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Inconceivable Families

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INCONCEIVABLE FAMILIES*

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Basic biology tells us that each child has no more than two biological parents, one who supplies the egg and one who supplies the sperm. Adoption law in this country has generally followed biology, insisting only two parents be legally recognized for each child. Thus, every adoption begins with loss. Before a child can be adopted, that child must first be cut off from their family of birth, rendering the equation of adoption one of subtraction, not addition. This Article examines the biological model of adoption that insists on mimicking the nuclear family—erasing one set of parents and replacing them with another set of parents, and explores the history of adoption "matching"—requiring the new adoptive family to look identical to a biological family. But changes in family formation, to include same-sex adoption and transracial adoption, make conceivable other departures from biologically justified parenting, including legal recognition of more than two parents. This Article argues that an additive, rather than subtractive, model of adoption should prevail. In light of what we know from psychological literature about the importance of family connections in adoption and based on different adoption structures in France and other parts of the world, the Article also explores some of the trepidation about more than two parents, including the potential for conflict among multiple parents, and suggests solutions to ameliorate some of those concerns. Families that were once inconceivable are now flourishing; legal recognition of more than two parents should follow.

** Professor of Law, Texas A&M University School of Law. I gratefully acknowledge the financial and institutional support of Texas A&M, without which this Article would not have been possible. A special thanks for the helpful comments from those participating at the Texas A&M Scholarship Retreat. As is the tradition among those who write about adoption, I wish to note my place in the adoption triad: I am an adoptive parent of two children via international adoption.

INTRODUCTION

When my daughter was five years old, she decided she did not want to use the phrase, "Gotcha Day," to celebrate the day she joined our family.[1] She did not like it because to her it sounded like someone would be jumping out of the bushes to grab her and tickle her. After discussing some alternatives, she landed on "Forever Family Day" as the perfect choice since we became a family forever on that day. When she was seven, she wanted to change it again. She said that the phrase was confusing, since her birth family was her family forever and we, her adoptive family, were also her family forever. She never had a moment's doubt that she had two forever families with two sets of parents. In her mind, adoption was addition, not subtraction. To her, a family with more than two parents was not inconceivable.[2]

1. "Gotcha Day" is very commonly utilized by adoptive families to signify the day they received the child. *See* John Raible, *Introduction to the Special Issue on Transracial and Transnational Adoption: New Directions in Critical Transracial Adoption Research*, 21 J. SOC. DISTRESS & HOMELESS 111, 117 (2012) (noting that adoption agencies and adoptive parent leaders have pushed the term to normalize adoption). It is not universally utilized; some object to celebrating a day that is often traumatic for the child. *See* Kimberly McKee, *The Consumption of Adoption and Adoptees in American Middlebrow Culture*, 42 BIOGRAPHY 669, 676 (2019) (describing Gotcha Day as representing social death for adoptees as they transition from their birth countries or families to their adopted country or family). Others object to the commodification suggested by the language. Mirah Riben, *The Insensitivity of Adoption Day Celebrations*, HUFFINGTON POST: THE BLOG (Dec. 6, 2017), https://www.huffpost.com/entry/the-insensitivity-of-adoption-day-celebrations_b_7207100 [https://perma.cc/8V6M-M7PD]. It is hard terminology to avoid—even Disney has utilized it. *Jessie: Gotcha Day* (Disney Channel broadcast Aug. 24, 2012). Any hopes I had of avoiding it in my family ended with that Disney episode.

2. I share this story with permission from my now adult daughter.

Basic biology tells us that each child has no more than two biological parents, one who supplies the egg and one who supplies the sperm.[3] The law generally follows biology, insisting that only two parents be legally recognized for each child.[4] As one researcher puts it, "the dominant North American family ideology defines a *real* family as the 'nuclear family unit of a heterosexual couple and their biological children.'"[5] This is the case even where biology is not the basis of the parent-child relationship—legal adoption[6] or assisted reproduction with donated gametes.[7] As to adoption, Naomi Cahn has noted, "[e]arly adoption law confronted the formation of families without blood ties by relying on the paradigm of the nuclear family."[8] A nuclear family, of course, can have a maximum of two parents. That means that before a child can be adopted, they must lose their legal parents to have them replaced with new, adoptive legal parents.[9]

3. That basic biologism argument is often made to justify denying parenthood to those who cannot procreate, even when that parenthood is based on nonbiology adoption. Thus, those who oppose adoption by same-sex couples may argue that they cannot parent because they cannot biologically create children together. That biologism is also used to justify a limitation of two legal parents per child, even when some claims of legal parenthood do not rest on biology, like adoption and assisted reproductive technology. In this Article, I take issue with biologically based patterns for legal families, while still recognizing that adopted children often benefit by continued connections to their biological families.

4. *See* Susan Frelich Appleton, *Parents by the Numbers*, 37 HOFSTRA L. REV. 11, 11–13 (2008) (noting how family law enshrines the number two); Katharine K. Baker, *Bionormativity and the Construction of Parenthood*, 42 GA. L. REV. 649, 654–55 (2008) (detailing the state interests in bionormativity); Nancy E. Dowd, *Multiple Parents/Multiple Fathers*, 9 J.L. & FAM. STUD. 231, 231–32 (2007) ("The assumption that every child has, or should have, two, but only two, parents remains a core operating assumption of family law."); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL'Y 47, 49 (2007) (exploring why more-than-two parent families are regarded as undesirable); Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. ST. L.J. 809, 851–52 (2006) [hereinafter Jacobs, *My Two Dads*] (advocating for disaggregating biological and social paternity to recognize two fathers); Katharine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives when the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 879 (1984) ("The law recognizes only one set of parents for a child at any one time.").

5. Katarina Wegar, *Adoption, Family Ideology, and Social Stigma: Bias in Community Attitudes, Adoption Research, and Practice*, 49 FAM. RELS. 363, 363 (2000) (citing Margaret L. Andersen, *Feminism and the American Family Ideal*, 22 J. COMPAR. FAM. STUD. 235 (1991)).

6. *See* Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1080 (2003) [hereinafter Cahn, *Perfect Substitutes*] (examining how adoption has historically used the nuclear family paradigm).

7. *See* Elizabeth J. Samuels, *An Immodest Proposal for Birth Registration in Donor-Assisted Reproduction, in the Interest of Science and Human Rights*, 48 N.M. L. REV. 416, 416 (2018) [hereinafter Samuels, *An Immodest Proposal*] ("Increasingly, an individual or a couple raising a newborn child may not be biologically related to the child.").

8. Cahn, *Perfect Substitutes*, *supra* note 6, at 1080.

9. *See* Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 148 (2013) [hereinafter Seymore, *Sixteen and Pregnant*] ("[For adoption,] a court must first terminate the parental rights of the birth parents before granting parental rights to the adoptive family.").

With the advent of assisted reproductive technology, children might have, in actuality, multiple biological progenitors. One person might supply an egg to be fertilized in vitro with another person's sperm,[10] and the embryo might be placed in a third person's uterus for gestation,[11] all with the intention that the child will be actually parented by a fourth and possibly fifth person.[12] Even as medical science might recognize that the child created in such an arrangement has multiple biological progenitors, the law strips away all but two in legally recognizing who is called "parent."[13]

This is true even in cases of stepparent adoption, where a child has two legal parents already. The only way to "add" a stepparent as a legal parent is to "subtract" one legal parent.[14] It is often difficult to persuade a legal parent to relinquish that parental connection to their child in order to permit a stepparent to adopt, creating a near-impossible obstacle to according a stepparent legal parenthood.[15] If a stepparent could be added, without subtracting another legal parent, the child would benefit from having a legally recognized stepparent with rights and responsibilities, and a legal family that reflects the reality of the child's life.[16] But three legal parents simply will not comport with the nuclear family described by Naomi Cahn.

It is not inevitable, however, that a legal family must replicate biology.[17] Courts and legislatures are recognizing that same-sex couples create a legal family with children even when there is no possibility of biological

10. Samuels, *An Immodest Proposal*, *supra* note 7, at 416. Furthermore, "[a] donated egg may even combine genetic material from two women." *Id.*

11. *See id.* at 417.

12. Richard F. Storrow, *Parenthood by Pure Intention: Assisted Reproduction and the Functional Approach to Parentage*, 53 HASTINGS L.J. 597, 602 (2002). Storrow notes that a child might have as many as eight individuals who can lay claim to parentage—suggesting that in addition to multiple biological "parents," the spouses of gamete donors and gestational surrogates might also have a claim to legal parenthood. *Id.*

13. *See* Samuels, *An Immodest Proposal*, *supra* note 7, at 417 (differentiating biological parentage from social and legal parentage).

14. Margaret M. Mahoney, *Stepparents As Third Parties in Relation to Their Stepchildren*, 40 FAM. L.Q. 81, 85 (2006); *see* Margorie Engel, *Stepfamily Tribulations Under United States Laws and Social Policies*, 2005 INT'L SURV. FAM. L. 529, 530 ("[American] law is not reflective of the reality of stepfamily life.").

15. 1 ADOPTION LAW AND PRACTICE § 2.10 (Joan Heifetz Hollinger ed., 2022). There are circumstances in which a court can permit a stepparent adoption without the consent of the biological parent, but that is then a contested legal battle about termination of parental rights for cause (such as abandonment) and may be even more difficult than soliciting consent from the biological father to the stepparent adoption. *Id.* § 2.10[3].

16. *See* Mahoney, *supra* note 14, at 85 (advocating for legally recognizing the stepparent-child relationship).

17. *See* Samuels, *An Immodest Proposal*, *supra* note 7, at 417 (noting how birth records for donated gametes may increasingly be works of fiction).

procreation.[18] Same-sex married couples are being given the benefit of the marital presumption—that a child born or conceived during a legal marriage is legally the child of both—even when biology makes it impossible.[19] The entire premise of adoption is that an adoptive family is a legal family like all others, despite the lack of biological ties.[20]

It is quite conceivable, then, to decouple legal parenthood from biology and thus have a legally cognizable family with more than two legal parents. France has a centuries-old history of adoption as addition, not subtraction.[21] Since 1804, France has recognized *adoption simple*, a form of "additive filiation," where a person is made legally a member of one family without cutting off ties from the biological family.[22] California has recently passed legislation to clarify that a child can have more than two parents,[23] which could open the door to adoption that maintains parental connection between adopted children and their birth parents.

This Article argues that more states should follow California's lead, accepting that children can have more than two parents, that legal recognition of the reality of children's lives allows them to maintain connections to *all* parents, including birth parents, and have *all* parents as a social safety net of support. Allowing for more than two parents provides for an equation where adoption is addition, not subtraction. Children's needs for connection and continuity to previous caregivers, and their need to understand their biological

18. *See generally* Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) [hereinafter NeJaime, *Marriage Equality*] (providing background on parental recognition for same-sex couples).

19. *Id.* at 1248–49.

20. 1 ADOPTION LAW AND PRACTICE, *supra* note 15, § 1.01[1] ("Upon issuance of a judicial decree of adoption, the legal relationship of the adopted child with its biological parents and other members of its original family is completely severed. Adopted children become, for all legal purposes, the children of their adoptive parents.").

21. *See* Jean-François Mignot, *"Simple" Adoption in France: Revival of an Old Institution (1804–2007)*, 56 REVUE FRANÇAISE DE SOCIOLOGIE 365, 365 (2015) [hereinafter Mignot, *Simple Adoption in France*] (describing how France has two types of adoption, one of which does not break the ties between the adoptee and their family of origin).

22. *Id.*

23. CAL. FAM. CODE § 7601(c) (Westlaw through Ch. 14 of 2022 Reg. Sess.) (defining parent-child relationship but not precluding "a finding that a child has a parent and child relationship with more than two parents"). Maine has done the same. ME. STAT. tit. 19-a, § 1891(5) (2022) (recognizing a "de facto parent . . . does not disestablish the parentage of any other parent"). There are also a few cases where courts have recognized three legal parents. *See, e.g.*, Jacob v. Shultz-Jacob, 2007 PA Super 118, ¶¶ 25–26, 923 A.2d 473, 481–82 (2007) (holding that a lesbian couple and the sperm donor-friend who were raising the child together were all legal parents, and thus all were obligated to pay child support); *see also* Courtney G. Joslin & Douglas NeJaime, *Multi-Parent Families, Real and Imagined*, 90 FORDHAM L. REV. 2561, 2575–78 (2022) (using empirical data from West Virginia to argue that courts have accommodated more-than-two-parent families).

beginnings in order to form a healthy sense of self, justify the recognition of birth parents as well as adoptive parents as a child's legal parents. Because legal parents are the supportive social safety net for children it makes little sense to erase those who seek to continue their connection to children. While there has been some discussion in legal literature of more-than-two parent regimes in terms of de facto parenting,[24] there has not been an explicit focus on birth parents and adoptive parents sharing parental rights.

Part I of this Article examines the current model of adoption that insists on mimicking the nuclear family by erasing one set of parents to replace with another set of parents and explores the history of adoption "matching," where the new adoptive family was made to look identical to a biological family even to the point of matching social class, religion, hair color and texture, etc. Part I also discusses the role of secrecy in adoption: the erase-and-replace model relies on secrecy, to the extent of issuing amended birth certificates showing the adoptive parents as the birthers of the child, allowing the illusion of a biologically created nuclear family. This part also outlines early practice in stepparent adoption confirming the erase-and-replace model of adoptive family creation. Part II explores how changes in family formation, to include same-sex adoption and transracial adoption, have made inroads in the subtract-and-replace model of replicating biological families. As families quite conspicuously not based in biology proliferate, they make conceivable other departures from biologically justified parenting. Part III presents an argument that the additive, rather than the subtractive, model of adoption should prevail nationally, in light of what we know from psychological literature about the importance of family connections in adoption and based on different adoption structures in France and other parts of the world. Part IV explores some of the trepidation about more than two parents, including the potential for conflict among parents, by suggesting that lessons from collaborative lawyering in divorce and alternative dispute resolution might ameliorate some of those concerns. Finally, in Part V, the Article sets out some concluding thoughts on adoption as addition rather than subtraction, with some suggestions for the parameters of legal changes to permit more than two parents.

24. *See* Appleton, *supra* note 4, at 11 (describing the typicality of two parents in family law); Baker, *supra* note 4, at 655 (discussing the core aspects of bionormativity); Dowd, *supra* note 4, at 231–32 (emphasizing how family law relies on the assumption children have two, and only two, parents); Kessler, *supra* note 4, at 49 (exploring why more-than-two parent families are seen as undesirable); Jacobs, *My Two Dads*, *supra* note 4, at 851–52; Bartlett, *supra* note 4, at 879.

I. REPLICATING THE NUCLEAR FAMILY IN ADOPTION

For adoption to mimic the biological family, as it was once widely believed to be necessary, it required two components: (1) secrecy to make the biological family "disappear," and (2) matching the adopted child and adoptive parents in all respects to make the adoptive family appear "as if" a biological family.[25] Even in stepparent adoption, the imperative to mimic a biological family existed.

A. *Secrecy Erases the Biological Family*

Secrecy has not always been a part of adoption. Before World War II, most adopted children were older and knew the identity and whereabouts of their biological parents.[26] Often, biological parents and adoptive parents made the adoption arrangements on their own, without an intermediary, and thus knew each other's identity and whereabouts.[27] Secrecy was introduced by progressive reformers to keep birth parents away from their children placed for adoption.[28]

Reformers of the era believed that in order to save children from poverty it was necessary to remove them from their impoverished families, rather than seeking to lift entire families from poverty.[29] The infamous Charles Loring Brace of the Orphan Trains shipped children by rail from cities in the Northeast to rural areas in the Midwest to remove them from what reformers believed to be the pernicious influences of impoverished parents.[30] Reformers seeking to "save" children from poverty were concerned that birth parents would look to

25. Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 997–98 (1995) ("The adoption paradigm that has dominated most of this century is one of exclusivity, secrecy, and transposition, through which the adoptee—usually an infant—is taken from one family and given to another, with all vestiges of the first family removed.").

26. Malinda L. Seymore, *Openness in International Adoption*, 46 COLUM. HUM. RTS. L. REV. 163, 168–69 (2015) [hereinafter Seymore, *International Adoption*]; *see* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 88 (1998) [hereinafter CARP, FAMILY MATTERS] ("Child-placing experts routinely recommended that all adopted children be informed."); DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 10 (2012) (explaining how sealing original birth certificates did not become common until the middle of the twentieth century).

27. Seymore, *International Adoption*, *supra* note 26, at 168–69; CARP, FAMILY MATTERS, *supra* note 26, at 197; *see also* SIEGEL & LIVINGSTON SMITH, *supra* note 26, at 10 (providing a historical perspective on adoption practices in America).

28. Seymore, *International Adoption*, *supra* note 26, at 169.

29. *Id.* at 169–70.

30. MARILYN IRVIN HOLT, THE ORPHAN TRAINS: PLACING OUT IN AMERICA 181 (1992); *see* RICHARD WEXLER, WOUNDED INNOCENTS: THE REAL VICTIMS OF THE WAR AGAINST CHILD ABUSE 33–36 (1990) (explaining the history of child saving in the nineteenth century).

reunite with their children and would, thereby, undo all the good work of saving the children.[31] "Progressive Era social workers began to include in relinquishment forms signed by birth parents promises not to seek out the child, to learn the child's location, or to interfere in any way with the child or adoptive parents."[32] In the *Orphan Train* documentary, a survivor describes how the envelope with his biological father's address was taken from him so that he could not inform his father of his final destination.[33]

By 1938, "disappearing" the birth parents became not just a standard practice in American adoption but official policy. It was then that the influential Child Welfare League of America formalized the requirement that "the identity of the adopting parents should be kept from the natural parents."[34] By 1948, a majority of states had legislation sealing adoption records.[35] Birth parents were further erased as states began to provide "amended birth certificates" to adoptive parents, where the birth parents' names would be removed from the child's birth certificate and replaced with the names of the adoptive parents.[36] The cumulative effect of these practices was that "[b]y the mid-1960s, the confidentiality regime had transformed into a secrecy regime, with birth parents denied information about the adoptive parents and the child's whereabouts, with adoption records sealed to all, and with records of original birth certificates also sealed."[37]

Secrecy was seen as the perfect solution; it allowed adopted children to be "treated as if they had been born into the adoptive family."[38] The practice of secrecy created an "alternative family," where it was "as if the birth mother had never borne this child, as if the adoptive mother herself had."[39] As

31. CARP, FAMILY MATTERS, *supra* note 26, at 103; *see* Naomi Cahn, *Birthing Relationships*, 17 WIS. WOMEN'S L.J. 163, 173 (2006) (describing parents who placed children in child-saving organizations); Elizabeth J. Samuels, *Surrender and Subordination: Birth Mothers and Adoption Law Reform*, 20 MICH. J. GENDER & L. 33, 53 (2013) ("[A] key purpose of sealing records . . . was to protect adoptive families from interference by birth parents.").

32. Seymore, *International Adoption*, *supra* note 26, at 169–70; E. WAYNE CARP, ADOPTION POLITICS: BASTARD NATION AND BALLOT INITIATIVE 7 (2004) [hereinafter CARP, ADOPTION POLITICS].

33. *See American Experience: The Orphan Trains* (PBS television broadcast Nov. 27, 1995).

34. JANINE M. BAER, GROWING IN THE DARK: ADOPTION SECRECY AND ITS CONSEQUENCES 72 (2004).

35. *See* CARP, ADOPTION POLITICS, *supra* note 32, at 9.

36. *See* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 376–77 (2001) [hereinafter Samuels, *The Idea of Adoption*].

37. Seymore, *International Adoption*, *supra* note 26, at 173.

38. ELINOR B. ROSENBERG, THE ADOPTION LIFE CYCLE: THE CHILDREN AND THEIR FAMILIES THROUGH THE YEARS 10 (1992).

39. *Id.*

anthropologist Judith Modell notes, "As-if-begotten informs everyday language about adoption in the United States."[40] From "paper pregnant" prospective adoptive parents,[41] to adoption photo shoots with globes or beach balls in place of the pregnant belly,[42] to "Born in my Heart" memorabilia,[43] the language of procreation infuses adoption.

The erasure of the birth family allowed for "a perfect and complete substitute for creating a family through childbirth . . . ."[44] Professor Annette Appell observes, "the adoption paradigm became one of fictive birth that substituted the adoptive parents for the birth parents."[45] The new family, therefore, had to mimic biology.

40. JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 6 (2002).

41. To be "paper pregnant" is to have filed the necessary paperwork to adopt; the waiting period for a match is the paper pregnancy. *'Paper Pregnancy'—What You Need To Know*, AM. ADOPTION NEWS (Aug. 30, 2019), https://www.americanadoptions.com/blog/paper-pregnancy-what-you-need-to-know/ [https://perma.cc/7W85-TYCL]. In this blog, the prospective adoptive parent includes a photo mimicking the typical pregnancy photo, with the paper file replacing the pregnant belly. *Paper Pregnant | April Self Portrait*, ABBY GRACE BLOG (Apr. 30, 2019), https://abbygraceblog.com/paper-pregnant/ [https://perma.cc/YZT8-5PD5]. One may also buy the "paper pregnancy" t-shirt. *Paper Pregnant Shirt*, ETSY, https://www.etsy.com/market/paper_pregnant_shirt [https://perma.cc/5UNU-RDH5].

42. Adjoa Adoptions, *I'm Paper Pregnant—Adoption Announcement Ideas*, PINTEREST, https://www.pinterest.com/hansen1161/im-paper-pregnant-adoption-announcement-ideasadjoa/ [https://perma.cc/RK8H-TUTT].

43. The memorabilia quote stems from a poem often beloved of adoptive parents:

> Not flesh of my flesh
> Nor bone of my bone,
> But still miraculously my own.
> Never forget for a single minute,
> You didn't grow under my heart
> But in it.
> – Fleur Conkling Heyliger

Adoption Poem by Fleur Conkling Heyliger, FRIENDS IN ADOPTION, https://www.friendsinadoption.org/adoption-quotes-poems/adoption-poem-by-fleur-conkling-heyliger/ [https://perma.cc/PS4G-BAPP]. Memorabilia featuring the sentiment include: a "Born In My Heart" charm, *"Born in My Heart" Adoption Charm*, JAMES AVERY, https://www.jamesavery.com/products/born-in-my-heart-adoption-charm [https://perma.cc/JD7C-J9Q4]; "Born in My Heart" wall hangings, *Not Flesh of My Flesh—Fleur Conkling Heyliger Adoption Quote*, ETSY, https://www.etsy.com/listing/109410498/not-flesh-of-my-flesh-fleur-conkling [https://perma.cc/CB8P-BANM]; and children's books, *Born in My Heart Paperback*, AMAZON, https://www.amazon.com/Born-My-Heart-Dixie-Phillips/dp/1951545079 [https://perma.cc/4BEA-VJF9].

44. Samuels, *The Idea of Adoption*, *supra* note 36, at 406–07.

45. Annette R. Appell, *The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting, and the Lessons of Adoption*, 22 BYU J. PUB. L. 289, 300–01 (2008) [hereinafter Appell, *The Endurance of Biological Connection*].

B. *Matching Replaces the Biological Family*

Adoption has long been viewed as an "imitation of the 'real [i.e., biological] family.'"[46] Social workers in the middle twentieth-century believed that successful adoptive families were those that best mimicked biology.[47] Social workers sometimes described their role of family creating as "playing God," emphasizing that they were, in creating adoptive families, doing what God did in creating biological families.[48] Adoptive parents "wanted desperately for their family's status to remain unknown in order to conform to America's cultural preference for 'blood' families."[49]

Matching children and parents became the method by which the biological family was replicated so as to ensure the happiness of adoptive parents and children.[50] "This included attempts to match people of the same ethnic, religious, and racial origins, so that the family would look like a biologically formed family."[51] Children who would "fit" in their adoptive families, in terms of "physical characteristics, intellectual capacities, temperament, and religious and ethnic affiliation," would better assimilate and be what social workers promised: "[A] child 'who might have been born to you.'"[52] Agencies would go so far as to match not just race or ethnicity, but also body type, hair, and eye color.[53] Adoption historian Ellen Herman found that adoption home studies invariably included sections describing the physical appearance of adoptive parents, birth parents and children in great detail, including skin tone and hair texture.[54] Adoptive parents, in describing the child they wished to adopt, "explained their tastes in racial, ethnic and national terms."[55] One adoptive family rejected a child because her coloring was darker than theirs; another

46. Jehnna Irene Hanan, Comment, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, 27 GOLDEN GATE U. L. REV. 167, 171 (1997).

47. Brian Paul Gill, *Adoption Agencies and the Search for the Ideal Family, 1918–1965*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 160, 162 (E. Wayne Carp ed., 2002); Appell, *The Endurance of Biological Connection*, *supra* note 45, at 289.

48. Gill, *supra* note 47, at 163.

49. CARP, FAMILY MATTERS, *supra* note 26, at 126; *see also* ELLEN HERMAN, KINSHIP BY DESIGN: A HISTORY OF ADOPTION IN THE MODERN UNITED STATES 122 (2008) [hereinafter HERMAN, KINSHIP BY DESIGN] ("Successful matching erased itself, making the social design of adoption invisible.").

50. Cahn, *Perfect Substitutes*, *supra* note 6, at 1148–49.

51. *Id.* at 1149; *see also* MODELL, *supra* note 40, at 7.

52. JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950, at 137 (2000); *see also* BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 52 (2002) (describing adoption as the "as if begotten" family).

53. BEREBITSKY, *supra* note 52, at 137.

54. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 123–24.

55. *Id.* at 124.

adoptive mother said she was repulsed by a child's fair complexion and green eyes.[56] Another family explained, though they were Jewish, they did not want a child who was "heavy Jewish looking."[57]

Racial lines were maintained in adoption so rigorously that prior to the 1950s, the question of transracial adoption "was hardly ever posed, simply because the very idea of interracial adoption was virtually inconceivable."[58] Adopting a child of the "wrong" race was grounds for undoing the adoption: "Kentucky passed a law specifying that if 'within a five-year period after an adoption is finalized a child reveals traits of ethnological ancestry different from those of the adoptive parents . . . the adoption can be canceled.'"[59] Indeed, adoption agencies did not simply permit adoptions to be undone when the child's race was revealed as different from the adoptive parents, many insisted that the adoption must be canceled.[60] Louisiana justified its race-matching requirement as mimicking biology: "It was patently 'unnatural,' the state maintained, for white parents to beget a black child, or black parents to beget a white one."[61] Adoption could do no more than replicate biology.

Less visible markers were also grounds for matching, like intellectual capacity, class, and religion. Arnold Gesell, a Yale University psychologist, advocated for testing very young children to determine their level of intelligence, and then taking care that "dull" children were not placed with educated families and "bright" children placed in homes with little intellectual promise.[62] That focus on intellectual capacity served as a proxy to preserve class structures as well.[63] Children matched with highly educated parents should have the capacity to avoid disappointing them, and "ensure (as much as possible according to the scientific thought of the day) that a family's social standing would be maintained through the subsequent generations."[64] Social class matching could be an inevitable by-product of circumstances—a physician

56. *Id.*

57. *Id.*

58. RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 387 (2003); *see also* HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 238 (noting the near complete consensus against transracial adoption prior to the 1960s).

59. KENNEDY, *supra* note 58, at 388 (noting that Missouri had a similar law).

60. *See* HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 129. In one case, when an adoption agency discovered a child had an African American father, the agency begged the birth mother to take the child back so as not to risk a white family adopting the child and later discovering the mixed race. *Id.*

61. KENNEDY, *supra* note 58, at 389.

62. BEREBITSKY, *supra* note 52, at 139–40.

63. *Id.* at 140.

64. *Id.*

might match the child of an unmarried patient to another patient desiring a child, and by virtue of sharing the same doctor they would have similar social backgrounds.[65] Some agencies catered to well-to-do unwed mothers and college students, and placed their children with other well-to-do and college-educated clients.[66]

Religious matching often had little to do with "fit" between child and prospective parents, as did other matching factors, but was motivated by religious protection and driven by religious groups themselves concerned with "predatory Protestantism." This referred to the practice of Protestant child welfare organizations of separating children of minority religions (primarily Catholicism) from their communities and placing them in Protestant homes.[67] Religious matching "was more likely than any other to be codified in adoption law."[68]

Sometimes religious matching and matching on other axes, such as race, could conflict. One notorious episode involved Catholic children taken from New York City to be placed in Catholic homes in the Arizona Territory in 1904.[69] The white Catholic children were placed in the homes of Mexican Catholics, "a racialized category that jeopardized the children's entitlement to whiteness."[70] Furious white neighbors forcibly removed the children from the Mexican homes and placed them in families where their races matched but their religions often did not.[71] When the Catholic Church sued for the return of the children in their care, they lost every battle in every court, including before the U.S. Supreme Court in *New York Foundling Hospital v. Gatti*.[72] While the Supreme Court held that a habeas corpus petition was not appropriate in this case, the petitioner in the case argued it was not in the best interest of the children, being "white, Caucasian," to be in the custody of a "Mexican Indian," who "by reason of his race, mode of living, habits and education," was "unfit to have the custody, care and education of the child."[73] "Ideally, matching was a

65. *Id.* at 141.

66. *Id.*

67. Ellen Herman, *The Difference Difference Makes: Justine Wise Polier and Religious Matching in Twentieth-Century Child Adoption*, 10 RELIGION & AM. CULTURE 57, 63–64 (2000) [hereinafter Herman, *The Difference Difference Makes*].

68. MELOSH, *supra* note 52, at 76.

69. *See* LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION 18–19 (2001).

70. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 126.

71. GORDON, *supra* note 69, at 1–2.

72. 203 U.S. 429 (1906).

73. *Id.* at 435.

seamless operation in which axes of identity all pointed in the same direction,"[74] but when race and religion conflicted, race clearly trumped religion.

Matching, according to the thought of the day, not only promised better assimilation into the family, it also provided invisibility for adoption.[75] Without matching, an adoptive family might expect that others would frequently point out differences between their families and those created by biology.[76] Adoptive families modeled closely on biological families could avoid the appearance of difference—of being "less than" biological families.[77] "According to the 'matching' paradigm that has governed modern adoption, adults who acquire children born to others must look, feel, and behave as if they had given birth themselves."[78] It was crucial that adoptive families mimicked biology.

Replicating biology in an adoptive family also presented problems with stepparent families, with two biological parents cleaved by divorce and a third person marrying one of the parents. More than two parents were not a biological family, so family status was problematic for the stepparent. The law had a simple way to solve the problem: erase and replace one parent, the noncustodial biological parent, netting the biologically mandated two parents for the child.

C. *Stepparent Adoption ≠ Nuclear Family*

Erasure was difficult with stepparent families, where the child was often older and was aware of his or her biological progenitors. Nonetheless, stepparent adoption sought to mimic the pattern of other adoptions in the erase-and-replace of at least one biological parent. A stepparent family is a near-nuclear family, because it contains at least one member of the child's biological, parental dyad, "yet because it does not contain both of the child's natural parents and indeed may threaten the status of the noncustodial parent, the stepfamily challenges traditional family-based doctrines of parental rights."[79] However, formation of "new" families after divorce still sought to recreate the former nuclear, biological family.[80] Stepparent adoption, therefore, is permitted

74. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 127.

75. MELOSH, *supra* note 52, at 52 (noting that matching abetted secrecy).

76. BEREBITSKY, *supra* note 52, at 138.

77. *Id.* at 137.

78. Herman, *The Difference Difference Makes*, *supra* note 67, at 57; *see also* MELOSH, *supra* note 52, at 52 (2002) (describing adoption as the "as if begotten" family); Susan Ayres, *The Hand That Rocks the Cradle: How Children's Literature Reflects Motherhood, Identity, and International Adoption*, 10 TEX. WESLEYAN L. REV. 315, 322–23 (2004) (noting the "as if" narrative of adoption).

79. Bartlett, *supra* note 4, at 912.

80. Elizabeth J. Aulik, *Stepparent Custody: An Alternative to Stepparent Adoption*, 12 U.C. DAVIS L. Rev. 604, 607 (1979) ("Once formed, a stepfamily may prefer to think of itself as just another nuclear family.").

only if the parental rights of at least one biological parent are terminated first.[81] In order to add a stepparent, we must first subtract a biological parent.

At one time in American law, a stepparent could only adopt a child who was "available for adoption,"[82] and for a child to be available for adoption, the child could have NO legal parents. So, for a stepparent adoption to happen, both the custodial and noncustodial parents would relinquish parental rights,[83] and then the custodial parent would adopt their biological child together with the stepparent.[84] Not surprisingly, there was great reluctance on the part of the custodial parent to relinquish parental rights in the fervent hope that the trial court would recreate those parental rights by approving an adoption.[85] Thus, legislatures began to create stepparent exceptions that allowed the custodial parent to retain parental rights while allowing adoption by a stepparent married to that custodial parent.[86] But that stepparent could only be added to the family

81. Mahoney, *supra* note 14, at 85.

82. *See, e.g.*, *In re* Adoption of Luke, 640 N.W.2d 374, 379–81 (Neb. 2002).

83. This history is discernable by analyzing second-parent adoption by same-sex couples, who often tried to fit within stepparent adoption statutes to avoid complete termination of parental rights by the custodial parent. *See generally In re* Adoption of R.B.F., 803 A.2d 1195 (Pa. 2002); Adoptions of B.L.V.B. & E.L.V.B., 628 A.2d 1271 (Vt. 1993); *In re* M.M.D. & B.H.M., 662 A.2d 837 (D.C. 1995); *In re Luke*, 640 N.W.2d at 374. State statutes at the time also mandated termination of all parental rights before a child could be adopted by a stepparent. See, e.g., Texas Family Code Annotated § 16.03(b) (1984), which said "no petition for adoption of a child may be considered unless there has been a decree terminating the parent-child relationship as to each living parent of the child," but now reads,

> (b) A child residing in this state may be adopted if:
> (1) the parent-child relationship as to each living parent of the child has been terminated or a suit for termination is joined with the suit for adoption;
> (2) the parent whose rights have not been terminated is presently the spouse of the petitioner and the proceeding is for a stepparent adoption.

TEX. FAM. CODE ANN. § 162.001 (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Legislature).

84. *In re Luke*, 640 N.W.2d at 381–82.

85. *Id.* at 387 (Gerrard, J., dissenting) (noting the considerable risk a relinquishing biological parent faces that a judge will deny the joint adoption by her and the second parent, thus losing all rights in her child).

86. 1 ADOPTION LAW AND PRACTICE, *supra* note 15, § 2.10 (2021) ("State statutes generally provide that the consent of a custodial parent to the adoption of a child by a stepparent does not relieve the custodial parent of responsibilities for the support and care of the child, nor deprive the custodial parent of any parental rights."); *see, e.g.*, 1 NY CLS DESK EDITION CIVIL PRACTICE ANNUAL § 117(1)(d) (2022) ("When a birth or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepparent may adopt such child, such consent shall not relieve the parent so consenting of any parental duty toward such child nor shall such consent or the order of adoption affect the rights of such consenting spouse and such adoptive child."); TEX. FAM. CODE ANN. § 162.001 (Westlaw) ("A child residing in this state may be adopted if: . . . the parent whose rights have not been terminated is presently the spouse of the petitioner and the proceeding is for a stepparent adoption.").

if the noncustodial biological parent was subtracted—his or her parental rights had to be terminated.

Divorce, remarriage, stepparent adoption, and the *Brady Bunch* blended family all began to show how families existed outside the mold of biology. In addition, the growth of transracial adoption, creating conspicuous families clearly not biologically related, and gay and lesbian parenting, where biology was obviously not the basis of family, began to break down notions of family based on biology.[87] Families that were once inconceivable became common and conspicuous. Research on adoptee identity formation, particularly for transracial adoptees, also showed the importance of recognizing biological parents rather than erasing them.[88] It no longer seemed imperative to erase biological progenitors when the "new" family did not mimic the "as if born to" model.[89] The next section explores how these changes have revolutionized views of adoption, while the law lags behind to insist that adoptive families still mimic a biological dyad.

II. "NEW" FAMILIES NOT RELIANT ON BIOLOGY

There is a veritable cottage industry of decrying the death of the nuclear family.[90] Single parenthood and divorce in particular come under scrutiny in concerns about the demise of the nuclear family. But in adoption, it is transracial adoption and same-sex adoption that receive scrutiny because they transgress norms of the biological basis of family. And in adoption, if the family is not created through biology, it has long been a truism that it should at least look as if it were. With the decline of matching in adoption coupled with the growth of transracial adoption and same-sex adoption, parenthood has become increasingly divorced from biology and attempts to mimic biology.

87. *See* discussion *infra* text accompanying notes 90–121.

88. *See* discussion *infra* text accompanying notes 122–60.

89. *See* discussion *supra* text accompanying notes 38–45.

90. For examples of works discussing and analyzing the death of the nuclear family, see Bartlett, *supra* note 4; David Popenoe, *American Family Decline, 1960–1990: A Review and Appraisal*, 55 J. MARRIAGE & FAM. 527 (1993); Clem Brooks, *Religious Influence and the Politics of Family Decline Concern: Trends, Sources, and U.S. Political Behavior*, 67 AM. SOCIO. REV. 191 (2002); NATASHA ZARETSKY, NO DIRECTION HOME: THE AMERICAN FAMILY AND THE FEAR OF NATIONAL DECLINE, 1968–1980 (2007); Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403 (2010).

A. *Transracial Adoption and the End of Matching*

As Randall Kennedy notes, "most jurisdictions prior to the 1960s took for granted the inadvisability of black-white interracial adoptions . . . ."[91] It was so commonplace an understanding that only two states bothered to legislate against it.[92] Even at the height of the matching era, however, there were dissenters. Historian Ellen Herman profiles three of them in her book, *Kinship by Design*: Judge Justine Wise Polier, who was judge of a New York domestic relations court starting in 1935 and fought against religious matching;[93] Pearl Buck, the well-known author of *The Good Earth*, who adopted seven mixed-race children between the 1920s and 1950s and even started her own adoption agency dedicated to "children considered unadoptable because of their mixed heritage";[94] and Helen Doss, whose adoption memoir, *The Family Nobody Wanted*, valorized the "one-family U.N." she created through transracial adoption.[95] As Herman notes:

> After midcentury the lessons of the Holocaust and the pluralistic formulations of identity and solidarity that accompanied the civil rights revolution made their mark on the adoption world. Public figures, including Justine Wise Polier and Pearl Buck, insisted that matching was antithetical to Americanism long before diversity and multiculturalism became keywords in American political culture . . . . Claims about children's adoptability and the importance of resemblance consequently appeared to be not simply antiquated but unjust.[96]

Despite these critiques of matching on racial grounds, there were very few formal adoption placements of children of color, whether in same-race homes or transracially.[97] There were only a few hundred transracial adoptions of Black

91. KENNEDY, *supra* note 58, at 387–88.

92. *See id.* at 388.

93. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 205–09.

94. *Id.* at 205–12; LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 151–52 (2012).

95. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 205–12.

96. *Id.* at 227.

97. *See id.* at 229–30 ("Adoption was 'the least likely of all child welfare services to be extended to Black children.'" (quoting ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE 72 (1972))). Informal adoption of Black children by Black parents is quite common, however. Nerissa LeBlanc Gillum, *Review of Research on Black Families Who Formally Adopted Black Children*, 92 FAMS. SOC'Y 324, 324 (2011) (noting that informal adoption is common practice in Black families, from the time of slavery to today). Black families may not formally adopt because adoption agencies usually do not seek to recruit Black families and do not have Black staff who might more fairly evaluate Black families for suitability. Kerry Woodward, *Marketing Black Babies Versus Recruiting Black Families: The Racialized Strategies Private*

children per year by the 1960s,[98] but even that small number dropped by the mid-1970s after the National Association of Black Social Workers ("NABSW") condemned transracial adoption in 1972 as genocide:

> Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally [in Black families] in order that they receive the total sense of themselves and develop a sound projection of their future . . . . Black children in white homes are cut off from the healthy development of themselves as Black people.[99]

While many decry the effect of this statement on transracial adoption,[100] it must be recognized that there was little evidence of a robust trend of transracial adoption before this position statement was promulgated.[101] Randall Kennedy, who strongly argues that the statement was powerfully influential, presents very low figures of transracial adoption of Black children before and after the NABSW statement: 733 such adoptions in 1968, 1,447 in 1969, 2,284 in 1970 (the 1972 statement), and then 1,091 adoptions in 1973 and 747 in 1974.[102] While there is undoubtedly a decline, the number of transracial adoption of Black children by white families represents a tiny fraction of overall adoptions at that time. The overall number of adopted children in 1968 was 166,000 and that number dropped to 138,000 in 1974.[103] Indeed, there was a

Adoption Agencies Use To Find Homes for Black Babies, 2 SOCIO. RACE & ETHNICITY 482, 487 (2016) ("[P]rivate adoption agencies have done a poor job of attracting and serving Black and other prospective parents of color, including mixed-race couples."). Thus, transracial adoption usually involves white adoptive parents with children of color; the number of Black families adopting white children is extremely small.

