GHOSTS IN THE POSTMODERN FAMILY

annette appell, Washington University in St Louis

Available at: https://works.bepress.com/annette_appell/3/
“Amid the many transformations that have reshaped the study of kinship over time, the question of the significance of biological facts has remained a persistent quagmire – as easy to fall into as it is difficult to leave behind.”

**Contents**

Abstract ............................................................................................................. 2

Introduction ..................................................................................................... 3

I. Bionormative Regulation of Families and the Production of Liberty ............ 9

A. The Constitutional Family and the Parental Rights Doctrine ..................... 11
   1. The Evolution of the Constitutional Family ............................................. 12
   2. The Matrifocal Construction of Parenthood .......................................... 14
   3. The Rights of Parenthood ..................................................................... 16

B. Early Postmodern Families: The Birth and Evolution of Adoption .......... 19
   1. The Creation of Adoption ..................................................................... 20
   2. The (re)Opening of Adoption ............................................................... 23

C. Second-order Postmodern Families: Balancing Consent and Connection .... 27
   1. The Decline and Rise of Fatherhood ...................................................... 29
   2. Biological Assistance: Families Created with Reproductive Technology .... 32
   3. Same-Sex Parents: Lesbian and Gay Families ....................................... 35

II. Biological Ordering and the Production of Identity ..................................... 38

A. Biological Connection and Identity ........................................................... 39

B. Disrupted Identity ....................................................................................... 44

C. Rehearsing Biology, Performing Identity ................................................... 53

---

1Professor, Washington University Law School. I am indebted to Laura Kessler for conjuring the Children in the Post-Nuclear Family panel at the 30th International Congress on Law and Mental Health, Padua, Italy, June 2007, for which I began to compare the trajectories of family and adoption law. I am also thankful to the other panelists at that conference, Susan Appleton, Irene Cant, Laura Rosenbury, and Donna Young, Marion Crain, Greg Magarian, and Naomi Cahn and participants at a Boyd Law School Faculty Colloquium provided helpful comments on earlier drafts. Law students Kristina Escamilla and Kim Herbert (Boyd Law) and Kathryn Crank and Jera Oliver (Washington University Law) provided research assistance. An earlier version of this Article carried the title The New Blended Families.

Abstract

As legal theory and doctrine respond to the range and complexity of biological and social connections that increasingly compose families, they evoke a bionormative nuclear family framework for lesbian and gay families, stepfamilies and families created with outsourced reproductive materials or labor. This Article questions this approach because it disregards the complex foundational roles of biological relationships in American jurisprudence and fails to appreciate the unique aspects of kinship in these postmodern families. Instead, this Article anchors the postmodern family law movement in the physical, social and economic conditions that affect the most disaffected among us: those who are socially, economically and politically disadvantaged and those who have experienced the legal loss of a biological parent or child. American stories of adoption, assisted reproduction, race, and lineage challenge the notion that biological connections are no longer significant to individual or group identity and status.

The regulation and study of adoption and other phenomena that disassociate children from their biological roots offer pertinent lessons for understanding and regulating the new postmodern families. These lessons are three-fold and apply to the
children and the adults in these families. The first is historical and follows adoption’s failed attempt at legal and social banishment of biological family connections, banishment that has been structurally connected to and dismissive of gender and race. The second is sociological and relates to the existential roles of biology in social (including racial) identity formation and ordering. The third lesson is doctrinal and regards adoption law’s recognition and regulation of these relationships through adoption with contact, which presents a model for shared parenting in other postmodern families.

Introduction

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

---

3 Judith Stacey, *In the Name of the Family, Rethinking Family Values in the Postmodern Age* 38 (1996).
4 See Stacey, *supra* note 3, at 2-8. Stacey, however, characterizes the postmodern family not with a “next stage” but as a signal of a “moment in . . . history when our belief in a logical progression of stages has broken down.” *Id.* at 8.
parenting of a child.

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

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

---


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

biological connections and the biological aspects of the parental rights doctrine.\(^8\) While these proposals and the freedom and possibility that the postmodern family offers are important and needed, they also have the potential to undermine maternal-child relationships, to disconnect disadvantaged women from motherhood, and to obscure the importance of biological connections to those whose own connections have been disrupted. This nation’s experience with adoption bears lessons both about the persistence and depth of biological connections and the coerciveness and corrosiveness of attempts to create the perfect family.

Adoption represents a bridge between the modern and postmodern family. It is modern in its nuclear, bionormative structure, but it is postmodern in its deviations from biological ordering and displacement of the patriarch. Institutionalized during the rise of the modern family (beginning in the mid-nineteenth century), adoption contradicts and mimics family law norms by discarding and then mirroring biological connections while seeking to replicate the nuclear, marital, heterosexual family. Rooted in the modern family form, with its patriarchal and racialized norms, adoption showed signs of strain as women and children gained voice and status in relation to law and social ordering and other postmodern families became more normative. These changes challenged the rebirth

---

paradigm and its extirpation of birth connections, pushing adoption to become more open and more diverse. In response to these changes, adoption law has continued to hew toward broader changes in family law, and in some ways family law has hewed toward adoption.9

As it attempts to respond to a stunning array of non-biological familial relations, family law has not absorbed the lessons of adoption; instead, its trajectory is toward favoring social at the expense of biological, ties.10 Despite social and political changes and increasingly plural parentage, family law has clung to the nuclear family form, just as adoption did a century before. In the meantime, and in contrast, adoption law and practice have come to embrace biological ties while protecting social ties (i.e., the relations created through adoption). These more profound changes in adoption law and practice have gone almost unnoticed, even though these changes include a rise in ongoing contact adoption11 and a relatively new legal form of adoption, “cooperative adoption” or “adoption with contact,” that legitimates and regulates post-adoption contact among adoptive and biological family members.

Both adoption with ongoing contact and adoption with contact have grown out of the experiences of adoptees, adoptive parents, birth relatives, and adoption professionals who found the anonymity and rigid closure of adoption to be unsatisfactory and

9See Appleton, supra note 8, at 16-17 (family law embraced anonymous sperm donation); Polikoff, Breaking the Link, supra note 8 (lesbian and gay civil unions and marriage, which followed second-parent adoption).
10Although parental rights continue to privilege biological connections, see infra pt. II.A., increasing methods have evolved to privilege social relations when adults determine whether they want a relationship with the child. See Appleton, supra note 8, at 16-23 (describing these changes).
11By “ongoing contact adoption,” I refer to adoptive families that have ongoing contact after adoption with members of the adopted child’s birth family.
These experiences have made open adoption the norm in practice and prompted states to enact statutes that enable members of the birth and adoptive family to enter into enforceable agreements for ongoing contact after adoption as part of the adoption itself. Such adoption anticipates the ongoing interconnectedness of the birth and adoptive families and the desire for communication among the family members. This new adoption model holds lessons for other postmodern and post-biological families that are facing many of the same experiences regarding the pull of biological connection.

This Article presents adoption as both a cautionary tale and an exemplar of and for postmodern families. For in some ways adoptive families anticipate and replicate the postmodern family—the various couplings, uncouplings and new couplings along with the non-sexual reproduction of children, which nevertheless cannot escape the pull of biology and an association with the often gendered and racialized coercive disruption of biologically-based kinships. Open adoption, particularly as it is regulated through adoption with contact, illustrates the preciousness of biological connections and the various types of parenting relationships adults can have with children that are both non-

---


15 See infra. Pt. III.
exclusive but also deeply protective of family privacy and autonomy. The open adoptive family preserves the connection between parents and their children while creating at least one new non-biological parent in the child’s life. Adoption with contact formalizes these connections by granting primary parental status to the adoptive parents while preserving consensual contact rights to birth parents and other family members.

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

This Article proceeds in three parts. Part I illustrates a paradox of the regulatory primacy of biological connection in that it promotes liberty by privatizing the propagation of value and culture, including the protection of the freedom of non-normative parents

---

16 Infra text pt. III.A.
17 By non-normative, I refer to those families who do not possess at least one of the following attributes: White, English-speaking, natural citizen, middle-class, heterosexual, or married. See, e.g., Angela Onwuachi-Willig, The Return Of The Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control, 93 CAL. LAW REV. 1647, 1654 (2005) (describing the U.S. “heteronormative ideal of the nation's perceived national familial identity—the self-sufficient American family with a working husband and a dependent wife and children); Amy Wax, Norm Change or Judicial Decree? The Courts, the Public, and
to parent, but also serves as a restrictive paradigm for family composition, rigidly adhering to a biologically-evocative, two-parent maximum that fails to reflect the intricacies of private ordering or political constructions of biological connection. In light of biological connection’s foundational roles in law and society, Part II traces the sometimes nefarious, but persistent, construction of biological connection and its role in the formation and experience of individual and group identity. Illustrating how the legal and social disruption of these connections exposes their structural and subjective materiality, part II surfaces important phenomena that the legal regulation of and commentary regarding postmodern families undervalue: the identitarian aspects of biological connection which challenge conventional notions of the two-parent family that continue to dominate doctrine and theory. Section III illustrates how adoption law and practice have begun to recognize and accommodate those disruptions and connections and suggests how adoption may model reconceptualization and perhaps regulation of second-order postmodern families which are now experiencing these same phenomena.

I. Bionormative Regulation of Families and the Production of Liberty

American family law is based on the modern family form and primarily employs biological connection and marriage\textsuperscript{18} to define family relationships and regulate rights, privileges, and benefits among family members and against the state. Nevertheless, the lived relations that constitute postmodern families are much more expansive and include adult-child relationships that do not hold the sanction of marriage or carry biological

\textsuperscript{18} States are also adopting civil unions or enhanced domestic partnership schemes to provide benefits akin to marriage for lesbian and gay couples. See \textit{infra} text accompanying notes 163 to 165.
connection. Family relationships are increasingly formed around adult relationships that are not biologically linked to their children. These families may have only one parent who is, and even no parents who are, biologically related to the children: the parents may be stepparents, adoptive parents, lesbian and gay parents, or single parent. In these cases, children experience a missing parent (or two) even while they have two parents in the home, but the doctrine all but ignores those connections, even while the family members interact with each other on imaginary and physical planes.

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

---

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

A. The Constitutional Family and the Parental Rights Doctrine

At the time of the U.S. founding, the family was a place for moral, political and economic production. While the composition of the family and the power of its constituents changed over time, central to the family’s role was the production of the next generation of democratic citizens and republican leaders. It would not be until well after Reconstruction that the nuclear, biological family became normative and the family would explicitly become a constitutionally protected organization.

This protection of the biological parent-child relationship is situated, at least in part, in Reconstruction which outlawed slavery—the ownership and sale of human beings, including other people’s children. After Reconstruction, both productive and reproductive labor (in theory) belonged to laborer. Thus parental rights are both rooted in ancient patriarchal norms and also more liberatory norms flowing from the abolition of slavery. In keeping with its ancient origins, family law continues to be heteronormative and limited, but in following its liberatory underpinnings, family regulation has proven to be flexible enough to afford recognition and protection to adult choices about intimacy and child rearing.

20 See, e.g., LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999) (portraying urban and Western family life during the 19th century); MICHAEL GROSSBERG, GOVERNING THE HEARTH (1985) (exploring the role of the family, and its transformation from public to private entity, during and after the founding of the republic); MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS (1994) (tracing the legal status of parent-child relationships from colonial times through the last century); STEVEN MINTZ, HUCK’S RAFT (2004) (providing a regional and temporal differences and developments of family life from colonial times through 20th century).

21 Arguably, it took the Reconstruction amendments to democratize individual and family liberty and to create or extend notions of liberty and privacy to state action. See PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES 91-92, 98, 108-117 (1997) (illustrating the connections between abolition, Reconstruction and family autonomy, particularly, the connection between freedom and the right to parent one’s children).

22 DAVIS, supra note 21, at 136 (noting that the conception of liberty from slavery and the right to moral freedom included the right to rear one’s children).
This part illustrates that the doctrine remains important politically, but through its adherence to a maximum of two parents and a corresponding absolutist view of parenthood, it may be pushed to a point of undermining the very values the constitutional family reflects.

1. The Evolution of the Constitutional Family

Although far from nuclear, secluded, or fully voluntary, colonial and post-colonial families were private, but publicly regulated.\(^{23}\) Even in the early days of the nation, free fathers controlled and were responsible for the support and education of their offspring\(^{24}\) as well as those children bounded out to\(^{25}\) or owned by them, with the exception that parents who were slaves generally did not have legal rights to their children.\(^{26}\) This was the family of the founding, but within a century, social, economic and constitutional developments refined and ultimately produced the modern constitutional family.\(^{27}\)

These material and ideological changes following the formation of the union gave rise to legally and morally secluded families even while regulation of families became more formal and more public.\(^{28}\) The notions of contract that undergirded the formation of

\(^{23}\) Grossberg, supra note 20, at 4-6, 18-19. Even outside of slavery, it was not unusual for children to be bounded out to masters who then became responsible for their care and empowered to profit from their work. See Grossberg, supra note 20, at 4-5 (describing the familial patriarch’s obligations for bounded-out youth and other dependents); Mintz, supra note 20, at 1-74 (reporting on the various family formations); Mason, supra note 20, at 2-6 (same).

\(^{24}\) Although during colonial times, children born outside of marriage were filius nullius (in effect, legal orphans), the law evolved slowly after the founding to require fathers to support and educate them. Mason, supra note 20, at 25-27; Grossberg, supra note 20, at 196-233.

\(^{25}\) Grossberg, supra note 20 at 259.

\(^{26}\) Mason, supra note 20, at 2-13; Mintz, supra note 20, at . Fathers were responsible for educating their children and their apprentices. Mason, supra note 20, at 8. Often educating a child meant sending him out to be apprenticed. Id. Mason notes that a “very large proportion” of colonial children spent portions of their childhood living with and indentured to others. Id. p. 30

\(^{27}\) See infra., text accompanying notes 28 to 38. These include the end of slavery, the industrial revolution and the Reconstruction Amendments.

\(^{28}\) See Grossberg, supra note 20, at 13 (noting the rise in judicial power and passage of general statutes “transferred authority over what had been private legislation such as . . . divorces to individuals and the
the union \(^29\) slowly superseded more rigid and hierarchical family norms, eventually leading to family units characterized by individual rights and obligations. During the first century after the founding, mothers and children began to gain agency—the former as parents and the latter as having interests and value outside of their role as economic producers.\(^{30}\) Both mothers and fathers had rights and obligations regarding their children,\(^{31}\) although patriarchal power remained supreme.\(^{32}\) The abolition of slavery and reconstruction of the union extended the liberty of biological connection and moral identity to all citizens.\(^{33}\) In addition, freer agency, greater value placed on the maternal–child bond, and the evolution of childhood into a special status of leisure for middle class children helped shape the nuclear family and make it normative, even while poor children and families experienced family lives and regulation that diverged from this model.\(^{34}\)

Along side and reflecting these changes, constitutional jurisprudence enshrined a doctrine of parental rights, itself rooted in conceptions of liberty\(^{35}\) and beliefs about the place of children and families in a liberal, republican democracy.\(^{36}\) This constitutional

\(^{29}\) See Holly Brewer, By Birth or Consent, Children, Law, & The Anglo American Revolution in Authority (2005) (exploring the ideological shift from divine to empirical knowledge and from birth right to consent that laid formed the political organizing tool for the United States).

\(^{30}\) Mason, supra note 20, at 50-73; see also Grossberg, supra note 20, at 7 (describing some of these changes which were animated by a new and domestic orientation toward individualism and autonomy).

\(^{31}\) Mason, supra note 20, at 71-72, 76-83 (describing the increased legal recognition of mothers along with fathers and the decline in apprenticeships and placing out). See also Mintz, supra note 20, at 75-93 (describing the 19th century ascendency of the middle class along with changing notions of childhood and parental responsibility for the moral shaping of children).

\(^{32}\) Grossberg, supra note 20, at 236.

\(^{33}\) United States Constitution, Amendments 13 and 14.

