.

177. Appell, *supra* note 83; Annette R. Appell, *Recent Developments in Lesbian and Gay Adoption Law*, ADOPTION Q., 2003, 73, 73-76, 78, 80.

parenting in that they model exclusive parenting, two-parent marital families, or single parents.¹⁷⁸ Adoption generally does not countenance as parents two fathers and a mother or two mothers and a father.¹⁷⁹ Thus, these adoptions are following the same patterns of adoption more generally in that they reflect modern, heteronormative families. As a result, like other postmodern families, and despite the fact that children reared by lesbian and gay couples have more than two biological parents,¹⁸⁰ legal regulation of same-sex couple families follows heterosexual and bionormative patterns, while recognizing the autonomy of the family.¹⁸¹

In sum, the law is responding to these new family formations in very familiar ways that reflect, preserve, and promote autonomy. Using the modern family as template, the law sanctions heteronormative kin networks in which normally two, and no more than two, theoretically monogamous adults may be recognized as a legal couple. Their children, no matter how they were conceived and whose genes or reproductive labor produced them, normally will have two, and no more than two, legal parents. The law is remarkably flexible in its ability to recognize parent-child relationships based on adult-adult social relationships and intentions, as in the married or otherwise committed couple and the anonymous or otherwise uninvolved gamete donor. Once the parent-child relationship is legally sanctioned, it persists even if the adult relationship deteriorates or terminates; and the adult-child relationship only terminates if a parent consents or the relationship terminates after due process. Thus, although biological relationships are not determinative in the ordering of family relationships, they are mimicked through the law's two-parent and exclusive parenting structure. At the same time, the biological connections are masked or discounted in favor of social relations. As a result, biological connection still looms large and remains pervasive in family law as natural fact and social model, but is routinely subordinated to adult-adult relationships. As the next

178. Appell, *supra* note 83, at 78-81.

179. *Id.* at 79-80. Adoption also seems to presume a romantically intimate relationship between those two parents. See *In re Adoption of Garrett*, 841 N.Y.S.2d 731 (N.Y. Surr. Ct. 2007) (denying second-parent adoption petition by the mother's brother).

180. The exception would be if one of the partner-parents changed his or her biological sex after the child was conceived.

181. Appell, *supra* note 82. In addition, most of the reported decisions regarding same-sex couple adoptions reveal couples who were in marriage-like relationships, characterized by monogamy, long term commitment, jointly held property, cooperation, future planning, and shared parenting. *Sharon S. v. Super. Ct.*, 73 P.3d 554 (Cal. 2003); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re Adoption M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of M.A.*, 930 A.2d 1088 (Me. 2007); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (N.Y. App. Div. 2004); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); *Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

part illustrates, however, these biological connections remain important despite the law's adherence to discrete nuclear family norms.

II. BIOLOGICAL ORDERING AND THE PRODUCTION OF IDENTITY

The foundational and liberatory roles the bionormative family plays in the production of political and moral value in liberalism in the United States push biological connection into a central role in individual and social ordering—informing the way people experience and view themselves and others. As biological connection has played important parts in the political and moral order, biological connection has, for better and for worse, served as a tool to sort others and ourselves. This identitarian aspect of biological connection and family history has been largely absent from the legal literature and doctrine regarding postmodern families and the critique of biological ordering. As this part illustrates, however, these connections are important to individual and group identity despite, and because of, the foundational and often harmful ways in which biology has been constructed in the United States. This part traces the structural role of biological connection in individual and group identity, and illustrates the persistence of these connections through an account of performances that reestablish biological relationships, bringing them into the new social orders. The deep and tenacious personal and political meanings encoded in these biological connections result from, and carry, political and personal weight that bear on the experience and regulation of family.

A. *Biological Connection and Identity*

Identity is a complex relational phenomenon that invokes difference and sameness along a number of often interrelated planes: philosophical, psychological, political, personal, legal, cultural, racial, ethnic, and social.¹⁸² There is a vast literature regarding identity in a number of disciplines.¹⁸³ For

182. See Barry Richards, *What is Identity?*, in *IN THE BEST INTERESTS OF THE CHILD: CULTURE, IDENTITY AND TRANSRACIAL ADOPTION* 77 (Ivor Gaber & Jane Aldridge eds., 1994); Ann Schwartz, *"Caught" Versus "Taught": Ethnic Identity and the Ethnic Socialization Experiences of African American Adolescents in Kinship and Non-kinship Foster Placements*, 29 *CHILD. & YOUTH SERVS. REV.* 1201, 1202-03 (2007) (explaining developmental processes through which children come to see themselves as members of a racial or ethnic group and distinct from members of other groups); see also KWAME ANTHONY APPIAH, *THE ETHICS OF IDENTITY* 64 (2005) (noting the role of perceived difference in the formation of social identity).

183. E.g., APPIAH, *supra* note 182 (exploring the role of identity in liberal moral and political philosophy); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (2006) (examining the performative, rather than biological, construction of gender identity); HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANSRACIAL ADOPTION* 93-114 (2002) (tracing the tensions between the roles of individual agency and socially constructed racial categories in the formation of and control over identity); Cheryl I. Harris, *Whiteness as Property*, 106 *HARV. L. REV.* 1707 (1993) (discussing the centrality of constructed race to identity); Sally Haslanger, *You Mixed? Racial Identity without Racial Biology*, in *ADOPTION MATTERS*, *supra* note 87, at 265, 274-78, 282-85 (contrasting philosophical notions of racial

example, as a psychological concept, identity is a developmental and non-linear process of identifying and differentiating, leading to a sense of authenticity.¹⁸⁴ Politically, identity has provided a platform for claims to civil rights arising out of difference (disparate treatment) and belonging (entitlement to societal goods).¹⁸⁵ Personal or subjective identity refers to the unique aspects of a person formed through relationships and experiences, while social and cultural identity refers to one's membership in specific groups, e.g., racial, professional, social, gender.¹⁸⁶ Cultural identity often refers to association with membership in a social group, including those constructed around national origin and ancestral connection.¹⁸⁷ Across all of these areas, identity operates on, and replicates itself through, macro and micro levels such that larger socially

identity with psychological and feminist approaches); Krista Maywalt Scottham, Robert M. Sellers & H  a X. Nguy  n, *A Measure of Racial Identity in African American Adolescents: The Development of the Multidimensional Inventory of Black Identity—Teen*, 14 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCHOLOGY 297 (2008) (from a psychological perspective, “each individual has a number of hierarchically ordered identities” including the dimensions of “salience, centrality, regard, and ideology”).

184. DAVID M. BRODZINSKY, MARSHALL D. SCHECHTER & ROBIN MARANTZ HENIG, BEING ADOPTED 14-19 (1992) (describing how adoptees incorporate the fact of their adoption at each developmental stage).

185. E.g., U.S. Const. amend. XIII, XIV, XV; Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (1964) (42 U.S.C. ch. 21); see also Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448 (which does not provide civil rights, per se, but vaguely protects identity); D. Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person's Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT'L L. 587 (2001). Questions about identity-based political claims or treatment have animated debates over tensions between multiculturalism and liberalism in political theory. Lori Watson, *Constituting Politics: Power, Reciprocity, and Identity*, 22 HYPATIA 96, 96-97 (2007); APPIAH, *supra* note 182; IRIS MARION YOUNG, INCLUSION AND DEMOCRACY 83-92 (2000) (rehearsing critiques and disputing the notion of group identity). This debate is largely outside the scope of this Article which takes liberalism's moral, epistemological, and political tenets to be primary, though not exclusive, organizing tools for United States political structure and which situate value production and propagation in, among other places, families. See *supra* Part I.A.

186. Richards, *supra* note 182, at 77, 81-84. See also APPIAH, *supra* note 182, at 117-18 (listing social identities, including gay, national, religious, regional); Eric J. Mitnick, *Law, Cognition, and Identity*, 67 LA. L. REV. 823, 845-47, 857-69 (2007) (discussing social and personal identity in similar terms as Richards, though more extensively, and characterizing personal identity also with individual traits, such as being charming).

187. See APPIAH, *supra* note 182, at 117-18 (noting how cultural identities, incoherent as they may be, form around social belonging and may appear precisely when a group has become Americanized or otherwise disassociated from what once set it apart, for example, language, rituals, geography); Lena Robinson, *Cultural Identity and Acculturation Preferences Among South Asian Adolescents in Britain: An Exploratory Study*, CHILD. & SOC'Y 1, 2 (2009) (defining cultural identity to include ethnic and national identity and describing approaches to cultural identity in two ways: ethnic or national identity formation and acculturation, the former being developmental and the latter more situational, examining maintenance of group identity when “an ethnic minority group is in continuous contact with the dominant group”).

constructed groupings gain meaning and importance, politically, socially, and personally.

We all navigate these various aspects of external projections and belonging, and of personal experiences, relationships, and constitution. Through the navigation of oppositions on these various planes, we negotiate how we are like and unlike others, what makes us distinct, where we belong, and what makes us belong. It is through this process that we identify who we are. For purposes of this Article, I am referring primarily to this more existential sense of identity—the types of things people refer to when reflecting on who they (or others) are, where they belong, and why they are similar to and different from others.¹⁸⁸ At the same time, these references are possible and meaningful precisely because of the social construction of division and belonging as well as the political and cultural aspects and functions of identity and connection.

In light of the foundational role of family and biological lineage in social and political ordering, it is not surprising that our identities are grounded in, and informed by, our kin: fictive, imagined, and biological. This is not to say that biology or biological connection is constitutive of identity, but simply that our own and our perceptions of others' identities often include reference to biological connections and the construction of those connections. These notions of biological affiliation help define who we are and where we fit in society in part because of these connections, but also because as political, legal, and social matters, their construction helps define family, class, gender, and race.¹⁸⁹ In turn, these constructions of biology and biological connections are primary arbiters of social status, norms, and identity.¹⁹⁰

This is particularly true and fundamental in the United States where the legal and social constructions of race and bloodlines were integral to its history and formation and have remained deeply embedded in this country's social scripts and organization.¹⁹¹ Race is based on a set of social norms or

188. SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 173 (2000) (“[I]dentity formation is shaped by the biological, embodied aspects of being, the cultural meanings systems available to individuals, and the public policies, social institutions, and political economy of the society in which a person lives.”).

189. See *infra* notes 191-196 and accompanying text.

190. See, e.g., *infra* text accompanying notes 191-278.

191. See, e.g., LEVANDER, *supra* note 98 (illustrating the centrality of race to the U.S. identity and the employment of childhood to construct and maintain White Supremacy); IAN F. HANEY LÓPEZ, WHITE BY LAW (1996) (book length treatment tracing how the law constructs race, particularly, though not exclusively, through immigration law); Adrienne D. Davis, *Identity Notes Part One: Playing in the Light*, 45 AM. U. L. REV. 695 (1996) (examining the association of American with Whiteness); Harris, *supra* note 183, at 1709 (1993) (analyzing the legal construction of racialized identity which in turn dictates status and rights); Kitty Calavita, *Immigration Law, Race, and Identity*, 3 ANN. REV. L. & SOC. SCI. 1 (2007) (exploring the pervasive, persistent, and exclusionary intersections between conceptions of race and immigration law since the founding of the United States); Laura E. Gómez, *Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico*, 25 CHICANO-LATINO L. REV. 9 (2005)

understandings relating to bloodlines, national heritage, and often skin pigment.¹⁹² Bloodlines can also determine ethnic and tribal identity and membership.¹⁹³ Moreover, medical science looks to genes and genetic background for answers,¹⁹⁴ adding further weight to biological kinship. Because these biological constructs are foundational, significant, and pervasive, they form core aspects of how we identify ourselves and how others identify us. And we are conditioned to look to our forbears to identify who we are and where we belong, and to look at the forbears of others to determine where others belong.¹⁹⁵ For these reasons, and for deeper psychological and social

(tracing roles and contingency of Latino and Native American race in the United States). Gender, the social and legal construction of certain biological differences, also serves important roles in kinship and social ordering, but is not passed on biologically to kin as a marker of identity.

192. See Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995) (explication of the social and legal construction of genetic ties around race and gender); Alex M. Johnson, Jr., *The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race*, 94 IOWA L. REV. 1547, 1558-1579 (2009) (tracing historic understanding of race as biological, embodied in the “one drop of blood” rule, to more current understandings of race as a social category while medical science treats race as a biological construct); Davis, *supra* note 191, at 695-711 (exploring, *inter alia*, the local nature of racial identity and its various legal constructions in the United States relating to ancestry or perceived ancestry); Ellen K. Feder, *supra* note 68, at 61, 63 (“[T]he origins of the idea of race are traceable to the early modern period, from which time attributions of racial difference have entailed exploitation, enslavement, and even genocide”); Daniel J. Sharfstein, *Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860*, 91 MINN. L. REV. 592 (2007) (tracing the “One-Drop Rule,” its contingency, and its limited efficacy in the context of individual agency and phenotypical passing); Pauline Turner Strong, *To Forget Their Name, and Their Whole Relation: Captivity, Extra-Tribal Adoption, and the Indian Child Welfare Act*, in RELATIVE VALUES: RECONFIGURING KINSHIP STUDIES, *supra* note 2, at 468, 468-69 (noting the use of blood quantity as legal measure of tribal belonging, which is based on United States law, rather than indigenous tribal law and practice).