98. *See* KENNEDY, *supra* note 58, at 396 (stating that in 1968, just 733 Black children were adopted by white families).

99. *Id.* at 393 (quoting NAT'L ASS'N OF BLACK SOC. WORKERS, POSITION STATEMENT ON TRANS-RACIAL ADOPTIONS (1972)). Laura Briggs provides a counternarrative to Kennedy's, arguing that the purpose of the NABSW statement was not "primarily an attack on white parents' skills" to parent Black children, but rather "an effort to keep black families together in the context of coercive separation of black children from their families dating back to slavery." BRIGGS, *supra* note 94, at 28–29.

100. Ellen Herman notes: "For thirty years, commentaries on transracial adoption have unfailingly identified the NABSW position paper as a powerful intervention in the debate and credited it with preventing adoptions that might have occurred otherwise." HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 250.

101. *Id.* ("Racial fears among whites had always inhibited transracial adoptions, of course, and the number of African American children adopted by whites was never large.").

102. KENNEDY, *supra* note 58, at 396; *see also* BRIGGS, *supra* note 94, at 35–37 (noting the low numbers of adoption of Black children in same-race and cross-race adoptions).

103. William Robert Johnson, *Historical Statistics on Adoption in the United States, Plus Statistics on Child Population and Welfare* (Aug. 5, 2017), http://www.johnstonsarchive.net/policy/adoptionstats.html [https://perma.cc/8SVV-4AD7].

drop in the number of children overall in the United States between 1968 and 1974.[104] This suggests that the drop in transracial adoption was consistent with general trends, rather than attributable to the NABSW statement. At that time, there was not a large groundswell of adoptive families seeking to adopt outside the paradigm of matching, especially across the Black/white racial divide. "The NABSW statement was influential, but its influence has been exaggerated. The NABSW was never able to translate its opposition to transracial adoption into law."[105]

Further, the NABSW position had little effect on the adoption of other children of color by white families. "Asian children placed in white families were the adoptees who made transracial adoption a conspicuous social issue for the first time."[106] The adoption of Asian children from Japan, Korea, and Vietnam was a response to American wars in those locales, and "were spearheaded by military and civilian families who responded to humanitarian appeals by making foreign children (some of them fathered by members of the U.S. armed services) their own."[107] In 1957, there were 10,900 international adoptions.[108] The large number from South Korea[109] far outstripped that year's transracial adoption of Black children by white families. Between 1968 and 1975, immigrant orphans admitted to the United States for the purposes of adoption increased by 350%.[110]

As the demand for adoptable children began to outstrip the supply of white children, attitudes toward transracial adoption began to change. Some prospective adoptive parents sued agencies and states when denied the ability to adopt a child of a different race, alleging that they were the subject of discrimination because of their race.[111] There were concerns about the number of Black children in foster care and the length of time they spent there, and some argued it was because available white families were prevented from

104. *See id.*

105. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 251.

106. *Id.* at 239.

107. *Id.*

108. Johnson, *supra* note 103.

109. *See* HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 220.

110. *Id.* at 252.

111. *See, e.g.*, Drummond v. Fulton City Dep't of Fam. & Child.'s Servs., 563 F.2d 1200, 1200–01 (5th Cir. 1977); DeWees v. Stevenson, 779 F. Supp. 25, 25 (E.D. Pa. 1991); *In re* Moorehead, 600 N.E.2d 778 (Ohio Ct. App. 1991). Note that in 1994, the Multi-Ethnic Placement Act, discussed in text accompanying notes 115–18, was passed, limiting the use of race in adoption and foster placement decisions.

adopting them.[112] Laura Briggs argues that the real reason was not a dearth of adoptive placements, but rather the lower rates of family reunification for Black children.[113] But by 1994, Congress passed the Multi-Ethnic Placement Act ("MEPA").[114] MEPA prohibited adoption and foster agencies that received federal funds from discriminating on the basis of race in adoptive and foster placements.[115] At least, race could not be the sole factor in the placement decision, nor could race considerations delay or deny a child's placement.[116]

MEPA did not achieve its intended purpose of preventing race matching, however:

> As Senators Carol Moseley-Braun and Howard Metzenbaum, the sponsors of the original legislation, stated in separate MEPA-related articles, the wording of MEPA did not allow race to be the sole factor in rejecting pre-adoptive parents, but it did allow race to be considered in adoption placements. Thus, rather than achieving the congressionally intended purpose of resolving the transracial adoption debate by limiting the basis for considering race, MEPA fueled the flames of the debate. In addition, there was evidence that, following the passage of MEPA, race matching in adoptions continued.[117]

The Act was strengthened in 1996 with the passage of new legislation that provided an enforcement mechanism—funding reductions for MEPA violations—and explicit language prohibiting all consideration of race in adoption.[118]

Transracial adoptions today represent a far more robust portion of adoptions than in the 1960s. In one study, transracial adoptions represented 21% to 24% of adoptions between 2000 and 2012.[119] In a government report based on the 2007 National Survey of Adoptive Parents, 40% of adoptions were

112. *See* KENNEDY, *supra* note 58, at 393; Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1166 (1991).

113. *See* BRIGGS, *supra* note 94, at 119 ("The question of the race of adoptive parents was essentially a red herring if the issue was getting children out of foster care—black children were spending a disproportionate amount of time in foster care because TANF and the moral panic around crack were separating them from their unmarried mothers as a matter of federal and state policy.").

114. Multi-Ethnic Placement Act, Pub. L. No. 103-382, 108 Stat. 3518 (1994) (codified at 42 U.S.C. § 622).

115. *Id.* § 553.

116. *See* CYNTHIA HAWKINS DEBOSE, MASTERING ADOPTION LAW AND POLICY 74 (2015).

117. *Id.* at 75.

118. Act of Aug. 20, 1996, Pub. L. No. 104-188, 110 Stat. 1755, 1903–04 (1996) (codified as amended at scattered sections of 26 U.S.C.).

119. Elisha Marr, *U.S. Transracial Adoption Trends in the 21st Century*, 20 ADOPTION Q. 222, 234 (2017).

transracial.[120] In another study, data revealed that "90% of Asian adoptees, 64% of multiracial adoptees, 62% of Hispanic adoptees, and 55% of [B]lack adoptees" were being raised in transracial placements in 2011.[121]

With the debates about transracial adoption, as well as the growth in numbers, there is increased awareness among transracial adoptive families of the need to address racial identity development—though there are many disagreements amongst parents about how to do so.[122] Adoptive parents may seek to instill racial pride by providing dolls and books with characters who look like the adopted child.[123] Children may attend cultural activities connected to their racial or ethnic identities.[124] Organizations have sprung up for transracial adoptive families, where children can interact with other children who share their ethnic, racial, cultural, and adoptive background.[125] Some international adoptive families take homeland tours designed to introduce the adopted child to their home country and provide an experience where they are no longer in the minority.[126] Adoptive parents may ensure that their children have adult role models of their race or ethnicity.[127] Some seek to prepare their children to face racism in the future.[128] These activities are very different from earlier days of

120. SHARON VANDIVERE, KARIN MALM & LAURA RADEL, ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS 14 fig.7 (2009).

121. Nicholas Zill, *The Changing Face of Adoption in the United States*, INST. FAM. STUD. (Aug. 8, 2017), https://ifstudies.org/blog/the-changing-face-of-adoption-in-the-united-states [https://perma.cc/QVX5-HDWN].

122. *See* Ellen E. Pinderhughes, Jessica A.K. Matthews, Xian Zhang & Judith C. Scott, *Unpacking Complexities in Ethnic-Racial Socialization in Transracial Adoptive Families: A Process-Oriented Transactional System*, 33 DEV. & PSYCHOPATHOLOGY 493, 494–95 (2021); Caitlin Killian & Nikki Khanna, *Beyond Color-Blind and Color-Conscious: Approaches to Racial Socialization Among Parents of Transracially Adopted Children*, 68 FAM. RELS. 260, 262 (2019).

123. *See* Robin L. Soster, Kelly L. Tian, Alexander S. Rose & Randall L. Rose, *Consuming To Be Good: Therapeutic Ideology and Transracial Adoptive Mothers*, 53 J. CONSUMER AFFS. 201, 215 (2019).

124. *See* Pinderhughes, *supra* note 122, at 499; Maya Blair & Meina Liu, *Ethnically Chinese and Culturally American: Exploring Bicultural Identity Negotiation and Co-Cultural Communication of Chinese-American Female Adoptees*, 13 J. INT'L & INTERCULTURAL COMMC'N 347, 348 (2020).

125. *See, e.g.*, FAMILIES WITH CHILDREN FROM CHINA, GREATER N.Y., https://fccny.org/ [https://perma.cc/K66W-NXN3] (supporting Chinese adoptees, their families, and their friends); ASIA FAMILIES, https://www.asiafamilies.org/ [https://perma.cc/2ER6-8H5M] (supporting adoptees from Korea); PACT: AN ADOPTION ALLIANCE, https://www.pactadopt.org/home.asp [https://perma.cc/UN6E-F9X9] (supporting adopted children of color and their families); *see also* Ravinder Barn, *Transracial Adoption: White American Adoptive Mothers' Constructions of Social Capital in Raising Their Adopted Children*, 41 ETHNIC & RACIAL STUD. 2522, 2529 (2018) (noting the importance white adoptive mothers placed on socialization through relationships with families "like them").

126. Sandra Sun-Ah Ponting, *Birth Country Travel and Adoptee Identity*, 93 ANNALS TOURISM RSCH. 1, 2 (2022).

127. *See* Barn, *supra* note 125, at 2531–32.

128. It seems that fewer white adoptive parents seek to address racism, even when they address racial and cultural identity formation. *See* CHRISTINE WARD GAILEY, BLUE-RIBBON BABIES AND

transracial adoption, when adoption professionals gave "the same parenting instructions given to same-race adoptive families—'raise your adopted child "as if" they were your biological child.'"[129]

The data are not fully in on whether the more recent attempts to address racial and cultural identity in transracial adoption have made a difference for transracial adoptees;[130] the voices of these adoptees as they reach adulthood are beginning to emerge and will prove helpful in answering that question.[131]

With the exponential growth in transracial adoption and the end of matching, modern adoption does not mimic biological expectations. Today no one would take the position that Louisiana took in 1970, that it was "unnatural" for white parents to produce a Black child via biology, and therefore it was equally unnatural for them to adopt.[132]

B. *Same-Sex Parenting Made Visible*

Biology prevents single persons or same-sex couples, unaided, from producing offspring. Yet, there is an increasing number of such families.[133] As one book puts it, "The gay and lesbian community is experiencing a baby boom."[134] Approximately a third of lesbian couples report they are parenting children, while a little more than a fifth of gay couples reported parenting at least one child.[135] While many are raising biological children from a prior

LABORS OF LOVE: RACE, CLASS, AND GENDER IN U.S. ADOPTION PRACTICE 34 (2010); Pinderhughes et al., *supra* note 122, at 499–500.

129. Pinderhughes et al., *supra* note 122, at 494. Some transracial adoptive parents still follow this advice, taking a color-blind approach that ignores or minimizes the importance of race. Killian et al., *supra* note 122, at 262.

130. Researchers also identify a possible confounding factor—the comfort levels of more recent transracial adoptees may have less to do with parental efforts to address racial identity and more to do with the availability of the internet and online communities of color. *See* Jason D. Reynolds (Taewon Choi), Nicole T. Elimelech, Simonleigh P. Miller, Megan E. Ingraham, Bridget M. Anton & Chiroshri Bhattacharjee, *In Their Own Voices: Identity and Racial Socialization Experiences of Young Adult Chinese Adoptees*, 25 REV. GEN. PSYCH. 85, 86 (2021).

131. *See id.* at 86–87; Krystal K. Cashen, Dominique K. Altamari, Harold D. Grotevant & Ruth G. McRoy, *Hearing the Voices of Young Adult Adoptees: Perspectives on Adoption Agency Practice*, 97 CHILD WELFARE, no. 4, 2019, at 1, 2; Julia Chinyere Oparah, Sun Yung Shin & Jane Jeong Trenka, *Introduction* to OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds., 2021).

132. *See* KENNEDY, *supra* note 58, at 389.

133. Cynthia Godsoe, *Adopting the Gay Family*, 90 TUL. L. REV. 311, 315, 329–30 (2015).

134. SUZANNE M. JOHNSON & ELIZABETH O'CONNOR, THE GAY BABY BOOM: THE PSYCHOLOGY OF GAY PARENTHOOD 1 (2002).

135. Jackie M. Davis & Mary Frances Hanline, *Young Children with Same-Sex Parents: Supporting Families and Children in Early Childhood Programs*, 21 YOUNG EXCEPTIONAL CHILD. 127, 128 (2018) (relying on U.S. Census Bureau data). Some report that as many as fourteen million children are being

heterosexual relationship,[136] one source notes that 65,500 adopted children are being raised by gay parents, amounting to more than four percent of all adopted children.[137] Cynthia Godsoe notes that even while forty-three states explicitly banned gay marriage before the Supreme Court invalidated such bans, only seven banned same-sex fostering and adoption.[138] But it may be less that states approved of same-sex adoption than that most gay parents were closeted.[139] Single-parent adoption, and in particular single-woman adoption, was not uncommon prior to World War II,[140] and some of those single adoptions were actually by lesbian women who raised their children together with other women.[141]

When gay parenting first became visible, however, it was less accepted. As gay and lesbian people sought rights in the 1970s, there was a backlash[142] that included pushback against same-sex adoption.[143] In 1977, as part of antigay activism spearheaded by Anita Bryant, the Florida legislature enacted an explicit ban against gay and lesbian individuals adopting.[144] In a 1977 Gallup

raised by same-sex parents, but the accuracy of that figure has been questioned. *See* Walter R. Schumm, Martin Seay, Keondria McClish, Keisha Clark, Abdullah Asiri, Nadyah Abdullah & Shuyi Huang, *Assessing the History of Exaggerated Estimates of the Number of Children Being Raised by Same-Sex Parents As Reported in Both Legal and Social Science Sources*, 30 BYU J. PUB. L. 277, 278–79 (2016).

136. *See* Davis et al., *supra* note 135, at 128; *see also* Godsoe, *supra* note 133, at 322.

137. GARY J. GATES, M.V. LEE BADGETT, JENNIFER EHRLE MACOMBER & KATE CHAMBERS, ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES 7 (2007), https://www.urban.org/sites/default/files/publication/46401/411437-Adoption-and-Foster-Care-by-Lesbian-and-Gay-Parents-in-the-United-States.PDF [https://perma.cc/Y7WF-WU6C].

138. Godsoe, *supra* note 133, at 335.

139. *Id.* at 330 ("Historical accounts do not generally discuss LGB adoption before the 1970s for the simple reason that homosexuality was still criminalized, and few people were 'out.'").

140. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 203–04.

141. *Id.* at 90–91 (discussing the relationship and adoptions of two women, Jessie Taft and her life partner, Virginia Robinson, who were also child welfare experts in the 1920s; the exact nature of their relationship is, of course, unknown, but they bought a house together and raised the children together, and Taft described in a letter, "We feel very much like a family"); *see also id.* at 90 n.24 (listing almost a dozen women of that era, mostly child welfare and health advocates, who adopted as single women and raised children with female partners).

142. Gillian Frank, *"The Civil Rights of Parents": Race and Conservative Politics in Anita Bryant's Campaign Against Gay Rights in 1970s Florida*, 22 J. HIST. SEXUALITY 126, 127 (2013).

143. Carlos A. Ball, *The Immorality of Statutory Restrictions on Adoption by Lesbians and Gay Men*, 38 LOY. U. CHI. L.J. 379, 383 (2007).

144. *Id.* at 383; HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 292; BRIGGS, *supra* note 94, at 245–46. The Eleventh Circuit upheld the constitutionality of the Florida ban in 2004 in a case involving gay foster parents of HIV-positive children who wished to adopt them. *See generally* Lofton v. Sec'y of Dep't of Child. and Fam. Servs., 358 F.3d 807 (11th Cir. 2004) (upholding the ban on due process grounds). For more about the Lofton-Croteau family that fought the Florida law, see WE ARE DAD (Tavroh Films 2005). But in 2010, a Florida state court found that the ban on gay adoption violated the Florida Constitution. *See generally* Fla. Dep't of Child. and Fams. v. *In re* Adoption of X.X.G. & N.R.G., 45 So. 3d 79 (Fla. Dist. Ct. App. 2010) (holding that the ban violated the equal protection clause of the Florida Constitution).

poll, only fourteen percent of Americans believed that gays and lesbians should be allowed to adopt children.[145] In the 1980s and 90s, "Christian conservatives supported definitions of kinship and familial divisions of labor that were, in their view, 'traditional': families centered on heterosexual marriages with stay-at-home mothers and breadwinning fathers."[146] Thus, though they vocally supported adoption as an antidote to abortion,[147] they opposed adoption by gay men and lesbians.[148] Arguments about the "traditional" family were deeply entwined with biology; as one legislator opposing gay adoption said, "A normal biological unit of a family is a mother and father."[149] Never mind that at issue was adoptive families, not biological families—again, adoption must mimic biology in this conservative formulation.

Nonetheless, "gay family law attorneys continued to win victories, expanding options for LGBT people to adopt or foster, first as veiled 'single parents' who hid their lovers and later as gay couples."[150] According to a Gallup poll, by 2003 the number of Americans who believed gay men and lesbians should be permitted to adopt had increased from the 1977 figure of fourteen percent to forty-nine percent.[151] A year before the Supreme Court legalized gay marriage in *Obergefell v. Hodges*[152] in 2015, the Gallup poll showed sixty-three percent believed that same-sex couples should have the legal right to adopt a child.[153] In *Obergefell*, the children of gay and lesbian couples were the centerpiece of the argument for the validity of gay marriage.[154] Justice Kennedy highlighted the story of one such couple:

> April DeBoer and Jayne Rowse are co-plaintiffs in the case from Michigan. They celebrated a commitment ceremony to honor their permanent relation in 2007. They both work as nurses, DeBoer in a neonatal unit and Rowse in an emergency unit. In 2009, DeBoer and Rowse fostered and then adopted a baby boy. Later that same year, they welcomed another son into their family. The new baby, born

145. *LGBT Rights*, GALLUP, https://news.gallup.com/poll/1651/gay-lesbian-rights.aspx [https://perma.cc/NAM5-GRBX] (cataloging data associated with June 17–20, 1977).

146. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 292.

147. Samuel L. Perry, *Conservative Christians and Support for Transracial Adoption as an Alternative to Abortion*, 95 SOC. SCI. Q. 380, 381 (2014); BRIGGS, *supra* note 94, at 28.

148. HERMAN, KINSHIP BY DESIGN, *supra* note 49, at 292.

149. Kari E. Hong, *Parens Patri[archy]: Adoption, Eugenics, and Same-Sex Couples*, 40 CAL. W. L. REV. 1, 7 (2003).

150. BRIGGS, *supra* note 94, at 258.

151. GALLUP, *supra* note 145 (cataloging data associated with May 5–7, 2003).

152. 576 U.S. 644 (2015).

153. GALLUP, *supra* note 145 (cataloging data associated with May 8–11, 2014). By 2019, the figure had risen again to seventy-five percent. *Id.*

154. NeJaime, *Marriage Equality*, *supra* note 18, at 2065.

> prematurely and abandoned by his biological mother, required around-the-clock care. The next year, a baby girl with special needs joined their family. Michigan, however, permits only opposite-sex married couples or single individuals to adopt, so each child can have only one woman as his or her legal parent. If an emergency were to arise, schools and hospitals may treat the three children as if they had only one parent. And, were tragedy to befall either DeBoer or Rowse, the other would have no legal rights over the children she had not been permitted to adopt. This couple seeks relief from the continuing uncertainty their unmarried status creates in their lives.[155]

The Court further noted changing attitudes toward gay and lesbian couples, again focusing on family: "In the late 20th century, following substantial cultural and political developments, same-sex couples began to lead more open and public lives and to establish families."[156]

One of its four justifications for protecting the right to marry in *Obergefell* was that "it safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education."[157] The Court noted that marriage was important to children in allowing them to see their families as similar to others in their community,[158] and to benefit from the permanency and stability that marriage affords and that is so profoundly in children's best interest.[159] Furthermore, the Court observed that many children were already being raised by gay couples in loving and nurturing homes, and at least in adoptive and foster homes, being raised with the full approval of states that permit gay adoption and foster placements.[160]

But in case there was any doubt that the Court was relying on *biological* notions of family in approving gay marriage, Justice Kennedy also decoupled the ruling from procreation, recognizing that procreation "is not and has not been a prerequisite for a valid marriage."[161] Gay families were fully families, deserving of the same recognition that marriage provides, as straight families. Children of gay and lesbian couples needed marriage so that they would not "suffer the stigma of knowing their families are somehow lesser."[162]

155. *Obergefell*, 576 U.S. at 658–59.