\(^{34}\) Grossberg, supra note 20, at 259-268; Mason, supra note 20; Gordon, supra note 20; see also Mintz, supra note 20 (noting the rise in this modern family form in the 19th century as the large-scale bounding out and enslavement of children decreased, large multigenerational and multi-relational households receded and work and home became increasingly separate).

\(^{35}\) Davis, supra note 21, illustrates the centrality of parental rights through the use of abolition discourse and slave narratives.

\(^{36}\) See Mark Brandon, Family and the American Constitutional Order, 77 Tex. L. Rev. 1195 (1999) (exploring the political conception and role of family during the time of the founding and particularly with regard to liberty and authority and the centrality of family to John Locke’s political theory).
family is a private place of value and economic production in which family relations are framed as natural—that is to say privately created and, normally, biologically ordered—but which also perform political functions. This interplay of private and public ordering establishes a delicate and complicated balance between autonomy and authority through rules that are neither purely biological nor purely social, forming a combination that has proven to be quite malleable and even protective of women and subordinated groups.

2. The Matrifocal Construction of Parenthood

While parenthood as a legal and constitutional matter is primarily rooted in biological connection, biology is merely a starting point, a foundation on which functional or intentional conduct gains meaning and legal relevance. The parental rights doctrine establishes a model for parenthood that privileges and protects biological mother-work and those associated with this work. Parents hold that status unless and until they voluntarily relinquish it or prove to be unfit. Although parenthood is biologically-based, it must be earned. Mothers earn it through the nurturing biological acts of gestation and birth. “Fathers” earn it in one of two ways: men who are biologically (genetically) related to the child can earn the status by caring for the child after birth; biological and non-biological fathers (and even biological and non-biological mothers)

37 See Brandon, supra note 36, at 1203-1206, 1208-1209, 1226-122 (exploring the unique social conditions of American colonial families and the political role of family, and particularly mothers and fathers, in American constitutional theory).
38 Infra. part I; see also, GROSSBERG, supra note 20, at 1 (“In the eyes of the law, the family was as John Adams had visualized it: the primary institution of American society.”) Grossberg refers to this process—the “consolidation, refinement, and revision . . . in a continuing effort to use the law to produce families of the sort that Adams had envisioned” as the “republican family.” Id. at 4, 6. These political functions of the family include economic distribution. Annette Ruth Appell, The Pre-political Child of Child-Centered Jurisprudence, 46 HOUSTON L. REV. 703, 750, 754-55 (2009).
39 Appell, Virtual Mothers, supra note 7, at 765-87.
40 Appell, Virtual Mothers supra note 7, at 703-05.
may earn parental status by making a commitment to the child’s mother (or father), generally, but not exclusively, through marriage or a civil union. For example, caring for a child or showing commitment to the child or mother includes financial support. In any event, neither marriage nor other type of civil union is essential to maternity or to biologically-based paternity.

Under this matrifocal construction of parenthood, the legal category of "father" is more variable than "mother" and includes both biological and non-biological relationships to the child. Thus, the father category is a paradigm for other domestic partners, including women. This construction of fatherhood establishes routes to parenthood in postmodern families, a construction that maintains the doctrine’s utility. At the same time, the constitutional family continues to be heteronormative in that it countenances just two parents at any given time. The Supreme Court’s inability to

---

42 California (domestic partnerships); Connecticut (marriage); District of Columbia (domestic partnerships); Iowa (marriage); Maine (marriage); Massachusetts (marriage); New Hampshire (marriage); New Jersey (civil unions); Nevada (domestic partnerships); New Jersey (civil unions, 2007), Oregon (domestic partnerships); Vermont (marriage); Washington (domestic partnerships). Human Rights Campaign, Marriage Equality & Other Relationship Recognition Laws, http://www.hrc.org/documents/Relationship_Recognition_Laws_Map.pdf, last visited July 19, 2009.

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

44 See e.g., Stanley v. Illinois, 405 U.S. 645 (1972) (upholding non-marital father’s right to a hearing before the state could remove from him the biological children he co-parented with their deceased mother).


46 In fact, state courts have held that women can establish fatherhood (though it is called motherhood) when the act of maternal creation is split between egg donation and childbearing K.M. v. E.G, 117 P.3d 675 (Cal. 2003); Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) or when a woman is involved in the conception of the child of her partner and holds herself out as a parent. Johnson v. Calvert, 851 P.2d 776 (Cal. 1993); see also McDonald v. McDonald, 608 N.Y.S.2d 477 (N.Y. 1994) (gestational mother married to the father is mother, despite her lack of genetic connection to the baby).

47 Michael H. v. Gerald D., 491 U.S. 110 (1989); see also, Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (permitting only one mother); but see, Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super., 2007) (holding that a child can have three legal parents, two of whom are women).
embrace three parents in *Michael H. v. Gerald D.* suggests that the Court may continue to privilege monogamous, heteronormative, modern family forms.

### 3. The Rights of Parenthood

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

---

48 Michael H. v. Gerald D., 491 U.S. 110 (1989);
49 In this Article, I generally use “heteronormative” to reflect monogamous, exclusive two-parent families that replicate biological reproduction of children and “bionormative” to reflect invocation of norms and practices that evoke of mimic biological parent-child relationships.
50 References to “parent” refer to persons who have attained parental status through legally valid and completed adoptions
and utilize heightened process.\textsuperscript{55}

The privilege law and society afford biological ordering is, of course, not necessary, essential or inevitable. It is, however, deeply embedded in our moral, political, economic, and existential constructs.\textsuperscript{56} In fact, this valuation and protection of biological connections was of a piece with the realization of moral liberty for adults in the U.S. through the abolition of slavery. As “an aspect of human self-definition and moral choice,”\textsuperscript{57} families are intimate associations created and controlled by autonomous adults. Families in turn support self-definition and moral autonomy by providing an environment semi-secluded from state control of socialization and value production.\textsuperscript{58} Whether this intimacy is an end in itself or a means through which people produce or exercise moral value, family relationships are the ultimate exercise of the positive freedom to form and protect intimate associations.\textsuperscript{59}

This matrifocal doctrine, in keeping with its grounding in liberal notions of autonomy, provides relatively definite rules for family membership and relations. These

\textsuperscript{55} M.L.B. v. S.L.J., 519 U.S. 102 (1996); Santosky v. Kramer, 455 U.S. 745 (1982); Stanley v. Illinois, 405 U.S. 645 (1972); \textit{but see} Lassiter v. DSS, 452 U.S. 18 (1981) (the due process does not require appointment of counsel for an incarcerated mother in state proceedings to terminate her parental rights against her will.)

\textsuperscript{56} \textit{See} Brandon, \textit{supra} note 36, at 1227; Anne C. Dailey, \textit{Constitutional Privacy and the Just Family}, 67 TUL. L. REV. 955, 1021-22 (1993); William A. Galston, \textit{The Legal and Political Implications of Moral Pluralism}, 57 MD. L. REV. 236, 236-40 (1998) (family autonomy protects liberalism by fostering value pluralism); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (noting the threat to liberty if the government were to “standardize” children); Meyer v. Nebraska, 262 U.S. 390, 410-02 (1923) (critiquing state laws that seek to “foster a homogenous people with American ideals”); \textit{see also}, Appell, \textit{Virtual Mothers}, \textit{supra} note 7, at 709-10, 779-87 (connecting biological ordering to the integrity of family roles in creating and maintaining pluralistic liberal democracy).

\textsuperscript{57} DAVIS, \textit{supra} note 21, at 168.

\textsuperscript{58} DAVIS, \textit{supra} note 52, at 1349

rules are adult-centered and grounded in biological reproduction and theoretically consensual adult relationships, such as marriage or its relative equivalent. The content and precision of these rules limit the state’s role in making assessments of who is in and who is out of the family.\(^\text{60}\) The parental rights doctrine’s private, biological, creative, and decisional aspects constitute a progressively protective organizing tool that features and often protects women as mothers\(^\text{61}\) while, in theory and increasingly in practice, neuters fatherhood.\(^\text{62}\)

In these ways, parental autonomy is morally and instrumentally valuable because it promotes a dynamic democracy that relies on autonomous citizens to govern.\(^\text{63}\) As a political and legal matter, families constitute a private zone of value production, in which children are raised and nurtured to become mature adults who are able to exercise political choice. In this way, families both protect children and help them become adult

\(^{60}\) Appell, *Virtual Mothers*, supra note 7, at 709-711.

\(^{61}\) Appell, *Virtual Mothers*, supra note 7, at 758-79. This is not to say that biology has not been and is not used in ways that blame and demonize mothers and their children (Ellen K. Feder, *The Dangerous Individual(s) Mother: Biopower, Family and the Production of Race*, 22 (2) *HYPATIA* 60 (2007)) or that maternal privacy is not compromised (see Carol Sanger, *Infant Safe Haven Laws: Legislating In The Culture Of Life*, 106 *COLUM. L. REV.* 753, 812-28 (2005))(noting how mothers are surveilled and controlled).

\(^{62}\) In other words, fathers may be men or women because the male (traditional paternal) gametic contribution to parenthood is not always sufficient to establish parenthood. *See supra* text accompanying notes 41 to 48. The regressive aspects of this privacy include economic isolation which functions to maintain wealth and poverty. Appell, *Pre-Political Child*, *supra* note 38, at 753-55. This distributive feature of parental rights doctrine makes the moral privacy aspects of the doctrine all the more important for subordinated families whose legitimacy is often contested. Appell, *Virtual Mothers*, *supra* note 7.

citizens who are morally independent from the state and can, therefore, exercise their constitutional sovereignty.\textsuperscript{64} By rearing children in private, morally autonomous settings, families maintain and create moral diversity and restrain the moral authority of the state.\textsuperscript{65}

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

Although constitutional family norms were informed by and developed around a heteronormative, biological nuclear family,\textsuperscript{66} that family was as transitory and mythic as other family forms and it was not long before lived relationships demanded legal regulation of adult-child relationships that were not developed through biological reproduction. In contrast to modern family law which rests the parent-child relationship on biological coupling and lineage, adoption law is a purely legal construct creating families where at least one biological connection is absent. Indeed, family and adoption law present mirror trajectories: one biologically based and moving to accommodate lived relationships; while the other, adoption law, is legally based and moving to accommodate biological relationships. Adoption law, itself a modern creation, has evolved over its relatively short life from a simple way to legally recognize de facto parent-child relationships to a rigid, almost mythic, imitation of the birth family and now toward a more organic and expansive system. This evolution is instructive.

\textsuperscript{64} Mintz, Huck’s Raft, supra note 20, at 71; A. Kristen Foster, “A Few Thoughts in Vindication of Female Eloquence” The Case for the Education of Republican Women, in Children and Youth in A New Nation 129 (James Marten, ed., 2009).

\textsuperscript{65} Appell, Virtual Mothers, supra note 7, at 705-14. It is also true that family privacy has existed along side and served as justification for great social and economic disparities, but the distribution of resources is a public function, masked by privacy. See Appell, The Pre-political Child, supra note 38, at 753-57 (noting how the privatization of childhood reifies socioeconomic status for children and their caregivers and suggesting that enhanced notions of liberal justice could work toward eradicating these inequalities).

\textsuperscript{66} See Troxel v. Granville, 530 U.S. 57 (2000) (affirming by a shattered plurality the bounded right of a parent to exclude grandparents from the family).
1. The Creation of Adoption

Adoption was not part of the law the U.S. inherited from England, but was a new addition to the Anglo-American lexicon, first through private legislative acts legalizing specific de facto parent-child relationships and next through general adoption statutes starting in the 1850s. These new adoption statutes established the hallmark of adoption: judicial termination of one family and creation of another, when in the interests of the child. Adoption law maintained these core characteristics, but became confidential and anonymous after World War I in response to an increase in infant adoptions that was in turn spurred by several forces, including a growth in infertility, the availability of more reliable infant formula, and changing psychological theories that began to view environment as more important in child development than genes. By late mid-century, fictive birth became the adoption paradigm, such that the adoption was equated with a new birth, and even called for substitution of the adoptive parents for the birth parents on the birth certificate. Eventually, the original birth certificates were sealed from all eyes,


68 Carp, supra note 12, at 5; E. Wayne Carp, Introduction in ADOPTION IN AMERICA 1, 4-5 (E. Wayne Carp, ed., 2004). Guthrie and Grossman’s study of adoptions in Alameda County during the Progressive Era revealed that in practice adoptions received virtually no scrutiny from the court. Guthrie & Grossman, supra note 67

69 Burton Z. Sokoloff, Antecedents of American Adoption, FUTURE OF CHILDREN 17, 22 (Spring 1993); RICKIE SOLINGER, WAKE UP LITTLE SUZIE (1992).

including those of the adoptee. The unitary view of adoption became that of anonymous infants, even for related adoptions and adoptions of older children. In substance, this unitary approach provided solely for confidential, static adoptive relationships which terminated all pre-birth connections and sealed all birth records. Even while challenging the biological basis of kinship, this form of adoption embodies traditional family law norms. It instantiates these norms in obvious ways: two parents, generally of the “opposite sex” to mirror sexual reproduction and monogamous coupling; marital, when there are two parents; and parenting that is exclusive.

Historically and structurally, adoption is rooted in oppressive patriarchal and racial norms. It privileges the social aspect of parenting, which the father traditionally performs, and devalues the biological mother work, as if the act of bearing and birthing were a commodity. The legal default to closed adoption, the sealing of adoption and birth records, and complete termination of parental and all derivative relationships, reflect a legal system that did not recognize the subjectivity of women (or children). As Drucilla Cornell explains, adoption law reflects and encodes male subjectivity, contemplating

---

71 Samuels, supra note 70, at 369-70.
73 See Samuels, supra note 70, at 385-400 (rehearsing these changes designed to protect the adoptee and the adoptive parents by subverting the birth connections).
75 Although this too is changing slowly such that non-marital same sex adoptions are permitted in some states tied also, though not exclusively, to domestic registered partnerships or civil unions. Case law exhibits very normative families: middle class (often professional), monogamous, long term, shared home and resources. Annette R. Appell, Legal Issues in Lesbian and Gay Adoption, in LESBIAN AND GAY ADOPTION: A NEW AMERICAN REALITY (David Brodzinsky, Adam Pertman & Diane Kunz, eds.) (forthcoming, Oxford U. Press).
76 Adoption is effected by the termination of birth or legal parents’ rights and transfer of those rights to the adoptive parent. Cahn, Perfect Substitutes, supra note 67, at 1125.
77 Supra, text accompanying notes 41-62 (exploring the construction of fatherhood around caring for and supporting the mother or child); Naomi Cahn, Birthing Relationships, 17 Wis. Women’s L.J. 163, 194-95 (2002) (describing the unique and affective aspects of motherhood).
woman through her duties as wife and mother, not as her own subject.\textsuperscript{78} Although law has changed in many ways, it continues to define women as either mothers or not mothers.\textsuperscript{79} This dichotomy does not permit a woman to be both a mother and not a mother—to be allowed to “come to terms with [her] own life-defining decisions about sexuality and family.”\textsuperscript{80}

This regime is not surprising in light of the historic context of adoption, the legal regulation of which evolved during a time when poor, racially marginalized children were placed for adoption as a method of socializing them into White middle-class, protestant norms.\textsuperscript{81} Adoption has continued to be a mechanism to regulate race, women’s sexuality and reproductive choices, imposing or prohibiting the right to place a child for adoption depending on the mother’s race\textsuperscript{82} and affording pregnant girls more freedom to relinquish their babies for adoption than to obtain an abortion.\textsuperscript{83} More recently, adoption has been presented as a solution for single, Black motherhood.\textsuperscript{84}

In addition, the movement to seal adoption records coincided with an

\textsuperscript{78} Drucilla Cornell, \textit{Adoption and it Progeny: Rethinking Family Law, Gender and Sexual Difference, in ADOPTION MATTERS, PHILOSOPHICAL AND FEMINIST ESSAYS} 19, 22-25 (Eds, Sally Haslanger & Charlotte Witt, 2005).
\textsuperscript{79} The law contemplates two mothers only when they reflect heteronormative families—as intimate domestic partners. \textit{Supra} text accompanying notes 166 to 169.
\textsuperscript{80} Drucilla Cornell, \textit{supra} note 78, at 28.
\textsuperscript{81} Italian, German, Irish children saved during the child saving and progressive eras in the late 19\textsuperscript{th} and early 20\textsuperscript{th} century were considered not white. \textit{Linda Gordon, The Great Arizona Orphan Abduction} 76-77, 98-106 (1999).
\textsuperscript{82} In the pre-Roe days, adoption was imposed on white women and prohibited to African American women who were charged with abandonment if they tried to relinquish their child. \textit{Solinger, supra} note 69, at 20-40.
\textsuperscript{83} Today, minor mothers can relinquish a child for adoption in most states without parental or judicial consent or involvement, but they cannot obtain an abortion without such consent in most states. \textit{Jen Durcan & Annette Appell, Minor Mothers and Consent to Adoption: An Anomaly in Youth Law, 5(1) ADOPTION Q.} 69 (2001)
unprecedented rise in non-marital birth among women of color.\textsuperscript{85} The closure and sealing of adoption excised birth mothers to avoid tainting the new legitimate family.\textsuperscript{86} Adoption historian E. Wayne Carp attributes this closure to the psychological theories of John Bowlby\textsuperscript{87} and Sigmund Freud.\textsuperscript{88} Yet the timing of this closure along with the racialized origins of psychology\textsuperscript{89} may suggest a more critical reading of the rebirth narrative, a narrative that is, as the next section illustrates, in rapid decline.