193. See e.g., Rose Cuison Villazor, *Blood Quantum Land Laws and the Race Versus Political Identity Dilemma*, 96 CAL. L. REV. 801 (2008) (examining the political and racial meanings of blood quantum in the context of colonization of indigenous peoples in the United States and its aftermath); Pauline Turner Strong & Barrik Van Winkle, “Indian Blood”: *Reflections on the Reckoning and Reconfiguring of Native North American Identity*, 11 CULTURAL ANTHROPOLOGY 547, 556-59 (1996) (explaining and critiquing the use of blood quantum rather than indigenous cultural practices to govern tribal membership).

194. James Lindemann Nelson, *Genetic Narratives: Biology, Stories, and the Definition of the Family*, 2 HEALTH MATRIX 71 (1992); see also Rayna Rapp, Deborah Heath, & Karen-Sue Taussig, *Genealogical Dis-Ease: Where Hereditary Abnormality, Biomedical Explanation, and Family Responsibility Meet*, in RELATIVE VALUE, *supra* note 2, 384-89 (discussing the Human Genome Project and rehearsing the history of biomedical research). Ironically, the more sophisticated genetic science becomes, the less relevant parentage is. Marilyn Strathern, *Displacing Knowledge: Technology and the Consequences for Kinship*, in CONCEIVING THE NEW WORLD ORDER, THE GLOBAL POLITICS OF REPRODUCTION, *supra* note 150, at 346, 355-57.

195. Of course we appropriate many other referents in constructing our identities, but for purposes of this Article I attend primarily to the role of the conventions regarding biology that inform identity. My project is not to interrogate the role of biology in one’s

reasons, people tend to have great interest in their own and others' backgrounds and what these backgrounds reveal about whence people came, where they belong, and who their ancestors were.¹⁹⁶ As the next two sections illustrate, the lived experiences of people separated from their biological origins (and offspring) reveal that these connections run deep and remain important, particularly to those who live apart from their or their children's biological kin. These phenomena are not surprising in a culture that has utilized biological facts as social and legal organizing tools, but these phenomena are under-theorized in family law discourse.

B. *Disrupted Identity*

The complexity of identity is particularly acute for those who have, or belong to a group that has, been separated from a genetic or historic past or from some ingredient of belonging and identification.¹⁹⁷ Such disruptions have served to promote White racial, economic, and social supremacy.¹⁹⁸ This is true, for example, for African Americans whose ancestors were forcibly torn from their families, tribes, villages, communities, and cultures and taken to far away lands where they were perpetually at risk of family separation. This brutal disruption and what followed all but destroyed their identities and compromised the identities of their descendants. As Frederick Douglass described it, "slavery . . . 'made my brothers and sisters strangers to me; it converted the mother that bore me into a myth; it shrouded my father in mystery, and left me without an intelligible beginning in the world.'"¹⁹⁹ In

sense of self or to claim that these meanings are natural, universal, or timeless, but merely to surface the many ways we call upon biological connections and disconnections in social, political, cognitive, and psychological understandings of who we are. See Cori Hayden, *Kinship Theory, Property, and the Politics of Inclusion: From Lesbian Families to Bioprospecting in a Few Short Steps*, 32 *SIGNS* 337, 337-39 (2007) (surveying critical anthropology's insights for understanding both the contingency of biological connections and persistence of connections among kinship, nation, gender, race, and religion); Calavita, *supra* note 191, at 11-12 (rehearsing studies showing that despite recognition and appreciation of common ancestry, African descendants living in other countries may distance themselves from African Americans); see also Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 *AKRON L. REV.* 347, 364-96 (2008) (exploring and critiquing the role and value of biological and genetic relationships in perceptions and creation of families).

196. E.g., Henry Louis Gates's project using DNA and other records to trace the history of slavery and African Americans in the U.S. See PBS African American Lives, <http://www.pbs.org/wnet/aalives/2006/about.html> (last visited May 19, 2010).

197. For those raised in race, in country, in biological family, in language, these aspects of identity are transparent. See Berge et al, *supra* note 107, at 1016 (noting the need for information about biological relations in the context of adoption).

198. Appell, *supra* note 93, at 421; Dorothy E. Roberts, *supra* note 192, at 223-38.

199. Quoted in MINTZ, *supra* note 23, at 95. According to Mintz, many slaves (including Douglass) "felt that slavery's greatest evil was the systematic deprivation of knowledge about one's ancestry, about reading and writing, and even about one's birth date." *Id.* at 95.

Douglass's view, slavery "robbed him not only of the attributes of childhood but of certain defining elements of a human identity."²⁰⁰

Henry Louis Gates's African American DNA and history project provides an example of how profound these biological connections remain.²⁰¹ The genealogical and historic methods the project employs to uncover information about African Americans provided deep meaning to those whose roots the project excavated. Gates' description of sharing this information with the subjects reflects the importance of basic genetic and historic information regarding their bloodlines:

It's one of the greatest honors of my life—when I saw what it meant to people when I revealed their family trees. They would . . . just sit and stare at their family trees and then look at me as if I'd just taken them down the rabbit hole into Wonderland! We made African American history come alive for these people in the most particular and personal way—that is, through their families. And their family's heritage inevitably leads where? *It leads to themselves.*²⁰²

One of those people was African American comedian, producer, writer, and actor Chris Rock who was raised in working class Brooklyn and bused to a White school where he experienced racial subordination.²⁰³ When DNA linked him to the knowledge that his great-great-grandfather was a South Carolina state legislator who owned a large amount of land, Mr. Rock exclaimed that while growing up, he "assumed" he would spend his life "pick[ing] up things for white people."²⁰⁴ Had he known about his great-great-grandfather, "it would have taken away the inevitability that I was going to be nothing."²⁰⁵ Rock thus suggests that his sense of himself and his place in life—his identity—related to his genetic connection to a man he never knew or knew of.

Native Americans also endured forced disruptions from their families, tribes, history, and culture.²⁰⁶ Several hundred years of federal and state policy

200. *Id.*

201. PBS African American Lives, <http://www.pbs.org/wnet/aalives/2006/about.html> (last visited May 19, 2010).

202. PBS African American Lives, "What did it mean for you as a historian, or simply as a person, to be able to communicate this information to the participants?" http://www.pbs.org/wnet/aalives/2006/profile_gates_q7.html (last visited May 19, 2010) (emphasis supplied). Gates's work examined the historical records of the slave trade and later census, voting, and other records of the ancestors of present day African Americans. His research also traced individual's DNA back to various regions in Africa and Europe.

203. Felicia R. Lee, *Famous Black Lives Through DNA's Prism*, N.Y. TIMES, Feb. 5, 2008, at E-1.

204. *Id.*

205. *Id.*

206. These separations included relocations of Indian tribes and nations to new regions, Suzanne L. Cross, *Indian Family Exception Doctrine: Still Losing Children Despite the Indian Child Welfare Act*, 85 CHILD WELFARE, 671, 674 (2006), and relocation of children from Indian parents to Anglo families. See CHILDREN OF THE DRAGONFLY: NATIVE

led to the removal of Native American children from their homes and tribes to boarding schools²⁰⁷ and Anglo-American families.²⁰⁸ This process of assimilation was thorough, even for those children whose legal ties to their families remained.²⁰⁹ The effects of these removals on Native American cultural, economic, family, and political life were acute and pervasive,²¹⁰ but Native Americans felt them on a personal level as well: they suffered from “ethnic confusion,”²¹¹ mental health problems, substance abuse, fear of attachment and loss,²¹² and an extraordinarily elevated suicide rate compared to on-reservation children and the general population.²¹³

This large-scale loss of generations had mutual negative effects on the integrity of tribal political and cultural life, and on the identities and psyches of children who were separated.²¹⁴ In addition, these losses are passed on through generations, reinforced by clashing social systems, and incorporated into the

AMERICAN VOICES ON CHILD CUSTODY AND EDUCATION (Robert Bensen ed., 2001) (collection of narratives from adults separated as children from their Native American parents and tribes).

207. See Annette Ruth Appell, *Uneasy Tensions Between Children's Rights and Civil Rights*, 5 NEV. L.J. 141, 148-50 (2004) (describing the large scale, long-lasting removals of Native American children from their families and tribes); Andrea A. Curcio, *Civil Claims for Uncivilized Acts: Filing Suit Against the Government for American Indian Boarding School Abuses*, 4 HASTINGS RACE & POVERTY J. 45, 54-55 (2006) (rehearsing the official and coercive federal programs of the nineteenth and twentieth centuries that utilized Indian Boarding Schools to erase Native American children's knowledge of their cultural identities and foster new, non-Indian identities); Lorie M. Graham, *Reparations, Self-Determination, and the Seventh Generation*, 21 HARV. HUM. RTS. J. 47, 48-60 (2008) (describing how beginning in the nineteenth century until fairly recently, the “U.S. Government officially embraced policies of forced assimilation aimed at the breakup of the American Indian family”).

208. Appell, *supra* note 207, at 148-50 (describing the large scale, longstanding removals of Native American children from their families and tribes); Lorie M. Graham, “*The Past Never Vanishes*”: *A Contextual Critique of the Existing Indian Family Doctrine*, 23 AM. INDIAN L. REV. 1, 1-34 (1998) (“Conservative estimates indicated that one-third of all American Indian children were being separated from their families and placed in foster care, adoptive homes, or educational institutions At least 85% of the placements were in non-Indian homes and institutions . . .”).

209. Curcio, *supra* note 207, at 56-61 (schools gave children English names, punished children for speaking their native language, converted them to Christianity, and taught curricula that did not relate in any way to the children's culture or heritage).

210. Graham, *supra* note 208, at 1-34; Appell, *supra* note 207, at 146.

211. Graham, *supra* note 208, at 30 (quoting a 1975 report by the American Academy of Child Psychiatry report).

212. Graham, *supra* note 208, at 30-32; Graham, *supra* note 207, at 58-59.

213. Graham, *supra* note 207, at 58 (“[C]hildren of removal . . . [had] a suicide rate twice that of the reservation population and four times that of the general population.”).

214. Appell, *supra* note 207, at 146-51; see also THERESA DELEANE O'NEILL, *DISCIPLINED HEARTS: HISTORY, IDENTITY, AND DEPRESSION IN AN AMERICAN INDIAN COMMUNITY* 36-73 (1996) (anthropological study of the role of disruption and Anglo intervention on the identities of Flathead Indians); CHILDREN OF THE DRAGONFLY, *supra* note 206 (containing Native American narratives of separation and identity).

culture and identity of Native Americans.²¹⁵ These losses are constructed and experienced along biological connections *and* cultural organization.

This drive for recovering genetic and related social connections—knowledge of, and connection to, origin, family, and tribe—is deep and persistent. For subordinated and non-normative groups, particularly those who continue to experience large-scale racialized interventions at multiple sites,²¹⁶ this experience of disconnection and displacement surfaces as an aspect of identity that seeks to reclaim, or at least know, the missing past. These experiences simultaneously provide lessons regarding the connections among family, culture, authority, and identity, illustrate the depth and meaning of individual experiences of disruption and dislocation, and recall the many functions of kinship.

This drive for social and genetic connection is also important in adoption, a different context, but one with some similarities regarding (often involuntary) ruptures from pre-birth heritage,²¹⁷ and one sometimes arising out of these same or similar race-based interventions of slavery and colonization.²¹⁸ For all

215. CHARLOTTE GOODLUCK & ANGELA A. A. WILLETO, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, NATIVE AMERICAN KIDS 2000: INDIAN CHILD WELL-BEING INDICATORS 17 (2000), http://www.nicwa.org/research/05.Native_Amer_Kids.pdf.