156. *Id.* at 661.

157. *Id.* at 667.

158. *Id.* at 668 (describing how giving recognition and legal structure to adopted children's parents' relationship, children understand the integrity and closeness of their own family).

159. *Id.*

160. *Id.*

161. *Id.* at 669.

162. *Id.* at 668.

The Supreme Court further decoupled family from biology for gay couples in *Pavan v. Smith*,[163] by extending the marital presumption of parentage to a lesbian couple. The marital presumption, of ancient origins, made a child conceived or born during marriage legally the child of the mother's husband.[164] The State of Arkansas, post-*Obergefell*, refused to issue birth certificates to two married same-sex couples who conceived via donor insemination.[165] If they had been an opposite-sex couple who conceived by means of assisted reproduction both parents would have been listed on the birth certificate despite the absence of biological parenthood.[166] The Supreme Court reaffirmed the holding of *Obergefell*, that the Constitution entitled same-sex couples not just the right to marry, but also that the marriage be "on the same terms and conditions as opposite-sex couples."[167] Arkansas could not deny the birth certificate based on the marital presumption, as it was one of the "constellation of benefits that the States have linked to marriage."[168]

Despite the public acceptance of gay and lesbian parenting, there is still resistance couched in terms of religious freedom. In *Fulton v. City of Philadelphia*,[169] the Supreme Court held that it violated the free exercise rights of a religious-based agency to insist that it comply with the City's nondiscrimination ordinance that prevented discrimination against gay and lesbian people.[170] The Catholic agency insisted that it would burden their religious exercise to place foster children with gay and lesbian couples. Despite holding that the agency was entitled to discriminate in this case, the Court also

163. 137 S. Ct. 2075 (2017) (per curiam).

164. Michael H. v. Gerald D., 491 U.S. 110, 124 (1989) (tracing the history of the presumption that children were legally the child of the mother's husband, and citing H. NICHOLAS, ADULTURINE BASTARDY 1 (1836), which in turn cites BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (1569)).

165. Smith v. Pavan, 2016 Ark. 437, at 2–3, 505 S.W.3d 169, 172, *rev'd*, 137 S. Ct. 2075 (2017) (per curiam). Arkansas argued that the purpose of birth certificates is simply to record a biological fact—the "truthfully recorded" "nexus of the biological mother and the biological father." *Id.* at 13–14, 505 S.W.3d at 179. That was a patently false statement, since birth certificates in Arkansas can reflect the nonbiological father of a child conceived through donor insemination and the nonbiological parents of an adopted child. *Pavan*, 137 S. Ct. at 2078.

166. *Pavan*, 137 S. Ct. at 2077. The Arkansas statute provided: "Any child born to a married woman by means of artificial insemination shall be deemed the legitimate natural child of the woman and the woman's husband if the husband consents in writing to the artificial insemination." ARK. CODE ANN. § 9-10-201(a) (LEXIS through all acts of the 2021 Reg. Sess., First Extraordinary Sess., Extended Sess., Second Extraordinary Sess., and the 2022 Fiscal Session including corrections and edits by the Ark. Code Revision Comm'n).

167. *Pavan*, 137 S. Ct. at 2078 (citation omitted).

168. *Id.* at 2077 (citation omitted).

169. 141 S. Ct. 1868 (2021).

170. *See id.* at 1875.

noted that the City's interest in preventing discrimination was considerable: "for '[o]ur society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.'"[171]

The Court's full acceptance in *Obergefell* and *Pavan* of families that do not mimic biology is one more example of how gay adoption and parenting has "expanded the boundaries of acceptable families."[172] As biology becomes less central in definitions of family, the argument that adoption should mimic the traditional nuclear, biological family becomes less compelling.

C. *Assisted Reproduction Decoupling Family & Biology*

Noted family law scholar Janet Dolgin has observed that "[t]he advent and swift expansion of reproductive technology beginning in the late 1970s accelerated the transformation of the family by undermining sacred assumptions about the reproductive process."[173] By decoupling family from biology, assisted reproductive technology opens up possibilities of family forms that do not mimic nature.[174] "Increasingly, an individual or a couple raising a newborn child may not be biologically related to the child."[175]

Assisted reproductive technology is the paradigmatic example of multiple biological progenitors, with the law seeking to restrict legal parenthood to a maximum of two parents. One person might supply an egg to be fertilized in vitro with another person's sperm,[176] and the embryo might be placed in a third person's uterus for gestation,[177] all with the intent that the child will be actually parented by a fourth and possibly fifth person.[178] Even as medical science might recognize that the child created in such an arrangement has multiple biological

171. *Id.* at 1882 (quoting Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018)).

172. Godsoe, *supra* note 133, at 339.

173. Janet L. Dolgin, *An Emerging Consensus: Reproductive Technology and the Law*, 23 VT. L. REV. 225, 225 (1998).

174. Courtney G. Joslin, *(Not) Just Surrogacy*, 109 CALIF. L. REV. 401, 404 (2021) ("Surrogacy law holds the potential to challenge family law rules that long have excluded families that depart from gender- and biology-based norms about the nature of motherhood and fatherhood."); Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2264 (2017) ("Those who form families through assisted reproductive technologies (ART)—donor insemination, *in vitro* fertilization, and gestational surrogacy—frequently establish parental relationships in the absence of gestational or genetic connections to their children.").

175. Samuels, *An Immodest Proposal*, *supra* note 7, at 416; NeJaime, *Marriage Equality*, *supra* note 18, at 1264.

176. Samuels, *An Immodest Proposal*, *supra* note 7, at 416.

177. *Id.*

178. Storrow, *supra* note 12, at 602. Storrow notes that a child might have as many as eight individuals who can lay claim to parentage—in addition to multiple biological "parents," the spouses of gamete donors and gestational surrogates might also have a claim to legal parenthood.

progenitors, the law strips away all but two in legally recognizing who is called "parent."[179] Legal parenthood in assisted reproduction today is determined in most jurisdictions by social, not biological, factors like who intended to parent.[180] That was not, however, always the case. In the early days of surrogacy, courts often determined legal parenthood by biology.

In *Doe v. Doe*,[181] for example, a Connecticut couple hired a surrogate who was impregnated with the husband's sperm. The wife had no genetic or gestational role in the child's conception or birth.[182] But the couple pretended that the wife had given birth to the child, with the surrogate falsely presenting as the wife at prenatal visits and at the hospital at birth.[183] The wife went so far as to stuff pillows under her shirt to simulate pregnancy. The names of the parents on the certified birth certificate were the names of the husband and wife.[184] They raised the child together for eight years before separating, and then shared custody during seven years of a contested divorce and custody proceeding.[185] Yet the Connecticut court held that the wife was not a legal parent.[186] Thus, the custody dispute was not between a mother and father, but between a parent and a nonparent.[187]

The lack of a genetic or gestational link to the child also led a California court to rule that a surrogate, not the intending mother, was the legal mother of a child.[188] Robert and Cynthia arranged to have a child via a surrogate,[189] but they filed for divorce soon after the birth.[190] Cynthia sought custody of the child, and the surrogate intervened also seeking custody.[191] The trial court

179. Samuels, *An Immodest Proposal*, *supra* note 7, at 416.

180. NeJaime, *Marriage Equality*, *supra* note 18, at 1264.

181. 710 A.2d 1297 (Conn. 1998).

182. *Id.* at 1302.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at 1297.

187. *Id.* at 1322–23. That legal posture advantaged the father with a presumption that it is in the best interest of the child to be in the custody of the parent. As a legal stranger to the child, the nonmother had the obligation to rebut the presumption by showing that "it would be detrimental to the child to permit the parent to have custody." *Id.* at 1301 n.5 (citation omitted). The court ultimately concluded that the stranger mother had met this burden and awarded her custody, *id.* at 1323, but if she were a legal parent, she would not have had the burden of rebutting the presumption in the first place.

188. *In re* Marriage of Moschetta, 30 Cal. Rptr. 2d 893, 903 (Cal. Ct. App. 1994).

189. *Id.* at 895.

190. *Id.* In fact, the surrogate found out while she was in labor that the Moschettas were having marital difficulties and began to rethink the surrogacy arrangement. *Id.* She only allowed them to take the baby home after they promised they would stay together. *See id.* They began divorce proceedings when the baby was seven months old. *See id.*

191. *Id.*

declared that the child's legal parents were the biological father, Robert, and the surrogate mother.[192] Cynthia was not a mother at all.[193] The appellate court concluded that when parentage is judged in traditional surrogacy, "biology is destiny."[194]

As Professor Courtney Joslin notes, "In the past, the person who gave birth was always considered a legal parent. Hence, children always had mothers at birth. But under permissive surrogacy laws, the person who gave birth may not be the child's legal parent at birth."[195] Gestational surrogacy presented a problem with the biology-is-destiny theory of parenthood because two women can make a claim based in biology as one woman supplies the egg and another woman gestates and births the baby.[196] But because the law will only recognize one legal mother for the child, "identifying the legal mother in gestational surrogacy cases sometimes gives rise to legal disputes."[197]

Today, surrogacy legal disputes are generally resolved by statute; twenty-seven jurisdictions (twenty-six states and the District of Columbia) have surrogacy statutes.[198] Twenty-two of the twenty-seven regimes that have addressed surrogacy by statute permit at least some surrogacy arrangements and will enforce surrogacy contracts.[199] Who is deemed a parent to the child and who is deemed a legal stranger to the child depends on the specifics of the statutory scheme,[200] but the general trend is to recognize the intended parents as legal parents and the surrogate as a legal stranger.

To illustrate how the newer statutory law has (or has not) changed the "biology is destiny" cases of *In re Marriage of Moschetta*[201] and *Doe v. Doe*,

192. *Id.*

193. *Id.* at 903. The court rejected the premise that Cynthia and the surrogate were "equally" the mother of the child—Cynthia because she intended to be the mother and the surrogate because she was genetically and gestationally the mother—and that intentionality should break the tie between them. *Id.* at 896. The court bluntly asserted: "The flaw in the argument is that Cynthia is not 'equally' the mother of Marissa. In fact, she is not Marissa's mother at all. There is no 'tie' to break." *Id.*

194. *Id.* at 903.

195. Joslin, *supra* note 174, at 406; *see also* Courtney Megan Cahill, *The New Maternity*, 133 HARV. L. REV. 2221, 2224 (2020) (questioning the legal assumption that maternity is "certain, obvious, monolithic, and rarely in doubt").

196. Amy M. Larkey, *Redefining Motherhood: Determining Legal Maternity in Gestational Surrogacy Arrangements*, 51 DRAKE L. REV. 605, 611 (2003).

197. Storrow, *supra* note 12, at 604.

198. Joslin, *supra* note 174, at 409, 464–73 (including an appendix listing and describing surrogacy law in all fifty states).

199. *Id.* at 409.

200. *Id.*

201. 30 Cal. Rptr. 2d 893 (Cal. Ct. App. 1994).

consider the outcome of those cases if decided under statutes passed in California and Connecticut since those cases were decided.

In California, statutes define both traditional surrogates[202] and gestational carriers,[203] but that definition is the only appearance of "traditional surrogates" in the California Family Code.[204] Further, in 2013, California adopted a *gestational* surrogacy statute that legalized gestational surrogacy agreements.[205] But recall that *Moschetta* was a traditional surrogacy case.[206] California statutes are silent on the status of traditional surrogacy agreements.[207] Does that mean, even today, that the *Moschetta* court would conclude that the intending mother was no mother at all? One Californian practitioner guide suggests that is a possibility:

> No guidance is provided for what would make a traditional surrogacy valid and enforceable. Presumably traditional surrogacy qualifies as "assisted reproduction" as defined in Family Code § 7606(a), since it is a form of non-sexual reproduction; and, if there is a written agreement between the parties which spells out who the intended parents are, the agreement also should qualify as an "assisted reproduction agreement" as defined in § 7606(b). However, beyond that the courts are left to figure out for themselves whether traditional surrogacy actually exists as a legal construct and, if so, what it consists of.[208]

Still, many commentators take the position that traditional surrogacy is legal in California because the statutes' silence means it is not prohibited, and a 1998 case recognized a surrogacy arrangement where neither intending parent had a genetic connection to a child born of a gestational surrogate but were nonetheless recognized as legal parents.[209] Under these arguments, the outcome in *Moschetta* might well be different today, but that result is less than certain.

In Connecticut, the state involved in *Doe v. Doe*, there has also been some change in the legal landscape of surrogacy. Connecticut recognizes surrogacy

202. CAL. FAM. CODE § 7960(f)(1) (Westlaw through Ch. 134 of 2022 Reg. Sess.) ("[A] woman who agrees to gestate an embryo, in which the woman is the gamete donor and the embryo was created using the sperm of the intended father or a donor arranged by the intended parent or parents.").

203. *Id.* § 7960(f)(2) (Westlaw) ("[A] woman who is not an intended parent and who agrees to gestate a genetically unrelated embryo pursuant to an assisted reproduction agreement.").

204. 2 KATHRYN KIRKLAND, IRA H. LURVEY, DIANA RICHMOND & STEPHEN JAMES WAGNER, CALIFORNIA FAMILY LAW PRACTICE & PROCEDURE § 36.09[3] (2d ed. 2021).

205. Act of Sept. 23, 2012, ch. 466, 2011–2012 Reg. Sess. Cal. Stat. 4390 (codified as amended at CAL. FAM. CODE § 7962 (2013)).

206. *In re Moschetta*, 30 Cal. Rptr. 2d at 903.

207. Joslin, *supra* note 174, at 413.

208. 2 KIRKLAND ET AL., *supra* note 204, § 36.09[3].

209. *See In re* Buzzanca, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998).

agreements by allowing a replacement birth certificate listing the intending parents as the legal parents once a court has issued an order of parentage under the agreement.[210] Until 2021, however, that was limited to gestational surrogacy, with the statute silent as to traditional surrogacy. Effective January 1, 2022, Connecticut recognized traditional surrogacy as well as gestational surrogacy.[211] Under this new statutory scheme, the result in *Doe v. Doe* would be different. The traditional surrogacy agreement in that case would now be respected, and the intending parents would be legal parents.

Even with new statutory reforms, there can be uncertainty about who the legal parents are in surrogacy arrangements, as the California statutory scheme illustrates. At least one driver of litigation over parentage in the surrogacy situation is the limitation on the number of persons who can be a legal parent, which cannot be more than two. The ways in which assisted reproductive technology, including surrogacy, has decoupled parentage from biology suggest that the last biological vestige—no more than two parents—is no longer helpful or necessary. Yet the requirement persists, leading to disputes between biological and intending parents. If more than two parents could be recognized these disputes would not exist.

The growth of assisted reproductive technology, including surrogacy, highlights the growing trend of families that do not mimic biology. Biology is no longer destiny. Yet the biological family persists as the model for all nonbiological families. As a result, despite the death of the erase-and-replace imperative in adoption, the adoption equation remains one of subtraction rather than addition.

III. ADOPTION AS ADDITION, NOT SUBTRACTION

Is it possible to conceive of a family with more than two legal parents? That has long been possible in France as well as other areas of the world where adoption does not legally erase the biological family. Would such families be good for children? The psychological literature strongly suggests that adopted children need to maintain connections to their biological families even as they

210. CONN. GEN. STAT. § 7-48a(b) (2021); *see also* Raftopol v. Ramey, 12 A.3d 783, 788 (Conn. 2011) (recognizing two males as the legal parents of a child born to gestational surrogate, when one was the biological father and one an intending parent).

211. Connecticut Parentage Act, Pub. Act No. 21-15, § 60 (codified in scattered sections of CONN. GEN. STAT. § 46b) (defining genetic surrogate (traditional surrogate) and gestational surrogate); § 68 (recognizing that upon birth of a child under a gestational surrogacy agreement the intending parent(s) are, by operation of law, legal parent(s)); § 2(13) (recognizing that upon birth of a child under a genetic surrogacy agreement the intending parent(s) are, by operation of law, legal parent(s)).

join a new adoptive family. The next section will address the psychological literature relating to connectedness in adoption, discuss some adoption practices around the world that support connection, and then analyze the French practice of adoption as addition rather than subtraction. This section will also consider what lessons unsuccessful attempts to create adoption as addition in Quebec can impart, and the passage of California's statute permitting more than two parents.

A. *Connection in Adoption*

Adoption as currently practiced in the United States is not always a benign institution for adoptees. While adoption often has a positive effect on adoptees,[212] psychological studies show that many adoptees experience issues throughout their lifetimes.[213] Many adoptees struggle with adoption identity issues, which may explain high levels of behavioral issues reported in adopted children and adolescents,[214] as well as the fact that they are significantly

212. David M. Brodzinsky, *Long-Term Outcomes in Adoption*, 3 FUTURE OF CHILD. 153, 153 (1993) [hereinafter Brodzinsky, *Long-Term Outcomes*] (describing how outcomes for adopted children are better than those for children raised in foster or institutional care); EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP: PROMOTING HEALTHY IDENTITY FORMATION IN ADOPTION 9 (2009) [hereinafter EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP] (noting the "extensive research indicating that children adopted across racial/ethnic lines generally fare as well as their non-adopted counterparts").

213. Harold D. Grotevant, Albert Y.H. Lo, Lisa Fiorenzo & Nora D. Dunbar, *Adoptive Identity and Adjustment from Adolescence to Emerging Adulthood: A Person-Centered Approach*, 53 DEVELOPMENTAL PSYCH. 2195, 2199 (2017) (examining fifteen- to twenty-five-year-olds who were adopted as infants, finding that adjustment difficulties associated with identity development persist over time); EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP, *supra* note 212, at 29–30. This study found, against expectations, that adoption issues would taper off for adults, that for both same-race and transracial adoptees adoptee identity continued into adulthood. "[Result] suggests the lifelong nature of identity work and the reality that adulthood is a crucial period in which adoptive and racial/ethnic identities continue to be salient for adopted persons." *Id.* at 30. Almost one-fourth of same-race adoptees reported, as adults, that they felt extremely or somewhat uncomfortable with their identity as an adopted person. Seymore, *Sixteen and Pregnant*, *supra* note 9, at 145 n.322; *see* EVAN B. DONALDSON ADOPTION INST., BEYOND CULTURE CAMP, *supra* note 212, at 32.

214. Grotevant et al., *supra* note 213, at 2196 ("The extensive literature on psychological outcomes for adopted persons indicates an elevated risk for adjustment problems, ranging from mild to serious psychopathology."); Daniel W. Smith & David Brodzinsky, *Stress and Coping in Adopted Children: A Developmental Study*, 23 J. CLINICAL CHILD PSYCH. 91, 91 (1994); Femmie Juffer, *Children's Awareness of Adoption and Their Problem Behavior in Families with 7-Year-Old Internationally Adopted Children*, 9 ADOPTION Q. 1, 2 (2006).

overrepresented in mental health care facilities.[215] Studies have also shown an increased risk of suicide and suicide attempts by adoptees.[216]

Adoptees may experience adoption not as the exclusively happy event adoptive parents and society ascribe to it, but as a more nuanced experience.[217] Adoptees may experience adoption as a profound loss—loss of family, loss of culture, loss of language, loss of all sense of familiarity—despite the "replacement" of the lost birth family by the adoptive family.[218] Adoptees may fear abandonment and rejection, and experience issues with trust and attachment that affects future relationships.[219] Because of cultural biases that

215. David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, *in* THE PSYCHOLOGY OF ADOPTION 3, 3 (David M. Brodzinsky & Marshall D. Schecter eds., 1990) (reporting that although adopted children are only two percent of the population, they represent between four and five percent referred to outpatient mental health facilities and ten to fifteen percent in residential care facilities); Michael Wierzbicki, *Psychological Adjustment of Adoptees: A Meta-Analysis*, 22 J. CLINICAL CHILD PSYCH. 447, 451 (1993) (adoptees significantly overrepresented in clinical populations); Femmie Juffer & Marinus H. van IJzendoorn, *Behavior Problems and Mental Health Referrals of International Adoptees: A Meta-Analysis*, 293 J. AM. MED. ASS'N 2501, 2507 (2005) (noting that adoptees, both domestic and international, exhibited more behavior problems than nonadoptee controls, and were overrepresented in mental health referrals). It is possible that the overrepresentation of adoptees in clinical populations is not because of increased incidences of psychological problems, but because of increased rates of referrals by adoptive parents and professionals who are aware of issues relating to adoption and, therefore, might be more inclined to refer. Seymore, *Sixteen and Pregnant*, *supra* note 9, at 145 n.324; *see* Brodzinsky, *Long-Term Outcomes*, *supra* note 212, at 3.