2. The (re)Opening of Adoption

Beginning with the rise of postmodernism in the last quarter of the 20th century, the rebirth model of adoption has become dated as parties to adoption experience less secrecy and value it less. A series of social and legal changes have led to this devaluation of secrecy and myth and to a loosening of the patriarchal caste in adoption. A decrease in the number and percentage of infant adoptions along with an increase in older child adoption by stepparents, relatives and foster parents made the rebirth theme of adoption less tenable.\textsuperscript{90} There has been a rise of openness even in infant adoption as birth mothers have gained more autonomy arising from increased reproductive choice and changing legal and social mores that produce less shame in the tangible incarnations of women’s

\textsuperscript{85} See E. Wayne Carp, How Tight Was the Seal? A Reappraisal of Adoption Records in the Unites States, England and New Zealand, 1861-1955, in ADOPTION IN CONTEXT 17, 20-23 (eds. Gretchen Miller Wrobel & Elsbeth Neil, 2009) (“[t]he largest increase in the number of out-of-wedlock births occurred among non-white mothers, climbing two and a half times, from 46,7000 in 1938 to 130,900 in 1957” (p. 20) and demand for adoption greatly exceeded supply, state governments and adoption agencies blocked access to birth information, the former by sealing adoption records and the latter by refusing to share information among adoption triad members).

\textsuperscript{86} See Samuels, supra note 70, at 506; CARP, supra note 12, at 113-17.

\textsuperscript{87} Carp, How Tight Was the Seal, supra note 85, at 22.

\textsuperscript{88} Carp, How Tight Was the Seal, supra note 85, at 23.


\textsuperscript{90} Appell, Blending, supra note 72, at 1001.
sexuality.\(^{91}\) Armed with this moral authority, birth mothers began to seek adoptive parents who would be willing to engage in open adoption in which birth and adoptive parents meet each other and might even have ongoing contact.\(^{92}\)

Similarly, several generations of adoptees who had been adopted under the post-war anonymous infant adoption model came of age and sought information about their birth history.\(^{93}\) Their adoptive parents too recognized the importance of this information and sought it along with or on their behalf of their adopted children.\(^{94}\) Finally, adoption has become more public as the federal government embraced adoption as an option for foster children.\(^{95}\) These events and the creation and rise of the children's bar since In re \textit{Gault}\(^{96}\) and the Child Abuse Prevention and Treatment Act\(^{97}\) have combined to promote more child-centered approaches to adoption that take account of children's ties to their birth families.\(^{98}\)

As a result of these social and legal movements, open adoption has become the norm in adoption practice, even for infant adoptions wherein the fiction of rebirth is more tenable than in stepparent, relative and foster child adoptions.\(^{99}\) Open adoption refers to a range of relationships including the exchange of information or a meeting between the adoptive and birth parents before adoption, to ongoing participation of the birth family in

\(^{91}\) CARP, \textit{supra} note 12, at 201-203 (1998).
\(^{92}\) Appell, \textit{Blending, supra} note 72, at 1008-09.
\(^{93}\) Henney, \textit{et al., supra} note 13, at 32-34.
\(^{94}\) Groth, \textit{et al., supra} note 12.
\(^{96}\) 387 U.S. 1 (1967).
\(^{99}\) Appell, \textit{Blending, supra} note 72, at 1008-1012
the life of the adoptive family; such contact could be mediated, direct, in person or via letter, phone or other electronic exchange.⁹⁰ Post-adoption contact ranges from occasional or regular correspondence to actual in-person visits to full family interrelationships, shared space and shared parenting.⁹¹

Generally, these relationships are privately ordered and maintained. In other words, open adoption arrangements are informal, premised upon the agreement of those people involved, but without the force of legal sanction should any of the parties choose to discontinue or otherwise stray from the terms of the agreement.⁹² The adoptive parents, as legal parents, retain the right to determine with whom their children have contact and the terms of that contact. And of course, the birth family members are not bound to continue the relationship.

Two types of regulatory schemes for open adoption have evolved out of concerns for different constituencies—even as unregulated open adoption continues to be the predominant practice.⁹³ One scheme permits post adoption contact over the adoptive parents’ objection (court-imposed open adoption); the other is voluntary and based solely on a pre-adoptive agreement among birth relatives and adoptive parents for ongoing contact after adoption (adoption with contact).⁹⁴ Both types of regulation present significant incursions into the legal and social paradigm of adoption as rebirth, but they afford different levels of autonomy to the legal parents.

---

⁹⁰ Chris Jones & Simon Hackett, Communicative Openness within Adoptive Families: Adoptive Parents’ Narrative Accounts of Adoption Talk and the Approaches used to Manage These Challenges, 10(3-4) ADOPTION Q. 157, 158-59 (2007).
⁹¹ Id. [Chris Jones & Simon Hackett, Communicative Openness158-59]
⁹² E.g. Birth Mother v. Adoptive Parents, 59 P.3d 1233 (2002) (refusing to uphold visitation agreements not entered into under specific statute or entered into in the absence of a statute providing for enforcement).
⁹³ Annette R. Appell, Survey of State Utilization of Adoption with Contact, 6(4) ADOPTION QUARTERLY 75 (2003); Annette R. Appell, Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact, 4(1) ADOPTION QUARTERLY 101 (2000).
⁹⁴ Appell, Enforceable Post Adoption Contact Statutes, Part II, supra note 103.
Court-imposed open adoption statutes do not aim to create a model for cooperative relationships, but instead to preserve pre-adoptive relationships between grandparents or other relatives and the adoptee, generally in related- or stepparent-adoptions.\textsuperscript{105} These statutes empower the court to maintain pre-adoptive visitation rights after adoption or order post adoption contact upon request of persons who may not be parties to the adoption; these statutes are more common and far more varied than adoption with contact statutes, but defy easy categorization or a unified sense of preservative or child-centered purpose.\textsuperscript{106} This type of regulation, although not without value, stands in opposition to family autonomy because it substitutes judicial authority for parental authority to assess and determine what is in the child’s best interests.

In contrast, the adoption with contact statutes, which began to emerge in the last decades of the 20\textsuperscript{th} century, create a mechanism for legalizing increasingly normative open adoptive relationships which exist in the shadow of, but mostly outside, the law. Adoption with contact, a consensual arrangement among birth and adoptive parents or relatives, both acknowledges the child’s pre-adoptive birth ties and brings these connections forward into the adoption, often as a very part of the adoption decree itself.\textsuperscript{107} Approximately twenty states have enacted adoption with contact statutes.\textsuperscript{108} This

\textsuperscript{105} Appell, Enforceable Post Adoption Contact Statutes, Part II, supra note 103

\textsuperscript{106} See Appell, Enforceable Post Adoption Contact Statutes, Part II, supra note 103.


legislation allows adoptive parents and birth relatives or others at, or before, the time of adoption to enter into enforceable agreements for post-adoption contact, such as visitation or correspondence. The statutes do not permit approval or enforcement of post-adoption contact plans unless the adoptive parents and the biological relative who will have contact agree to such a plan at or before the time of adoption. In this way, the statutes in effect create a new type of adoption because from the start, the parties are committed to ongoing cooperation around the child. This type of adoption legally recognizes a range of consensual legal rights and relationships among parents, biological kin, and children that bear lessons for the new postmodern families.

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

Adoptive families are being joined by a new order of postmodern family in which at least one biological relation to the child is outside the legal family. These families include those reconstituted post-divorce, families created with the assistance of reproductive technologies, and lesbian and gay-headed families created through a variety of methods. These second-order postmodern families are beginning to receive some of the recognition and protections afforded modern families. Families now can have two mothers or two...
fathers,\textsuperscript{112} sequential fathers or mothers,\textsuperscript{113} only one legal parent,\textsuperscript{114} parents and gamete donors,\textsuperscript{115} and parenthood, or a limited version of it, can be created by a sort of estoppel.\textsuperscript{116} These families are also receiving recognition and autonomy (including the prerogatives of parenthood), all within a modern family template.\textsuperscript{117}

As a formal matter, the parental rights doctrine has been remarkably adaptable to these new family formations. It has generally held to the two-parent model, the voluntariness of these associations, and the procedural protections surrounding dissolution of family relations. In other words, the regulation of families created by or through reproductive technologies, remarriage, and co-parenting among same-sex intimate partners follows the binaries of the modern family: two parents, who are intimate with each other, and children who belong only to those parents.\textsuperscript{118} Many of these families hew to the normal because it is the norm\textsuperscript{119} and because the law sanctions the norm.\textsuperscript{120} Yet even as these families seek to replicate the modern family, they remain divergent.\textsuperscript{121}

\textsuperscript{112}Infra., pt. II.C. 3.
\textsuperscript{113}Infra., pt. II.C. 1.
\textsuperscript{114}Infra., pt. II.C. 2.
\textsuperscript{115}Infra., pt. II.C.2.
\textsuperscript{116}I have omitted discussion of quasi-parental rights created post family dissolution through de facto parent, parenthood by estoppel (Appell, Virtual Mothers, supra note 7, at 720-24) and the recent ALI recommendations. (AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS sec. 203(1)(c)(2000). Those relate to the postmodern, new blended families are relevant to this topic, but the regulation occurs after dissolution, making them less central to the subject of this Article, which regards non-legally sanctioned biological connections brought into the social family. In any event, these post-dissolution visitation rights are consistent with the parental rights doctrine. Appell, Virtual Mothers, supra note 7, at 720-24
\textsuperscript{117}See infra., pt. I.C.1-3.
\textsuperscript{118}At least one court has sanctioned three legal parents: two mothers and one father. Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super., 2007).
\textsuperscript{120}See Appell, Endurance, supra note 74, at 306-319 (2008) (rehearsing legal regulation of lesbian and gay families with children that form conventional families).
\textsuperscript{121}See Judith Stacey & T.J. Biblarz, (How) Does the sexual orientation of parents matter?, 65 AM.
These postmodern families, described below, differ because they are characterized by a disruption in biological connection and often engage in performances to recapture these relationships, including opening up the family to actively include birth relations.

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

1. The Decline and Rise of Fatherhood

The privilege and power of fathers have waxed and waned over time in the U.S. Beginning in colonial times and continuing through much of 19th century, fathers were presumptive parents before, during and after marriage, but by the late 1800s, mothers gained priority in post-dissolution custody and in presumptions of legal parenthood of...
non-marital children.\textsuperscript{125} This departure from Blackstonian presumptions of paternity and paternal custody arose alongside adoption.\textsuperscript{126} In fact, stepparent adoptions appear to have predominated early in the adoption era as divorce rates rose and widows with minor children remarried.\textsuperscript{127} The maternal parent priority lasted through the middle of the 20\textsuperscript{th} century when fathers again became viable candidates for custody.\textsuperscript{128}

In keeping with this rise in the value of fatherhood, beginning in 1972 the Supreme Court recognized as legal fathers or potential legal fathers non-marital biological fathers who had developed relationships to their children or the children’s mother.\textsuperscript{129} As biological fathers received constitutional status, the parental rights doctrine articulated special protections against terminating parental rights and instituted limitations to the establishment of non-marital fathers’ rights.\textsuperscript{130} As a result of these legal changes biological paternity is legally material, though more contingent than maternity. This means that the state and mothers can compel fathers to provide support for their non-marital children and fathers gain additional rights to visitation and custody. In addition, those who remarry after divorce have the option to exchange the new marital parent for

\textsuperscript{125} MASON, supra note 20, at 61-62, 111-117 (post divorce custody); and 68-71 (children born outside of marriage). Divorce proceedings accelerated toward the end of the 19\textsuperscript{th} century as did the decline in coverture which left women with more power to seek post-dissolution custody. See MASON supra note 20, at 54-68

\textsuperscript{126} See MASON, supra note 124., at 54-64 (tracing the rise of divorce in the late 1800s and the movement from presumptive paternal custody to various child-centered standards starting in 1809 but accelerating after the mid 19\textsuperscript{th} century).

\textsuperscript{127} Guthrie & Grossman, supra note 67, at 241-242, 250-253.

\textsuperscript{128} MASON, supra note 124, at 122-133; by 1990, custody was awarded almost evenly to mothers and fathers, id. at 129.

\textsuperscript{129} Stanley v. Illinois, 405 U.S. 645 (1972); Caban v. Mohammed, 441 U.S. 380 (1979); These changes arose out of civil rights litigation beginning in the 1970s challenging the designation of non-marital children as “illegitimate” and the correlating denial of paternal benefits to and through these children. Mary Patricia Byrn, From Right to Wrong: A Critique of the 2000 Uniform Parentage Act, 16 UCLA WOMEN’S L.J. 163, 181-183 (2007).

the old, resulting in the disruption of the alignment between biological and legal relationships and increasing the number of men and women who law and society recognize as fathers and mothers over time, even if not simultaneously.

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

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

---

131 Note that stepparent adoption is also available to non-marital parents in same sex couple adoptions in many states. Appell, Legal Issues in Lesbian and Gay Adoption, supra note 75.
132 Margaret M. Mahoney, Stepparents as Third Parties in Relation to their Stepchildren, 40 FAM. L.Q. 81, 86 (2006). Of course stepmothers also adopt their husband’s children.
133 Estimates suggest that 50 per cent of children are not living with their fathers. Lin, supra note 43.
134 Margaret M. Mahoney, Stepparents as Third Parties in Relation to their Stepchildren, 40 FAM. L.Q. 81, 86 (2006).
135 Michael H. v. Gerald D., 491 U.S. 110 (1989); Mahoney, Stepparents, supra note 134, at 86. It is possible, however, for them to gain status after the relationship dissolves. Id., at 99-105. This may be changing, for at least one jurisdiction has recognized two mothers and a sperm donor father. Jacob v. Shultz-Jacob, 923 A.2d 473 (Pa. Super., 2007).
2. Biological Assistance: Families Created with Reproductive Technology

Assisted reproductive technologies (ART) allow single women, single men, same-sex couples and married couples to produce children with the assistance of genetic materials of men and women who will not be part of the legally recognized family. In the past several decades, reproductive technologies have advanced and proliferated. Non-sexual insemination of sperm is certainly not new and does not require sophisticated technology, but the mass marketing of sperm is of fairly recent vintage. The first U.S. sperm bank appears to have been the California Cyrobank which opened in 1977. The Repository for Germinal Choice (more commonly known as the Nobel Sperm Bank, opened in 1980 for the purpose passing intelligence genes to subsequent generations. Although maternal surrogacy likely has ancient origins, egg transplant is a relatively recent phenomenon dating back to at least 1978 with the birth of Louise Brown, “the world’s first ‘test-tube baby.’”

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

---

biological father and a legal father and mother.\textsuperscript{140} These are perhaps the most post-modern of the post-modern families.