216. *See, e.g.*, JONATHAN KOZOL, THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA (2005) (describing the resegregation of schools in the United States); Dorothy E. Roberts, *The Social and Moral Cost of Mass Incarceration in African American Communities*, 56 STAN. L. REV. 1271 (2004) [hereinafter Roberts, *Mass Incarceration*] (describing the high spatial, rate, and proportion of incarceration Blacks in prison); Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171 [hereinafter Roberts, *Child Welfare*] (analyzing the over-representation of Black children in the foster care system and in poverty); DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS (1998) (tracing the creation of racial housing segregation and socio-economic disenfranchisement); JOHN G. RED HORSE, CECILIA MARTINEZ, PRISCILLA DAY, DON DAY, JOHN POUPART & DAWN SCHARNBERG, NATIONAL INDIAN CHILD WELFARE ASSOCIATION, FAMILY PRESERVATION: CONCEPTS IN AMERICAN INDIAN COMMUNITIES (2000), <http://www.nicwa.org/research/01.FamilyPreservation.pdf> (illustrating the ongoing culturally mismatched intervention into Native American families and communities).

217. Infant and other young adoptees have no choice as a developmental and legal matter. *See* American Bar Association Child Custody & Adoption Pro Bono Project, *Hearing Children's Voices and Interests in Adoption and Guardianship Proceedings*, 41 FAM. L. Q. 365, 376-77 (2007) (49 states require children to consent to their own adoption, but not when they are younger than ten, twelve or fourteen years old, depending on the state); Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT'L L. 413, 466-68 (2009) (arguing children should have a chance to be raised in his or her own culture). Similarly, as a legal or practical matter, birth parents may have limited authority because parental rights have been terminated involuntarily, or because of other coercive material or social factors that disable them from raising their children.

218. *See* Appell, *supra* note 207, at 157-61 (tracing the child welfare movement's history of coercive intervention into single-mother-led families and families of color). This is also true in the international adoption context, which shares similar issues to those in domestic transracial adoption, including a transfer of poor children of color to richer, white families. In these cases, adoption is a particularly mixed bag, as anthropologist Strong

adoptees, of all ages and origins, adoption is, by definition, both a disruption of at least one genetic tie and the production of a new set of ties.²¹⁹ Many adoptees experience deep and ongoing interest in their biological family history. Indeed, studies show that substantial numbers of adoptees are curious about their birth families. In one large, longitudinal study, researchers found that regardless of whether they were in open or closed adoptions, “[v]irtually all of the children . . . wanted to know more about their birth parents.”²²⁰ Another large study revealed that over 80% of adoptees adopted as infants were curious about their birth parents and 70% of adolescent girls and 57% of adolescent boys expressed an interest in meeting their birth parents.²²¹ It is now widely recognized that adoptees continue to be members of their adoptive *and* birth families.²²²

Even in the postmodern family era, “society . . . typically defines kinship in genetic terms and perceives other types of families as inauthentic or inferior.”²²³ So biologically based families continue to be the norm against which other kin groups are distinguished, and although adoptive families are not inferior or inauthentic, they are understood to be a different and unique type of family.²²⁴ They are unique because the members experience or contemplate the biological family and its environment—ethnicity, race, country, and the like. For the adoptee, it is both (or either) the physical questions relating to appearance and health, and the more imaginative questions, the whys and the

explains: “Adoption across political and cultural borders may simultaneously be an act of violence and an act of love, an excruciating rupture and a generous incorporation, an appropriation of valued resources and a constitution of personal ties.” Strong, *supra* note 192 at 471.

219. This legal fact is true even in stepparent, second parent, and related adoptions, which constitute a majority of adoptions. See Evan B. Donaldson Adoption Institute. Research: Adoption Facts <http://www.adoptioninstitute.org/research/adoptionfacts.php> (last visited May 19, 2010) (noting, in the absence of national record-keeping since 1992, “stepparent adoptions accounted for 42% of all adoptions and foster care adoptions 15%”). These adoptions though carry much less mystery than non-related adoptions. Appell, *supra* note 80.

220. RUTH McROY, HAROLD D. GROTEVANT & SUSAN AYERS-LOPEZ, CHANGING PRACTICES IN ADOPTION 20 (1994).

221. PETER L. BENSON, ANU R. SHARMA & EUGENE C. ROEHLKEPARTAIN, GROWING UP ADOPTED 26 (1994).

222. See BRODZINSKY ET AL., *supra* note 184, at 12-14; MIRIAM REITZ & KENNETH W. WATSON, ADOPTION AND THE FAMILY SYSTEM (1992); H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964); Kenneth W. Watson, *The Case for Open Adoption*, PUB. WELFARE, Fall 1988, at 24, 24.

223. Katarina Wegar, *Adoption and Mental Health: A Theoretical Critique of the Psychopathological Model*, 65 AM. J. ORTHOPSYCHIATRY 540, 542 (1995); see also Strathern, *supra* note 194, at 348-49 (asserting that the Euro-American conception of kinship is biogenetic).

224. REITZ & WATSON, *supra* note 222, at 11.

what ifs—the possibilities of having been part of the birth family.²²⁵ These all form part of the adoptee's roots and by extension, those of the adoptive family.

A wealth of theoretical and empirical social science research explores the importance of biological connection for adoptees in their development of identity.²²⁶ Fernando Colón, a psychologist and former foster child, described the connection between biological connection and identity as “a deeply felt psychological and emotional need, a need for roots, for existential continuity, and for a sense of completeness.”²²⁷ This phenomenon has been referred to as “genealogical bewilderment.”²²⁸ Psychologists understand that questions about birth families and birth histories play important and ongoing roles in an adoptive child's development. At each stage of development and rite of passage, adoptees confront and re-confront issues relating to their adoption: why they were adopted; what are their birth parent's character, habits, and appearance like; what is their national heritage; whom do they resemble; and what genes might they be passing on to their children.²²⁹ These queries for information regarding biological history, what psychologists and social workers call “a basic human need . . . is unrecognized by most people who have automatic access to such information.”²³⁰

Cultural studies professor and transracial adoptee Sandra Patton-Imani asserts that adoptees' experiences of missing information about birth families cause

225. As one adoptee put it: “Why just me? It feels very strange. One wonders, ‘What would have become of me if I had remained there? Who was I during the time I was there?’” Barbara Yngvesson, *Going “Home”: Adoption, Loss of Bearings, and the Mythology of Roots*, 21 SOC. TEXT 7, 9 (2003) (quoting interviewee Sarah Nordin); Berge et al., *supra* note 107, at 1024 (adolescent adoptees have described the effect of birth parent contact as: “I feel like I know who I am now” or “I feel like, more like, complete, I guess, because I know everything about myself now”).

226. For a brief overview of adoption and identity, see Gretchen Miller Wrobel, Julie K. Kohler, Harold D. Grotevant & Ruth G. McRoy, *The Family Adoption Communication (FAC) Model: Identifying Pathways of Adoption-Related Communication*, ADOPTION Q., 2003, 53, 60-63.

227. Fernando Colón, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 302 (1978).

228. Sants, *supra* note 222. Contemporary theorists refer to a similar phenomenon, particularly among foster children, as an “ambiguous loss of home.” Gina Miranda Samuels, *Ambiguous Loss of Home: The Experience of Familial (Im)permanence Among Young Adults with Foster Care Backgrounds*, 31 CHILD. & YOUTH SERV. REV. 1229, 1230, 1236-37 (2009).

229. BRODZINSKY ET AL., *supra* note 184; Berge et al., *supra* note 107 at 1023; *see also* PATTON, *supra* note 188, at 171-72 (the adoptees she interviewed “discussed their identities through the categories of biology and culture, often mourning their lack of knowledge of a biological heritage”).

230. Berge et al., *supra* note 107, at 1016. Of course this is not to say that all adoptees feel a need or desire for this contact or information. *See e.g., id.* at 1027-31 (reporting on the feelings of adoptees who were satisfied having no contact with their birth families).

frustration that we have no family medical history, no (known) biological ancestors, no (biologically based) physical resemblance with our families, and no sense of physical connection to our parents or knowledge of our birth. We know we have ‘alien’ origins that guide our bodily development with biological, genetic maps sketched in indecipherable code.²³¹

These identity and origin issues are particularly cogent and contextual in transracial adoption,²³² through which transracially adopted children both retain and lose their race after adoption.²³³ Moreover, their sense of identity is particularly complex and contingent upon location. African Americans adopted into White families report being perceived as Black when in White communities and White while in Black communities.²³⁴ Similarly, a transracially, internationally adopted Korean adoptee may be Korean when with his or her Swedish parents but Swedish when among Koreans.²³⁵ In other words, as a social matter, race is both relative and permanent: perceived lineage does not evaporate after adoption.

Children and adults conceived through donor insemination have similar experiences regarding identity and biological connection. They report that their interest in such knowledge and contact with the donor would teach them about themselves and enhance their sense of identity.²³⁶ Parents choosing open donor insemination recognize this drive and report that they chose openness in order

231. PATTON, *supra* note 188, at 171.

232. *Id.* at 171-72.

233. These themes of contextualized race, ethnicity, and national origin pervade transracial and transnational adoption narratives. *E.g.*, Mark Hagland, *Reflections on a Multi-Prismed Identity*, in *OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION*, 39, 39-41 (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds., 2006) (describing experience of being perceived as a foreigner in the United States though without the language or culture of Korea); Patrick McDermott, *Disappeared Children and the Adoptee as Immigrant*, in *OUTSIDERS WITHIN*, *supra* note 233, at 105, 106-07 (describing multiple identities as American adoptee and El Salvadoran); Ami Inja Nafzger, *Proud to Be Me*, in *OUTSIDERS WITHIN*, *supra* note 233, 233, 233-40 (Korean adoptee describing her experience as non-white in Wisconsin and a foreigner when she returned to Korea to search for her Korean identity); Indigo Williams Willing, *Presenting our Transracial Lives*, in *OUTSIDERS WITHIN*, *supra* note 233, at 259, 263-64 (noting feeling that many Vietnamese-Australian adoptees feel both “white” and Vietnamese); PATTON, *supra* note 188, at 62-87; Rhoda Scherman & Niki Harré, *The Ethnic Identification of Same-Race Children in Intercountry Adoption*, *ADOPTION Q.*, 2008, at 45, 53-61.

234. PATTON, *supra* note 188, at 62 (quoting a transracially adopted African American’s experience of “realizing” she was “Black” once she went to college and came to know Blacks); *id.* at 86-87 (quoting a Black transracial adoptee who identifies as White).

235. See Yngvesson, *supra* note 86, at 238-40, 248-52. For other thoughtful discussions of identity in adoption, see Richards, *supra* note 182, at 77-88; Cynthia B. Cohen, *Parents Anonymous*, in *NEW WAYS OF MAKING BABIES: THE CASE OF EGG DONATION* 88, 92 (Cynthia B. Cohen ed., 1996). For a discussion of transracial adoption and identity, see Appell, *supra* note 93, at 445-49.

236. *E.g.*, J.E. Scheib, M. Riordan & S. Rubin, *Adolescents with Open-Identity Sperm Donors: Reports from 12-17 Year Olds*, 20 *HUM. REPROD.* 239, 239-52 (2005).

to give their children the option of contacting the donor and to leave the door open should the child need further medical or other information in the future.²³⁷ In fact, the absence of access to identifying information regarding donors has made parents of donor-conceived children reluctant to tell their children about the insemination because the child would have no options to find out more information about his or her identity.²³⁸

Biological parents also experience these biological ties and ruptures as parts of their own lives and identities. Like their offspring, birth parents often feel profound connections to the children they have relinquished, and for birth mothers, a connection that likely was quite literally a part of them. This loss of identity forms a core component of grief.²³⁹ For many, these “feelings of loss, pain, and mourning” do not disappear.²⁴⁰ These emotions are no doubt heightened because the context of adoption is one in which a child is born of one person and transferred to another in circumstances that are often, although not always, wrenching and not entirely voluntary. Many birth parents, particularly those in closed adoptions, suffer chronic unresolved grief.²⁴¹ Even gamete donors may feel connected to the children their donations produce.²⁴²

237. Joanna E. Scheib, Maura Riordan & Phillip R. Shaver, *Choosing Between Anonymous and Identity-Release Sperm Donors: Recipient and Donor Characteristics*, 10 REPROD. TECH. 50, 54 (2001).

238. *Id.* at 50.

239. See JUDITH BUTLER, *PRECARIOUS LIFE: THE POWERS OF MOURNING AND VIOLENCE* 22 (2004) (“If I lose you . . . [who constitutes part of me], then I not only mourn the loss, but become inscrutable to myself.”).