216. Gail Slap, Elizabeth Goodman & Bin Huang, *Adoption as a Risk Factor for Attempted Suicide During Adolescence*, 108 PEDIATRICS 1, 1 (2001) (reporting an increased risk of suicide among American adoptees living with an adoptive parent when compared to those living with a biological parent); Annika von Borczyskowski, Anders Hjern, Frank Lindblad & Bo Vinnerljung, *Suicidal Behaviour in National and International Adult Adoptees: A Swedish Cohort Study*, 41 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 95 (2006) (reporting increased suicidality for domestic adoptees compared to the population at large, and an even higher risk for international adoptees). *But see* William Feigelman, *Are Adoptees at Increased Risk for Attempting Suicide?*, 35 SUICIDE & LIFE-THREATENING BEHAV. 206, 213 (2005) (reporting no greater risk of attempting suicide and depression for adoptees).

217. *See* Brodzinsky, *Long-Term Outcomes*, *supra* note 212, at 155 (explaining that adopted children have higher rates of "acting out"); Penny Callan Partridge, *The Particular Challenges of Being Adopted*, 61 SMITH COLL. STUD. SOC. WORK, 197, 198 (1991) (positing that all adoptees face issues of loss, less grounding in reality, secrecy around adoption, doubts about self-worth, lack of genetic mirrors, divided loyalties and identities, and feelings of being an outsider).

218. Partridge, *supra* note 217, at 199.

219. Seymore, *Sixteen and Pregnant*, *supra* note 9, at 145; *see* Wendy Tieman, Jan van der Ende & Frank C. Verhulst, *Social Functioning of Young Adult Intercountry Adoptees Compared to Nonadoptees*, 41 SOC. PSYCHIATRY & PSYCHIATRIC EPIDEMIOLOGY 68, 70 (2006) (explaining that adult adoptees in the study were almost two times less likely to be married than nonadopted counterparts, were less likely to be living with a romantic partner, and were less likely to have had a relationship that lasted longer than one year). *But see* Johanna Despax, Evelyne Bouteyre & Jean-Baptiste Pavani, *Adoptees' Romantic Relationships: Comparison with Nonadoptees, Psychological Predictors and Long-Term Implications of the Adoption Pathway*, 24 ADOPTION Q. 251, 265 (2021) (finding no differences between adoptees and nonadoptees not accounted for by pre-adoption experiences).

favor biological families, adoptees may face stigma associated with being adopted.[220]

Adoption professionals recognize that "adopted children are part of two separate and distinct family groups—one preexisting the adoption and the other created as a result of the adoption."[221] Although the law traditionally severs the relationship with one while creating the other, modern understanding is that adopted children exist in a web of relationships between the two.[222] One study of First Nation adoptees in Canada showed significant links between connectedness to birth family and tribe, mental and physical health, and well-being.[223] Adoptee author Nicole Chung makes this point about continuing connections even after adoption: "My thinking about family bonds expanded as a result of searching for and finding my birth family. I realized these are real bonds and links that we have—and even if they were broken, they're still there,

220. Seymore, *Sixteen and Pregnant*, *supra* note 9, at 145. Consider this description of the stigma of being adopted:

> Adopted children are seen as coming from a defective biological line; their birth parents either did not want them or were immoral and dysfunctional. Adopted children are seen as damaged goods, presumed to have suffered maltreatment after birth before being rescued and processed by the child protective system, and therefore, likely to have lifelong struggles. . . . Adopted children also appear atomistic, because they are disconnected from their extended biological family and because we suspect their extended adoptive family keeps them at arms length, never treating them as full or equal members of the family. They are persons with no real family. Because of this perception, adopted children are often uncomfortable revealing that they were adopted. This perception is a major reason why many adoptees undertake a search for their birth parents: we communicate to them that they are deficient, lacking something of great importance, and as a result, they go to great lengths to try to become complete.

James G. Dwyer, *First Parents: Reconceptualizing Newborn Adoption*, 37 CAP. UNIV. L. REV. 293, 295–96 (2008); *see* Seymore, *Sixteen and Pregnant*, *supra* note 9, at 145 n.328; *see also* Amanda Baden, *"Do You Know Your* Real *Parents?" and Other Adoption Microaggressions*, 19 ADOPTION Q. 1, 13 (2016) (examining adoption stigma and microaggressions and identifying thirteen themes common to adoption stigma).

221. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1652 (1995); *see also* Anne J. Atkinson & Debbie B. Riley, *Training for Adoption Competency: Building a Community of Adoption-Competent Clinicians*, 98 FAMS. SOC'Y 235, 239 (2017) (noting the importance of adoption-competent therapists realizing the "importance and ongoing impact of birth parents"); Anne J. Atkinson, *Adoption Competent Clinical Practice*, *in* THE ROUTLEDGE HANDBOOK OF ADOPTION 435, 438 (Gretchen Miller Wrobel, Emily Helder & Elisha Marr eds., 2020) (stating that adoption competent therapists acknowledge that a "child's past and current relationships with birth parents and other birth family members, including siblings, play a critical role in the child's development and adjustment").

222. Malinda L. Seymore, *Ethical Lawyering in Adoption: Centering the Child in Adoption Law*, 24 ADOPTION Q. 48, 60 (2021) [hereinafter Seymore, *Ethical Lawyering*].

223. Jeannine Carriere, *Connectedness and Health for First Nation Adoptees*, 10 PAEDIATR CHILD HEALTH 545, 545, 548 (2005) (study of eighteen adult First Nations adoptees, examining feelings of connectedness with birth family and tribe as contributing factor to mental and physical health issues).

in this fundamental way. It was strange to me to deny that."[224] Annette Appell describes the absent birth family as "a ghost family, not physically present but lurking."[225]

While secrecy and matching in adoption was once the prevailing practice, the modern trend is toward openness, with at least some continuing relationship between birth family and adopted child.[226] Studies of all members of the adoption triad show that openness best serves all.[227] Thus, open adoption may offer lessons for the value of multiple parents that allow continuing contact.

Numerous social science studies show that openness and continuing contact in adoption is good for adoptees. It improves the relationship between adoptees and their adoptive parents, increases adoptees' self-esteem and confidence, and helps in identity formation for all adoptees and racial identity formation in transracial adoptees.[228] Adopted children in open adoptions understood that adoption was permanent, and felt secure in their relationships with their adoptive parents,[229] in contrast to criticism that children who maintained contact with birth parents would be confused about who the "real" parents were. When children were excluded from contact with birth parents,

224. Ashley Fetters, *The Fraught Language of Adoption: A Conversation with the Writer Nicole Chung*, ATLANTIC (Oct. 1, 2018), https://www.theatlantic.com/family/archive/2018/10/adoptees-real-parents-nicole-chung/571783/ [https://perma.cc/FEU2-GLAM (dark archive)]. *See generally* NICOLE CHUNG, ALL YOU CAN EVER KNOW: A MEMOIR (2018) (detailing Chung's experiences through her memoir).

225. Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER & SOC'Y 73, 131 (2010); *see also* Seymore, *International Adoption*, *supra* note 26, at 225 ("[B]irth parents—in their absence—would have a powerful presence in . . . [my adoptive] family.").

226. Seymore, *International Adoption*, *supra* note 26, at 163.

227. Seymore, *Ethical Lawyering*, *supra* note 222, at 60. Adoption myths that lead to closed adoptions are not supported by more recent trends in adoption research, which have "challenged the assumed benefits of closed adoptions and suggested that openness is not only a viable option but often a preferable adoption arrangement." Donna Brown, Scott Ryan & Janet Therese Pushkal, *Initial Validation of the Open Adoption Scale: Measuring the Influence of Adoption Myths on Attitudes Toward Open Adoption*, 10 ADOPTION Q. 179, 181 (2007).

228. David Brodzinsky, *Family Structural Openness and Communication Openness As Predictors in the Adjustment of Adopted Children*, 9 ADOPTION Q. 1, 10 (2006) (study of same-race, infant placement adoptions shows correlation between more openness in adoption and higher self-esteem in adoptees); Margaret Sykes, *Adoption with Contact: A Study of Adoptive Parents and the Impact of Continuing Contact with Families of Origin*, 24 ADOPTION & FOSTERING 20, 26 (2000) (in UK-based study, adoptive parent satisfaction with open adoption increased over time); Haley Kranstuber Horstman, Colleen Warner Colaner & Christine E. Rittenour, *Contributing Factors of Adult Adoptees' Identity Work and Self-Esteem: Family Communication Patterns and Adoption-Specific Communication*, 16 J. FAM. COMMC'N 263, 272–73 (2016) (finding in study of adult adoptees that communicative openness (willingness to talk openly and honestly about adoption) promotes healthful consideration of adoptive identity and correlates positively to higher self-esteem).

229. Seymore, *International Adoption*, *supra* note 26, at 179; *see* HAROLD D. GROTEVANT & RUTH G. MCROY, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS 91–92 (1998) (noting no significant difference between children in open adoptions and closed adoptions in terms of belief in security and permanence of adoption).

when such contact is possible, approximately two-thirds expressed concerns about permanence.[230] Thus, the quality of the relationship adopted children have with their adoptive parents is enhanced by openness.[231]

Adoptive parents feel more certain about the permanency of the adoption as they are less fearful about the birth parents.[232] Birth mothers experience less grief when they know that their children are happy in their adoptive homes.[233] Birth fathers feel more positively about the adoption when they are involved in the process.[234] In all, an adoption process that encourages continuing relationships is better for all involved—and especially so for adopted children.[235]

Secrecy in adoption, like most family secrets, can be dangerous and damaging. Consider the experience of late-discovery adoptees—those who were

230. Seymore, *International Adoption*, *supra* note 26, at 179. *See* GROTEVANT & MCROY, *supra* note 227, at 91–92.

231. Seymore, *International Adoption*, *supra* note 26, at 179, 179 n.98; *see also* Sykes, *supra* note 228, at 20, 25 (contact with birth family is helpful in reducing a child's sense of "muddle and confusion," enabling growth of more satisfying relationship with adopters).

232. Seymore, *Ethical Lawyering*, *supra* note 222, at 60; *see, e.g.*, Harold D. Grotevant, *Openness in Adoption: Research with the American Kinship Network*, 4 ADOPTION Q. 45, 50 (2000) (showing that adoptive parents in open adoptions experienced lower level of fear that the birth mother would seek to reclaim child); GROTEVANT & MCROY, *supra* note 229, at 91 (stating that familiarity with birth parents reduces fear that they will reclaim child); Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents' Feelings Seven Years Later*, 48 SOC. WORK 409, 417 (2003) (finding that in follow-up study seven years after open adoption placement, parents still express satisfaction with open adoption); Xiaojia Ge, Misaki N. Natsuaki, David M. Martin, 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. PSYCH. 529, 529 (2008) (studying 323 matched adoptive parents and birth mothers and finding that adoptive parents' satisfaction with the adoption positively correlated to degree of openness); Marianne Berry, *Adoptive Parents' Perceptions of, and Comfort with, Open Adoption*, 72 CHILD WELFARE 231, 234, 246 (1993) (stating that increased openness correlated to increased satisfaction for adoptive parents).

233. Ge et al., *supra* note 232, at 529 (finding openness positively correlated with post-adoption adjustment and satisfaction with the adoption); Ruth G. McRoy, Harold D. Grotevant, Susan Ayers-Lopez & Susan M. Henney, *Open Adoptions: Longitudinal Outcomes for the Adoption Triad*, *in* HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES 175 (Rafael A. Javier, Amanda L. Baden, Frank A. Biafora & Alina Camacho-Gingerich eds., 2007) (showing that birth mothers in longitudinal study at points twelve to twenty years from placement satisfied with postadoption contact); Cinda L. Christian, Ruth G. McRoy, Harold D. Grotevant & Chalandra M. Bryant, *Grief Resolution of Birthmothers in Confidential, Time-Limited Mediated, Ongoing Mediated, and Fully Disclosed Adoptions*, 1 ADOPTION Q. 35, 48–49 (1997) (finding thirty percent of birth mothers in closed adoption had very poor grief resolution, while only eleven percent in fully open adoptions experienced very poor grief resolution).

234. Eva Y. Deykin, Patricia Patti & Jon Ryan, *Fathers of Adopted Children: A Study of the Impact of Child Surrender on Birthfathers*, 58 AM. J. ORTHOPSYCHIATRY 240, 243 (1988); Ge et al., *supra* note 232, at 529 ("[T]he levels of choice or control birth fathers had in determining the degree of openness was positively associated with birth fathers' satisfaction toward the adoption experience . . . .").

235. Malinda L. Seymore, *Ethical Lawyering*, *supra* note 222, at 60; *see also supra* note 227.

not told that they were adopted until later in life.[236] They report, upon discovery, feelings of betrayal, loss of trust, and difficulty forgiving.[237] As one late-discovery adoptee reported, "I felt profoundly betrayed, . . . the brunt of a 40-year joke."[238] The older a person was in discovering their adoption, the greater the psychological distress they experienced and the lower quality of life they reported.[239] The secrecy associated with late discovery of adoption can "create intrapersonal conflicts (such as questioning one's identities), as well as interpersonal conflicts with others due to mistrust and other negative emotions."[240] Late-discovery adoptees also reported that the most successful coping strategy upon learning of the adoption was to seek connection with the birth family and other adoptees.[241]

The psychosocial literature about open adoption suggests that continuing contact between adoptees and relinquishing birth parents would be as beneficial as a system where the birth parents retain legal status as parents.

B. *France and Adoption Simple*

The way adoption is practiced in America would appear quite strange in many parts of the world—as strange as their practices may appear to us.[242] In some Polynesian cultures, for example, children are seen as belonging to the larger society rather than to individual parents, so children are not placed for adoption through any legal process, but may still be moved around from family to family for a variety of purposes.[243] As Isabelle Leblic notes in her study of traditional adoption in French Polynesia and New Caledonia,

236. Amanda L. Baden, Doug Shadel, Ron Morgan, Ebony E. White, Elliotte S. Harrington, Nicole Christian & Todd A. Bates, *Delaying Adoption Disclosure: A Survey of Late Discovery Adoptees*, 40 J. FAM. ISSUES 1154, 1155 (2019) (noting that the phenomenon lacked agreed-on terminology until adoptees who experienced it self-labeled as "late discovery adoptees").

237. Helen J. Riley, *The Late Discovery of Adoptive Status*, 7 FAM. RELATIONSHIPS Q. 13, 14 (2008).

238. *Id.*

239. Baden et al., *supra* note 236, at 1166, 1172 (noting that in study involving 254 adult adoptees, "distress increases as the age of adoption discovery increases. With respect to life satisfaction, . . . satisfaction decreased as age of adoption discovery increased").

240. *Id.* at 1171.

241. *Id.*

242. Malinda L. Seymore, *Separation and Connectedness: Global Norms of Open vs. Closed Adoption*, *in* EXPLORING NORMS AND FAMILY LAWS ACROSS THE GLOBE 107 (Melissa Breger ed., 2022).

243. Jessica A.K. Matthews, Ellen E. Pinderhughes & Martha L. Pott, *Adoptive Parenting Is More Complex Than Evolutionary Theory Would Predict: Evidence from Historical and Contemporary Perspectives*, *in* THE OXFORD HANDBOOK OF EVOLUTIONARY PSYCHOLOGY AND PARENTING 375 (Viviana A. Weekes-Shackelford & Todd Kennedy Shackelford eds., 2021) (citing M. Bourgeois & J. Malarrive, *Fa'a'mu and Fanau: Various Traditional Aspects and Current Problems of Adoption and Donation of Children*

> One of the most important features of traditional adoption in Polynesia, as more generally in Oceania, is that birth parents and adoptive parents choose each other and, in the majority of cases, stay in touch (there is no secret about adoption). As a consequence, the children add together the rights and obligations of their two kin groups (birth and adoption).[244]

In traditional Maori culture, children were freely shared among families while children retained family and tribal ties with their original family.[245] In one island of Papua New Guinea as many as half of the inhabitants of some villages are adopted while maintaining connections with birth families.[246] In the Baatombu tribe in Benin, Africa, children maintain lineal relationships with the biological father's tribe, who retains a claim on the child, even as others are raising the child.[247] In Islam, adoption as we know it does not exist. That "someone other than the biological parents can fictitiously become a parent in the same position as a biological parent" is forbidden.[248] However, *kafala* is practiced, a fostering relationship which brings with it

> the responsibility of upbringing the adopted child as your own. It tries to achieve a balance between raising the child as your own all the while ensuring the adopted child's identity is not absorbed into the identity of the adoptive family. Negation of the biological identi[t]y [sic] would be considered haram or forbidden.[249]

Psychological literature in the United States and Europe seems to support these alternative practices regarding the importance of maintaining connections

in French Polynesia, 1 ANN. MED. PSYCHOL (Paris) 721 (1976)); Isabelle Leblic, *From French Polynesia to France: The Legacy of Fa'a'amu Traditional Adoption in "International" Adoption*, 56 ANTHROPOLOGICA 449, 449 (2014).

244. Leblic, *supra* note 243, at 450.

245. *See* George Graham, *Whangai Tamariki: The Custom Pertaining to the Adoption of Children in Accordance with Ancient Maori Custom*, 57 J. POLYNESIAN SOC'Y 268, 268 (1948) (describing Maori customs). The government of New Zealand still recognizes informal adoption by families and clans as Whangai. NEW ZEALAND GOVERNMENT, WHANGAI (2020), https://www.govt.nz/browse/family-and-whanau/adoption-and-fostering/whangai/ [https://perma.cc/CQX2-2FYP].

246. Astrid Anderson, *Adoption and Belonging in Wogeo, Papua New Guinea*, *in* CROSS-CULTURAL APPROACHES TO ADOPTION 135, 135 (Fiona Bowie ed., 2004).

247. Erdmute Alber, *"The Real Parents Are the Foster Parents": Social Parenthood Among the Baatombu in Northern Benin*, *in* CROSS-CULTURAL APPROACHES TO ADOPTION, *supra* note 246, at 33.

248. Faisal Kutty, *Islamic "Adoptions": Kafalah, Raadah, Istilhaq and the Best Interests of the Child in* THE INTERCOUNTRY ADOPTION DEBATE: DIALOGUES ACROSS DISCIPLINES 526, 539 (Robert L. Ballard, Naomi H. Goodno, Robert F. Cochran & Jay A. Milbrandt eds., 2015).

249. *Id.* at 551; *see also* Andrea Büchler & Eveline Schneider Kayasseh, *Fostering and Adoption in Islamic Law—Under Consideration of the Laws of Morocco, Egypt, and the United Arab Emirates*, 6 ELEC. J. ISLAMIC & MIDDLE EASTERN L. 31, 40–42 (2018) (describing *Kafalah*'s status in classical and modern Islamic law). *See generally* Marcia C. Inhorn, *"He Won't Be My Son": Middle Eastern Muslim Men's Discourses of Adoption and Gamete Donation*, 20 MED. ANTHROPOLOGY Q. 94 (2006) (detailing interviews with Middle Eastern Muslim Men on their attitudes toward adoption and gamete donation).

between children and biological family even after adoption.[250] Yet some may argue that these practices neither translate in the United States, nor do they represent legally recognized parental status.

France's practice of *adoption simple* may suggest possibilities that answer those critiques. France has a centuries-old history of adoption as addition, not subtraction.[251] Since 1804, France has recognized *adoption simple*, a form of "additive filiation," where a person is made legally a member of one family without cutting off ties from the biological family.[252] Initially, the purpose of such adoptions was to facilitate inheritance, and *adoption simple* was restricted to the adoption of adults.[253] But following World War I, which left many children parentless and many parents childless, French law was modified to allow for *adoption simple* of minors as well.[254] Thus, *adoption simple* "was no longer only a matter of finding an heir for a family, but also a child to be raised."[255] When *adoption simple* was available only for the adoption of adults, the numbers remained steady at approximately 100 per year.[256] With the change to allow adoption of minors after World War I, the numbers increased ten- to twenty-fold to 1,000–2,500 yearly.[257] While the numbers may appear small, this is against a yearly plenary adoption figure that never exceeded 5,000 during that same time period.[258] The focus of *adoption simple* had changed with the addition of adoption of minors, from the needs of the adoptive parents—to transmit an estate—to the "interests of the adoptee—in order to give the child loving parents."[259]

By 1939, France had also created another form of adoption—"plenary adoption"—that severed completely the ties between biological family and

250. *See supra* notes 226–41 and accompanying text (detailing this research).