Estimates of children born each year through sperm and egg donation range from 40,000 to over 65,000 annually.\textsuperscript{141} These are voluntary relationships in which gamete donors and surrogates donate their reproductive capacities. Gamete-donation arrangements have traditionally been anonymous, at least when health care professionals are involved, and anonymity continues to be the legal norm in this country.\textsuperscript{142} This anonymity, besides arguably promoting donations,\textsuperscript{143} helps maintain a fiction of biological relatedness which allows families to pass as normative.\textsuperscript{144} Indeed, the “[e]laborative devices used to preserve the anonymity of donors highlight the significance attached to genetic ties in western societies and how this is linked to ideas about family, intimacy and social relations more generally.”\textsuperscript{145}

\textsuperscript{140} One woman could donate a gamete which could be fertilized by a donor’s sperm and implanted into the womb of a surrogate who would deliver the baby to a married couple.


\textsuperscript{142} Naomi Cahn, Necessary Subjects: The Need For A Mandatory National Donor Gamete Databank, 12 DEPAUL J. HEALTH CARE LAW 203, 210-12 (2009); see also Eric Blyth & Lucy Frith, Donor-Conceived People’s Access to Genetic and Biographical History: An Analysis of Provisions in Different Jurisdictions Permitting Disclosure of Donor Identity, 23 INT’L J. LAW, POL’Y & FAMILY 174 (2009) (noting that only a minority of western countries permit donor-conceived people to learn the identity of the donor).

\textsuperscript{143} One rationale for anonymity is that it encourages donation. See Cahn, supra note142, at 215-216 (citing studies that suggest removal of donor anonymity might dampen donor willingness).

\textsuperscript{144} Cahn, Necessary Subjects, supra note 142, at 204.

\textsuperscript{145} Katrina Hargreaves and Ken Daniels, Parents Dilemmas in Sharing Donor Insemination Conception Stories with their Children, 21 CHILDREN & SOCIETY 420, 420 (2007).
Beginning in the 1970s, states amended their laws away from biologically-based parenthood when donors were involved. These laws cut off any legal relationship between the donor and the child to further preserve the nuclear family ideal and mask the missing genetic ties. Legal regulation here generally distinguishes between known and unknown donors, reproduction assisted by a doctor or performed at home, and between children born to a marriage and children born to an unmarried person or couple. Generally, a child born to a married woman is presumptively the legal child of the husband, no matter how the child is conceived. Anonymous sperm donation through a sperm bank or with the aid of a physician will generally not result in the assignment of parenthood to the donor. The situation of known donors is more complicated, and the law does not easily distinguish between biological fathers who consented to donor-conception and those who had unmediated intercourse; the presumption is that they are legal fathers, at least when the mother does not have a legal domestic partner, such as a husband.

Similarly, maternal surrogacy also raises questions about which law does and should apply (adoption or contract). For example, disputes have arisen regarding the rights of a gestational surrogate to change her mind about keeping the baby she carried in

---

146 See Byrn, supra note 141, at 169-176 (tracing these changes).
149 Shapo, supra note 147, at 1120.
150 Id., at 1121-26.
her womb. Resolution of these disputes revolves around the durability of the
gestational mother’s initial intention to relinquish the born child and tends to privilege
married couples when deciding which parents to sanction. Legal regulation of the
effect of such arrangements is consistent with the bionormativity of the modern family
and the voluntariness and autonomy of the parental rights doctrine in that it prizes
family autonomy, protects the intent of persons involved in the reproduction; and it
generally recognizes only two parents, despite the variety of people that might perform
biological and social parental roles.

3. Same-Sex Parents: Lesbian and Gay Families

The most recently and visibly legitimized (thought still contested) postmodern
families are those headed by lesbians and gays. Lesbians and gay men create families
while in prior heterosexual relationships or become parents while single or in committed
relationships, through maternal surrogacy, sperm from anonymous donors, and
sometimes using known sperm donors, such as gay male friends or relatives of a same

153 E.g., In re Baby M., 537 A.2d 1227 (N.J. 1988) (refusing to enforce the surrogacy contract by terminating parental rights, but remanding for custodial determination); Johnson v. Calvert, 851 P.2d 776 (Cal. 1993) (enforcing the gestational surrogate’s pre-birth promise to relinquish the child); see also Shapo, supra note 147, at 1171-81 (discussing the law surrounding surrogacy).
156 This section primarily addresses couples because of the two parent maximum in family law. To the extent that single lesbians and gays create families through adoption or ART and maintain their single-parent status, they share similar legal opportunities to heterosexual singles who create families through adoption or reproductive technology.
157 E.g., Judith Stacey, Gay Parenthood and the Decline of Paternity as We Knew It, 9(1) SEXUALITIES 27 (2006) (study of gay male couple who had children with the aid of an egg donor and surrogate mother).
159 E.g., Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (App. Div. 1994); for a discussion of these cases, issues and solutions for better regulation, see Polikoff, Breaking the Link, supra note 8.
Lesbians and gay men also form families through adoption, many while openly acknowledging their sexual orientation. It is estimated that in the past few decades, thousands of lesbians and gays have become legal parents through adoption alone.

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

When these schemes are not available or when lesbians and gays bring children to the family from a prior relationship, adoption law continues to govern their options for establishing mutual parental rights and responsibilities regarding the children. Courts have been openly permitting same-sex couple adoptions to occur at least since the 1980s, generally by finding that the best interests of the children in question militates an interpretation of the adoption statute that would permit the legal parent to add a second,

---

160 E.g., In re. Adoption of Tammy, 619 N.E.2d 315 (Mass. 1993)
164 Just as adoption legally constructs birth.
165 See statutes and cases cited supra note 163.
non-marital parent, to the family or allow two intimate, committed adults to adopt a child jointly.\textsuperscript{166} Adoption laws reflect remarkably similar norms regarding families and parenting in that they model exclusive parenting, two-parent marital families, or single parents.\textsuperscript{167} Adoption generally does not countenance as parents two fathers and a mother or two mothers and a father. Thus, these adoptions are following the same patterns of adoption more generally in that they reflect modern, heteronormative families. As a result, like other postmodern families, and despite the fact that children reared by lesbian and gay couples have more than two biological parents,\textsuperscript{168} legal regulation of same-sex couple families follows heterosexual and bionormative patterns, while recognizing the autonomy of the family.\textsuperscript{169}

\* \* \*

In sum, the law is responding to these new family formations in very familiar ways that reflect, preserve and promote autonomy. Using the modern family as template, the law sanctions heteronormative kin networks in which normally two, and no more than two, theoretically monogamous adults may be recognized as a legal couple. Their

\begin{footnotesize}
\begin{itemize}
\item[166] Annette R. Appell, \textit{Legal Issues in Lesbian and Gay Adoption}, supra note 75.
\item[167] Id. [Appell, Legal Issues in Lesbian and Gay Adoption].
\item[168] The exception would be if one of the partner-parents changed his or her biological sex after the child was conceived.
\end{itemize}
\end{footnotesize}
children, no matter how they were conceived and whose genes or reproductive labor produced them, normally will have two, and no more than two, legal parents. The law is, however, remarkably flexible in its ability to recognize parent-child relationships based on adult-adult social relationships and intentions, as in the married or otherwise committed couple and the anonymous or otherwise uninvolved gamete donor. Once the parent-child relationship is legally sanctioned, it persists even if the adult relationship deteriorates or terminates; and the adult-child relationship only terminates if a parent consents or the relationship terminates after due process. Thus, although biological relationships are not determinative in the ordering of family relationships, they are mimicked through the law’s two-parent and exclusive parenting structure. At the same time, the biological connections are masked or discounted in favor of social relations. Thus biological connection still looms largely and pervasively in family law as natural fact and social model, but is routinely subordinated to adult-adult relationships. As the next part illustrates, however, these biological connections remain important despite the law’s adherence to discrete nuclear family norms.

II. Biological Ordering and the Production of Identity

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

A. Biological Connection and Identity

Identity is a complex relational phenomenon that invokes difference and sameness along a number of often interrelated planes: philosophical, psychological, political, personal, legal, cultural, racial, ethnic, and social.\textsuperscript{170} There is a vast literature regarding identity in a number of disciplines.\textsuperscript{171} For example, as a psychological concept, identity is

\textsuperscript{170} See Barry Richards, What is Identity? in IN THE BEST INTERESTS OF THE CHILD, CULTURE, IDENTITY AND TRANSRACIAL ADOPTION 77 (Ivor Gaber & Jane Aldridge, eds., 1994); Ann Schwartz, “Caught” versus “Taught”: Ethnic identity and the ethnic socialization experiences of African American adolescents in kinship and non-kinship foster placements, 29 CHILDREN & YOUTH SERVICES REV. 1201, 1202-03 (2007) (explaining developmental processes through which children come to see themselves as members of a racial or ethnic group and distinct from members of other groups); see also, KWAME ANTHONY APPIAH, THE ETHICS OF IDENTITY 64 (2005) (noting the role of perceived difference in the formation of social identity).

\textsuperscript{171} E.g., APPIAH, supra note170 (exploring the role of identity in liberal moral and political philosophy); JUDITH BUTLER, GENDER TROUBLE (1990/1999) (examining the performative, rather than biological, construction of gender identity); HAWLEY FOGG-DAVIS, THE ETHICS OF TRANSRACIAL ADOPTION 93-114 (2002) (tracing the tensions between the roles of individual agency and socially constructed racial categories in the formation of and control over identity); Harris, supra note 179 (discussing the centrality of constructed race to identity); Sally Haslanger, You Mixed? Racial Identity without Racial Biology, in ADOPTION MATTERS supra note 78, 265, 274-278, 282-285 (contrasting philosophical notions of racial identity with psychological and feminist approaches); Krista Maywalt Scottham, Robert M. Sellers and Hòa X. Nguyễn, A Measure of Racial Identity in African American Adolescents: The Development of the Multidimensional Inventory of Black Identity—Teen, 14(4) CULTURAL DIVERSITY AND ETHNIC MINORITY PSYCHOLOGY 297 (2008) (from a psychological perspective “each individual has a number of hierarchically ordered identities” including the dimensions of “salience, centrality, regard, and ideology”).
a developmental and non-linear process of identifying and differentiating, leading to a sense of authenticity.\(^{172}\) Politically, identity has provided a platform for claims to civil rights arising out of difference (disparate treatment) and belonging (entitlement to societal goods).\(^{173}\) Personal or subjective identity refers to the unique aspects of a person formed through relationships and experiences while social and cultural identity refers to one’s membership in specific groups, e.g., racial, professional, social, gender.\(^{174}\) Cultural identity often refers to association with membership in a social group, including those constructed around national origin and ancestral connection.\(^{175}\) Across all of these areas, identity operates on and replicates itself through macro and micro levels such that larger socially constructed groupings gain meaning and importance, politically, socially, and personally.

\(^{172}\) David M. Brodzinsky, Marshall D. Schechter, & Robin Marantz Henig, Being Adopted 14-19 (1992) (describing how adoptees incorporate the fact of their adoption at each developmental stage).

\(^{173}\) E.g., United States Const. Am. XIII, XIV, XV; The Civil Rights Act of 1964 (Pub. L. 88-352, 78 Stat. 241), 42 USC ch. 21; see also Convention on the Rights of the Child which does not provide civil rights, per se, but vaguely protects identity; D. Marianne Brower Blair, The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person’s Identities and Heritage: A Comparative Examination, 22 Mich. J. Int’l L. 587 (2001). Questions about identity-based political claims or treatment have animated debates over tensions between multiculturalism and liberalism in political theory. Lori Watson, Constituting Politics: Power, Reciprocity, and Identity, 22(4) Hypatia 96, 96 (2007); APPIAH, supra note 170; Iris Marion Young, Inclusion and Democracy 83-92 (2000) (rehearsing critiques and disputing the notion of group identity) This debate is largely outside the scope of this Article which takes liberalism’s moral, epistemological, and political tenets to be primary, though not exclusive, organizing tools for U.S. political structure and which situate value production and propagation in, among other places, families. Supra, pt. I.A.

\(^{174}\) Richards, supra note 170, at 77, 81-84. See also APPIAH, supra note 170, at 117-18 (listing social identities, including gay, national, religious, regional); Eric J. Mitnick, Law, Cognition, and Identity, 67 Louisiana L. Rev. 823, 845-47, 857-69 (2007) (discussing social and personal identity in similar terms as Richards, though more extensively, and characterizing personal identity also with individual traits, such as being charming).

\(^{175}\) See APPIAH, supra note 170, at 117-18 (noting how cultural identities, incoherent as they may be, form around social belonging and may appear precisely when a group has become Americanized or otherwise disassociated from what once set it apart, for example, language, rituals, geography); Lena Robinson, Cultural Identities and Acculturation Preferences Among South Asian Adolescents in Britain: an Exploratory Study, CHILDREN & SOCIETY 1, 2 (2008) (defining cultural identity to include ethnic and national identity and describing approaches to cultural identity in two ways: ethnic or national identity formation and acculturation, the former being developmental and the latter more situational, examining maintenance of group identity when “an ethnic minority group is in continuous contact with the dominant group.”)
We all navigate these various aspects of external projections and belonging and of personal experiences, relationships, and constitution. Through the navigation of oppositions on these various planes, we negotiate how we are like and unlike others, what makes us distinct, where we belong, and what makes us belong. It is through this process that we identify who we are. For purposes of the Article, I am referring primarily to this more existential sense of identity—the types of things people refer to when reflecting on who they (or others) are, where they belong, and why they are similar to and different from others. At the same time, these references are possible and meaningful precisely because of the social construction of division and belonging as well as the political and cultural aspects and functions of identity and connection.

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

---

176 See infra notes 179-184 and accompanying text.
177 See infra notes 179-184 and accompanying text.
178 See, e.g., infra, text accompanying notes 179 to 260.
This is particularly true and fundamental in the U.S. where the legal and social construction of race and blood lines were integral to its history and formation and have remained deeply embedded in this country’s social scripts and organization.179 Race is based on a set of social norms or understandings relating to blood lines, national heritage and often skin pigment.180 Blood lines can also determine ethnic and tribal identity and membership.181 Moreover, medical science looks to genes and genetic background for

---

179 See, e.g LEVANDER, supra note 89 (illustrating the centrality of race to the U.S. identity and the employment of childhood to construct and maintain White Supremacy); IAN F. HANEY LOPEZ, WHITE BY LAW (1996) (book length treatment tracing how the law constructs race, particularly, though not exclusively, through immigration law); Adrienne D. Davis, Identity Notes Part One: Playing In The Light, 45 AM. U. L. REV. 695 (1996) (examining the association of American with Whiteness); Cheryl Harris, Whiteness as Property, 106 HARV. L. REV. 1709 (1993) (analyzing the legal construction of racialized identity which in turn dictates status and rights); Kitty Calavita, Immigration Law, Race, and Identity, 3(1) ANNUAL REV. LAW & SOC. SCI. 1 (2007) (exploring the pervasive, persistent, and exclusionary intersections of race and immigration law since the founding of the U.S.); Laura E. Gómez, Off-White in an Age of White Supremacy: Mexican Elites and the Rights of Indians and Blacks in Nineteenth-Century New Mexico, 25 CHICANO-LATINO L. REV. 9 (2005) (tracing roles and contingency of Latino and Native American race in the U.S.). Gender, the social and legal construction of certain biological differences also serves important roles in kinship and social ordering, but is not passed on biologically to kin as a marker of identity.