240. ARTHUR D. SOROSKY, ANNETTE BARAN & REUBEN PANNOR, *THE ADOPTION TRIANGLE* 54 (1978).

241. Susan Smith, Evan B. Donaldson Adoption Inst., *Safeguarding the Rights and Well-Being of Birthparents in the Adoption Process* 5 (rev. 2007), http://www.adoptioninstitute.org/research/2006_11_birthparent_wellbeing.php (last visited May 19, 2010). There is less research regarding how birth fathers experience adoption and its aftermath. Xiaojia Ge, Misaki N. Natsuaki, David M. Matin, Leslie D. Leve, Jenae M. Neiderhiser, Daniel S. Shaw, Georgette Villareal, Laura Scaramella, John B. Reid & David Reiss, *Bridging the Divide: Openness in Adoption and Postadoption Psychosocial Adjustment Among Birth and Adoptive Parents*, 22 J. FAM. PSYCHOL. 529, 531 (2008); see also Barbara Melosh, *Autobiographical Narrative and the Politics of Identity*, in *ADOPTION IN AMERICA*, *supra* note 76, 218, 221-22 (noting how few birth fathers are present in adoption narratives). Reflecting on the near absence of male voices in adoption narratives, Melosh suggests:

“Most likely, birth mothers rather than birth fathers are telling stories of relinquishment and regret because unwed mothers’ ‘moral career’ is more dramatically disrupted by out-of-wedlock pregnancy. Her transgression is more visible to others and to herself through the embodied experiences of pregnancy and childbirth. And motherhood still carries more cultural weight than does fatherhood: *mother love*, signifying an enduring and unconditional nurture, is a phrase without a male-gendered equivalent.” *Id.* at 222.

242. See *infra* text accompanying notes 266-277 and 391-404.

C. *Rehearsing Biology, Performing Identity*

The connections between identity and biological heritage are surprisingly deep, persistent, and spread widely across various forms of biological disconnections. Children and adults with these separations feel connected to their unknown ancestors, their siblings, the owners of the gametic material that produced them, the mothers who bore them, and the mothers of their siblings.²⁴³ The postmodern families of part I.B. & C., above, reflect and mirror these disruptions through performances and recreations of identity to bridge and even recapture those biological relations.²⁴⁴ The drive to connect with historic and current biological connections belongs to the separated but also to the social relations constructed to replace or erase those connections. The new social connections appropriate these biological connections through a variety of physical and symbolic activities, ranging from bringing the corporeal biological connections into social family, to utilizing surrogates, such as a sibling's parent, to visiting places that are evocative of the child's origin. These biological connections exist alongside purely social connections and may even serve to enhance those connections.

Both biological and social parents experience the child and the child's families. Just as adoptees seek or long for facts regarding their birth and biological parents when navigating identity, birth parents, too, experience an ongoing or perhaps episodic relationship to the adoptee because part of the birth parent's identity is her experience with and without the adoptee.²⁴⁵ The strong sense of identity and connection many birth parents feel toward the children they relinquish for adoption has helped drive the movement toward adoptions that are more open.²⁴⁶ Similarly, adoptive parents may experience some of the disjointedness that surrounds adoption. Beside their own sense of what ifs and why nots regarding the possibilities of producing their own biological children, they may encounter the child's gap between original family or community and the adopted ones.²⁴⁷ Adoptive parents often seek to bridge these gaps through a variety of methods. They have sought information from adoption agencies about their adopted children's family and background—often on behalf of the child.²⁴⁸

Children adopted from different countries or of different races and their adoptive parents also may seek to bridge gaps between the adoptive family and the child's birth identity. For example, children adopted from Eastern Europe in New Zealand are more likely than not to follow and root for sports teams from

243. See *infra* text accompanying notes 249, 259-262, 266-271, 285-290.

244. See *infra* text accompanying notes 250-258, 277-284.

245. See *supra* notes 239-242 and accompanying text.

246. Annette R. Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, 18 CHILD. LEGAL RTS. J., Fall 1998, at 24, 26; Berge et al., *supra* note 107, at 1012; Groth et al., *supra* note 14.

247. See *infra* text accompanying notes 248, 251-258.

248. Groth et al., *supra* note 14; CARP, *supra* note 14.

their birth countries.²⁴⁹ White parents of Black children might move into an integrated or predominately Black community.²⁵⁰ International adoptive parents might visit the country in which their child was born, as two Swedish adoptive parents did when they traveled to Chile so they could “pass on to [their Chilean daughter] our sense of the sounds and smells, what one has experienced oneself.”²⁵¹ This desire reflects a poignant intimacy among the adoptive parents, their daughter’s home country, and their daughter. It also reflects a wish to restore, what anthropologist Barbara Yngvesson describes as “harmony in the experienced dissonance of having a child who belongs on (whose roots are in) the other side of the world.”²⁵² It is not surprising then that adoptive parents were also a force in both the open records and open adoption movements.²⁵³

Adoptive families increasingly engage in ongoing and regular in-person contact. The kinship arrangements that form between adoptive and birth families create complex and dynamic family constellations. In some kinship networks, the contact is with extended birth relatives and does not include the birth parents.²⁵⁴ In other networks, the contact begins between the birth and adoptive parents and later comes to include relatives as the birth parents bring them to visits.²⁵⁵ The blended adoptive-birth family may include the adoptee’s birth siblings, foster siblings, grandparents, aunts, and uncles.²⁵⁶ Adoptive parents also seek to maintain contact among birth siblings of the adoptees who were adopted into different homes.²⁵⁷ In at least one study, families tended to view the most open of the adoptions in their homes as the ideal model for openness.²⁵⁸

The performative character of these connections and attempts to bridge relational and experiential gaps also surfaces among adoptees and their siblings’ birth mothers. For example, complex networks of fictive kinships form among adopted siblings and their own and the others birth family

249. See Scherman & Harré, *supra* note 233, at 58 (the majority of children in their study “took an active interest in watching or supporting competitors from their birth countries. . . [s]upporting competitors from the birth country may allow the children to exercise a socially acceptable affinity with the birth culture in a way that does not disrupt their connection with the host culture”).

250. Haslanger, *supra* note 188, at 265-89.

251. Yngvesson, *supra* note 225, at 15 (quoting the adoptive parent).

252. *Id.*

253. Appell, *supra* note 246, at 26; Groth et al., *supra* note 14, at 247.

254. CAROLE SMITH & JANETTE LOGAN, AFTER ADOPTION: DIRECT CONTACT AND RELATIONSHIPS 92 (2004); Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents’ Feelings Seven Years Later*, 48 SOC. WORK 409, 414 (2003); Murray Ryburn, *A Study of Post-Adoption Contact in Compulsory Adoptions*, 26 BRIT. J. SOC. WORK 627 (1996).

255. SMITH & LOGAN, *supra* note 254.

256. Lois Wright, Cynthia C. Flynn, Wendy Welch, *Adolescent Adoption and the Birthfamily*, 1 J. PUB. CHILD WELFARE 35, 47 (2007).

257. *Id.*

258. Siegel, *supra* note 254, at 415.

members.²⁵⁹ In families where only one adoptive sibling had contact with the birth mother, the in-contact birth mothers had relationships with their child's adopted sibling, and served as symbolic surrogate birth mothers for the siblings who did not know or have contact with their birth mothers.²⁶⁰ One adopted girl who did not have contact with her birth family explained that meeting her adoptive brother's birth mother was "like I'm meeting my birthmom."²⁶¹ The in-contact adoptees, too, felt the import of these virtual relationships to their siblings. One such in-contact adoptee said of his adopted siblings that, through his birth mother, his not-in-contact adoptive siblings could "experience [their own birth mothers] themselves . . . because they have this desire to meet theirs . . . at some point . . . but they can kind of see what it's going to be like or experience it through me."²⁶²

In recent years, there has also been movement toward openness in families created through assisted reproduction. These families may share information with their children regarding both their ART origins and the identity of the donor.²⁶³ Although there are differences regarding disclosure issues in families created through ART and adoption,²⁶⁴ the lessons of closed, anonymous adoption have informed this move toward more transparency regarding genetic parentage. Advances in genetic science and testing have also no doubt influenced this movement toward openness as DNA testing is able to identify parentage and so many other aspects of a person's being.²⁶⁵

In 2000, a twelve-year-old sperm donor-conceived child and his mother established an internet registry for donor siblings.²⁶⁶ By 2010, the site claimed to have facilitated matches between more than 7,266 "half-siblings (and/or

259. Jerica M. Berge, Kevin M. Green, Harold D. Grotevant & Ruth G. McRoy, *Adolescent Sibling Narratives Regarding Contact in Adoption*, ADOPTION Q., 2006, at 81, 89-91, 94. In fact, even children's pre-adoptive kin networks are not confined to birth family; instead, the adoptive kin network includes a wide variety of blood and social kin, including foster siblings, stepparents, and other people important to the adopted child and his or her birth family. Wright et al., *supra* note 254, at 48.

260. Berge et al., *supra* note 259, at 91.

261. *Id.*

262. *Id.* at 92.

263. See *infra* text accompanying notes 266-277. "Guidelines for clinical practice now tend to include recommendations for openness" to children regarding their donor origins. Rachel Cook, Susan Golombok, Alison Bish & Clare Murray, *Disclosure of Donor Insemination: Parental Attitudes*, 65 AM. J. ORTHOPSYCHIATRY 549, 549 (1995) (citing American Fertility Society, 1993; Human Fertilisation and Embryology Authority, 1993); Joanna E. Scheib & Rachel A. Cushing, *Open-Identity Donor Insemination in the United States: Is it on the Rise?*, 88 FERTILITY AND STERILITY 231, 231-32 (2007).

264. Cook et al., *supra* note 263, at 558; Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 533-35 (2006).

265. See Byrn, *supra* note 139, at 171-76 (discussing the development of genetic testing in the late 1960s and subsequent developments in reproductive technology).

266. Scheib et al., *supra* note 236, at 248; The Donor Sibling Registry, <http://www.donorsiblingregistry.com/> (last visited May 19, 2010).

donors).²⁶⁷ These biological kin form relationships with each other, even though they may live far apart and may not know the identity of their donor.²⁶⁸ They might correspond via e-mail, visit in person, or speak on the phone.²⁶⁹ One teenager, re/united with four of his siblings, said to one of his sisters in anticipation of their first face-to-face encounter: “It’s so weird to know that you’re going to meet someone that you’re going to know for the rest of your life.”²⁷⁰ One donor who through the registry matched with several of his children said of his re/united relations: “How do we define this family, and what are we to each other?”²⁷¹

Other anecdotal and scientific evidence suggest that in childhood and adulthood, donor-conceived people have great interest in their donor parents and biological siblings.²⁷² This is true of the parents and donors as well, and they are often the forces behind openness. Birth mothers of children conceived with the assistance of open-identity sperm donors have reached out to families with children from the same donor.²⁷³ These (disproportionately single) mothers sought these connections to enlarge and perhaps normalize family for the children, and also to address curiosity about the donor by comparing the offspring.²⁷⁴ Most of the families in one small study had ongoing contact with each other.²⁷⁵ Even birth mothers who utilize donor eggs may wish for her children to reach out to their donor mother.²⁷⁶ Sperm donors also may feel connected to their offspring. As one donor stated: “I cannot imagine that some . . . donors . . . have said that they rarely think about their children, because I think of mine very often. Indeed, I expect that they will be included among my last conscious thoughts on this sweet earth.”²⁷⁷

These new relationships, which are at once familial, life-long, and somehow discrete, challenge notions that we can turn our backs on biological relations just as they challenge traditional notions of family and of family law. It also appears that embracing the complexity of the family’s origins can

267. The Donor Sibling Registry, <http://www.donorsiblingregistry.com/> (last visited May 19, 2010). The site further claims the registry has 27,250 registered donors, parents and donor-conceived children.*Id.*; see also Amy Harmon, *Hello, I’m Your Sister. Our Father is Donor* 150, N.Y. TIMES, Nov. 20, 2005, available at <http://www.nytimes.com/2005/11/20/national/20siblings.html> (reporting on relationships among several groups of siblings united through the Donor Sibling Registry and noting that the vast majority of the matches are between half-siblings).

268. Harmon, *supra* note 267.

269. *Id.*

270. *Id.*

271. Amy Harmon, *Sperm Donor Father Ends His Anonymity*, N.Y. TIMES, Feb. 14, 2007, at A18, available at <http://www.nytimes.com/2007/02/14/us/14donor.html>.

272. E.g., J.E. Scheib et al., *supra* note 236, at 248; PLOTZ, *supra* note 149 at 52-71.

273. Amy Harmon, *supra* note 267; Joanna E. Scheib & Alice Ruby, *Contact Among Families Who Share the Same Sperm Donor*, 90 FERTILITY AND STERILITY 33 (2008).

274. Scheib & Ruby, *supra* note 273, at 39-40.

275. *Id.* at 40.