251. *See* Laura J. Schwartz, *Models for Parenthood in Adoption Law: The French Conception*, 28 VAND. J. TRANSNAT'L L. 1069, 1090 (1995) (noting reasons why French "families formed by adoption cannot 'pass' as biological ones").

252. Mignot, *Simple Adoption in France*, *supra* note 21, at 366. This form of adoption also exists in Belgium, Françoise-Romaine Ouellette, *The Social Temporalities of Adoption and the Limits of Plenary Adoption*, *in* INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 69, 69–70 (Diana Marre & Laura Briggs eds., 2009), and Italy, Jean-François Mignot, *Adoption in France and Italy: A Comparative History of Law and Practice (Nineteenth to Twenty-First Centuries)*, 70 POPULATION 759, 759 (2015).

253. Mignot, *Simple Adoption in France*, *supra* note 21, at 366–67.

254. *Id.* at 367; Pierre Verdier, *'Limited Adoption' in France*, 12 ADOPTION & FOSTERING 41, 41 (1988) (noting that simple adoption is "possible at any age").

255. Mignot, *Simple Adoption in France*, *supra* note 21, at 367.

256. *Id.* at 370.

257. *Id.*

258. *Id.* at 370 fig.1. Schwartz reports that "[a]s of 1990, an average of 3,800 *adoptions plénières* and 2,300 *adoptions simples* are pronounced each year." Schwartz, *supra* note 251, at 1096 n.140.

259. Mignot, *Simple Adoption in France*, *supra* note 21, at 368.

adopted child.[260] Plenary adoption looks much like the form of adoption familiar to those in the United States.

Full adoption completely severs the ties between the adoptee and his often-unknown family of origin: the adoptee replaces the name and the inheritance he would have from his family of origin with those he takes from his adoptive family (substitutive filiation). Nowadays, the main reason to adopt in the full adoption form is for a sterile adopter or for those for whom assisted reproductive technology has failed to satisfy their desire to raise a child and to love and be loved by them.[261]

The implementation of plenary adoption may have been motivated by a perceived reluctance of adoptive parents to adopt through *adoption simple* and maintain those bonds between the adoptee and their family of origin.[262] Completely divorcing the child from the biological family was perhaps more palatable to some adoptive parents. In one descriptive article about child welfare policies and adoption in France, the authors opine that

> [e]xcept for intra-family adoption, simple adoption does not work very well and is not very often employed: above all, it concerns children with mentally ill parents and children in permanent placement with foster families[.] It can be problematic for children in long-term care with very antisocial or disturbed parents: Who will protect the adoptive family if there are conflicts with the birth parents?[263]

There is no support offered for this proposition, but it tends to be in line with ideas about open adoption and birth parent involvement that have been largely debunked in U.S. studies.[264]

260. *Id.*; Ouellette, *supra* note 252, at 69 (plenary adoption makes the child a "legal stranger to his or her birth parents").

261. Mignot, *Simple Adoption in France*, *supra* note 21, at 368.

262. *Id.* There is little data to substantiate this concern, but there is certainly evidence that adoptive parents may choose types of adoption that eliminate continuing contact with birth family. *See* Seymore, *International Adoption*, *supra* note 26, at 165 (noting the choice of adoptive parents to seek international adoption where no birth parent contact is usually possible in to avoid open adoption with birth parent involvement domestically).

263. Annick-Camille Dumaret & Dominique-Jeanne Rosset, *Adoption and Child Welfare Protection in France*, 175 EARLY CHILD DEV. & CARE 661, 663 (2005).

264. See discussion of open adoption studies at *supra* notes 226–41 and accompanying text; *see also* Brown et al., *supra* note 227, at 182–83 (noting the persistence of adoption myths, particularly in adoption from the child welfare system, about birth parents). Of course, there are differences in open adoption, U.S. style, and *adoption simple*, of which there are far fewer extant studies.

But nonetheless, France preserved *adoption simple* as an alternative as well, utilized by those who had no interest in severing original parental ties[265] or where doing so was not considered in the best interest of the child.[266] Beginning in the 1970s, with considerable growth in divorce rates in France, there was a spike in *adoption simple* attributable to a growth in stepparent adoption.[267] Indeed, French literature has suggested that "[o]verall, it appears that simple adoption is more common today than it has ever been."[268] Indeed, the number of *adoptions simple* has increased from about 1,500 per year to approximately 10,000 per year.[269] "Stepfamilies often prefer simple adoption because it creates an adoptive parenthood without erasing the previous one."[270] With *adoption simple*, the adoptee adds the family name of the adoptive family but does not excise the name of the original family.[271] And while the adoptive parents have parental authority, the biological parents still maintain a duty of support of the child and the child may inherit from both the adoptive parents and the biological parents.[272]

One other difference between plenary adoption and *adoption simple* needs mention. While plenary adoption is considered irrevocable, French statutes

265. Mignot, *Simple Adoption in France*, *supra* note 21, at 368 ("Those now being adopted through simple adoption are minors or, in particular, adults who are not abandoned or orphaned, and who have no interest in seeing their original parental ties being severed."); Dumaret & Rosset, *supra* note 263, at 663 (contrasting full and simple adoption: "Full adoption is new parentage through rupture with the birth family. . . . Simple adoption is an additional parentage").

266. Schwartz, *supra* note 251, at 1097 (noting that a French judge, in announcing an *adoption simple*, said, "[A]n *adoption plénière* 'would accentuate the discrepancy between biological reality and legal fiction and tend to jeopardize the psycho-emotional equilibrium of the child'" (citation omitted)).

267. Mignot, *Simple Adoption in France*, *supra* note 21, at 373 ("[T]he opportunities for stepparents to adopt their step-children are increasing, so much so that the number of simple adoptees has crossed a second threshold: it has gone up from about 1,500 to about 10,000 per year.").

268. *Id.*

269. *Id. But see* Dumaret & Rosset, *supra* note 263, at 663 ("Except for intra-family adoption, simple adoption does not work very well and is not very often employed."). The 10,000 simple adoptions a year are a stark contrast to the number of full adoptions in France. According to Mignot, at about this same time, approximately 3,000 international adoptions to France occurred annually, and only 731 children annually were adopted from foster care. Jean-Francois Mignot, *Full Adoption in England and Wales and France: A Comparative History of Law and Practice (1926–2015)*, 41 ADOPTION & FOSTERING 142, 151–52 (2017).

270. Jean-Francois Mignot, *Stepfamilies in France Since the 1990s: An Interdisciplinary Overview*, *in* THE INTERNATIONAL HANDBOOK OF STEPFAMILIES: POLICY AND PRACTICE IN LEGAL, RESEARCH, AND CLINICAL ENVIRONMENTS 53, 71 (Jan Pryor ed., 2008) [hereinafter Mignot, *Stepfamilies in France*].

271. Schwartz, *supra* note 251, at 1094. Schwartz contends that *adoption simple* evidences France's commitment to biological parent-child relationships, as does France's commitment to destigmatize unwed parenthood, provide financial and social support of single mothers, and allow a three-month time period within which a placing birth mother may revoke her consent to adoption. *Id.* at 1082–89, 1095.

272. *Id.* at 1094–95.

allow for the termination of an *adoption simple*.[273] However, revocation is only permitted upon a showing of serious cause.[274] This requirement of justification for termination of an *adoption simple* means that U.S. immigration requirements of permanency of adoption are satisfied by a French *adoption simple*.[275]

Despite these many changes in adoption in France, *adoption simple* still involves the adoption of adults more than the adoption of children. In the first years in which data about age was available, 1968–1970, almost all simple adoptees were adults. Between 1992 and 2007, eighty-five percent of simple adoptees were adults.[276] And ninety-two percent of *adoptions simple* involve a stepparent adopting a stepchild.[277] These figures, however, may not paint a fully accurate picture of the use of *adoption simple*. For example, *adoption simple* may be utilized in some international adoptions to France. If the consent of the birth parent in the sending country was to an *adoption simple*, then the only allowable form of adoption in France would be an *adoption simple*.[278] There is also anecdotal evidence that *adoption simple* is used in family creation beyond these parameters. Consider the story of Amelie and Francoise, a lesbian couple who desired to become parents in France.[279] A friend offered to place a child with them, and Amelie's brother listed himself as the father on the birth certificate of the child. Amelie then used *adoption simple* to become the legal mother of the child.[280] While it may appear that this is a family adoption—Amelie adopted the child of her brother—factually that is not what happened. But by using

273. *Id.* at 1095.

274. Dumaret & Rosset, *supra* note 263, at 663.

275. 16 IMMIGRATION LAW AND PROCEDURE AFM 21.15(c)(3) (2020) ("Even if a 'simple adoption' might be more easily terminated than a 'full' adoption, that alone does not mean the simple adoption does not create a 'permanent' relationship."); U.S. CITIZENSHIP & IMMIGR. SERVS., 5 POLICY MANUAL ch. 4, A(4) (2021) ("A simple adoption may be valid for immigration purposes if it meets the definition of an adoption for immigration purposes and the parent-child relationship cannot be terminated for other than serious or grave reasons.").

276. Mignot, *Simple Adoption in France*, *supra* note 21, at 372–73.

277. *Id.* at 375.

278. Schwartz, *supra* note 251, at 1097. This position is consistent with the Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, which will not allow for a form of adoption in the receiving country absent the birth parents' consent in the sending country. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, art. 4, May 29, 1993, 80 Stat. 271, T.I.A.S. No. 08-401; *see also* Stephanie Zeppa, *"Let Me In, Immigration Man": An Overview of Intercountry Adoption and the Role of the Immigration and Nationality Act*, 22 HASTINGS INT'L & COMP. L. REV. 161, 179–80 (1998).

279. Anne Cadoret, *Mothers for Others: Between Friendship and the Market*, *in* INTERNATIONAL ADOPTION: GLOBAL INEQUALITIES AND THE CIRCULATION OF CHILDREN 271–73 (Diana Marre & Laura Briggs eds., 2009).

280. *Id.*

adoption simple the biological mother, Amelie, and her brother all share legal rights in, and legal responsibilities to, the child.

It is notable that despite the passage of legislation authorizing full or plenary adoption, *adoption simple* still exists in robust numbers in France. And the primary feature of *adoption simple*, the addition of parents rather than the subtraction of parents, remains a possibility for those who are not interested in divorcing the child from their first family.

C. *Quebec and Adoption Simple*

Inspired by France's *adoption simple*, and motivated by a recognition that maintaining connections in adoption was important, Quebec sought to create a system where the birth family maintained legal connection to the child even after adoption.[281] In doing so, the proposed method of adoption would "derogate from the prevailing understanding by which Quebec law recognizes at most two parents."[282] Though the reforms stalled and were never passed,[283] the experience has some lessons to impart.

Proposed by the Minister of Justice to the Quebec National Assembly in October 2009, the legislation sought to strike a balance between the benefits of adoption for children who needed a loving family with the financial security to meet their needs and the benefits of continuity with biological family and healthy identity formation.[284] The proposed law suggested that maintaining family filiation would be particularly worthwhile when the child was older at the time of adoption or when the adoption was by a stepparent or other family member.[285] The purpose of the method proposed in Quebec was to preserve in law what is true in fact—that the child has a preexisting connection to the birth family. "The enduring filial status would allow the adoptee to say to the birth parents, with the law's imprimatur, 'You are still my mother' or 'You are still my father.'"[286]

In Quebec the proposed *adoption simple* would leave intact the prior filiation of child and birth family, as does French *adoption simple*, and also preserve the French model of continuing support obligations for the birth

281. Françoise-Romaine Ouellette & Alain Roy, *Prendre Acte des Nouvelles Réalités de L'adoption [Take Note of the New Realities of Adoption]*, 44 REVUE JURIDIQUE THEMIS 7, 15 (2010); Robert Leckey, *Identity, Law, and the Right to a Dream?*, 38 DALHOUSIE L.J. 525, 535 (2015).

282. Leckey, *supra* note 281, at 536.

283. *Id.* at 534.

284. Ouellette & Roy, *supra* note 281, at 26.

285. *Id.*

286. Leckey, *supra* note 281, at 536 (citation omitted).

parents.[287] But some opined that it would be unfair to saddle birth parents with duties, like the duty of support, without also imparting reciprocal rights.[288] A second proposed Quebec model, therefore, would not maintain any of the rights and duties of parenthood for the birth parents that French *adoption simple* would provide, including the duty of support.[289] In addition to the purported unfairness, there was fear that a support obligation would discourage birth parents from placing the child for adoption if that liability would nonetheless continue.[290]

The Quebec proposal seems grounded in a belief of the symbolic force of law. Maintaining family filiation, rather than the rupture traditional adoption caused, speaks to a societal recognition, given the force of law, of the importance of continuity for the adopted person and the relevance of those connections in identity formation. As Ouellette and Roy put it:

> The relationship of filiation is constituted by the concrete practices of the actors, but also by symbolic references. In our cultural context, it would be absurd to claim that the persistence of the bond between the original parents and the child is not important to him, especially when this bond structured his first years of life. At a time when personal identities are composite, fluctuating, often built on the crossing of borders between genders, ethnic groups, cultures, it is necessary to distance ourselves from the norm of exclusivity in adoption and to allow ourselves to a margin of play in the definition of kinship. Especially since we know how to do it in other circumstances, as the blended families testify.[291]

The efforts to pass the legislation in Quebec may well have failed because of concerns of adoptive parents who cannot accept the idea of adopting without breaking the original bond; many adoptive parents may not be able to accept not being the only parents of the child.[292] Yet the growth of open adoption is suggestive of the ability of adoptive parents to make changes to traditional norms of adoption when they see the benefits of maintaining connections in adoption. The law can have substantial effects in setting social norms and expectations, so a law that permits the reality of more than two parents may well gain social acceptance in the way that open adoption has.

287. Ouellette & Roy, *supra* note 281, at 26.
288. *Id.*
289. *See* Leckey, *supra* note 281, at 536.
290. Ouellette & Roy, *supra* note 281, at 30–31.
291. *Id.* at 42.
292. *See id.* at 43.

D. *California Permits More than Two Parents*

In 2015, California passed legislation permitting more than two parents for a child:

> (b) "Parent and child relationship" as used in this part means the legal relationship existing between a child and the child's natural or adoptive parents incident to which the law confers or imposes rights, privileges, duties, and obligations. . . .
>
> (c) This part does not preclude a finding that a child has a parent and child relationship with more than two parents.[293]

It was not easily passed—the first attempt to pass the bill was stymied when Governor Brown vetoed the bill, saying, "I am sympathetic to the author's interest in protecting children, but I am troubled by the fact that some family law specialists believe the bill's ambiguities may have unintended consequences. I would like to take more time to consider all of the implications of this change."[294] However, in the next legislative session the bill was passed and Governor Brown signed it into law.[295] In passing the bill, the Senate made the following statement of legislative intent:

> (a) Most children have two parents, but in rare cases, children have more than two people who are that child's parent in every way. Separating a child from a parent has a devastating psychological and emotional impact on the child, and courts must have the power to protect children from this harm. . . .
>
> (c) This bill does not change any of the requirements for establishing a claim to parentage under the Uniform Parentage Act. It only clarifies that where more than two people have claims to parentage, the court may, if it would otherwise be detrimental to the child, recognize that the child has more than two parents.
>
> (d) It is the intent of the Legislature that this bill will only apply in the rare case where a child truly has more than two parents, and a finding

293. Act of Oct. 3, 2013, ch. 564, § 5.5, 2013–2014 Reg. Sess. Cal. Stat. 4627, 4629 (codified as amended at CAL. FAM. CODE § 7601(c) (2014)).

294. Mike Roe & Julie Small, *Gov. Brown Vetoes Bill That Would Have Allowed Legal Recognition for More Than 2 Parents*, KPCC (Sept. 30, 2012), https://www.scpr.org/blogs/news/2012/09/30/10241/gov-brown-vetoes-bill-allowing-legal-recognition-m/ [https://perma.cc/YCX8-UGDC].

295. Patrick McGreevy & Melanie Mason, *Brown Signs Bill To Allow Children More Than Two Legal Parents*, L.A. TIMES (Oct. 4, 2013, 12:00 AM), https://www.latimes.com/local/la-xpm-2013-oct-04-la-me-brown-bills-parents-20131005-story.html [https://perma.cc/C7EQ-8SZ9 (dark archive)].

> that a child has more than two parents is necessary to protect the child from the detriment of being separated from one of his or her parents.[296]

It seems that the legislature expected it to be only in rare and exceptional cases that a child would have more than two legal parents.

Further, the legislature wanted the permissive requirement to be used only to make legal what had already existed in fact—a child with more than two adults who had acted as parents to the child. In offering guidance, the legislature added the following to their statute on who would qualify as a parent:

> In an appropriate action, a court may find that more than two persons with a claim to parentage under this division are parents if the court finds that recognizing only two parents would be detrimental to the child. In determining detriment to the child, the court shall consider all relevant factors, including, but not limited to, the harm of removing the child from a stable placement with a parent who has fulfilled the child's physical needs and the child's psychological needs for care and affection, and who has assumed that role for a substantial period of time. A finding of detriment to the child does not require a finding of unfitness of any of the parents or persons with a claim to parentage.[297]

The state senator who wrote the bill was motivated by a California case where a child ended up in foster care because her two legal mothers could not care for her and the court would not recognize her biological father as a legal parent.[298] In *In re M.C.*,[299] the intermediate appellate court found itself bound by the California Supreme Court's previous rejection of three parents: "[W]hat we considered and rejected in *Johnson* was the argument that a child could have three parents: a father and two mothers."[300] The court further suggested that it was up to the legislature to change that,[301] an invitation ultimately accepted by California lawmakers.[302] The court also opined that if it had the power to grant recognition to three parents that this would not have been an appropriate case

296. Act of Oct. 3, 2013 § 1, at 4627–28.

297. Act of Sept. 28, 2018, ch. 876, § 47, 2017–2018 Reg. Sess. Cal. Stat. 5654, 5674 (codified as amended at CAL. FAM. CODE § 7612(c) (2014)).

298. Paula Gerber & Phoebe Irving Lindner, *Birth Certificates for Children with Same-Sex Parents: A Reflection of Biology or Something More?*, 18 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 260–61 (2015). That case was *In re* M.C., 195 Cal. App. 4th 197 (2011).

299. 195 Cal. App. 4th 197 (2011).

300. *Id.* at 214 (citing Elisa B. v. Superior Ct., 37 Cal. App. 4th 108, 119–20 (2005); *In re* Jesusa V., 32 Cal. App. 4th 588, 603 (2004); Johnson v. Calvert, 5 Cal. App. 4th 84, 90 (1993); Kristine H. v. Lisa R., 37 Cal. App. 4th 156, 166 (2005)).

301. *See id.*

302. Act of Oct. 3, 2013, ch. 564, § 5.5, 2013–14 Reg. Sess. Cal. Stat. 4629 (codified as amended at CAL. FAM. CODE § 7601(c) (2014)).

in which to do so since the biological father had not developed a relationship with the child prior to the custody determination.[303]

In *C.A. v. C.P.*,[304] the court recognized that the new statute abrogated *In re M.C.*[305] The first line of the opinion in *C.A. v. C.P.* presages the result of the new law: "This case involves a little girl bonded to and loved by each of her three parents."[306] The biological mother and her husband were raising the child, while acknowledging that another man was the biological father.[307] The other man was fully involved in the child's life, had held the child out as his own, and his close family members had also developed a relationship with the child.[308] The biological father had participated in medical decision-making for the child as well.[309] The court upheld the trial court's judgment that "declares that the child has three parents who shall share custody, with mediation to resolve any conflicts, and also adds plaintiff's last name to the child's existing set of names, though not as her last name."[310]

The California statute seeks to formalize already existing functional co-parenting relationships of more than two parties. That may apply in some situations of adoption where birth parents and adoptive parents are co-parenting, including stepparent adoption cases, but it does not answer the normative question of whether all adoption relationships should be designed to maintain connections between birth parents and adopted children through a formalized parenting relationship. Nonetheless, the ability to recognize more than two legal parents opens the door to such relationships.