180 See Dorothy E. Roberts, The Genetic Tie, 62 U. CHI. L. REV. 209 (1995) (explication of the social and legal construction of genetic ties around race and gender); Alex M. Johnson, Jr., The Re-Emergence of Race as a Biological Category: The Societal Implications—Reaffirmation of Race, 94 IOWA L. REV. 1547, 1558-1579 (2009) (tracing historic understanding of race as biological, embodied in the “one drop of blood” rule, to more current understandings of race as a social category while medical science treats race as a biological construct); Davis, Identity Notes, supra note 179, at 695-711 (exploring, inter al., the local nature of racial identity and its various legal constructions in the U.S. relating to ancestry or perceived ancestry); Ellen K. Feder, supra note 61, at 61, 63 (“the origins of the idea of race are traceable to the early modern period, from which time attributions of racial difference have entailed exploitation, enslavement, and even genocide”); Daniel J. Sharfstein, Crossing the Color Line: Racial Migration and the One-Drop Rule, 1600-1860, 91 MINN. L. REV. 592 (2007) (tracing the “One-Drop Rule,” its contingency, and its limited efficacy in the context of individual agency and phenotypical passing); Pauline Turner Strong, To Forget Their Name, and their Whole Relation: Captivity, Extra-Tribal Adoption, and the Indian Child Welfare Act, in RELATIVE VALUES, 468, 468-69 (eds. Sarah Franklin & Susan McKinnon, 2001) (noting the use of blood quantity as legal measure of tribal belonging, which is based on U.S. law, rather than indigenous tribal law and practice).

adding further weight to biological kinship. Because these biological constructs are foundational, significant, and pervasive, they form core aspects of how we identify ourselves and how others identify us. And we are conditioned to look to our forbears to identify who we are and where we belong and to look at the forbears of others to determine where others belong. For these reasons and for deeper psychological and social reasons, people tend to have great interest in their own and others’ backgrounds and what these backgrounds reveal about whence people came, where they belong, and who their ancestors were. As the next two sections illustrate, the lived experiences of people separated from their biological origins (and offspring) reveal that these connections run deep and remain important, particularly to those who live apart from their or their children’s biological kin. These phenomena are not surprising in a culture that has utilized biological facts as social and legal organizing tools, but these phenomena are under-theorized in family law discourse.


183 Of course we appropriate many other referents in constructing our identities, but for purposes of this Article I attend primarily to the role of the conventions regarding biology that inform identity. My project is not to interrogate the role of biology in one’s sense of self or to claim that these meanings are natural, universal, or timeless, but merely to surface the many ways we call upon biological connections and disconnections in social, political, cognitive, and psychological understandings of who we are. See Cori Hayden, *Kinship Theory, Property, and the Politics of Inclusion: From Lesbian Families to Bioprospecting in a Few Short Steps*, 32(2) SIGNS 337, 337-339 (2007) (surveying critical anthropology’s insights for understanding both the contingency of biological connections and persistence of connections among kinship, nation, gender, race and religion); Kitty Calavita, *Immigration Law, Race, and Identity*, 3(1) ANN. REV. LAW. & SOC. SCI. 1, 11-12 (2007) (rehearsing studies showing that despite recognition and appreciation of common ancestry, African descendants living in other countries may distance themselves from African Americans); see also Janet L. Dolgin, *Biological Evaluations: Blood, Genes, and Family*, 41 AKRON L. REV. 347, 364-396 (2008) (exploring and critiquing the role and value of biological and genetic relationships in perceptions and creation of families).

B. Disrupted Identity

The complexity of identity is particularly acute for those who have, or belong to a group that has, been separated from a genetic or historic past or from some ingredient of belonging and identification,\(^\text{185}\) disruptions that have served to promote White racial, economic and social supremacy.\(^\text{186}\) This is true, for example, for African Americans whose ancestors were forcibly torn from their families, tribes, villages, communities and cultures and taken to far away lands where they were perpetually at risk of family separation. This brutal disruption and what followed all but destroyed their identities and compromised the identities of their descendants. As Frederick Douglass described it, “slavery `made my brothers and sisters strangers to me; it converted the mother that bore me into a myth; it shrouded my father in mystery, and left me without an intelligible beginning in the world.'”\(^\text{187}\) In Douglass’s view, slavery “robbed him not only of the attributes of childhood but of certain defining elements of a human identity.”\(^\text{188}\)

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

---

\(^\text{185}\) For those raised in race, in country, in biological family, in language, these aspects of identity are transparent. See Berge, et al, supra note 98, at 1016 (noting the need for information about biological relations in the context of adoption).

\(^\text{186}\) Appell, Disposable Mothers, supra note 84, at 421; Dorothy E. Roberts, The Genetic Tie, supra note 180, at 223-38.

\(^\text{187}\) Quoted in Mintz, supra note 20, at 95. According to Mintz, many slaves (including Douglass) “felt that slavery’s greatest evil was the systematic deprivation of knowledge about one’s ancestry, about reading and writing, and even about one’s birth date.” Id. p. 95

\(^\text{188}\) Mintz supra note 20, at 95.
It's one of the greatest honors of my life – when I saw what it meant to people when I revealed their family trees. They would . . . just sit and stare at their family trees and then look at me as if I'd just taken them down the rabbit hole into Wonderland! We made African American history come alive for these people in the most particular and personal way -- that is, through their families. And their family's heritage inevitably leads where? It leads to themselves.\textsuperscript{189}

One of those people was African American comedian, producer, writer, and actor Chris Rock who was raised in working class Brooklyn and bused to a White school where he experienced racial subordination.\textsuperscript{190} When DNA linked him to the knowledge that his great-great-grandfather was a South Carolina state legislator who also owned a large amount of land, Mr. Rock exclaimed that while growing up, he “assumed” he would spend his life “picking up things for white people” but had he known about his great-great-grandfather, “it would have taken away the inevitability that I was going to be nothing.”\textsuperscript{191} Rock thus suggests that his sense of himself and his place in life—his identity—related to his genetic connection to a man he never knew or knew of.

Native Americans also endured forced disruptions from their families, tribes, history, and culture.\textsuperscript{192} Several hundred years of federal and state policy lead to the

\textsuperscript{189} PBS African American Lives, “What did it mean for you as a historian, or simply as a person, to be able to communicate this information to the participants?” \texttt{http://www.pbs.org/wnet/aalives/profile_gates.html}, last visited June 11, 2007 (emphasis supplied). Gates’s work examined the historical records of the slave trade and later census, voting and other records of the ancestors of present day African Americans. His research also traced individual's DNA back to various regions in Africa and Europe.

\textsuperscript{190} Felicia R. Lee, Famous Black Lives Through DNA’s Prism, \textit{THE NEW YORK TIMES} E-1 (Feb. 5, 2008).

\textsuperscript{191} Id. [Lee, Famous Black Lives]

\textsuperscript{192} These separations included relocations of Indian tribes and nations to new regions (Suzanne L. Cross, \textit{Indian Family Exception Doctrine: Still Losing Children Despite the Indian Child Welfare Act}, 85 CHILD WELFARE, 671, 674 (2006)) and relocation of children from Indian parents to Anglo families. See
removal of Native American children from their homes and tribes to boarding schools and Anglo-American families. This process of assimilation was thorough, even for those children whose legal ties to their families remained. The effects of these removals on Native American cultural, economic, family, and political life were acute and pervasive, but American Indians felt them on a personal level as well: they suffered from “ethnic confusion,” mental health problems, substance abuse, fear of attachment and loss, and an extraordinarily elevated suicide rate compared to on-reservation children and the general population.

This large scale loss of generations had mutual negative effects on the integrity of tribal political and cultural life and on the identities and psyches of children who were

---


194 Appell, Uneasy Tensions, supra note 193, at 148-50 (describing the large scale, longstanding removals of Native American children from their families and tribes); Lorie M. Graham, “The Past Never Vanishes”: a Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 1-34 (1998) (“Conservative estimates indicated that one-third of all American Indian children were being separated from heir families and placed in foster care, adoptive homes, or educational institutions. . . . At least 85% of the placements were in non-Indian homes and institutions. . . .”)

195 Curcio, supra note 193, at 56-61 (schools gave children English names, punished children for speaking their native language, converted them to Christianity, and taught curricula that did not relate in any way to the children’s culture or heritage.)

196 Graham, The Past Never Vanishes supra note 194, at 1-34; Appell, Uneasy Tension, supra note 193, at 146.


198 Graham, The Past Never Vanishes, supra note 194, at 30-32; Graham, Reparations, supra note 193, at .

199 Graham, Reparations, supra note 193, at 58 (“children of removal . . . [had] a suicide rate twice that of the reservation population and four times that of the general population.”)
separated. In addition, these losses are passed on through generations, reinforced by clashing social systems and incorporated into the culture and identity of Native Americans. These losses are thus constructed and experienced along biological connections and cultural organization.

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

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

---

203 Infant and other young adoptees have no choice as a developmental and legal matter. See American
based interventions of slavery and colonization. For all adoptees, of all ages and origins, adoption is, by definition, both a disruption of at least one genetic tie and the production of a new set of ties. Many adoptees experience deep and ongoing interest in their biological family history. Indeed, studies show that substantial numbers of adoptees are curious about their birth families. In one large, longitudinal study, researchers found that regardless of whether they were in open or closed adoptions, “[v]irtually all of the children . . . wanted to know more about their birth parents.” Another large study revealed that over 80% of adoptees adopted as infants were curious about their birth parents and 70% of adolescent girls and 57% of adolescent boys expressed an interest in meeting their birth parents. It is now widely recognized that adoptees continue to be members of their adoptive and birth families.

204 See Appell, Uneasy Tensions, supra note 193, at 157-61 (tracing the child welfare movement’s history of coercive intervention into single-mother-led families and families of color). This is also true in the international adoption context, which carries similar issues to domestic transracial adoption and a transfer of children to richer families and countries from poor families and countries. In these cases, adoption is a particularly mixed bag, as anthropologists Strong and VanWinkle explain: “Adoption across political and cultural borders may simultaneously be an act of violence and an act of love, an excruciating rupture and a generous incorporation, an appropriation of valued resources and a constitution of personal ties.” Strong & VanWinkle, supra note 180 at 471.

205 This legal fact is true even in stepparent, second parent, and related adoptions, which constitute a majority of adoptions. See Evan B. Donaldson Adoption Institute. Adoption Facts, last visited July 18, 2009, http://www.adoptioninstitute.org/research/adoptionfacts.php (noting, in the absence of national record-keeping since 1992, “stepparent adoptions accounted for 42% of all adoptions and foster care adoptions 15%”). These adoptions though carry much less mystery than non-related adoptions. Appell, Blending Families, supra note 72.


208 See BRODZINSKY ET AL., supra note 172, at 12–14; MIRIAM REITZ & KENNETH W. WATSON, ADOPTION AND THE FAMILY SYSTEM (1992); H.J. Sants, Genealogical Bewilderment in Children with
Even in the postmodern family era, “society . . . typically defines kinship in genetic terms and perceives other types of families as inauthentic or inferior.” So biologically based families continue to be the norm against which other kin groups are distinguished, and although adoptive families are not inferior or inauthentic, they are understood be a different and unique type of family. They are unique because the members experience or contemplate the biological family and its environment—ethnicity, race, country, and the like. For the adoptee, it is both (or either) the physical questions relating to appearance and health and the more imaginative questions, the whys and the what ifs—the possibilities of having been part of the birth family. These all form part of the adoptee’s roots and by extension, those of the adoptive family.

A wealth of theoretical and empirical social science research explores the importance of biological connection for adoptees in their development of identity. Fernando Colon, a psychologist and former foster child, described the connection between biological connection and identity as “a deeply felt psychological and emotional need, a need for roots, for existential continuity, and for a sense of completeness.”

---

Substitute Parents, 37 BRIT. J. MED. PSYCHOL. 133 (1964); Kenneth W. Watson, The Case for Open Adoption, PUB. WELFARE 24, 24 (Fall 1988).

Katarina Wegar, Adoption and Mental Health: A Theoretical Critique of the Psychopathological Model, 65(4) AMERICAN J. ORTHOPSYCHIATRY 540, 542 (1995); see also Strathern, supra note 182, at 348-49 (asserting that the Euro-American conception of kinship is biogenetic).

REITZ & WATSON, supra note 208, at 11.

As one adoptee put it: “Why just me? It feels very strange. One wonders, What would have become of me if I had remained there? Who was I during the time I was there?” Barbara Yngvesson, Going “Home”, 21(1) SOCIAL TEXT 74, 76 (2003)(quoting interviewee Sarah Nordin) [on Muse it is p. 7, 9] [this Article is also in the Toby Alice Volkman book – CULTURES OF TRANSNATIONAL ADOPTION 25-48 (2005)]; Berge, et al., supra note 98 at 1024 (adolescent adoptees have described the effect of birth parent contact as: “I feel like I know who I am now.” or “I feel like, more like, complete, I guess, because I know everything about myself now.”).


phenomenon has been referred to as “genealogical bewilderment.”

Psychologists understand that questions about birth families and birth histories play important and ongoing roles in an adoptive child’s development. At each stage of development and rite of passage, adoptees confront and re-confront issues relating to their adoption: why they were adopted; what are their birth parent’s character, habits and appearance like; what is their national heritage; whom do they resemble; and what genes might they be passing on to their children. These queries for information regarding biological history, what psychologists and social workers call “a basic human need . . . is unrecognized by most people who have automatic access to such information.”

Cultural studies professor and transracial adoptee Sandra Patton-Imani asserts that adoptees’ experiences of missing information about birth families cause frustration that we have no family medical history, no (known) biological ancestors, no (biologically based) physical resemblance with our families and no sense of physical connection to our parents or knowledge of our birth. We know we have ‘alien’ origins that guide our bodily development with biological, genetic maps sketched in indecipherable code.

These identity and origin issues are particularly cogent and contextual in transracial adoption, through which transracially adopted children both retain and lose their race.

---

214 Sants, supra note 208.
215 BRODZINSKY, ET AL., supra note 208; Berge, et al., supra note 98; see also, SANDRA PATTON-IMANI, supra note 176, at 171-72 (the adoptees she interviewed “discussed their identities through the categories of biology and culture, often mourning their lack of knowledge of a biological heritage.”)
216 Berge, et al., supra note 98, at 1016. Of course this is not to say that all adoptees feel a need or desire for this contact or information. See, e.g., id. at 1027-1031 (reporting on the feelings of adoptees who were satisfied having no contact with their birth families).
217 PATTON-IMANI, supra note 176, at 171.
218 PATTON-IMANI, supra note 176, at 171-72.
after adoption. Moreover, their sense of identity is particularly complex and contingent upon location. African Americans adopted into White families report being perceived as Black when in White communities and White while in Black communities. Similarly, a transracially, internationally adopted Korean adoptee may be Korean when with his or her Swedish parents but Swedish when among Koreans. In other words, as a social matter, race is both relative and permanent: perceived lineage does not evaporate after adoption.

Children and adults conceived through donor insemination have similar experiences regarding identity and biological connection. They report that their interest in such knowledge and contact with the donor would teach them about themselves and enhance their sense of identity. Parents choosing open donor insemination recognize this drive and report that they chose openness in order to give their children the option of contacting the donor and to leave the door open should the child need further medical or

---

219 These themes of contextualized race, ethnicity, and national origin pervade transracial and transnational adoption narratives. E.g., Mark Hagland, Reflections on a Multi-Prismed Identity in OUTSIDERS WITHIN 39–41 (eds, Jane Jeong Trenka, Julia Chinyere Oprah & Sun Yung Shin, 2006) (describing experience of being perceived as a foreigner in the U.S. though without the language or culture of Korea); Patrick McDermott, Disappeared Children and the Adoptee as Immigrant, in OUTSIDERS WITHIN, supra 106-07, (describing multiple identities as U.S. adoptee and El Salvadoran); Ami Inja Nafzger, Proud to be me in OUTSIDERS WITHIN, supra 233-240 (Korean adoptee describing her experience as non-white in Wisconsin and a foreigner when she returned to Korea to search for her Korean identity); Indigo Williams Willing, Presenting our Transracial Lives, in OUTSIDERS WITHIN, supra, 259, 263-64 (noting feeling that many Vietnamese-Australian adoptees feel both “white” and Vietnamese); SANDRA PATTON-IMANI, supra note, 176 at 62-87.; Rhoda Scherman & Niki Harré, The Ethnic Identification of Same-Race Children in Intercountry Adoption, 11(1) ADOPTION QUARTERLY 45, 53-61 (2008).

220 PATTON-IMANI, supra note 176, at 62 (quoting a transracially adopted African American’s experience of “realizing” she was “Black” once she went to college and came to know Blacks); id. at 86-87 (quoting a Black transracial adoptee who identifies as White).