276. Harmon, *supra* note 152.

277. PLOTZ, *supra* note 149, at 132 (quoting a donor to the Nobel sperm bank).

strengthen the family. For example, an early study suggests that donor-conceived children reared by single mothers felt closer to their mothers when they learned of their insemination roots and were slightly more likely to have interest in the donor's identity.²⁷⁸

At the same time, social context may circumscribe the extent of kinship donor-conceived children and their families share with the donors. For example, those who can pass as a traditional family, such as heterosexual, intimate, and especially marital, partners, appear to be more resistant to sharing information about the use of donors and to embracing openness regarding the donor's identity.²⁷⁹ Moreover, heterosexual couples appear to be more likely than not to choose a sperm donor with similar physical characteristics to the father.²⁸⁰ Even same sex partners who cannot pass as joint biological parents are more likely to choose a donor with characteristics similar to the non-genetically related parent.²⁸¹ Couples make these choices also to increase the partner's involvement with the donor insemination process and the child they will share.²⁸² For example, one lesbian sought a Jewish sperm donor because her lover was Jewish.²⁸³ Perhaps these impulses even reflect notions of evolutionary biology.²⁸⁴

Children conceived through donor insemination also absorb heteronormativity correlated with the social family structure. The daily relationships children have with parent-figures appear to correlate with donor-conceived children's interest in their donor parent. For example, children born through known donor insemination and living in two-parent (hetero- or homosexual) families were less interested than the children of single parents in the possibility of contacting their donors.²⁸⁵ "In families headed by lesbian and heterosexual couples, the mere presence of a co-parent, regardless of their sex,

278. Scheib et al., *supra* note 236, at 249.

279. Cook et al., *supra* note 263, at 553; Scheib et al., *supra* note 237. Another reason though that parents may be reluctant to reveal the fact of a donor to their children is that the parents have little information about the donor and do not have any way to contact him (or her) in the likely event that the child will want more information about the donor. Cook et al., *supra* note 263, at 552-53; Scheib et al., *supra* note 237, at 51.

280. See Scheib et al., *supra* note 237, at 55 (noting that 57.1% of the heterosexual couples in the study matched the donor to the male partner).

281. See *id.* (noting that 61% of lesbians in the study matched the donor to the non-genetic parent). The authors of the study noted that "[a]lthough 74% of our couples were lesbians, respondents still reported a strong preference that the donor be matched to their partner, suggesting that matching serves functions beyond concealing non-genetic relatedness between father and child." *Id.* at 50.

282. *Id.* at 55.

283. Caroline Jones, *Looking Like a Family: Negotiating Bio-Genetic Continuity in British Lesbian Families Using Licensed Donor Insemination*, 8 *SEXUALITIES* 221, 229-30 (2005).

284. See Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, GA. L. REV. 649, 662-63 (2007) (noting that evolutionary biology holds that parents who are biologically connected to their children will be more willing to support them).

285. Scheib et al., *supra* note 230, at 249.

appears to have the similar effect of dampening the youths' expressed interest in their donors.²⁸⁶

Donor-conceived children born to single parents are more interested in their donor fathers than children raised in heterosexual and lesbian couple families, presumably because they have a "social" father.²⁸⁷ Moreover, compared to youth in families headed by single women or lesbian couples, youth in heterosexual couple families experienced their families as "less positive that they had a donor . . . and they expected their parents to be less positive about their request for the donor's identity."²⁸⁸ Yet, despite children's interest in their donor parents, the donors, or the children's idea of them, do not necessarily play a "critical role in their lives."²⁸⁹ Instead, adolescents conceived through donor insemination from an open-identity-donor sperm bank thought that knowledge of the donor would give them more knowledge of themselves and their identity, and imagined that any future relationship they might have with the donor would be like a friendship.²⁹⁰

These experiences of adoptees and donor-conceived persons and members of groups that have experienced non-consensual and often brutal separation from biological family, nation, and heritage reveal that it is hard to escape biology and all that is constructed through and around it, even while fully and comfortably ensconced into new families and new nations. Nor would such an escape be a good thing, at least so far as we can imagine a bodiless world. For such an escape can be dehumanizing even in present contexts—a way, perhaps unintentionally, to commodify children, to make them untethered, transferable, blank.²⁹¹ On the contrary, birth connections help define and humanize us. Yngvesson explains that it is the adoptive children's preexisting ties to a family, a history, a culture, not just their potential for the future that distinguishes prospective adoptees from mere commodities.²⁹² Although this commodification lingers in the still dominant legal construction of adoption as absolute—a complete and clean termination of one relationship and creation of a new one, amended birth certificate and all,²⁹³ adoption triad members²⁹⁴ and

286. *Id.* at 249.

287. *Id.*

288. *Id.*

289. *Id.* at 248.

290. *Id.* at 245-48.

291. Anthropologist Barbara Yngvesson has written about this phenomenon of commodification, particularly in the context of transnational and transracial adoption. Yngvesson, *supra* note 86; Yngvesson, *supra* note 225.

292. Yngvesson, *supra* note 86, at 239.

293. Cahn, *supra* note 75, at 1077. Indeed, adoption in the United States not only changes the facts surrounding the birth, it buries and negates birth connections altogether. Generally upon adoption, a new birth certificate is issued and the old one sealed – even from the born child. Samuels, *supra* note 78, at 375-98. Western European nations, which also have legal adoption regimes and gamete donation, have not fully embraced or are moving away from this fiction and the notions of anonymous reproduction. See Samantha Besson, *Enforcing the Child's Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21

families created with ART actually navigate multiple levels of kinship, transform relationships, and create new family relations that are without direct adult intimacy, but grounded in their shared interest in the child and the child's shared interest in them.

III. BLENDING BIOLOGICAL AND SOCIAL CONNECTIONS: ADOPTION'S LESSONS FOR SECOND-ORDER POSTMODERN FAMILIES

The preceding part illustrated three interrelated phenomena regarding the construction and experience of biological connection: that these connections form a central part of individual and social identity; that those who experience disruption of those connections have interest in surfacing and even restoring the connections; and that these interests extend to and cross family constellations thereby expanding the family's social boundaries. These intangible and tenacious, comprehensible, but not fully explainable, connections to birth, place, parents, and culture expose the material and symbolic importance of biological relatedness in individual and family life. The legal dominion of the modern family form, however, defies these connections, insisting on clean breaks and separations to preserve the two-parent norm even though second-order postmodern families are created by a disruption of one or more aspects of biological connection.

The experiences of adoptive families and families created with the aid of third parties, described above, reveal that embracing these separations—these ghosts—can enhance the integrity of postmodern families. As Yngvesson observed in the context of international adoption, “[c]onfrontation with this impossibility [of fully belonging] shakes up the idea of a coherent ‘I’ and the illusion of autonomous families, nations, and selves on which this ‘I’ is contingent.”²⁹⁵ Bursting this myth of separation by acknowledging the kinships that help create postmodern families might bridge the gap between a model of exclusive parenting and the enlarged family systems that increasingly characterize family life. In fact, this self-consciousness about these real and imagined relationships has led to the ascendancy of an adoption model that is beginning to eclipse the old one, which dismissed important biological relationships and minimized the mothering work of pregnancy and other

INT'L J. L. POL'Y, & FAM. 137 (2007) (describing national and international legal trends to protect a child's right to know his or her origins, within limits, including the Convention on the Rights of the Child (CRC), arts. 7 & 8; legal disapproval of anonymous donor insemination in many countries; and certain protections under the European Convention on Human Rights art. 8). Besson notes that the CRC's protection of children's right to know their identities was added pursuant to an Argentinean proposal during a time when Argentina was confronting its era of disappeared children. Besson, *supra* note 293, at 143.

294. The adoption triad refers to the adoptee, adoptive kin, and biological kin. Adoption historian Wayne Carp dates the first use of the phrase to a 1977 Social Services Review article by C. Wilson Anderson, *The Sealed Record in Adoption Controversy*. CARP, *supra* note 14, at 270, n. 16.

295. Yngvesson, *supra* note 225, at 17 (referring to international adoption).

biological connection.²⁹⁶ This reconceptualization of adoption, instead of banishing the child's biological origins, embraces the child's biological kin (and their kin) as a conceptual, practical, and increasingly legal matter. These families present a model for understanding and perhaps regulating second-order postmodern families.

Social scientists have been systematically researching open adoptions in this country for over two decades²⁹⁷ and have produced a growing number of reports based on both small and large, longitudinal qualitative and quantitative studies.²⁹⁸ Researchers in England have been studying open adoption as well.²⁹⁹ The studies here and abroad, reveal that these new blended families comprise rich, organic, and complex social structures.³⁰⁰ These family arrangements are not without problems and complications, but they illustrate a new type of extended family that situates parental rights in one nuclear family, but brings into that nucleus the child's birth relations. As such, they share some features with, and may serve as models for, other postmodern families.³⁰¹

A. Characteristics of Adoptive Families with Ongoing Contact

Studies of open adoptive families reveal both exceptional and familiar family values and tensions. These families have been dissolved by consent or

296. Plus the old adoption model only fit anonymous infant adoptions; for decades, the majority of adoptions have been related (stepparent, etc.) or foster child. See Cahn, *supra* note 75 (describing evolution of adoption).

297. Siegel, *supra* note 254, at 411. Social scientists have been studying open adoption at least since the 1980s. Harold D. Grotevant, Ruth G. McRoy, Carol L. Elde & Deborah Lewis Fravel, *Adoptive Family System Dynamics: Variations by Level of Openness in the Adoption*, 33 FAM. PROCESS 125, 127 (1994); Robert Borgman, *The Consequences of Open and Closed Adoption for Older Children*, 61 CHILD WELFARE 217 (1982).

298. E.g., Karie M. Frasch, Devon Brooks & Richard P. Barth, *Openness and Contact in Foster Care Adoptions: An Eight-Year Follow-Up*, 49 FAM. REL. 435-36 (2000) (describing the California Long-Range Adoption Study, begun in 1990, studying 600-1000 adoptions); University of Minnesota, Department of Family Social Science, Minnesota-Texas Adoption Research Project, <http://cehd.umn.edu/fsos/Centers/mtarp/> (last visited May 20, 2010) (Harold Grotevant & Ruth McRoy, Co-Principal Investigators, PIs; 20 year old study involving 720 individuals); see also Ge et al., *supra* note 241 (describing a longitudinal multisite study of adopted children).

299. E.g., SMITH & LOGAN, *supra* note 254 (reporting on findings regarding adoptions with post adoption contact); Elsbeth Neil, *Coming to Terms with the Loss of a Child: The Feelings of Birth Parents and Grandparents About Adoption and Post-Adoption Contact*, ADOPTION Q., 2006, 1 (reporting on second wave of a longitudinal "Contact after Adoption" study which began in 1996).

300. As do many lesbian and gay-headed families formed with assisted reproduction. Appell, *supra* note 82, at 306-15.

301. See Harold D. Grotevant, Nicole M. Ross, Mary Ann Marchel & Ruth G. McCoy, *Adaptive Behavior in Adopted Children: Predictors from Early Risk, Collaboration in Relationships Within the Adoptive Kinship Network, and Openness Arrangements*, 14 J. ADOLESCENT RES. 231, 245 (1999) (suggesting that the open adoption kinship networks "could be useful in the investigation of other complex family forms that involve the child's linkages to multiple sets of adults, such as found in postdivorce families").

involuntary court processes³⁰² and subsequently reformed through judicial processes and negotiation regarding the terms of post-adoption contact. These newly reconstituted families embody and reflect the old and new, and also model respect for the enduring legal, social, and biological connections that unite families in time and space. These open adoptive families reflect and promote the following family values and occasional tensions, many of which exist in modern and postmodern families: (1) biological and social kinship; (2) boundaries and incorporation; (3) contact and connection; (4) altruism and self-interest; and, perhaps unsurprisingly, (5) care and gender.

1. Biological and Social Kinship

This private family space in adoption, as in other families, is not static or impervious. On the contrary, it is ever changing and evolving to reflect the circumstances, needs, and desires of its members. The ongoing contact adoptive families exhibit plasticity and complexity in their family constellations.³⁰³ Leading adoption researchers “conceptualize the adopted child as part of an adoptive kinship network: the people who are part of the child’s birth family . . . and adoptive family The child bridges both worlds, linking two family systems into a kinship network.”³⁰⁴ These networks offer post-adoption contact that is varied and fluid in terms of the amount and particulars of contact and in terms of the family constellations that are included.³⁰⁵

These open adoption kinship networks view the child at the center and embrace persons because of their connection to the child.³⁰⁶ Thus, in some kinship networks, the contact is with extended birth relatives and not with the birth parents.³⁰⁷ In other networks, the initial contact might have included just the birth and adoptive parents, but might later come to include relatives that the birth parents bring to visits.³⁰⁸ The new family may involve the adoptee’s birth siblings, grandparents, aunts and uncles, and their significant others.³⁰⁹ Adoptive parents also may seek to maintain contact among birth siblings of the

302. For example, state initiated foster care and then involuntary termination of parental rights.

303. Wright et al., *supra* note 256, at 47-48.

304. Grotevant et al., *supra* note 301, at 232.

305. SMITH & LOGAN, *supra* note 254 (reporting a wide array of birth parents and relatives in contact and amount of contact); Nora Dunbar, Manfred H. M. van Dulmen, Susan Ayers-Lopez, Jerica M. Berge, Cinda Christian, Ginger Gossman, Susan M. Henney, Tai J. Mendenhall, Harold D. Grotevant & Ruth G. McRoy, *Processes Linked to Contact Changes in Adoptive Kinship Networks*, 45 FAM. PROCESS 449 (2006).