IV. THE REALITY OF MORE THAN TWO: CONCERNS AND POTENTIAL SOLUTIONS

There is much good that can come from the legal recognition of more than two parents. A legally recognized stepparent, for example, can consent to medical treatment and thus the sole legal parent would not need to shoulder every doctor's visit. The legally recognized second parent can pick the child up from school, register the child for volleyball, and sign the field trip permission

303. *In re* M.C., 195 Cal. App. 4th at 214.
304. 29 Cal. App. 5th 27 (2018).
305. *Id.* at 35.
306. *Id.* at 30.
307. *See id.*
308. *Id.*
309. *Id.* at 31.
310. *Id.* at 32.

slip.[311] Some of these might seem like small things, but a legal co-parent can make life easier for both parents and the child. This Article has already discussed the importance of continuity of contact and identity formation as a "good" from adding, rather than subtracting, legal parents, but there are perhaps other more concrete benefits as well.

In the United States, parents are the social safety net for children. From the time of Blackstone, it has been understood that parents have an obligation to support their children.[312] The discourse surrounding child welfare payments makes clear that the parents are the first line of defense against poverty[313]—child support enforcement is supposed to prevent children from needing welfare and thus save the government coffers. As one commentator puts it bluntly, "[C]hild support enforcement is an anti-dependency measure. Politicians want to enforce child support orders because they are worried that the country is spending too much money on welfare . . . ."[314] With parents as the first line of support for children, the more legal parents with obligations of support the better, no?

Potential concerns about multiplying the number of parents for each child involve confusion and destabilization for children, destroying appropriate conceptions of family, and producing family conflict. Those who generally oppose more than two parents assert that children will be confused by family forms that do not match biological families with one mother and one father.[315] They suggest that changing the concept of family so significantly would interfere with traditional marriage and limit traditional parental rights.[316] And,

311. Sarah E.C. Malia, *Balancing Family Members' Interests Regarding Stepparent Rights and Obligations: A Social Policy Challenge*, 54 FAM. RELS. 298, 301 (2005) (noting that "even if the custodial parent wishes to grant his/her spouse authority to act on the child's behalf, a stepparent cannot validly sign permission slips or make decisions that can be honored by medical personnel and schools about a child's medical treatment, class field trip participation, or the like . . .").

312. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND IN FOUR BOOKS 446 (George Sharswood ed., Liberty Fund, Inc. 2011) (n.d.). Blackstone states that the duty of parents—even to their "bastard children"—is "principally that of maintenance." *Id.* at 458.

313. Appleton, *supra* note 4, at 20 (noting that "family law expresses a strong preference for private support of children" and that "increasing the number of recognized parents offers more resources and a more effective buffer against dependence on the state").

314. Drew D. Hansen, *The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law*, 108 YALE L.J. 1123, 1124 (1999).

315. *See, e.g.*, Scott FitzGibbon, *The Law's Duty To Promote the Kinship System: Implications for Assisted Reproductive Techniques and for Proposed Redefinitions of Familial Relations*, 29 BYU J. PUB. L. 389, 422–23 (2015) (criticizing the uncertainty of parentage which would result from assisted reproductive technologies and three-parent statutes like California's).

316. *See, e.g.*, Stanley Kurtz, *Heather Has 3 Parents*, NAT'L REV. (Mar. 12, 2003, 2:00 PM), https://www.nationalreview.com/2003/03/heather-has-3-parents-stanley-kurtz/ [https://perma.cc/YH

anecdotally, when I have discussed the possibility of more than two parents for a child, the first response from others has been concern for how such relationships would be managed in light of potential conflicts between parents.[317] Noted family law scholar Brian Bix describes some of these arguments as "the bogeyman of three (or more) parents."[318] This section will address these concerns and suggest some ways to ameliorate them.

A. *Confusion & Disruption*

One argument against a multiplicity of parents is that the situation would be confusing to children who would be unable to identify who their "real"[319] parents are, and profoundly destabilizing because more than two parents are indicative of too much change in a child's life. This echoes an argument made about putting children in day care—that they will no longer know who their mothers are when someone else is providing daily care.[320] Professor Bix sees some of these arguments as thinly disguised concern about same-sex couples and third-party egg and sperm donors,[321] where even without the third party's involvement some are concerned about the confusion they presume children will experience when they have two mommies or two daddies.[322]

Children in America today live in far more complex family forms than was once the case. A recent study recounts the change in diversity and complexity

5Q-LEW8] ("Once we cross the border into legalized multiple parenthood, we have virtually arrived at the abolition of marriage and the family."); *see also infra* notes 340–56 and accompanying text.

317. *See infra* notes 368–69 and accompanying text.

318. *See generally* Brian H. Bix, The Bogeyman of Three (or More) Parents (Aug. 1, 2008) (unpublished manuscript) (on file with the North Carolina Law Review).

319. It seems clear that this critique is identifying "real" parents as those two parents who are the biological progenitors of the child. In describing situations in which three persons could be biological/genetic parents, Professor FitzGibbon claims it would lead to chaotic outcomes, as "[p]ersons who are uncertain as to their parentage are therefore uncertain as to their entire families." FitzGibbon, *supra* note 315, at 423.

320. *See* Colleen Cancio, *Will My Baby Prefer the Nanny Over Me?*, HOW STUFF WORKS, https://lifestyle.howstuffworks.com/family/parenting/parenting-tips/baby-prefer-the-nanny.htm [https://perma.cc/86HW-9D37] (advising parents on how to deal with the problems that "arise when a baby begins to show a preference for the nanny over his or her parents").

321. *See* Bix, *supra* note 318, at 4.

322. Selena E. Van Horn, *"How Do You Have Two Moms?" Challenging Heteronormativity While Sharing LGBTQ-Inclusive Children's Literature*, 27 TALKING POINTS 2, 4 (2020) (noting the belief of some that children are "too young" to learn about gay and lesbian parenting). The so-called "Don't Say Gay" legislation in Florida rests on the assumption that young children (in grades kindergarten through third grade, according to the statute) should not be exposed to information about sexual orientation or gender identity. *See* H.B. 1557, 2022 Leg., Reg. Sess. (Fla. 2022) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.").

of family structures in today's children's experience: "The structure of adolescents' families, and thus parental forms, in the United States, have become more heterogeneous and fluid over the past several decades. These changes are due to increases in never-married, single parents, divorce, cohabitation, same-sex parenting, multipartnered fertility, and co-residence with grandparents."[323] One researcher terms current families with divorce, remarriage and repartnering as "serial polygamy," or "polygamy on the installment plan."[324] Children have managed these situations of multiple caregivers without undue confusion about who is entitled to be considered a parent to them.

A study of children whose parents are in concurrent (as opposed to serial) polyamorous relationships also suggests the ability of children to manage complex family arrangements without undue confusion.[325] They are likely to identify as parental figures those who have been in their lives since they were babies or toddlers and who live with them.[326] Shorter term involvement, or those who did not cohabit with them were seen "as a chosen family member akin to an aunt, uncle, cousin, or older sibling."[327] There might be complexity relating to stepsiblings and half siblings in polyamorous families, as there are in monogamous families as well.[328]

Concerns about confusion pervaded early arguments against open adoption as well. Opponents to open adoption argued that adopted children would have identity confusion over two sets of parents,[329] and that is not an uncommon concern among prospective adoptive parents.[330] But one of the most important longitudinal studies of adoption—the Minnesota/Texas Adoption

323. Lisa D. Pearce, George M. Hayward, Laurie Chassin & Patrick J. Curran, *The Increasing Diversity and Complexity of Family Structures for Adolescents*, 28 J. RSCH. ON ADOLESCENCE 591, 591 (2018).

324. Mark Goldfeder & Elisabeth Sheff, *Children of Polyamorous Families: A First Empirical Look*, 5 J.L. & SOC. DEVIANCE 150, 167–68 (2013).

325. *Id.* at 198–99.

326. *Id.* at 199.

327. *Id.* at 198.

328. *Id.* at 234 (noting that experiences with stepsiblings tended to mirror "experiences of other blended families with half- and step-siblings in serial monogamous families").

329. Adrienne D. Kraft, Joe Palombo, Dorena L. Mitchell, Patricia K. Woods, Anne W. Schmidt & Nancy G. Tucker, *Some Theoretical Considerations on Confidential Adoptions Part III: The Adopted Child*, 2 CHILD & ADOLESCENT S. WORK J. 139, 142 (1985) (discussing the difficulty of adopted children to integrate birth parents in open adoption); Marianne Berry, *Risks and Benefits of Open Adoption*, 3 FUTURE OF CHILD. 125, 129 (1993) (postulating that open adoption would produce confusion and divided loyalty between the two sets of parents in the adoptee).

330. *See* Harold D. Grotevant, Gretchen Miller Wrobel, Lynn Von Korff, Brooke Skinner, Jane Newell, Sarah Friese & Ruth G. McRoy, *Many Faces of Openness in Adoption: Perspectives of Adopted Adolescents and Their Parents*, 10 ADOPTION Q. 79, 96 (2007).

Research Project[331]—found that adopted persons in open adoptions experienced no confusion about who their parents were.[332] Most adoptees with the highest level of contact—face-to-face meetings—described their birth mothers as "a close or special friend or acquaintance or casual friend;"[333] others viewed them as "a relative, another parent, or playing a 'birth mother role.'"[334] Thus, it appears the adopted adolescents in this study were able to distinguish the position of birth parent from adoptive parent.

Professor Bix notes that those who oppose multiple legal parents might respond as Elizabeth Marquardt did:

> Those who have noticed tend to say [situations with multiple parents] are nothing new, because many children already grow up with several parent figures. But this fails to recognize that [they] still have only two legal parents.[335]

Yes, and if the state granted parental status to more than two, there would not then be confusion about who the "real" parents are, would there? Of course, if one conceives of the only "real" parents as biological parents, then the statement is not simply a normative statement about who should be a parent, it is also one that discounts adoptive families.

One argument about confusion is that potential parents might also be confused. They may be uncertain about what their rights are and what their obligations are vis-à-vis a particular child. Stanly Kurtz argues that

> once parental responsibilities are parceled out to more than two people . . . it becomes easier for any one parent to shirk his or her responsibilities. The very notion that parents can be added and subtracted at will tends to cut against the feeling of special responsibility for a given child.[336]

331. The study began almost forty years ago and has spawned a huge body of literature on the long-term effects of various forms of adoption. *Id.* at 81.

332. *Id.* at 89.

333. *Id.* at 88.

334. *Id.*

335. Bix, *supra* note 318, at 6 (quoting Elizabeth Marquardt, *When 3 Really Is a Crowd*, N.Y. TIMES (July 16, 2007), https://www.nytimes.com/2007/07/16/opinion/16marquardt.html [https://perma.cc/F8HF-LVGC (dark archive)]).

336. Stanley Kurtz, *Heather Has 3 Parents*, NAT'L REV. ONLINE (Mar. 12, 2003, 2:00 PM), https://www.nationalreview.com/2003/03/heather-has-3-parents-stanley-kurtz/ [https://perma.cc/6DNY-5T9M].] This appears to be a species of the bystander effect problem, where mobs allegedly fail to intervene where a single person would have done so. Professor Bix suggests facetiously if the "shirking" argument is valid, it would be best, then, to restrict children to a single parent. Bix, *supra* note 318, at 3; *see also* FitzGibbon, *supra* note 315, at 422 (arguing, "[p]eople who might consider

To the extent that there is confusion or ambiguity about the respective roles of birth parents and adoptive parents, the proposal to allow more than two legal parents is bound to alleviate rather than produce confusion. It is the undefined nature of birth parenthood, for example, that is likely to cause confusion.[337] Asserting legal status, with defined rights and obligations, would resolve ambiguity in many ways. If a court ruled that a third person was a parent, and ordered the payment of child support, one would expect no more shirking than is the norm in the already epidemic-level problem of nonpayment of child support.[338]

Concerns about confusion and dispersion of responsibility compare the presence of three legally recognized parents to the heteronormative two-parent, never-divorced biological parents of the hypothetically perfect family. But that family does not exist for a great number of children.[339] Blocking legal recognition does not change the reality of the existence of such families, it simply leaves children unprotected by denying parental recognition that could formalize responsibility for the care and protection of the children. Turning back the clock to a more idealized time might be attractive but is profoundly unrealistic now.

B. *Changing Conceptions of Family*

Professor Bix sees some of the arguments against three-parent families as thinly disguised concern about same-sex families, a rear-guard action against

themselves to be parents would be uncertain as to whether they occupy that status; children would be uncertain of their parentage").

337. *See* Deborah Lewis Fravel, Ruth G. McRoy & Harold D. Grotevant, *Birthmother Perceptions of the Psychologically Present Adopted Child: Adoption Openness and Boundary Ambiguity*, 49 FAM. RELS. 425, 425 (2000) (suggesting that education to maneuver roles would be helpful for boundary ambiguity).

338. In fiscal year 2020, the total amount of unpaid child support in arrears was $115,130,048,828.00. OFF. OF CHILD SUPPORT ENF'T, U.S. DEP'T OF HEALTH & HUM. SERVS. PRELIMINARY REPORT FY 2020 91 (2021), https://www.acf.hhs.gov/sites/default/files/documents/ocse/fy_2020_preliminary_data_report.pdf [https://perma.cc/45D8-WA66]. Total caseloads for child support enforcement nationwide for that year was 13,203,628. *Id.* at 58.

339. According to the Pew Research Center, in 2014, less than fifty percent of children lived in a two-parent, first marriage household, while twenty-six percent of children lived in single parent households, fifteen percent with two-parent, remarried households, seven percent lived with cohabiting, unmarried parents, and five percent had no parents at all in their household. *The American Family Today*, PEW RSCH. CTR. (Dec. 17, 2015), https://www.pewresearch.org/social-trends/2015/12/17/1-the-american-family-today/ [https://perma.cc/5T4J-SFR7]. Additionally, "[m]ore than 125,000 same-sex couple households (19%) include nearly 220,000 children under age 18." GARY J. GATES, WILLIAMS INST., LGBT PARENTING IN THE UNITED STATES 1 (Feb. 2013), https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting-Feb-2013.pdf [https://perma.cc/7ZCN-K4GG].

gay marriage.[340] For others, the argument is simply against anything different from the conventional two-parent family of earlier times; Scott FitzGibbon argues that the state has a role in enforcing kinship status when it is a social good, and that it is a social good only in its traditional formulation.[341] He finds little positive value in families that involve multiple parenting structures or assisted reproductive technology that creates claims for biological parenthood beyond two parents.[342] This seems to be the crux of the argument for much opposition to legally recognize more than two parents. Anything that changes the typical biological dyad of two parents runs the risk of destroying the family as we know it.[343]

Professor Bix notes that the bogeyman of the three-parent debate "quickly leads back to that other bogeyman: polygamy."[344] Yet more than two parents does not make more than two marriage partners inevitable any more than two parents has made marriage and parenting coterminous today.[345] While there is an assumption that polygamous families often exhibit harmful characteristics such as violence and exploitation,[346] studies suggest "that these abuses are caused by 'particularly dysfunctional' polygynist families rather than problems inherent to polygyny."[347] In other words, having more than two parents is not the problem. Studies show that polyamorous families can raise successful, well-adjusted children.[348]

Concerns about changing the nature of the family might be asserted as a violation of constitutionally protected parental and marriage rights. In *C.A. v. C.P.*, the California case where a married couple resisted recognition of the biological father as a legal parent, the couple asserted that the state was required to protect marriage and that recognizing the third parent would diminish their constitutionally protected parental rights.[349] The court gave these arguments little weight. While the court agreed that a parent's right to care, custody, and

340. *See* Bix, *supra* note 318, at 6 ("It is hard not to suspect that much of the shocked reaction to the three parent cases is grounded in the visceral response to both same-sex couples on one hand, and new reproductive technologies . . . on the other.").

341. FitzGibbon, *supra* note 315, at 390–91.

342. *Id.* at 418–20 (rejecting polyamorous families and three-parent embryos).

343. Bix, *supra* note 318, at 3.

344. *Id.* at 3.

345. *See* Goldfeder & Sheffet, *supra* note 324, at 177 ("[F]amily law has already disaggregated marriage from parenting.").

346. *Id.* at 162.

347. *Id.* at 182 (discussing study that suggests "abuses are caused by 'particularly dysfunctional' polygynist families rather than problems inherent to polygyny").

348. *Id.* at 182–83.

349. C.A. v. C.P., 29 Cal. App. 5th 27, 32 (2018).

management of a child should not be lightly interfered with by a nonparent, the court held there was no unwarranted interference with parental rights when the third person is a parent.[350] Indeed, the logical extension of the argument would otherwise say that each of two parents interfered with the parental rights of the other parent simply by existing! The only constitutionally valid parental rights in that formulation would be the undiluted rights of a single parent.

The arguments about the changing nature of family are familiar from the debates about recognition of gay marriage. In offering constitutional protection to same-sex marriage, the Supreme Court in *Obergefell v. Hodges* acknowledged that those seeking same-sex marriage were not doing so out of a desire to "demean the revered idea and reality of marriage," but instead seek it because of "their respect and need for its privileges and responsibilities."[351] The purpose of such recognition was not to change the family as we know it, but to acknowledge that the family—as exemplified by marriage—had already changed profoundly. And the Supreme Court noted that the changes "have strengthened, not weakened, the institution of marriage."[352] Legal recognition of more than two parents will, in the same way, further strengthen the reality of family life.

Adoptive parents may be concerned that recognizing legal status of birth parents delegitimizes adoptive families by suggesting that biological ties are superior to adoptive ties.[353] It is not a matter of a hierarchy of parentage to recognize more than two parents, biological and adoptive; it is a recognition of reality that children see themselves already as existing in two families, each with a different set of parents.[354] Connecting these families aids the child in grounding their identity and conception of family. And the two-parent limit, itself, reifies the biological conception of family in a way far more consequentially harmful for adoptive families. It is, in many ways, setting up adoptive families for failure—no matter how much an adoptive family may seek to be "as if" biological, they will never be the biological progenitors of the child.

C. *Conflicts Among Multiple Parents*

Opposition to more than two parents often rests on the premise that additional parents will breed intractable conflicts in parenting. Yet managing

350. *Id.* at 43.
351. Obergefell v. Hodges, 576 U.S. 644, 657–58 (2015).
352. *Id.* at 660.
353. Ouellette & Roy, *supra* note 281, at 29.
354. *Id.*

conflicts between parents is a staple of family law. Consider divorce and child custody: when two parents split up, courts are accustomed to establishing and regulating the rights and obligations of each parent, and enforcing those rights and obligations in a number of ways.[355] In joint custody arrangements in particular, the parents might actually have equal decisional rights—each having a right to decide where a child goes to school, where a child resides, what medical care a child should receive, and other important decisions.[356]

Katharine Bartlett describes the rights and duties of parents as "both exclusive and indivisible."[357] Each parent is entitled to exercise fully each right and duty of parenthood, even when parenting jointly. But when parents seek divorce and to adjudicate child custody, the rights and duties in children become more like that bundle of sticks law students learn in first-year property.[358] A court can divide the parental right of custody and the parental duty of support between the two parents.[359] In joint-custody arrangements, parents may have equal physical custody rights, as well as equal decision-making rights, or those rights may be parceled out between them.[360]

In Texas, for example, parents seeking joint custody can file a joint parenting plan with the court, which indicates who would have the right to designate the child's primary residence, specifies the rights and duties of each parent for the child's physical care, support, and education; and "allocate[s] between the parents, independently, jointly, or exclusively, all of the remaining rights and duties of a parent."[361] If the parties do not do so, and the court nonetheless orders joint custody, the court sets forth the division of all the rights

355. J. Herbie DiFonzo, *From the Rule of One to Shared Parenting: Custody Presumptions in Law and Policy*, 52 FAM. CT. REV. 213, 213 (2014). Professor DiFonzo gives an illustration of joint custody statutes in New Mexico, stating, "[t]he statutory scheme also provides seven options for making 'decisions regarding major changes in a child's life.' These include mediation and family counseling requirements, allocating final decisional authority on a matter to one party, terminating joint custody, as well as a binding arbitration and court decision options." *Id.* at 223 (quoting N.M. STAT. ANN. § 40-4-9.1 J(5) (2022)).

356. *Id.* at 222–23.

357. Bartlett, *supra* note 4, at 883.

358. Laura Kessler touches on this analogy, arguing the need to "disaggregate the bundle of parental rights" to recognize more than two parents. Kessler, *supra* note 4, at 74; *see also* Melanie B. Jacobs, *Why Just Two? Disaggregating Traditional Parental Rights and Responsibilities to Recognize Multiple Parents*, 9 J.L. & FAM. STUD. 309, 325 (2007) [hereinafter Jacobs, *Why Just Two?*] (making the argument about strands of parental rights: "By disaggregating the strands of parentage, it becomes possible to recognize the many individuals who play a role in the child's life").