222 E.g., J.E. Scheib, M. Riordan and S. Rubin, Adolescents with open-identity sperm donors: reports from 12-17 year olds, 20(1) HUMAN REPRODUCTION 239-52 (2005), hereafter Scheib, et al., Reports from 12-17 year olds.
other information in the future. In fact, the absence of access to identifying information regarding donors has made parents of donor-conceived children reluctant to tell their children about the insemination because the child would have no options to find out more information about his or her identity.

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

---

---

224 Scheib, et al., Choosing Between Sperm Donors, supra note 223, at 50.
225 See Judith Butler, PRECARIOUS LIFE, THE POWERS OF MOURNING AND VIOLENCE 22 (2004) ("If I lose you, . . . [who constitutes part of me], then I not only mourn the loss, but become inscrutable to myself.")

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

id. at 222.
the children their donations produce.\textsuperscript{228}

\textbf{C. Rehearsing Biology, Performing Identity}

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

Both biological and social parents experience the child and the child’s families. Just as adoptees seek or long for facts regarding their birth and biological parents when navigating identity, birth parents too experience an ongoing or perhaps episodic relationship to the adoptee because part of the birth parent’s identity is her experience with and without the adoptee. The strong sense of identity and connection many birth parents feel toward the children they relinquish for adoption has helped drive the

\textsuperscript{228} \textit{Infra}. text accompanying notes 248 to 259 and 373 to 386.
movement toward adoptions that are more open.\textsuperscript{229} Similarly, adoptive parents may experience some of the disjointedness that surrounds adoption. Beside their own sense of what ifs and why nots regarding the possibilities of producing their own biological children, they may encounter the child’s gap between original family or community and the adopted ones. Adoptive parents often seek to bridge these gaps through a variety of methods. They have sought information from adoption agencies about their adopted children’s family and background – often on behalf of the child.\textsuperscript{230}

Children adopted from different countries or of different races and their adoptive parents also may seek to bridge gaps between the adoptive family and the child’s birth identity. For example, children adopted from Eastern Europe in New Zealand are more likely than not to follow and root for sports team from their birth countries.\textsuperscript{231} White parents of Black children might move into an integrated or predominately Black community.\textsuperscript{232} International adoptive parents might visit the country in which their child was born as Swedish adoptive parents did when they traveled to Chile so they could “pass on to [their Chilean daughter] our sense of the sounds and smells, what one has experienced oneself.”\textsuperscript{233} This desire reflects a poignant intimacy among the adoptive parents, their daughter’s home country and their daughter. It also reflects a wish to restore “harmony in the experienced dissonance of having a child who belongs (whose roots are

\textsuperscript{229} Annette R. Appell, \textit{Increasing Options to Improve Permanency: Considerations in Drafting An Adoption With Contact Statute}, 18(4) CHILDREN’S LEGAL RIGHTS JOURNAL 18, 26; Berge, et al., \textit{supra} note 98185 at 1012; Groth, \textit{et al.}, \textit{supra} note 12.
\textsuperscript{230} Groth, \textit{et al.} \textit{supra} note 12; CARP, \textit{supra} note 12.
\textsuperscript{231} \textit{See} Scherman & Harré, \textit{supra} note 219, at 58 (the majority of children in their study “took an active interest in watching or supporting competitors from their birth countries. . . . Supporting competitors from the birth country may allow the children to exercise a socially acceptable affinity with the birth culture in a way that does not disrupt their connection with the host culture.”).
\textsuperscript{232} Haslanger, \textit{You Mixed?} \textit{supra} note 176, at 264-289.
\textsuperscript{233} Yngvesson, \textit{Going Home}, \textit{supra} note 211, 15 (Muse) or 81 (Social Text) (quoting the adoptive parent).
in) the other side of the world.” It is not surprising then that adoptive parents were also a force in both the open records and open adoption movements.

Adoptive families increasingly engage in ongoing and regular in-person contact. The kinship arrangements that form between adoptive and birth families create complex and dynamic family constellations. In some kinship networks, the contact is with extended birth relatives and does not include the birth parents. In other networks, the contact begins between the birth and adoptive parents and later comes to include relatives as the birth parents brought them to visits. The blended adoptive-birth family may include the adoptee’s birth siblings, foster siblings, grandparents, aunts, and uncles. Adoptive parents also seek to maintain contact among birth siblings of the adoptees who were adopted into different homes. In at least one study, families tended to view the most open of the adoptions in their homes as the ideal model for openness. The performative character of these connections and attempts to bridge relational and experiential gaps also surfaces among adoptees and their siblings’ birth mothers. For example, complex networks of fictive kinships form among adopted siblings and their own and the other’s birth family members.

---

234 Yngvesson, *Going Home*, supra note 211, at 15 (Muse) or 81 (Social Text)
237 SMITH & LOGAN, *supra* note 236, at 92.
239 Wright, *supra* note 238.
240 Siegel, *supra* note 236, at 415.
241 Jerica Berge, Kevin Green, Harold Grotevant, Ruth McRoy, *Adolescent Sibling Narratives Regarding Contact in Adoption*, 9(2/3) ADOPTION QUARTERLY 81, 89-91, 94 (2006). In fact, even children’s pre-adoptive kin networks are not confined to birth family; instead, the adoptive kin network includes a wide
had contact with the birth mother, the in-contact birth mothers had relationships with their child’s adopted sibling, and served as symbolic surrogate birth mothers for the siblings who did not know or have contact with their birth mothers.\textsuperscript{242} One adopted girl who did not have contact with her birth family explained that meeting her adoptive brother’s birthmother was “like I’m meeting my birthmom.”\textsuperscript{243} The in-contact adoptees too felt the import of these virtual relationships to their siblings. One such in-contact adoptee said of his adopted siblings that through his birth mother his not-in-contact adoptive siblings could “experience [their own birth mothers] themselves . . . because they have a desire to meet theirs . . . at some point . . . but they can kind of see what it’s going to be like or experience it through me.”\textsuperscript{244}

In recent years, there has also been movement toward openness in families created through assisted reproduction. These families may share information with their children regarding both their ART origins and the identity of the donor.\textsuperscript{245} Although there are differences regarding disclosure issues in families created through ART and adoption,\textsuperscript{246} the lessons of closed, anonymous adoption have informed this move toward more honesty regarding genetic parentage. Advances in genetic science and testing have also no doubt influenced this movement toward openness as DNA testing is able to identify

\begin{flushright}
\textsuperscript{242} Berge, et al., \textit{supra} note 241, at 91
\textsuperscript{243} \textit{Id} (Berge, et al AQ 2006) at 91.
\textsuperscript{244} \textit{Id.} (Berge, et al AQ 2006), at 92.
\textsuperscript{246} Cook, et al., \textit{supra} note 245, at 558; Ellen Waldman, \textit{What Do We Tell the Children?}, 35 CAPITAL U. LAW REV. 517, 533-35 (2006).
\end{flushright}
parentage and so many other aspects of a person’s being.\textsuperscript{247}

In 2001 a twelve year old sperm donor-conceived child and his mother established an internet registry for donor siblings.\textsuperscript{248} By 2009, the site claimed to have facilitated matches between more than 6603 “half-siblings (and/or donors).”\textsuperscript{249} These biological kin form relationships with each other, even though they may live far apart and not know the identity of their donor.\textsuperscript{250} They might correspond via e-mail, visit in person, or speak on the phone.\textsuperscript{251} One teenager, re/united with four of his siblings, said to one of his sisters in anticipation of their first face-to-face encounter: “It’s so weird to know that you’re going to meet someone that you’re going to know for the rest of your life.”\textsuperscript{252} One donor who through the registry matched with several of his children said of his re/united relations: “How do we define this family, and what are we to each other?”\textsuperscript{253}

Other anecdotal and scientific evidence suggest that in childhood and adulthood, donor-conceived people have great interest in their donor parents and biological siblings.\textsuperscript{254} This is true of the parents and donors as well and they are often the forces behind openness. Birth mothers of children conceived with the assistance of open-identity


\textsuperscript{248} Scheib, \textit{et al.}, \textit{Reports from 12-17 year olds}, supra note 370, at 248; The Donor Sibling Registry, \url{http://www.donorsiblingregistry.com/about.php}, Last visited 7-26-09.

\textsuperscript{249} The Donor Sibling Registry, \url{http://www.donorsiblingregistry.com/}. Last visited 7-26-09. The site further claims the registry has 24,789 registered donors, parents and donor-conceived children. \textit{Id.}; see also, Amy Harmon, \textit{Hello, I’m Your Sister. Our Father is Donor 150}, \textit{NEW YORK TIMES}, Nov. 20, 2005, \url{http://www.nytimes.com/2005/11/20/national/20siblings.html} (reporting on relationships among several groups of siblings united through the Donor Sibling Registry and noting that the vast majority of the matches are between half-siblings).

\textsuperscript{250} Amy Harmon, \textit{Hello, I’m Your Sister. Our Father is Donor 150}, \textit{NEW YORK TIMES}, Nov. 20, 2005, \url{http://www.nytimes.com/2005/11/20/national/20siblings.html}

\textsuperscript{251} \textit{Id.}[I’m your Sister...]

\textsuperscript{252} \textit{Id.}[I’m your Sister...]


\textsuperscript{254} E.g., J.E. Scheib \textit{et al.}, \textit{Reports from 12-17 year olds, supra note 370, at 248}; PLOTZ, \textit{supra} note 138.
sperm donors have reached out to families with children from the same donor. These (disproportionately single) mothers sought these connections to enlarge and perhaps normalize family for the children and also to address curiosity about the donor by comparing the offspring. Most of the families in one small study had ongoing contact with each other. Even birth mothers who utilize donor eggs may wish for her children to reach out to their donor mother. Sperm donors also may feel connected to their offspring. As one donor stated: “I cannot imagine that some . . . donors . . . have said that they rarely think about their children, because I think of mine very often. Indeed, I expect that they will be included among my last conscious thoughts on this sweet earth.”

These new relationships, which are at once familial, life-long and somehow discrete, challenge notions that we can turn our backs on biological relations just as they challenge traditional notions of family and of family law. It also appears that embracing the complexity of the family’s origin can strengthen the family. For example, early study also suggests that donor-conceived children reared by single mothers felt closer to their mothers when they learned of their insemination roots and were slightly more likely to have interest in the donor’s identity.

At the same time, social context may circumscribe the extent of kinship donor-conceived children and their families share with the donors. For example, those who can pass as a traditional family, such as heterosexual, intimate, and especially marital,

---

257 Id.
259 PLOTZ, supra note 138, at 132 (quoting a donor to the Nobel sperm bank).
260 Scheib, et al., Reports from 12-17 year olds, supra note 370, at 249.
partners, appear to be more resistant to sharing information about the use of donors and embracing openness regarding the donor’s identity.\footnote{Cook, et al., supra note 245, at 553; Scheib, et al., Choosing identity-release, supra note 223. Another reason though that parents may be reluctant to reveal the fact of a donor to their children is that the parents have little information about the donor and do not have any way to contact him (or her) in the likely event that the child will want more information about the donor. Cook, et al., supra note 245, at 552-53; Scheib, et al., Choosing Between, supra note 223, at 51.} Moreover, heterosexual couples appear to be more likely than not to choose a sperm donor with similar physical characteristics to the father.\footnote{See Scheib, et al., Choosing Between, supra note 223, at 55 (noting that 57.1\% of the heterosexual couples in the study matched the donor to the male partner).} Even same sex partners who cannot pass as joint biological parents are more likely to choose a donor with characteristics similar to the non-genetically related parent.\footnote{See id. [Scheib, et al., Choosing Between, supra note 223, at 55] (noting that 61\% of lesbians in the study matched the donor to the non-genetic parent). The authors of the study noted that “[a]lthough 74\% of our couples were lesbians, respondents still reported a strong preference that the donor be matched to their partner, suggesting that matching serves functions beyond concealing non-genetic relatedness between father and child.” Id., at 50} Couples make these choices also to increase the partner’s involvement with the donor insemination process and the child they will share.\footnote{Scheib, et al., Choosing Between, supra note 223, at 55.} For example, one lesbian sought a Jewish sperm donor because her lover was Jewish.\footnote{Caroline Jones, Looking Like a Family: Negotiating Bio-Genetic Continuity in British Lesbian Families Using Licensed Donor Insemination, 8(2) SEXUALITIES 221, 229-30 (2005).} Perhaps these impulses even reflect notions of evolutionary biology.\footnote{See Katharine K. Baker, Bionormativity and the Construction of Parenthood, GEORGIA L. REV. 649, 662-63 (2007) (noting that evolutionary biology holds that parents who are biologically connected to their children will be more willing to support them).}

Children conceived through donor insemination also absorb heteronormativity correlated to the social family structure. The daily relationships children have with parent-figures appear to correlate to donor-conceived children’s interest in their donor parent. For example, children born through known donor insemination and living in two-parent (hetero- or homosexual) families were less interested than the children of single parents in the possibility of contacting their donors.\footnote{Scheib, et al., Reports from 12-17 year olds, supra note 216, at 249.} “In families headed by lesbian and
heterosexual couples, the mere presence of a co-parent, regardless of their sex, appears to have the similar effect of dampening the youths’ expressed interest in their donors.”

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

* * *

These experiences of adoptees and donor-conceived persons and members of groups that have experienced non-consensual and often brutal separation from biological family, nation and heritage reveal that it is hard to escape biology and all that is constructed through and around it, even while fully and comfortably ensconced into new

---

268 Id. [J.E. Scheib, et al., Reports from 12-17 year olds, supra note 370], at 249.
269 Id. [J.E. Scheib, et al., Reports from 12-17 year olds, supra note 370, at 249.
270 Id. [J.E. Scheib, et al., Reports from 12-17 year olds, supra note 370] at 249.
271 Id. [J.E. Scheib, et al., Reports from 12-17 year olds, supra note 370] at 248.
272 Id. [J.E. Scheib, et al., Reports from 12-17 year olds, supra note 370,] at 245-5.
families and new nations. Nor would such an escape be a good thing, at least so far as we can imagine a bodiless world. For such an escape can be dehumanizing even in present contexts—a way, perhaps unintentionally, to commodify children, to make them untethered, transferable, blank. On the contrary, birth connections help define and humanize us. As anthropologist Barbara Yngvesson explains, “[i]t is the adoptive child’s preexisting ties to a family, a history, a culture, not just their potential for the future that distinguishes prospective adoptees from mere commodities.”

Although this commodification lingers in the still dominant legal construction of adoption as absolute—a complete and clean termination of one relationship and creation of a new one, amended birth certificate and all, adoption triad members and families created with ART actually navigate multiple levels of kinship, transform relationships, and create new family relations that are without direct adult intimacy, but grounded in their shared interest in the child and the child’s shared interest in them.

273 Anthropologist Barbara Yngvesson has written about this phenomenon of commodification, particularly in the context of transnational and transracial adoption, *Placing the “Gift Child” in Transnational Adoption*, 36 LAW & SOC’Y REV. 227 (2002); *Going ‘Home” Adoption, Loss of Bearings, and the Mythology of Roots*, 21(1) SOCIAL TEXT 74 (2003)?