306. See REITZ & WATSON, *supra* note 222, at 11 (adoption creates “a new kinship network that forever links these two families together through the child, who is shared by both”).

307. SMITH & LOGAN, *supra* note 254.

308. *Id.*

309. See *infra* Part III.A; see also, e.g., SMITH & LOGAN, *supra* note 254, at 92 (noting that family members in contact grew over time as birth parents brought relatives to visits).

adoptees who were adopted into different homes.³¹⁰ The type and constituents of contact change over time, expanding and contracting as the needs and interests of the families or their members change.³¹¹ This flexibility emerges out a “collaborative network” through which adoptive and birth family members “monitor the relationships in the family and adjust their participation in service of maintaining the network relationships on behalf of the child’s ultimate well-being.”³¹²

Moreover, within one family, there may be different levels and amounts of contact among adoptees. For example, in an adoptive family with four adopted children, one sibling may have ongoing contact with his birth father, three out of four of his biological siblings, and a number of second degree relatives; one sibling may have no contact with any birth family members; one sibling with may have monthly phone contact with his birth mother; and one sibling may have mediated monthly exchange of letters and pictures.³¹³ Families tended to view the most open of the adoptions in their homes as the ideal model for openness.³¹⁴

Continuous contact families do not appear to be rigid about the terms of contact, but often allow it to grow as the parties become more comfortable with it and as the child ages.³¹⁵ Studies indicate that over time families generally complied with non-enforceable post-adoption contact agreements and did not unilaterally stop contact.³¹⁶ As time passed, some mediated contact adoptions became direct contact adoption as the parties felt more comfortable with each other and the mediation of the contact became more of a hassle than a benefit.³¹⁷ Sometimes, these changes were driven by the children’s desire for more contact,³¹⁸ even though the birth and adoptive parents were satisfied with the existing level.³¹⁹ As children reach adolescence, they gain more agency in the relationship and the responsibility for initiating and defining terms of the contact.³²⁰ Often then, the birth and adoptive parents defer to the adolescents and let them set the pace.³²¹ In other instances, the adoptive parents push for

310. Ryburn, *supra* note 254, at 633.

311. Dunbar et al., *supra* note 305 (reporting a wide array of birth relatives in contact and types of contact); Frasch et al., *supra* note 298; Ryburn, *supra* note 254 at 633; Siegel, *supra* note 254.

312. Grotevant et al., *supra* note 301, at 239.

313. Siegel, *supra* note 254, at 414-15. Prior to adoption, while in foster care this fourth child had weekly mother-child visits. *Id.*

314. *Id.* at 254, at 415; Berge et al., *supra* note 259.

315. Dunbar et al., *supra* note 305, at 450-51; Ryburn, *supra* note 254, at 633-34.

316. Siegel, *supra* note 254, at 410.

317. Dunbar et al., *supra* note 305.

318. Adopted adolescents tended to push for changes in contact. *E.g., id.* at 454.

319. SMITH & LOGAN, *supra* note 254, at 174.

320. Dunbar et al., *supra* note 305, at 459-60.

321. *Id.*

changes in contact, often in favor of more contact,³²² but also to decrease contact when the contact distresses the children.³²³

The adoptive and birth families may become increasingly intertwined in fairly natural and intimate ways. For example, some adoptive and birth family vacation together,³²⁴ attend family functions and rites of passage like birthday parties and weddings,³²⁵ and even baby-sit for each other.³²⁶ Extended birth family members may be part of this extended kin group.³²⁷ Indeed, as one student of open adoption noted: "Birth and adoptive family relationships in open adoptions are likely to be as complex and varied as relationships among spouses, parents and children, siblings, and other family members in different family arrangements."³²⁸

Adopted children may experience these two families in numerous and seemingly contradictory ways. Some children want to be with both their birth and adoptive parents.³²⁹ For them, loving and wanting to be with both sets of kin is not a contradiction.³³⁰ They may feel a mixture of happiness and sadness that they are with their adoptive parents and not with their birth parents.³³¹ Other children felt more comfort with extended birth relatives than with birth parents; and still others were uncomfortable with birth parent visits.³³²

2. Boundaries and Incorporation

One of the most enduring family values is that of autonomy: the family, normally through the parents, has the authority (if not the means) to regulate childrearing and membership. One of the most important factors in adoption is that the new adoptive parents feel secure in their position and in control of the family space.³³³ It is not surprising that one of the strongest indicators for successful open adoption is the sense of control the adoptive parents experience

322. *E.g., id.* at 454.

323. SMITH & LOGAN, *supra* note 254, at 137-41. Even when children felt discomfort, visits might continue because the children were satisfied with them. *Id.* at 140-41.

324. Siegel, *supra* note 254, at 414.

325. For example, the adoptive family may attend the birth mother's wedding. Siegel, *supra* note 254, at 415; Ryburn, *supra* note 254, at 632 (birthday party); SMITH & LOGAN, *supra* note 254, at 155 ("[S]pecial family occasions are enjoyed together in each other's homes.").

326. Siegel, *supra* note 254, at 414; *see* SMITH & LOGAN, *supra* note 254, at 121.

327. SMITH & LOGAN, *supra* note 254, at 92; Siegel, *supra* note 254, at 414; *see* Ryburn, *supra* note 254, at 631-32.

328. Siegel, *supra* note 254, at 417.

329. SMITH & LOGAN, *supra* note 254, at 136-37.

330. *E.g.,* Janette Logan & Carole Smith, *Face-to-Face Contact Post Adoption: Views from the Triangles*, 35 BRIT. J. SOC. WORK 3, 27 (2005) ("I've got my birth family and my adoptive family, so it's quite good," quoting an adoptee).

331. SMITH & LOGAN, *supra* note 254, at 132-43.

332. *Id.*; Grotevant et al., *supra* note 301, at 232.

333. Jeanne Etter, *Levels of Cooperation and Satisfaction in 56 Open Adoptions*, 72 CHILD WELFARE 257 (1993); SMITH & LOGAN, *supra* note 254, at 162-63.

regarding the frequency, type, and amount of contact.³³⁴ It may be that the heart of the adoptive relationship is adoptive parent control and autonomy rather than the fiction of rebirth. As two British researchers explained:

it was clear from our interviews that adoption achieves far more than legal security – it constructs parenthood. It was the experience and meaning of parenthood – legally, socially and emotionally – that was of enormous significance to the adopters in our sample. For many adoptive parents the phenomenology of parenthood is intrinsically characterised by a sense of ownership and control.³³⁵

This sense of boundary, of authority, is closely tied to the success of open arrangements and why, ultimately, cooperative adoption appears to be flourishing.³³⁶ Incorporation can be more tenuous and boundaries more impervious when adoptive parents do not fully consent to the contact. When adoptive parents choose open adoption out of desperation rather than true desire, contact is likely to decrease; and it is often the birth parents who initiate the decrease, presumably because they feel the adoptive parents' reluctance and discomfort.³³⁷ In contrast, "[a]dopters are less likely to find contact problematic when they have been fully involved in discussions about the details and purpose of contact arrangements and where they do not feel compelled to accept contact as a condition of placement."³³⁸ Yet, successful ongoing contact appears to help all members feel more comfortable about the adoptions.³³⁹

Ultimately, cooperative adoption respects the autonomy of the family just as the family consents to curb some of that autonomy through the agreement to

334. SMITH & LOGAN, *supra* note 254, at 183; HAROLD D. GROTEVANT & RUTH G. MCROY, *OPENNESS IN ADOPTION* 16 (1998).

335. SMITH & LOGAN, *supra* note 254, at 105.

336. See Carole Smith, *Adoptive Parenthood as a 'Legal Fiction'—Its Consequences for Direct Post-Adoption Contact*, 14 *CHILD & FAM. L. Q.* 281, 293-98 (2002) (excerpted transcripts illustrating adoptive parents' sense of ownership, control, and security regarding child contact).

337. See Marianne Berry, Debora J. Cavazos Dylla, Richard P. Barth & Barbara Needell, *The Role of Open Adoption in the Adjustment of Adopted Children and Their Families*, 20 *CHILD. & YOUTH SERV. REV.* 151 (1998) (noting adopters who agreed to open adoption at the insistence of the adoption agency eventually stopped the contact); Dunbar et al., *supra* note 305, at 451. Nevertheless, the British studies indicate that such relationships formed initially without consent can work.

338. SMITH & LOGAN, *supra* note 254, at 183; see also Dunbar et al., *supra* note 305, at 458 ("When adoptive parents perceived a high degree of control over changes (increases or decreases), they tended to be more satisfied. . . . When increases in openness were initiated by the adopted adolescent, the adoptive parents reported feeling less control and satisfaction.").

339. "Children's accounts of their feelings about adoption and contact suggest that, for most of them, their everyday lives were not clouded by a significant sense of loss." SMITH & LOGAN, *supra* note 254, at 144. However, they do worry about the wellbeing of their birth relatives. "Direct contact went some way towards quelling these [and other] worries for many children and adoptive parents were aware of its importance in this respect." *Id.* at 144.

enlarge the family circle. This enlargement is premised on a shift of roles and perceptions: birth relations accept and respect the adopters as parents and give permission to the child to take on the adopters as parents; adopters give the birth relations permission “to have an ongoing role in their children’s lives.”³⁴⁰ When these permissions are given, the relationships are allowed to evolve and flourish.³⁴¹ The birth relatives can remain in the adoptee’s life because their roles are bounded; they recognize a new parent or set of parents and those new parents, in turn, exercise their newfound authority to reincorporate the birth parents or relatives, but on different terms.

Sometimes this incorporation can be so complete as to change the boundaries of the family. In one open adoption network, both sets of maternal and paternal adoptive grandparents were deceased and the birth grandparents slowly became *the* grandparents and, in effect, the parents of the adoptive parents themselves, even spending holidays in the adoptive home.³⁴² The birth aunt became like a younger sister to the adoptive mother and, in turn, the birth aunt viewed the adoptive mother as older sister.³⁴³

This incorporation of the old family into the new one also can be, as one would expect, complicated and ripe for misunderstandings and missed cues. It may be difficult for extended adoptive kin whose only shared history and intimacy is through the child to interpret each other’s words and actions.³⁴⁴ Similarly, not all birth parents or relatives are able to relinquish moral authority to the adoptive parents.³⁴⁵ In these instances, however, the relationships may be able to continue and even succeed because the legal authority has transferred parenthood and because the adoptive and birth parents are able to appreciate the role and importance of the other.³⁴⁶

Perceptions and power imbalances of the adoptive kin network in which the adoptive family occupies the center can complicate these bounded and permissive relationships. The birth relatives are likely to have their own families which, of course, tend to be central for them. The adoptive family may not fully appreciate the separate and independent existence and needs of the birth family. For example, one study showed that adoptive families were concerned about the boundaries of the adoptive family, but not that of the birth family.³⁴⁷ The authors of that study noted that “[a]doptive parents tended to see

340. *Id.* at 162.

341. Logan & Smith, *supra* note 330, at 20-21.

342. *Id.* at 17.

343. *Id.*

344. *See e.g.*, Dunbar et al., *supra* note 305, at 457-58 (describing such instances).

345. *E.g.*, Logan & Smith, *supra* note 330, at 28 (describing birth parents who resisted relinquishment of their parental role).

346. *See id.* at 28 (noting that even birth mothers who saw the adoption as temporary, “could also identify benefits flowing from the adoption” and the adoptive parents felt secure in the children’s attachments to them. Plus, “the adults managed their feelings and relationships in such a way that they were able to maintain contact without generating significant interpersonal conflict”).