359. Bartlett, *supra* note 4, at 899.

360. *See, e.g.*, TEX. FAM. CODE ANN. § 153.131(b) (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Legislature) (presumption of joint custody).

361. *Id.* § 153.133(a)(1), (2), (4) (Westlaw).

and duties of a parent between the petitioning parents.[362] Texas is not an anomaly in this division of parents' rights and duties upon divorce.[363]

Like many states, Texas also provides that a custody order should contain a recommendation that "the parties use an alternative dispute resolution method before requesting enforcement or modification of the terms and conditions of the joint conservatorship through litigation."[364] This is in line with the modern role of family courts in divorce and child custody. Andrew Schepard describes family law courts today as "conflict managers rather than fault finders," with courts as

> the apex of a multifaceted dispute resolution system that encourages out-of-court agreement on parenting plans. Court-affiliated education programs, mediation, and legal rules which reward post divorce and separation cooperation between parents are the core of a newly created settlement culture, and trials are a last resort for particularly troublesome cases.[365]

California takes to heart the role of the court as manager of child custody disputes, having mandated the mediation of such disputes since 1981.[366] Mediation has proven very successful in resolving custody disputes. Nancy Welsh writes, "[r]esearch has affirmed that divorce and child custody mediation results in higher rates of compliance, fewer returns to the courts with post-divorce disputes, and more significant relationships between children and both of their parents."[367] And mediation is not the only alternative to litigation to solve custody disputes. Professor Welsh identifies a number of processes courts have used to avoid litigation and solve custody disputes, including conflict resolution conferences that are more directive than mediation, hybrid processes that include negotiation and agreements but may include information gathering and assessments for recommendations to the court, and collaborative or

362. *Id.* § 153.134(a) (Westlaw).

363. *See* Bartlett, *supra* note 4, at 899 ("The law assumes that both parents will continue to have relationships with the child and that they will divide parental duties and responsibilities.").

364. § 153.134(b)(5) (Westlaw).

365. Andrew Schepard, *The Evolving Judicial Role in Child Custody Disputes: From Fault Finder to Conflict Manager to Differential Case Management*, 22 U. ARK. LITTLE ROCK L. REV. 395, 396 (2000).

366. Sofya Perelshteyn, *Mediator or Judge?: California's Mandatory Mediation Statute in Child Custody Disputes*, 17 PEPP. DISP. RESOL. L.J. 1, 2 (2017). Whether mandatory mediation is appropriate is beyond the scope of this Article. For many, less than voluntary mediation is not mediation at all.

367. Nancy A. Welsh, *You've Got Your Mother's Laugh: What Bankruptcy Mediation Can Learn from the Her/History of Divorce and Child Custody Mediation*, 17 AM. BANKR. INST. L. REV. 427, 454 (2009).

cooperative lawyering.[368] There is no reason to believe that these alternatives are not capable of resolving disputes when more than two parents are involved. Indeed, in *C.A. v. C.P*, the California court recognized the third parent also required mediation to resolve any disputes.[369]

Open adoption agreements, while often not legally enforceable, may have enforcement mechanisms in some jurisdictions.[370] Texas, for example, allows for legal enforcement of some such arrangements.[371] But Texas also requires that the parties try mediation before seeking legal enforcement.[372] This further emphasizes that tools already exist to mitigate the concerns about conflicts between more than two parents—the same tools that solve conflicts between two parents.

Conflicts could be reduced by legislative choices as well. Recall that the final Quebec proposal for more than two parents limited the rights and obligations of birth parents so that they would not have an obligation to provide child support and had no rights of authority over the child.[373] And in France *adoption simple* allocates parental authority to the adoptive parents, but imposes obligations of support and inheritance on birth parents.[374] Rather than leave the decision about how to allocate authority between multiple parents to judges on a case-by-case basis, the legislature could set out specific rights or limitations on rights for parents with varying statuses. While the case-by-case method is already utilized in conflicting parenting between two parents—and is likely to be able to better handle individual family differences—there are potential and viable legislative solutions to conflicts of this sort.

Concerns about more than two parents gaining legal recognition are premised on an idealized form of family that exists for few children today. Whether or not other adults are recognized as legal parents, they are already

368. *Id.* at 456–57. *See generally* John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 42 FAM. CT. REV. 280 (2004) (comparing and contrasting various alternative methods to resolve divorce cases, including child custody).

369. C.A. v. C.P., 29 Cal. App. 5th 27, 32 (2018); *see also id.* at 44 (noting that the third parent "treated the child as his daughter *with the consent of defendants*." (emphasis added)).

370. Seymore, *International Adoption*, *supra* note 26, at 182–83; Seymore, *Sixteen and Pregnant*, *supra* note 9, at 151–53.

371. TEX. FAM. CODE ANN. § 161.2061(a) (Westlaw through the end of the 2021 Reg. and Called Sess. of the 87th Legislature).

372. *Id.* § 161.2061(c) (Westlaw) ("The terms of an order of termination regarding limited post-termination contact may be enforced only if the party seeking enforcement pleads and proves that, before filing the motion for enforcement, the party attempted in good faith to resolve the disputed matters through mediation.").

373. *See supra* note 287 and accompanying text.

374. *Id.*

important to children in stepparent families, in families created through assisted reproductive technology, and in adoptive families. Legal recognition would offer less confusion because it would further define familial roles. It would offer more protection for the family as legal obligations and rights became clear. Finally, legal recognition of more than two parents would provide a formalized process for dispute resolution that has always been utilized for families of divorce. Recognizing the reality of children's already-complicated family lives is in their best interests.

D. *Private Ordering and More Than Two Parents*

If individuals wish to establish groups larger than two people to raise children together, and to each be called parent without the assistance of the state to recognize parental rights and enforce them, they would be free to make such a private arrangement. But multiple parents may run up against the traditional reluctance of family law to recognize private ordering if they seek state enforcement of their private agreement.[375] The traditional view of private ordering in family law demands that the state establishes the exclusive "contract" of marriage and parentage. Once a family was created, the state decided the terms of the marital contract, including the ability to terminate the contract by divorce, financial responsibilities upon divorce, and the like.[376] And with children, the state also set the terms of the contract of parenthood, including who was recognized as a parent and what the rights and duties of parents would be.[377]

But today, private ordering in family law is not unusual: "One can speak of premarital agreements, marital agreements, separation agreements, open adoption agreements, co-parenting agreements, agreements on the disposition of frozen embryos, and agreements to arbitrate disputes arising out of any of the above agreements."[378] Adoption today, like other areas of family law, is a mix of legal ordering and private ordering.[379] The state reserves the right to

375. Private ordering in family law occurs when individuals make "private arrangements to alter the legal rules surrounding family status." Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL L. 249, 249 (2010) [hereinafter Bix, *Private Ordering*].

376. *Id.*; *see also* Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1446 (1992) ("Traditionally, the legal principles governing marriage and consensual alternatives to marriage reflected a strong preference in favor of public ordering of behavior.").

377. Bix, *Private Ordering*, *supra* note 375, at 249; *see also* Singer, *supra* note 377, at 1478 (discussing the shift from public to private ordering in the context of adoption).

378. Bix, *Private Ordering*, *supra* note 375, at 249.

379. *See generally* Amanda C. Pustilnik, *Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law*, 20 YALE L. & POL'Y REV. 263, 263 (2002). In fact, Pustilnik argues that adoption is "nonstatutory, with deep private-ordering roots in contract law." *Id.* at 264.

determine who may adopt and to define the adoptive family.[380] Yet many other aspects involve private ordering. Jana Singer finds proof that adoption is shifting to private ordering from the "change in the perceived purpose of American adoption law, from promoting the welfare of children in need of parents—traditionally and unproblematically a 'public' function—to fulfilling the needs and desires of couples who want children."[381] She notes the growth of private placement adoption, where prospective adoptive parents advertise for birth mothers and make their own arrangements to adopt a child.[382] The state's involvement is minimal, as the parties contact each other over the internet or in other ways,[383] contract with a private social worker for a home study, and accept placement of the child before any state intervention.[384] It is only later that the prospective adoptive parents go to court for a legal order of adoption.

Private ordering also extends to open adoption agreements, where the parties may agree to continuing contact in derogation of legal rules that hold that birth parents whose rights have been terminated do not have any right to continuing contact, as they are legal strangers to their children.[385] Courts were once quite reluctant to enforce open adoption agreements, accepting that "the parties had no power to alter the terms of a state-created status."[386] Now through legislation and court action, many states provide enforcement of at least some continuing contact agreements.[387]

There are many possible variations for operationalizing a new more-than-two rule in adoption. The simplest is private ordering—at least in cases where all the parties agree, the state should permit more than two parents. Private ordering should allow parents who agree to contract for more than two parents.

380. *Id.* at 264.

381. Singer, *supra* note 376, 1478.

382. Singer, *supra* note 376, at 1479; *see also* Pustilnik, *supra* note 379, at 287–88 (noting that eighty-five percent of adoptions are transacted privately, with only fifteen percent going through state or state-regulated agencies).

383. Singer, *supra* note 376, at 1481; Pustilnik, *supra* note 379, at 287–88. Those other ways include through intermediaries like doctors, preachers or lawyers who might come into contact with unwed mothers considering adoption, or via advertisements in newspapers, particularly on college campuses. *Id.* at 1482.

384. Singer, *supra* note 376, at 1485 n.194 (describing the private placement process as requiring only a post-placement home study).

385. *See* Bix, *Private Ordering*, *supra* note 375, at 275 ("In recent decades there has been a growing use and acceptance of 'open adoption' agreements, under which the birth parent(s) and the adopting parent(s) agree that the birth parent(s) can continue to have contact with the child being adopted."). *But see* Seymore, *Sixteen and Pregnant*, *supra* note 9, at 152 ("In those states with enforceable open-adoption agreements, there are complex legal requirements that serve to limit the parties who can enter into such agreements and to limit the types of adoptions in which such agreements are enforceable.").

386. Bix, *Private Ordering*, *supra* note 375, at 275.

387. *Id.* at 275–76.

States, however, need to recognize that the definition of family extends to multiple-parent families to allow for that legal recognition of such parenting. Parents can then create a parenting agreement, much like that utilized in the divorce of two parents, to allocate rights and responsibilities among more than two parents. Integrating the two families of adopted children—the birth family and the adoptive family—is, according to the psychosocial literature, in the best interests of children. Children can then have a family that comports with the reality of their multidimensional lives and the wishes of all their parents.

CONCLUSION

One of many lessons from the recent COVID-19 pandemic is that parenting is hard. With parents seeking to balance working, childcare, and the education of children all at home, it was the unusual parent who did not wish for additional help and support. Although parents may not have thought to ask for another parent to join the household, they may have thought that this description of parenting in a more-than-two-parent household seemed like a wished-for fantasy:

> Whereas a single adult or even two adults with little or no time to themselves can "burn out," multiple adults can meet the endless needs of children without becoming frustrated or insensitive. Children can benefit from having multiple loving parents who can offer not only more quality time, but a greater range of interests and energy levels to match the child's own unique and growing personality.[388]

But separate from the "helping hands" dynamic of legal recognition of more than two parents, there are considerable benefits in the psychosocial literature about adoption to maintain connections between an adopted child and their birth families as they grow up in their adoptive families.

The imperative to make the adoptive family closely resemble a biological family, to seek the justification that the child belongs because it is "as if" the child was born to the adoptive family, no longer holds sway. Instead, there is widespread recognition that adopted children are part of two separate and distinct family groups—one preexisting the adoption and the other created by the adoption. Even when there is a legal rupture, the absent birth parents

388. Goldfeder et. al, *supra* note 324, at 187. The idealized description may not be fully accurate, of course. The study authors note that polyamorous families have a vested interest in "portraying their polyamorous families as 'perfect.'" *Id.* at 195. It is a way to distance themselves for the stigma often experienced by sexual minorities. Still, there is an innate logic to this claim, though on balance there may be negatives not accounted for.

remain salient in the child's imagination. And reality is more psychologically stabilizing than a legal fiction that the child had no origins before the adoption paperwork was signed.

Legal erasure is not an inevitable consequence of adoption—it is a chosen and accepted consequence of how adoption is practiced in the United States. It was built on a foundation that is no longer accepted as being in the best interest of children. It can be changed; after all, the experience of France with *adoption simple* tells us that we can change the equation of adoption to one of additive filiation.

Doing so would not just be good for the children of adoption; it may also be good for the institution of adoption itself. One issue that plagues adoption today is that there are more prospective adoptive parents seeking to adopt than there are available infants to adopt.[389] Open adoption initially flourished because it was thought to motivate birth parents to place their children for adoption.[390] Retaining parental rights may serve that same instrumental function today. As Candace Zierdt notes, parents are extremely reluctant to forfeit their parental rights:

> In my experience as a guardian ad litem in many contested adoption/termination of parental right cases, it often appeared that birthparents contested the termination and adoption not necessarily because they anticipated or even desired obtaining custody of their child, but because they believed they loved the child and did not want the child to think they had not fought for her. Additionally, the idea of being totally cut off from their child was just too difficult for many parents, and they could not allow it without a battle. If a parent, however, had a route which allowed her to keep a legal relationship with the child instead of abandoning all of her parental rights, perhaps a parent would find it easier to consent to the adoption.[391]

This reluctance is also present in many stepparent adoption cases, where the biological parent is simply unwilling to relinquish parental rights so that a

389. Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 314 (2012) (quoting the National Committee for Adoption commenting on the decline in 1989, "[m]ore than a million couples are chasing the 30,000 white infants available in the country each year"). Of course, there are other children available for adoption—older children, children from foster care, sibling groups, children with disabilities, children of color—but there is less competition for these children, with adoptive parents competing for healthy, white newborns. Michele Goodwin, *The Free-Market Approach to Adoption: The Value of a Baby*, 26 B.C. THIRD WORLD L.J. 61, 63 (2006) (noting different valuation of fees paid for adoption depending on the race and genetics of a child).

390. *See* Seymore, *International Adoption*, *supra* note 26, at 175 (Early proponents of open adoption suggested it would encourage reluctant birth mothers to place children for adoption).

391. Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497, 505 n.43 (1993).

stepparent can adopt.[392] So even when the stepparent is raising the child, they will have no recognized legal rights as a parent. If we could instead add the stepparent without subtracting the biological parent, the reality of the child's family experience could gain legal recognition, creating a stronger support network for the child.

While private ordering could provide a partial answer to how to permit more than two parents, should the state also, through legal ordering, impose multiple parenthood without full parental agreement? The California statute recognizing more than two legal parents seeks to do so when already-existing caregiving relationships are being threatened in a way that is detrimental to the child.[393] The purpose is to give legal recognition to what already exists as a more-than-two-parents practice. And part of the justification in one case was that the two already-legal parent had invited or acquiesced to the parenting relationship of the third parent for many years.[394] Others have suggested that states should recognize such de facto parents.[395]

Katharine Bartlett argues for recognition of de facto parents, at least in circumstances where the nuclear family has already been disrupted.[396] She would also require "that the relationship with the child began with the consent of the child's legal parent or under court order."[397] The American Law Institute also suggests recognition in divorce and child custody for parenting by estoppel and de facto parenthood for those with an already-existing parenting relationship that commenced with the consent of at least one parent.[398] While the California court did not require disruption of the marriage in order to recognize a third parent, it did require agreement/acquiescence of the other parents at the start of the third-parent/child relationship. Other commentators

392. 1 ADOPTION LAW AND PRACTICE, *supra* note 15, § 2.10[3] (noting that while stepparent adoptions account for over half of all adoptions, they still occur in only a small fraction of households with a stepparent present, attributing it to the need to sever legal ties with the noncustodial parent who may wish to remain in the child's life).

393. *See supra* note 296 and accompanying text.

394. C.A. v. C.P., 29 Cal. App. 5th 27, 44 (2018) ("For over three years [the third parent] treated the child as his daughter with the consent of defendants.").

395. *See* Bartlett, *supra* note 4, at 946 (arguing for the legal recognition of rights of "psychological parents," or "adults who provide for the physical, emotional, and social needs of the child").

396. *Id.*

397. *Id.* at 947.

398. AM. L. INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03(1) (2002).

have not relied on the breakup of the nuclear family as justification for recognition of more than two parents.[399]

But how should a more-than-two formulation extend to birth parents whose presence in a child's life has been more limited, not rising to the level of de facto parenthood? Private ordering is one answer, and open adoption has been a mechanism for doing so. But open adoption does not change the status of the birth parents—they remain legal strangers to the child, allowed continuing contact only on sufferance by the adoptive parents who are the only legal parents.

Alison Young argues that allowing all parental rights to exist in only the adoptive parents essentially makes the birth parents disappear.[400] Professor Young also suggests there should be alternatives to the all-or-nothing conception of parental rights—a parent has all parental rights, a nonparent has nothing.[401] She envisions parenting relationships where a core parent or parents—usually the one with physical custody—has decision-making authority, while other parenting figures have rights to information and access.[402] The model of *adoption simple* in France and the proposed model of adoption in Quebec incorporate this idea of different rights for different parents, with *adoption simple* imposing child support obligations on birth parents but with adoptive parents maintaining decisional authority.[403] While Professor Young utilizes open adoption as an example of different tiers of parental rights,[404] open adoption as currently practiced does not, in fact, create an enduring parental status for birth parents. Rather, parental rights of the birth parents are terminated, leaving them only with potential contractual rights of contact.[405]

399. *See* Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 508–09 (1998) (advocating for recognizing "non-traditional family units as well as the range of roles potentially played by various actors in the life of a child"); Appleton, *supra* note 4, at 15 (examining recent discourse on multi-parentage); Dowd, *supra* note 4, at 232 (exploring how to recognize multiple fathers); Kessler, *supra* note 4, at 49 (discussing more-than-two-parenting, or "community parenting"); Jacobs, *My Two Dads*, *supra* note 4, at 851–52 (arguing for disaggregation of biological and social paternity to recognize two legal fathers); Jacobs, *Why Just Two?*, *supra* note 359, at 313 (advocating for relative parental rights to recognize all parents in a child's life).

400. Young, *supra* note 399, at 544.

401. *Id.* at 506.

402. *Id.* at 518.

403. *See* discussion *supra* Sections III.B–C.

404. *See* Young, *supra* note 399, at 538–39 (noting how open adoptions allow birth mothers to serve a "supplementary and complementary parental role").

405. *See* Seymore, *Sixteen and Pregnant*, *supra* note 9, at 152–53 (explaining how in Texas, "a post-adoption contact agreement is enforceable only if a judge incorporates it in the termination of a parental rights order").

There is value in formalizing the relationship between birth parents, adoptive parents, and children with recognition that birth parents and adoptive parents are, indeed, parents of the child. Carl E. Schneider speaks of the "channelling function" of law, the way in which it "recruits, builds, shapes, sustains, and promotes social institutions."[406] It does so through its "expressive function," employing "the law's power to impart ideas through words and symbols."[407] And in doing so, "such symbolic statements can promote changes in social sentiment which in turn may promote a reformation of social behavior."[408] The channelling function of the law also creates social institutions, including marriage and parenthood.[409]

Legal recognition of a continuing parental relationship between birth parent and child would channel adoptive and birth families into these relationships that the social science literature tells us is important to the development of adopted children. By permitting more than two parents, the law would signal that families that do not meet the traditional definition of bionormativity are as valid and deserving of dignity (as Justice Kennedy framed it in *Obergefell*) as those who do.[410] To quote the Supreme Court, recognition of parental rights in more than two parents would allow children "to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives."[411] Without legal recognition of parenthood for all of their parents, "children suffer the stigma of knowing their families are somehow lesser."[412]

There is value in law as symbol: "[t]he enduring filial status" of birth parents recognized as legal parents "would allow the adoptee to say to the birth parents, with the law's imprimatur, 'You are still my mother' or 'You are still my father.'"[413]

406. Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 496 (1992).

407. *Id.* at 498.

408. *Id.*

409. *Id.* at 500.

410. Obergefell v. Hodges, 576 U.S. 644, 681 (2015).

411. United States v. Windsor, 570 U.S. 744, 772 (2013).

412. *Obergefell*, 567 U.S. at 646. Of course, in *Obergefell*, the Court was speaking of marriage linking children to families rather than recognition of parental rights, but in fact both marriage and legal recognition of parental rights are important in creating a legal family.

413. Leckey, *supra* note 281, at 536.