274 Barbara Yngvesson, *Gift Child*, supra note 273, at 239.

275 Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L. J. 1077 (2003). Indeed, adoption in the United States not only changes the facts surrounding the birth, it buries and negates birth connections altogether. Generally upon adoption, a new birth certificate is issued and the old one sealed – even from the born child. Samuels, supra note 70, at 375-98. Western European nations, which also have legal adoption regimes and gamete donation have not fully embraced or are moving away from this fiction and the notions of anonymous reproduction. See Samantha Besson, *Enforcing the Right to Know Her Origins: Contrasting Approaches Under the Convention on the Rights of the Child and the European Convention on Human Rights*, 21 INT’L J. L. POL’Y, & FAM. 137 (2007) (describing national and international legal trends to protect a child’s right to know his or her origins, within limits, including the Convention on the Rights of the Child (CRC), arts. 7 & 8; legal disapproval of anonymous donor insemination in many countries; and certain protections under the European Convention on Human Rights Art. 8). Besson notes that the CRC’s protection of children’s right to know their identities was added pursuant to an Argentinean proposal during a time when Argentina was confronting its era of disappeared children. Besson, supra, at 143

276 The adoption triad refers to the adoptee, adoptive kin and biological kin. Adoption historian Wayne Carp dates the first use of the phrase to a 1977 Social Services Review article by C. Wilson Anderson, *The Sealed Record in Adoption Controversy*. CARP, supra note 12 at 270, note 16.
III. Blending Biological and Social Connections: Adoption’s Lessons for Second-order Postmodern Families

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

The experiences of adoptive families and families created with the aid of third parties, described above, reveal that embracing these separations—these ghosts—can enhance the integrity of postmodern families. As Yngvesson observed in the context of international adoption, “[c]onfrontation with this impossibility [of fully belonging] shakes up the idea of a coherent ‘I’ and the illusion of autonomous families, nations, and selves on which this ‘I’ is contingent.”277 Bursting this myth of separation by acknowledging the kinships that help create postmodern families might bridge the gap between a model of exclusive parenting and the enlarged family systems that increasingly

---

277 Yngvesson, Going “Home” supra note 211, at 17 (MUSE) 84? (SOCIAL TEXT) (referring to international adoption).
characterize family life. In fact, this self-consciousness about these real and imagined relationships has lead to the ascendency of an adoption model that is beginning to eclipse the old one which dismissed important biological relationships and minimized the mothering work of pregnancy and other biological connection. This reconceptualization of adoption, instead of banishing the child’s biological origins, embraces the child’s biological kin (and their kin) as a conceptual, practical, and increasingly a legal matter. These families present a model for understanding and perhaps regulating second-order postmodern families.

Social scientists have been systematically researching open adoptions in this country for approximately two decades and have produced a growing number of reports based on both small and large, longitudinal qualitative and quantitative studies. Researchers in England have been studying open adoption as well. The studies here and abroad, reveal that these new blended families comprise rich, organic and complex social structures. These family arrangements are not without problems and

---

278 Plus the old adoption model only fit anonymous infant adoptions; for decades, the majority of adoptions have been related (step-parent, etc.) or foster child. See Cahn, supra note 67 (describing evolution of adoption).

279 Deborah H. Siegel, supra note 236, at 411. Social scientists have been studying open adoption at least since the 1980s. Harold D. Grotevant, Ruth G. McRoy, Carol L. Elde, & Deborah Lewis Fravel, Adoptive Family System Dynamics: Variations by level of Openness in the Adoption, 33 FAM. PROCES 125, 127 (1994); Robert Borgman, The Consequences of Open and Closed Adoption for Older Children, 61 CHILD WELFARE 217 (1982).

280 E.g., California Long-range Adoption Study, Co-Principal Investigators, Richard Barth and Marianne Berry (Karie M. Frasch, Devon Brooks, & Richard P. Barth, Openness and Contact in Foster care Adoptions: An Eight-Year Follow Up, 49(4) FAMILY RELATIONS 435-36 (2000) (describing the, begun in 1990, studying 600-1000 adoptions); the Minnesota-Texas Adoption Research Project, http://cehd.umn.edu/fsos/Centers/mtarp/, last visited 12.31.08 (Harold Grotevant & Ruth McRoy, Co-Principal Investigators, PIs; 20 year old study involving 720 individuals); see also Gé, et al., supra note 227 (describing a longitudinal multisite study of adopted children).

281 E.g., SMITH & LOGAN, AFTER ADOPTION, supra note 236 (reporting on findings regarding adoptions with post adoption contact); Elspeth Neil, Coming to Terms with the Loss of a Child: The Feelings of Birth Parents and Grandparents About Adoption and Post-Adoption Contact, 10(1) ADOPTION Q. 1 (2006) (reporting on second wave of a longitudinal “Contact after Adoption) study which began in 1996).

282 As do many lesbian and gay-headed families formed with assisted reproduction. Appell, Endurance, supra note 74, at 306-15.
complications, but they illustrate a new type of extended family that situates parental rights in one nuclear family, but brings into that nucleus the child’s birth relations. As such, they share some features with, and may serve as models for, other postmodern families.  

A. Characteristics of Adoptive Families with Ongoing Contact

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

1. Biological and Social Kinship

This private family space in adoption, as in other families, is not static or impervious. On the contrary it is ever changing and evolving to reflect the circumstances, needs and desires of its members. The ongoing contact adoptive families exhibit

---

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

284 E.g., state initiated foster care and then involuntary termination of parental rights.
plasticity and complexity in their family constellations. Leading adoption researchers “conceptualize the adopted child as part of an adoptive kinship network: the people who are part of the child’s birth family . . . and adoptive family . . . . The child bridges both worlds, linking two family systems into a kinship network.” These networks offer post adoption contact that is varied and fluid in terms of amount and particulars of contact and in terms of the family constellations that are included.

These open adoption kinship networks view the child at the center and embrace persons because of their connection to the child. Thus in some kinship networks, the contact is with extended birth relatives and not with the birth parents. In other networks, the initial contact might have included just the birth and adoptive parents, but might later come to include relatives the birth parents brought to visits. The new family may also involve the adoptee’s birth siblings, grandparents, aunts and uncles, and their significant others. Adoptive parents also seek to maintain contact among birth siblings of the adoptees who were adopted into different homes. The type and constituents of contact change over time, expanding and contracting as the needs and interests of the families or their members change. This flexibility emerges out a “collaborative network” through which adoptive and birth family members “monitor the relationships in

285 Wright, et al. (2007), supra note 238, at 47-48;  
288 See REITZ & WATSON supra note 208, at 11 (adoption creates “a new kinship network that forever links these two families together through the child, who is shared by both.”)  
289 SMITH & LOGAN, supra note 236.  
290 SMITH & LOGAN, supra note 236, at 92.  
291 Infra, Pt. IIIA; see also, e.g., SMITH & LOGAN, supra note 236, at 92 (noting that family members in contact grew over time as birth parents brought relatives to visits).  
292 Ryburn, supra note 236, at 633.  
293 Dunbar, supra note 287(reporting a wide array of birth relatives in contact and types of contact); Frasch et al., supra note 280; Ryburn, supra note 236; Siegel, supra note 236.
the family and adjust their participation in service of maintaining the network relationships on behalf of the child’s ultimate well-being.”

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

Continuous contact families do not appear to be rigid about the terms of contact, but often allow it to grow over time as the parties become more comfortable with it and as the child ages. Studies indicate that over time families generally comply with non-enforceable post adoption contact agreements and none unilaterally stopped contact. As time passed, some mediated contact adoptions became direct contact adoption as the parties felt more comfortable with each other and the mediated contact became more of a hassle than a benefit. Sometimes, these changes are driven by the children who tended to want more contact, even though the birth and adoptive parents were satisfied with the existing level. As children reach adolescence, they gain more agency and the

295 Siegel, supra note 236, at 414-15. Prior to adoption, while in foster care this fourth child had monthly mother-child visits. Id.
296 Siegel, supra note 236, at 415; Berge, et al., supra note 241.
297 Dunbar, supra note 287; Ryburn, supra note 236.
298 Siegel, supra note 236, at 410.
299 Dunbar, supra note 287.
300 Adopted adolescents tended to push for changes in contact. E.g., Dunbar, supra note 287, at 454.
301 SMITH & LOGAN, supra note 236, at 174.
responsibility for initiating and defining terms of the contact.\textsuperscript{302} The birth and adoptive parents defer to the adolescents and let them set the pace.\textsuperscript{303} In other instances, the adoptive parents push for changes in contact, often in favor of more contact.\textsuperscript{304} Sometimes though the adoptive parents choose to decrease contact because the contact distressed the children.\textsuperscript{305}

The adoptive and birth families can also become increasingly intertwined in fairly natural and intimate ways. For example, some adoptive and birth family vacation together,\textsuperscript{306} attend family functions and rites of passage like birthday parties and weddings,\textsuperscript{307} and even baby-sit for each other.\textsuperscript{308} Extended birth family members may be part of this extended kin group.\textsuperscript{309} Indeed, as one student of open adoption noted: “Birth and adoptive family relationships in open adoptions are likely to be as complex and varied as relationships among spouses, parents and children, siblings, and other family members in different family arrangements.”\textsuperscript{310}

Adopted children may experience these two families in numerous and seemingly contradictory ways. Some children want to be with both their birth and adoptive parents.\textsuperscript{311} For them, loving and wanting to be with both sets of kin is not a contradiction.\textsuperscript{312} They may feel a mixture of happiness and sadness that they are with

\begin{footnotes}
\item[302] Dunbar, supra note 287, at 459-60.
\item[303] Dunbar, supra note 287, at 459-60.
\item[304] E.g., Dunbar, supra note 287, at 454.
\item[305] SMITH & LOGAN, supra note 236, at 137-41. Even when children felt discomfort visits might continue because the children were satisfied with it. Id. at 140-41.
\item[306] Siegel, supra note 236, at 414
\item[307] For example, the adoptive family may attend the birth mother’s wedding. Siegel, supra note 236, at 415; Ryburn, supra note 236, at 632 (birthday party); SMITH & LOGAN, supra note 236, at 155 (“special family occasions are enjoyed together in each other’s homes.”)
\item[308] Siegel, supra note 236, at 414; SMITH & LOGAN, supra note 236, at 121.
\item[309] SMITH & LOGAN, supra note 236, at 92; Siegel, supra note 236, at 414; Ryburn, supra note 236.
\item[310] Siegel, supra note 236, at 417.
\item[311] SMITH & LOGAN, supra note 236, at 136-37.
\item[312] E.g., Janette Logan & Carole Smith, Face-to-Face Contact Post Adoption: Views from the Triangles,
their adoptive parents and not with their birth parents.\textsuperscript{313} Other children felt more comfort with extended birth relatives than with birth parents; and still others were uncomfortable with birth parents visits.\textsuperscript{314}

2. Boundaries and Incorporation

One of the most enduring family values is that of autonomy: the family, normally through the parents, has the authority (if not the means) to regulate childrearing and membership. One of the most important factors in adoption is that the new adoptive parents feel secure in their position and in control of the family space.\textsuperscript{315} It is not surprising that one of the strongest indicators for successful open adoption is the sense of control the adoptive parents experience regarding the frequency, type and amount of contact.\textsuperscript{316} It may be that the heart of the adoptive relationship is adoptive parent control and autonomy rather than the fiction of rebirth. As two British researchers explained:

it was clear from our interviews that adoption achieves far more than legal security – it constructs parenthood. It was the experience and meaning of parenthood – legally, socially and emotionally – that was of enormous significance to the adopters in our simple. For many adoptive parents the phenomenology of parenthood is intrinsically characterized by a sense of ownership and control.\textsuperscript{317}

\textsuperscript{313} BRIT. J. SOC. WORK 3, 27 (2005) (“I’ve got my birth family and my adoptive family, so it’s quite good.”” quoting an adoptee).
\textsuperscript{314} SMITH & LOGAN, supra note 236, at 132-43.
\textsuperscript{315} SMITH & LOGAN, supra note 236, at 132-43; Grotevant, et al., Adaptive Behavior, supra note 283, at 232.
\textsuperscript{316} Jeanne Eeter, Levels of Cooperation and Satisfaction in 56 Open Adoptions, 72 CHILD WELFARE 257 (1993); SMITH & LOGAN, supra note 236, at 162-63.
\textsuperscript{317} SMITH & LOGAN, supra note 236, at 183; HAROLD D.GROTEVANT & RUTH G. McROY, OPENNESS IN ADOPTION 16 (1998); SMITH & LOGAN, supra note 236, at 105.
This sense of boundary, of authority, is closely tied to the success of open arrangements and why, ultimately, cooperative adoption appears to be flourishing.\textsuperscript{318} Incorporation can be more tenuous and boundaries more impervious when adoptive parents do not fully consent to the contact. When adoptive parents choose open adoption out of desperation rather than true desire, contact is likely to decrease; and it is often the birth parents who initiate the decrease, presumably because they feel the adoptive parents’ reluctance and discomfort.\textsuperscript{319} In contrast, “[a]dopters are less likely to find contact problematic when they have been fully involved in discussions about the details and purpose of contact arrangements and where they do not feel compelled to accept contact as a condition of placement.”\textsuperscript{320} Yet successful ongoing contact appears to help all members feel more comfortable about the adoptions.\textsuperscript{321}

Ultimately cooperative adoption respects the autonomy of the family just as the family consents to curb some of that autonomy through the agreement to enlarge the family circle. This enlargement is premised on a shift of roles and perceptions: birth relations accept and respect the adopters as parents and give permission to the child to take on the adopters as parents; adopters give the birth relations permission “to have an


\textsuperscript{319} See Marianne Berry, Debora J. Cavazos Dylla, Richard P. Barth & Barbara Needell, \textit{The Role of Open Adoption in the Adjustment of Adopted Children and Their Families}, 20 CHILD. & YOUTH SERV. REV. 151 (1998) (noting adopters who agreed to open adoption at the insistence of the adoption agency eventually stopped the contact); Dunbar, et al., \textit{supra} note 287, at 451. Nevertheless, the British studies indicate that such relationships formed initially without consent can work.

\textsuperscript{320} SMITH & LOGAN, \textit{supra} note 236, at 183; \textit{see also} Dunbar, \textit{supra} note 287, at 458 (“When adoptive parents perceived a high degree of control over changes (increases or decreases), they tended to be more satisfied. . . . When increases in openness were initiated by the adopted adolescent, the adoptive parents reported feeling less control and satisfaction.”)

\textsuperscript{321} “Children’s accounts of their feelings about adoption and contact suggest that, for most of them, their everyday lives were not clouded by a significant sense of loss.” SMITH & LOGAN, \textit{AFTER ADOPTION}, \textit{supra} note 236, at 144. However, they do worry about the wellbeing of their birth relatives. “Direct contact went some way towards quelling these [and other] worries for many children and adoptive parents were aware of its importance in this respect.” \textit{id} at p. 144
ongoing role in their child’s life.” When these permissions are given, the relationships are allowed to evolve and flourish. The birth relatives can remain in the adoptee’s life because their roles are bounded; they recognize a new parent or set of parents and those new parents in turn exercise their newfound authority to reincorporate the birth parents or relatives, but on different terms.

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

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

---

322 SMITH & LOGAN, supra note 236, at 162.
323 Logan & Smith, supra note 312 at 20-21.
324 Logan & Smith, supra note 312, at 17
325 Logan & Smith, supra note 312, at 17.
326 See e.g., Dunbar, et al., supra note 287, at 457-58 (describing such instances).
327 E.g., Logan and Smith, supra note 312, at 28 (describing birth parents who resisted relinquishment of their parental role.)
328 See Logan & Smith, supra note 368, at 28 (noting that even birth mothers who saw the adoption as temporary, “could identify benefits flowing from the adoption” and the adoptive parents felt secure in
Perceptions and power imbalances of the adoptive kin network in which the adoptive family occupies the center can complicate these bounded and permissive relationships. The birth relatives are likely to have their own families which, of course, are likely to be central for them. The adoptive family may not fully appreciate the separate and independent existence and needs of the birth family. For example, one study showed that adoptive families were concerned about the boundaries of the adoptive family, but not that of the birth family.\(^{329}\) The authors of that study noted that “[a]doptive parents tended to see boundary issues only in terms of whether the birth mother had violated any adoptive family boundaries; they did not evaluate whether they might have violated any of the birth mother’s boundaries.”\(^{330}\) In contrast, birth mothers were more conscious about the adoptive family’s boundaries, but felt like the boundaries were too rigid and impermeable.\(^{331}\)

Similar conflicting interests and perceptions can arise around the amount and timing of visitation.\(^{332}\) Although these open adopted families are blended, there are bound to be differences in timing and amount of contact. Four visits per year and visits during holidays may feel intrusive to the adoptive family, but completely natural for the birth family.\(^{333}\) Along these lines, what feels like comfortable and respectful contact for a birth mother might feel intrusive to the adoptive mother.\(^{334}\) Other times, the birth relatives


\(^{330}\) Dunbar, et al., supra note 287, at 457-58.

\(^{331}\) Dunbar, et al., supra note 287, at 458.