347. Dunbar et al., *supra* note 305, at 457-58.

boundary issues only in terms of whether the birth mother had violated any adoptive family boundaries; they did not evaluate whether they might have violated any of the birth mother's boundaries."³⁴⁸ In contrast, birth mothers were more conscious about the adoptive family's boundaries, but felt like the boundaries were too rigid and impermeable.³⁴⁹

Similar conflicting interests and perceptions can arise around the amount and timing of visitation.³⁵⁰ Although these open adoptive families are blended, there are bound to be differences in timing and amount of contact. Four visits per year and visits during holidays may feel intrusive to the adoptive family, but completely natural for the birth family.³⁵¹ What feels like comfortable and respectful contact for a birth mother might feel intrusive to the adoptive mother.³⁵² Other times, the birth relatives decide to stop contact.³⁵³ Sometimes the children want more contact, but the adults are content with the amount of contact.³⁵⁴

3. Contact and Intimacy

One of the leading reasons for entering into post-adoption contact agreements is to provide an open door between the adoptive and birth family so that the adoptees, their relatives, and their adoptive families can know about one another. Triad members have pushed for openness in adoption because they understand or came to understand the importance of family history to adoptees and those who love them.³⁵⁵ The instrumental value of openness is not lost on adoptive parents who appreciate the importance of having knowledge about the birth family so they can better understand the child,³⁵⁶ discuss with the child his or her birth family, keep information about the birth family up to date, and guard against potential resentment adoptees might feel toward the adoptive parents for keeping the child away from his or her birth family.³⁵⁷

Moreover, familiarity tended to increase the value placed on connection. For example, adoptive parents who were foster parents were less concerned or fearful about birth parent contact after adoption than were adoptive parents who

348. *Id.*

349. *Id.* at 458.

350. See Wright et al., *supra* note 256, at 47 ("Though parents reported that birthfamily contact was emotionally charged, decisions about contact were related to specifics (amount of contact, structure, and strategies) rather than to whether contact would occur.").

351. SMITH & LOGAN, *supra* note 254, at 183.

352. See Dunbar et al., *supra* note 305, at 458 (describing an adoptive mother's discomfort with the birth mother calling the adoptee every day).

353. *Id.* at 457.

354. SMITH & LOGAN, *supra* note 254, at 144, 174.

355. See Appell, *Survey*, *supra* note 112.

356. As one adoptive mother said, what "makes them tick." SMITH & LOGAN, *supra* note 254, at 93.

357. *Id.* at 93.

had not fostered the adoptee.³⁵⁸ Indeed, the latter were more likely to demonize or fear birth parents.³⁵⁹ The more contact the families had, the more advantages and fewer disadvantages to that contact the adoptive parents perceived.³⁶⁰ In addition, in many open adoptions, the comfort level and quality of interaction increased after contact so that positive feelings about openness and sometimes openness itself increased over time.³⁶¹ In contrast to persons who did not know the birth parents prior to adoption and feared contact, those adoptive parents who knew the parents before adoption and those adoptive parents who came to know the birth parents during adoption felt more sympathetic to the birth parents after having met and humanized them.³⁶² Even so, the parties to the contact tended to value the connections and to grow from them. They mostly found the contact to be beneficial because of these connections—for the ways in which it enriched their, and especially the adoptee's, understanding and knowledge of the adoptee's complex identity.

For better and for worse, though, communication in adoptive families, like in other families, can be fraught, difficult, and divisive. Qualitative studies, particularly those involving both birth and adoptive parents, show that triad members sometimes had contrasting views regarding changes in contact. When contact increased, the triad members were more likely to agree on who caused the increase, but when contact decreased, the parties tended to blame others.³⁶³ For example, the birth mother might attribute a decline in contact to the adoptive parents while the adoptive mother attributes it to the birth mother.³⁶⁴ In other instances, the family members were looking to the adolescent adoptee who was not aware that he or she held the key to contact.³⁶⁵ In mediated adoptions, such communication gaps were even more likely to occur.³⁶⁶

358. *Id.* at 74-76.

359. *See id.* at 75; Siegel, *supra* note 254, at 415.

360. Ryburn, *supra* note 254, at 634-44.

361. Siegel, *supra* note 254, at 415; *see also* Ryburn, *supra* note 254, at 634-35 (the more contact families had, the more advantages and fewer disadvantages they saw to it).

362. SMITH & LOGAN, *supra* note 254, at 75-76.

363. Dunbar et al., *supra* note 305, at 456-57. "It was both striking and poignant that network members may become distanced from one another because of inaccurate perceptions about each other's intentions regarding contact." *Id.* at 461.

364. *Id.* at 456-57.

365. *Id.* at 460.

366. *Id.* at 461. This is not to say that social workers or other family professionals do not have an important role to play in preparing the family for open adoption. On the contrary, third parties (social workers, mediators, etc.) can help provide clarity of roles, boundaries, expectations, risks, and benefits before the entering into an open adoption and social workers can provide that the adopters, birth family, and children require preparation for this new kinship arrangement. *See* SMITH & LOGAN, *supra* note 254, at 144, 182-84; Dunbar et al., *supra* note 305, at 461-62. The boundaries between birth and adoptive (legal) family, the purpose of such contact and everyone's expectations, especially the child's, need tending. Adoptive parents may need assistance in anticipating and responding to "emotional and management issues" that will likely arise over the course of the relationship. SMITH & LOGAN, *supra* note 254, at 182. Birth parents may need assistance transitioning from a parental role to a new less central and autonomous role. SMITH & LOGAN, *supra* note 254, at

4. Altruism & Self-Interest

Concern for triad members pervades open adoption contact regimes. Adoptive and birth families engage in post-adoption contact willingly, as in the case of adoption with contact and non-legally sanctioned open adoption, and perhaps less willingly when post-adoption contact is court-ordered.³⁶⁷ Technically though, adopters who are court-ordered to provide contact have the choice not to adopt at all if they are truly opposed to contact. It is also true that some adoptive parents may not have freely chosen open adoption, but did so to ensure the ability to obtain an infant or child.³⁶⁸ In any event, it seems that many adopters recognize the importance of the contact to the children and also to the birth family and themselves.

This ability to perceive and put others' needs above one's own comfort or wishes also marks the more successful open adoptions. While affection and respect among birth and adoptive parents are important factors in the experience of ongoing contact adoption as beneficial, even adults who were not fond of each other could engage in positive relationships, if they felt "sympathy, gratitude and acceptance."³⁶⁹ When the adults did not particularly like each other or feel particular closeness, their ability, nevertheless, to understand and sympathize with the other's circumstances enabled the adults to continue relationships and appreciate their value.³⁷⁰ An ability to put oneself aside and view the needs and perspectives of others may also contribute to sustainable post-adoption contact, permitting the adults to overcome their own discomfort or disagreements for the sake of the child and, perhaps, the other adults.³⁷¹ "Adopters who had a high capacity to take the perspective of others were more likely to view contact positively and maintain or increase such contact over time" even when contact was problematic.³⁷² The ability to take the viewpoint of the birth family and the adoptee appears to be critical both to managing difficult situations and to continuing contact, and can even lead to more comfortable relationships.³⁷³

Whatever the origin of the contact or feelings about each other, birth and adoptive parents (and other adult kin) enter into or continue these cooperative

182. On the other hand, birth parents might feel uncomfortable with too much involvement in the adoptive family. *See* Grotevant et al., *supra* note 301, at 242. And it may be helpful for social workers to be available on an ongoing, as needed basis. SMITH & LOGAN, *supra* note 254, at 183; Dunbar et al., *supra* note 305, at 462.

367. As it may be in England where the Children Act 1989 permits courts to order such contact and does not rely on agreements like many of the United States do. Children Act, 1989, c. 41, §§ 8-11 (Eng.).

368. Dunbar et al., *supra* note 305, at 451.

369. SMITH & LOGAN, *supra* note 254, at 174.

370. Logan & Smith, *supra* note 386, at 18-20.

371. *See* Neil, *supra* note 299, (study suggesting that empathy can mediate interpersonal differences).

372. Elsbeth Neil, *Understanding Other People's Perspectives: Tasks for Adopters in Open Adoption*, ADOPTION Q., 2003, at 3, 25.

373. Logan & Smith, *supra* note 330, at 19-20.

relationships for the benefit of the children and sometimes for the benefit of the birth family.³⁷⁴ In one study, just over half (57%) of the adoptive parents could identify benefits of contact for themselves, birth families, and the children; yet, even those adoptive parents who viewed the contact as beneficial only to the adoptees and birth families, and not for themselves, continued the contact for the benefit of the others;³⁷⁵ and some did so even when they found contact to be uncomfortable.³⁷⁶ Still adoptive parents are more likely than not to feel satisfied and comfortable with the contact.³⁷⁷ In one study, “[e]very respondent (100 percent) agreed that ‘my child is better off because she or he has access to her or his birth parent.’”³⁷⁸ Mutual adoptive and birth parent concern for the adoptee’s needs for more contact is associated with increase in contact over time.³⁷⁹ Reasons for decrease in contact include interpersonal differences between birth and adoptive parents and inability to reach mutual agreements regarding contact.³⁸⁰

Of course, there are also differences in perceptions of the beneficence and sufficiency of contact. For example, adoptive mothers in one study claimed more satisfaction than the birth mothers with the amount and level of contact, while the birth mothers wished for more.³⁸¹ Moreover, birth relatives in another study were more likely to view the contact as beneficial to themselves as they were to view it as beneficial to the child.³⁸² Very few viewed such contact to be beneficial to the adoptive parents.³⁸³

B. *The Open Adoption Family Model and Second-order Postmodern Families*

As the foregoing studies illustrate, adoption with ongoing contact is distinct from closed adoption. This difference is quantitative and qualitative. First, the kinship networks of families of open and closed adoption are different. The ongoing contact family is larger and more diverse, including multiple sets of parents, grandparents, aunts and uncles, and siblings.³⁸⁴ The closed adoption family is more like the normative family with one or two parents, corresponding grandparents, and perhaps adoptive siblings; and they

374. E.g., SMITH & LOGAN, *supra* note 254; Dunbar et al., *supra* note 305, at 459; Siegel, *supra* note 254, at 416.

375. SMITH & LOGAN, *supra* note 254, at 93.

376. *Id.* at 99.

377. *Id.*

378. Siegel, *supra* note 254, at 416.

379. Dunbar et al., *supra* note 311.

380. *Id.* at 452.

381. *Id.* at 461.

382. SMITH & LOGAN, *supra* note 254, at 126 (this study involved court ordered contact and involuntary termination of parental rights).

383. *Id.*

384. See Grotevant et al., *supra* note 297, at 126-27 (describing open adoptive families).

have no more than two sets of cousins, aunts, uncles, and other kin. Second, the ongoing contact and closed adoptive families seem to be qualitatively different in that the families appear to perceive themselves and their children differently.³⁸⁵ For the ongoing contact family, there is an expressive function of contact, one that communicates to the child and the birth family that the child is cared for and is connected to others.³⁸⁶ There is also a positive sense of the adoptive family as a second (even if primary, most important and best) family, which wraps itself around the adoptee and all that comes with him or her. In this way, these ongoing contact families are literally child-centered. Adoptive families without contact may be less secure or feel less entitled; as a result of their inability to experience or support the birth family, it becomes, in essence, a ghost family, not physically present but lurking and, for some, perhaps, mildly threatening.³⁸⁷

Adoption creates new parents with parental agency and autonomy who can use this power to enter into enforceable or non-enforceable agreements to keep the birth family, or select members of it, in the new adoptive family's life, on whatever levels the adoptive parents determine are appropriate for the child and the family. Adoption with contact affords birth relatives special rights to have negotiated contact with the adoptee; and if that contact fails down the road, adoption with contact provides the right to a dispute resolution mechanism to enforce or modify those rights. Even if the dispute cannot be resolved in a mutually satisfactory way, and even if the contact terminates, the adoption stands, thus reinforcing the primacy of the rights of the adoptive parents. Because adoption with contact is, by definition, entered into at the adoption itself, it creates a new type of extended family *ab initio* that is built on consent and thus preserves (adoptive) parent autonomy. The biological kin are part of this family, but in the background.

Ongoing contact adoption and adoption with enforceable contact reflect the social and biological kinship network. Ongoing contact adoption and particularly adoption with contact illustrate that it is possible, and perhaps preferable, to legally and consensually unbundle parental status and rights. These open adoptive families also anticipate and reflect the patterns we see in

385. See Phyllis R. Silverman, Lee Campbell & Patricia Patti, *Reunions Between Adoptees and Birth Parents: The Adoptive Parents' View*, 39 SOC. WORK 542 (1994) (noting families in closed adoptions saw themselves as no different than birth families); Berry et al., *supra* note 337, at 152.) ("Open adoption is in direct opposition to the traditional confidential adoption practices of the recent past . . .").

386. See Grotevant et al., *supra* note 301, at 239-40 (suggesting that collaboration among birth and adoptive parents would communicate respect for the child's birth history); Logan & Smith, *supra* note 330, at 9 (citing the theory that "continuing contact allows birth relatives to show that they still care for the child. . .").

387. See Ryburn, *supra* note 254, at 635-36 (listing positives and negatives of contact experienced by open and closed adoptive families). Studies of open adoption suggest that openness reduces adoptive parents' fears of the birth parents and the child's attachment to them. Neil, *supra* note 299; Margaret R. Sykes, *Adoption with Contact: A Study of Adoptive Parents and the Impact of Continuing Contact with Families of Origin*, 23 J. FAM. THERAPY 296 (2001).

other postmodern families. These patterns are surfacing in the context of sperm-donor conceived children. As assisted reproduction has become more common and less secretive, these offspring are expressing interest in obtaining knowledge of, and even contact with, their donor parents and siblings.³⁸⁸

The families created through the assistance of the Nobel Repository, discussed above, present cases in point. The early generation of donor-conceived children from the Nobel Repository, which practiced anonymous donation,³⁸⁹ produced a number of offspring who discovered the secret of their conception and sought the human origins and offspring of their roots.³⁹⁰ These relationships were varied and sometimes short lived, but knowledge about the fact of insemination, and sometimes knowledge of the donor himself, was important and meaningful.

For Tom, one young man featured in *The Genius Factory*,³⁹¹ a book chronicling a *Slate* journalist's investigation into the Repository, its donors, and its offspring, the revelation that his father was a sperm donor to the Repository initially brought great relief that he was not related to the man married to his mother and who had held himself out to be his father.³⁹² Tom searched for his father and was delighted to learn he had paternal siblings,³⁹³ one of whom he corresponds with periodically.³⁹⁴ When he finally met his biological father,³⁹⁵ the visit was comfortable and familiar, but it did not lead to the kind of father and son relationship Tom had hoped it would.³⁹⁶ In fact, it may have brought him closer to his legal father with whom he had not been close, and made him appreciate the depth and quality of his social connections to his wife and legal father.³⁹⁷

Similar to adoptive and birth parent kinship, the mothers who chose the Repository felt connected to the anonymous sperm donors, identified only by

388. *E.g.*, Scheib et al., *supra* note 236.

389. PLOTZ, *supra* note 149, at 36-38, 49, 53 (many of the donors turned out not to be laureates); *see id.* at 193 (describing one donor whose entry to the sperm bank was based not on his accomplishments but only on his own unsupported claim that his IQ was 160).

390. *Id.* at 52-71; *see also* David Plotz, *Exploring the "Nobel Prize Sperm Bank": The "Genius Babies," and How They Grew*, SLATE, Feb. 8, 2001, <http://www.slate.com/id/100331/> (last visited May 21, 2010) (known as the "Seed Project," this series chronicles Plotz's research for the book).

391. PLOTZ, *supra* note 149 at 52.

392. *Id.* at 57. Tom's younger sister, also a product of the Repository, was not moved and was uninterested in searching for her father or corresponding with her paternal siblings. *Id.* at 59, 118-19. Yet when there was a fire that destroyed her mother's home, she made sure that they were able to save her Repository file. *Id.* at 118.

393. *Id.* at 59.

394. *Id.* at 63-67, 123, 254-55.

395. In a touching gesture, Tom secretly married his fiancé (and mother of his child) before they met Donor Coral, whom he finally knew as Jeremy. *Id.* at 218 ("Tom did not say why they had married so suddenly ... but he didn't have to. Tom was eager to present Lana to Jeremy as his bride.").

396. *Id.* at 252-55.

397. *Id.* at 254.

colors such as White, Fuchsia, and Coral.³⁹⁸ It was often the mothers who told their children of their paternal origins.³⁹⁹ Mothers searched or helped their children search for the fathers.⁴⁰⁰ One mother even brought her one-year-old daughter, Joy, to the Repository and left her there for two hours so that her biological father, Donor White, and his wife could meet her, while preserving everyone's anonymity.⁴⁰¹ Donor White brought her a doll, which her mother kept for Joy. Thereafter, the mother sent photos to the Repository for Donor White and a mediated mutual correspondence followed over the years with exchanges of cards and photos through the Repository.⁴⁰² Eventually, they corresponded directly and met each other again when Joy was twelve at the home of Donor White and his wife.⁴⁰³ By this time, Joy had three fathers to whom she and her mother felt close—her legal father (the man to whom her mother was married when Joy was conceived), a stepfather, and a biological father (who was no longer merely a sperm donor).⁴⁰⁴

C. *Reconceiving Second-order Postmodern Families*

The foregoing studies of open adoption, here and abroad, and the nascent study of donor-assisted families, reveal that these blended families comprise rich, organic, and complex social structures.⁴⁰⁵ These family arrangements are not without problems and complications, but they illustrate a new type of extended family that situates parental rights in one nuclear family, but brings into that nucleus the child's birth relations. As such, they share some features with, and may serve as models for, other postmodern families.⁴⁰⁶

These families follow in the steps of early adoption law and practice. When structuring their legal relationships, they mimic biological ordering and disregard the biological connections of their children even while they include biological relations in the social kinship network. These patterns create two

398. *E.g.*, *id.* at 58, 78, 73.

399. *E.g.*, *id.* at 55, 82.

400. *E.g.*, *id.* at 59, 62-63, 80-83.

401. *Id.* at 78. As the mother left Joy, the Repository called Donor White who, with his wife, "raced over from their house." *Id.*

402. *Id.* at 78-80. Several years later, just as this correspondence was gaining steam and increased depth, the Repository refused to continue mediating the communications and they ended. *Id.* at 80. The mother felt a great sense of loss. *Id.* at 80-83. Eventually, with the help of David Plotz, Donor White and the mother reconnected via email. *Id.* at 131-32.

403. *Id.* at 205-07.

404. *Id.* at 205-12. Included in this multifaceted band was Donor White's wife who became kin as well. Even to Joy's mother, Donor White was "not a sperm donor anymore. . . . He was a *dad*." *Id.* at 211. Joy and her mother visited Donor White again, this time with her stepfather in tow. *Id.* at 257.

405. As do many lesbian and gay-headed families formed with assisted reproduction. Appell, *supra* note 82, at 306-15.

406. See Grotevant et al., *supra* note 301, at 245 (suggesting that the open adoption kinship networks "could be useful in the investigation of other complex family forms that involve the child's linkages to multiple sets of adults, such as found in postdivorce families").

potential problems. First, those families that disregard the missing biological connections risk closing doors that may better serve them and their children, if open. Second, those families who have kept those doors open, who have included biological relatives in their family circle, risk some uncertainty regarding the boundaries, conditions, and future of these relationships.⁴⁰⁷

Adoption with ongoing contact sheds light on shared parenting and postmodern views of children and parents. Open adoption, and particularly its regulations through adoption with contact statutes, illustrates that it is possible to have bundles of rights, statuses, and connections that honor the parent-child relationships and other biological and social relationships—rights that also protect the authority of the primary legal parents in whom reside the authority to make important parental decisions regarding their children, such as where the child will go to school, where the child will live, with whom the child will visit, and all of the daily mundane and not so mundane parental determinations. Decisions regarding the contact with the birth family are, under adoption with contact and informal open adoption constructs, voluntary, or at least began that way.⁴⁰⁸ The difference between the two is that adoption with contact is regulated and thus provides some predictability, rules, boundaries, and recourse to binding dispute resolution.

Open adoption also provides examples of community or shared parenting. It undermines the heteronormative model of two-parent and exclusive parenting by recognizing the multiple people who have parental or parent-like relationships with children.⁴⁰⁹ Those seeking to reconceive family law along purely social lines might take heed of the open adoption experience and the continued importance of biological connection in social ordering. In this particular moment, postmodern families and the laws that regulate them are still deeply grounded in modern family norms, which themselves are embedded in larger political structures that privilege family relationships as natural phenomena, thus masking their political and distributive functions. Moving forward with changes to the legal construction of family in this context requires some caution because we are not so far from the punitive and autonomy-defeating construction of race and nation. In this context, it may make some sense to trust that the vast majority of families negotiate these complexities and contradictions every day without resort to the courts or the need to dismantle current foundational legal regimes.

At the same time, adoption with contact illustrates the enduring importance and relevance of both biological and social families and provides an

407. *E.g.*, *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (N.Y. App. Div. 1994) (dispute between lesbian mothers and the sperm-donor father); *LaChapelle v. Mitten*, 607 N.W.2d 151 (Minn. Ct. App. 2000) (dispute between lesbian mothers and the sperm-donor father); *see also* Polikoff, *supra* note 8 (describing such relationships and disputes).

408. In contrast to court imposed post adoption contact. *Annette*, *Enforceable*, *supra* note 112.

409. Compare to *Rosenbury*, *supra* note 5, who makes a converse point that family functions can be disaggregated from family relations. My point is that family relations can be disaggregated from family functions.

example of how parental rights and relationships need not be all or nothing. Instead, parents can lose (or never gain) their parental rights or status, but they can nevertheless receive the right to maintain a relationship with their children under terms agreeable to both sets of parents. In effect, it provides an opening, creating a more complex, though still largely private and autonomous, family system.

Adoption with contact provides a conceptual model, though not necessarily a legal template, for how the newer postmodern families might recognize and navigate the enduring biological connections in their families. In adoption with contact, the plans for post-adoption contact are part of the adoption.⁴¹⁰ Indeed, the very proceeding that finally terminates parental rights and establishes the adoptive family also reincorporates the birth family on terms the parties establish—terms that acknowledge and preserve biological connections but disaggregate them from parental rights.⁴¹¹ The center piece of this type of adoption is its voluntariness and durability in that it plans for future need *and* future disputes.

Most open adoption studies involve informal (not legally enforceable or court-ordered) open adoption. British researchers have studied court-ordered open adoption after foster care and contested termination of parental rights.⁴¹² Lessons for legal regime changes are not yet clear in the adoption context or in the context of other post-modern families.⁴¹³ And these lessons are not necessarily intuitive. For example, the most open of the open adoptions may be those involving adoption of infants; while the more fraught ones may be those arising out of coercive state intervention.⁴¹⁴ In each case, the contact is important for the child on some level, though it can be disconcerting. The birth parents in the foster care adoptions may share less in common with the adopters in terms of race, class, culture, and mental health than the infant adoptions and be angrier about the adoption.⁴¹⁵ Yet, these adoptions may have lessons for post-divorce families, particularly those that experience high conflict. The infant open adoptions may have more lessons for the families of assisted reproduction.

410. See *supra* Part I.B.2.

411. See *id.*

412. The United Kingdom permits courts to order post-adoption contact. Children Act, 1989, c. 41, § 8 (Eng.). Studies of these open adoptions include SMITH & LOGAN, *supra* note 254; Logan & Smith, *supra* note 330; Carole Smith, *Trust v Law: Promoting and Safeguarding Post-Adoption Contact*, 27 J. SOC. WELFARE & FAM. L. 315 (2005); Neil, *supra* note 299; Ryburn, *supra* note 254, at 639.

413. Moreover, despite the steady growth in adoption with contact – 20 statutes so far, social scientists have not studied these adoptions. Legal studies suggest that there is little litigation regarding the statutes. Appell, *supra* note 112.

414. For example, foster care adoptions. Wright et al., *supra* note 256.

415. Ge et al., *supra* note 241.

CONCLUSION

This Article illustrated that the postmodern family law movement is mired in the modern family, seeking to replicate that family while casting off biological connections despite the lived experiences of those who have lost the legitimacy of their birth, race or nation. This Article has shown that biological and social relationships are not dichotomous or oppositional. On the contrary, it is not necessary to undermine or devalue biology as a basis of family to protect or recognize other family formations, including adoptive families, kinship networks, and same-sex or plural-parent families. Nor is it necessary to devalue non-biologically connected families. Such derogation is unnecessary under our current doctrines and not helpful for adults or children. Of greater utility is an enhanced notion of biological connection—one that accounts for existential issues, the body work of bearing a child, the physicality of tissue and genetic connections for both the adults (adoptive and biological) and the children. Yet, as important as it is to reorganize family law to reflect social, and not merely biological and marital, relationships, it is useful to take into account the existential value and equalizing aspects of biological ordering in the recognition and protection of families.

The biological connection is deep and pervasive in contemporary life, despite our ability to avoid or replicate those relationships. That is because these connections hold existential, social, and political value. Disrupting them may create problems for anyone experiencing such a disjunction and particularly for families without much social or economic capital. Critiques of biological ordering will be richer when they are informed by the subjective, lived experiences of individuals and families living with disrupted connections to kin. These experiences reveal that biological connection is primal, even if culturally constructed, experienced in various ways, and fulfilled on various levels of actual connection, fantasy, and imagination. To paraphrase Kwame Anthony Appiah, I write neither as biology's friend nor its foe.⁴¹⁶ Instead I survey the pervasiveness, depth, and persistence of biological connections in social ordering in the context of movements to disregard a possibly dated, but still vital, organizing tool and offer approaches to manage these connections even as their role in family formation recedes.

416. APPIAH, *supra* note 182, at xvi ("And so I write neither as identity's friend nor as its foe.").