\(^{332}\) See Wright, et al, supra note 238, at 47 (“Though parents reported that birthfamily contact as emotionally charged, decisions about contact were related to specifics (amount of contact, structure, and strategies) rather than whether contact would occur.”).

\(^{333}\) SMITH & LOGAN, supra note 236, at 183.

\(^{334}\) See Dunbar, supra note 287, at 458 (describing an adoptive mother’s discomfort with the birth mother calling the adoptee every day).
decide to stop contact. Sometimes the children want more contact, but the adults are content with the amount of contact.

### 3. Contact and Intimacy

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

Moreover, familiarity tended to increase the value placed on connection. For example, adoptive parents who were foster parents were less concerned or fearful about birth parent contact after adoption than were adoptive parents who had not fostered the adoptee. Indeed, the latter were more likely to demonize or fear birth parents. The more contact the families had, the more advantages and fewer disadvantages to that contact the adoptive parents perceived. In addition in many open adoptions, the

---

335 Dunbar, et al., supra note 287, at 457.  
336 SMITH & LOGAN, supra note at 236, at 144, 174.  
337 Appell, Survey of State Utilization of Adoption with Contact, supra note 103.  
338 As one adoptive mother said what “makes them tick.” SMITH & LOGAN, supra note 236, at 93.  
339 SMITH & LOGAN, supra note 236, at 93.  
340 SMITH & LOGAN, supra note 236, at 75-76.  
341 SMITH & LOGAN, supra note 236, at 75; Siegel, supra note 236, at 415.  
342 Ryburn, supra note 236, at 634-44.
comfort level and quality of interaction increased after contact so that positive feelings about openness and sometimes openness itself increased over time.\(^{343}\) In contrast to persons who did not know the birth parents prior to adoption and feared contact, those adoptive parents who knew the parents before adoption and those adoptive parents who came to know the birth parents during adoption felt more sympathetic to the birth parents after having met and humanized them.\(^{344}\) Even so, the parties to the contact tended to value the connections and to grow from them. They mostly found the contact to be beneficial because of these connections – for the ways in which it enriched their, and especially the adoptee’s, understanding and knowledge of the adoptee’s complex identity.

For better and for worse, though, communication in adoptive families, like other families can be fraught, difficult and decisive. Qualitative studies, particularly those involving both birth and adoptive parents, show that triad members sometimes had contrasting views regarding changes in contact. When contact increased, the triad members were more likely to agree who caused the increase, but when contact decreased, the parties tended to blame others.\(^{345}\) For example, the birth mother might attribute a decline in contact to the adoptive parents while the adoptive mother attributes it to the birth mother.\(^{346}\) In other instances, the family members were looking to the adolescent adoptee who was not aware that he or she held the key to contact.\(^{347}\) In mediated

\(^{343}\) Siegel, supra note 236, at 415; see also Ryburn, supra note 236, at 634-5 (the more contact families had, the more advantages and fewer disadvantages they saw to it.).

\(^{344}\) SMITH & LOGAN, supra note 236, at 75-76.

\(^{345}\) Dunbar, supra note 287, at 456-57. “It was both striking and poignant that network members may become distanced from one another because of inaccurate perceptions about each other’s intentions regarding contact.” Id., at 461.

\(^{346}\) Dunbar, supra note 287, at 456-57

\(^{347}\) Dunbar, supra note 287, at 460.
adoptions such communication gaps were even more likely to occur.\textsuperscript{348}

4. Altruism & Self Interest

Concern for triad members pervades open adoption contact regimes. Adoptive and birth families engage in post adoption contact willingly, as in the case of adoption with contact and non-legally sanctioned open adoption, and perhaps less willingly when post adoption contact is court ordered.\textsuperscript{349} Technically though, adopters who are court-ordered to provide contact have the choice not to adopt at all if they are truly opposed to contact. It is also true that some adoptive parents may not have freely chosen open adoption, but did so to ensure the ability to obtain an infant or child.\textsuperscript{350} In any event, it seems that many adopters recognize the importance of the contact to the children and also to the birth family and themselves.

This ability to perceive and put others’ needs above one’s own comfort or wishes also marks the more successful open adoptions. While affection and respect among birth and adoptive parents is an important factor in the experience of ongoing contact adoption

\textsuperscript{348} Dunbar, \textit{supra} note 287, at 461. This is not to say that social workers or other family professionals do not have an important role to play in preparing the family for open adoption. On the contrary, third parties (social workers, mediators, etc.) can help provide clarity of roles, boundaries, expectations, risks, and benefits before the entering into an open adoption is important and social workers can provide that the adopters, birth family, and children require preparation for this new kinship arrangement. \textsc{Smith} & \textsc{Logan}, \textit{supra} note 236, at 144, 182-83; Dunbar, et al., \textit{supra} note 287, at 461-62. The boundaries between birth and adoptive (legal) family, the purpose of such contact and the everyone’s expectations, especially the child’s need tending. Adoptive parents may need assistance in anticipating and responding to “emotional and management issues” that will likely arise over the course of the relationship. \textsc{Smith} & \textsc{Logan}, \textit{supra} note 236, at 182. Birth parents may need assistance transitioning from a parental role to a new less central and autonomous role. \textsc{Smith} & \textsc{Logan}, \textit{supra} note 236, at 182. On the other hand birth parents might feel uncomfortable with too much involvement in the adoptive family. \textit{See} Grotevant, \textit{et al.}, \textit{Adaptive Behavior} (1999), at 242. And it may be helpful for social workers to be available on an ongoing, as needed basis. \textsc{Smith} & \textsc{Logan}, \textit{supra} note 236, at 183; Dunbar, et al., \textit{supra} note 287, at 462.

\textsuperscript{349} As it may be in England where the Children’s Act 1989 permits courts to order such contact and does not rely on agreements like many of the United States do. Children’s Act, 1989 Ch. 41, Pt. II, §§8-11.

as beneficial, even adults who were not fond of each other could engage in positive relationships, if they felt “sympathy, gratitude and acceptance.”\(^{351}\) When the adults do not particularly like each other or feel particular closeness, their ability, nevertheless, to understand and sympathize with the other’s circumstances enabled the adults to continue relationships and appreciate their value.\(^{352}\) An ability to put oneself aside and view the needs and perspectives of others may also contribute to sustainable post adoption contact, permitting the adults to overcome their own discomfort or disagreements for the sake of the child and, perhaps, the other adults.\(^{353}\) “Adopters who had a high capacity to take the perspective of others were more likely to view contact and maintain or increase contact over time” even when contact was problematic.\(^{354}\) The ability to take the viewpoint of the birth family and the adoptee appear to be critical both to managing difficult situations and to continuing contact, and can even lead to more comfortable relationships.\(^{355}\)

Whatever the origin of the contact or feelings about each other, birth and adoptive parents (and other adult kin) enter into or continue these cooperative relationships for the benefit of the children and sometimes for the benefit of the birth family.\(^{356}\) In one study, just over half (57%) of the adoptive parents could identify benefits of contact for themselves, birth families and the children; yet even those adoptive parents who viewed the contact as beneficial only to the adoptees and birth families, and not for themselves, continued the contact for the benefit of the others;\(^{357}\) and some did so even when they

\(^{351}\) Smith & Logan, supra note 236, at 174.
\(^{352}\) Logan and Smith, supra note 368, at 18-20.
\(^{353}\) See Neil, supra note 281, (study suggesting that empathy can mediate interpersonal differences).
\(^{354}\) Neil, supra note 281, at 25.
\(^{355}\) Logan & Smith, supra note 368, at 19-20.
\(^{356}\) E.g., Smith & Logan, supra note 236; Dunbar, et al., supra note 287, at 459. Siegel, supra note 236, at 416.
\(^{357}\) Smith & Logan, supra note 236, at 93.
found contact to be uncomfortable.\textsuperscript{358} Still adoptive parents are more likely than not to feel satisfied and comfortable with the contact.\textsuperscript{359} In one study, “[e]very respondent (100 percent) agreed that ‘my child is better off because she or he has access to her or his birth parent’.”\textsuperscript{360} Mutual adoptive and birth parent concern for the adoptee’s needs for more contact is associated with increase in contact over time.\textsuperscript{361} Reasons for decrease in contact include interpersonal differences between birth and adoptive parents and inability to reach mutual agreements regarding contact.\textsuperscript{362}

Of course there are also differences in perceptions of the beneficence and sufficiency of contact. For example, adoptive mothers in one study claimed more satisfaction than the birth mothers with the amount and level of contact, while the birth mothers wished for more.\textsuperscript{363} Moreover, birth relatives in another study were more likely to view the contact as beneficial to themselves as they were to view it as beneficial to the child.\textsuperscript{364} Very few viewed such contact to be beneficial to the adoptive parents.\textsuperscript{365}

\textbf{B. The Open Adoption Family Model and Second-Order Postmodern Families}

As the foregoing studies illustrate, adoption with ongoing contact is distinct from closed adoption. This difference is quantitative and qualitative. First, the kinship networks of families of open and closed adoption are different. The ongoing contact family is larger and more diverse, including multiple sets of parents, grandparents, aunts

\begin{itemize}
\item \textsuperscript{358} \textsc{Smith} & \textsc{Logan}, supra note 236, at 99.
\item \textsuperscript{359} \textsc{Smith} & \textsc{Logan}, supra note 236, at 99.
\item \textsuperscript{360} Siegel, supra note 236, at 416.
\item \textsuperscript{361} Dunbar, \textit{et al.}, supra note 293.
\item \textsuperscript{362} Dunbar, \textit{et al.}, supra note 287, at 452.
\item \textsuperscript{363} Dunbar, et al., supra note 287, at 461.
\item \textsuperscript{364} \textsc{Smith} & \textsc{Logan}, supra note 236, at 126. (This study involved court ordered contact and involuntary termination of parental rights.)
\item \textsuperscript{365} \textsc{Smith} & \textsc{Logan}, supra note 236, at 126.
\end{itemize}
and uncles and siblings. The closed adoption family is more like the normative family with one or two parents, corresponding grandparents and perhaps adoptive siblings; and no more than two sets of cousins, aunts, uncles and other kin. Second, the ongoing contact and closed adoptive families seem to be qualitatively different in that the families appear to perceive themselves and their children differently. For the ongoing contact family there is an expressive function of contact, one that communicates to the child and the birth family that the child is cared for and connected to others. There is also a positive sense of the adoptive family as a second (even if primary, most important and best) family which wraps itself around the adoptee and all that comes with him or her. In this way, these ongoing contact families are literally child-centered. Adoptive families without contact may be less secure or entitled and unable to experience or support the birth family which becomes, in essence, the ghost family, not physically present but lurking and for some, perhaps, mildly threatening.

In other words, adoption creates new parents with parental agency and autonomy who can use this power to enter into enforceable or non-enforceable agreements to keep the birth family, or select members, in the new adoptive family’s life, on whatever levels the adoptive parents determine are appropriate for the child and the family. Adoption

---

367 See Phyllis R. Silverman, Lee Campbell, & Patricia Patti, Reunions between Adoptees and Birth Parents: The Adoptive Parents’ View, 39 SOC. WORK 542 (1994) (noting families in closed adoptions saw themselves as no different than birth families); Berry, et al., supra note at 152.) (“Open adoption is in direct opposition to the traditional confidential adoption practices of the recent past . . . .”)
368 See Grotevant, et al., Adaptive Behavior, supra note 283, at 239-240 (suggesting that collaboration among birth and adoptive parents would communicate respect for the child’s birth history); Logan & Smith, supra note 368, at 9 (citing the theory that “continued contact allows birth relatives to show that they still care for the child. . . . “)
369 See Ryburn, supra note 236, at 635-6 (listing positives and negatives of contact experienced by open and closed adoptive families). Studies of open adoption suggest that openness reduces adoptive parents’ fears of the birth parents and the child’s attachment to them. Neil, supra note 281; Margaret R. Sykes, Adoption with contact: a study of adoptive parents and the impact of continuing contact with families of origin, 23 J. FAMILY THERAPY 296 (2001).
with contact affords birth relatives special rights to have negotiated contact with the adoptee; and if that contact fails down the road, adoption with contact provides the right to a dispute resolution mechanism to enforce or modify those rights. Even if the dispute cannot be resolved in a mutually satisfactory way, and even if the contact terminates, the adoption stands, thus reinforcing the primacy of the rights of the adoptive parents. Because adoption with contact is by definition entered into at the adoption itself, it creates a new type of extended family \textit{ab initio} that is built on consent and thus preserves (adoptive) parent autonomy. The biological kin are part of this family, but in the background.

Ongoing contact adoption and adoption with enforceable contact reflect the social and biological kinship network. Ongoing contact adoption and particularly adoption with contact illustrate that it is possible, and perhaps preferable to legally and consensually unbundle parental status and rights. They also anticipate and reflect the patterns we see in other postmodern families. These patterns are surfacing in the context of sperm-donor conceived children. As assisted reproduction has become more common and less secretive, these offspring are expressing interest in obtaining knowledge of and even contact with their donor parents and siblings.\textsuperscript{370}

The families created through the assistance of the Nobel Repository, discussed above, present cases in point. The early generation of donor-conceived children from the Nobel Repository which practiced anonymous donation,\textsuperscript{371} produced a number of offspring who discovered the secret of their conception and sought the human origins and

\textsuperscript{370} E.g., Scheib, \textit{et al.}, \textit{Reports from 12-17 year olds}, supra note 222.
\textsuperscript{371} Plotz, supra note 138, at 36-38, 49, 53; many of the donors turned out not to be laureates. \textit{See id.} at 193 (describing one donor whose entry to the sperm bank was based not on his accomplishments but only on his own unsupported claim that his IQ as 160).
offspring of their roots. These relationships were varied and sometimes short lived, but knowledge about the fact of insemination and sometimes knowledge of the donor himself was important and meaningful.

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

Similar to adoptive and birth parent kinship, the mothers who chose the Repository felt connected to the anonymous sperm donors, identified only by colors such as White, Fuchsia, and Coral. It was often the mothers who told their children of their paternal

---

372 PLOTZ, supra note 138; see also, Exploring the "Nobel Prize sperm bank" http://www.slate.com/id/100331/, last visited Jan. 24, 2009 (known as the “Seed Project,” this series chronicles Plotz’s research for the book).
373 PLOTZ, supra note 138
374 PLOTZ, supra note 138, at 57. Tom’s younger sister, also a product of the Repository, was not moved and was uninterested in searching for her father or corresponding with her paternal siblings. Id. at 59, 118-119. Yet when there was a fire that destroyed her mother’s home, she made sure that they were able to save her Repository file. Id. at 118.
375 PLOTZ, supra note 138, at 59.
377 In a touching gesture, Tom secretly married his fiancé (and mother of his child) before they met Donor Coral, whom he finally knew as Jeremy. Id. at 218 (“Tom did not say why they had married so suddenly, but he didn’t have to. Tom was eager to present Lana to Jeremy as his bride.”)
378 PLOTZ, supra note 138, at 252-55.
379 Id. at 254.
380 E.g., PLOTZ, supra note 138, at 58, 78, 73.
Mothers searched or helped their children search for the fathers. One mother even brought her one-year-old daughter, Joy, to the Repository and left her there for two hours so that her biological father, Donor White, and his wife could meet her, while preserving everyone’s anonymity. Donor White brought her a doll which her mother kept for Joy. Thereafter, the mother sent photos to the Repository for Donor White and a mediated mutual correspondence followed over the years with exchanges of cards and photos through the Repository. Eventually, they corresponded directly and met each other again when Joy was twelve at Donor White and his wife’s home. By this time, Joy had three fathers to whom she and her mother felt close—her legal father (the man to whom her mother was married when Joy was conceived), a stepfather, and a biological father (who was no longer merely a sperm donor).

C. Reconceiving Second-Order Postmodern Families

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

---

381 E.g., PLOTZ, supra note 138, at 55, 82;
382 E.g., PLOTZ, supra note 138, at 59, 62-63; 80-83.
383 PLOTZ supra note 138, at 78. As the mother left Joy, the Repository called Donor White who, with his wife, “raced over from their house.” Id.
384 PLOTZ, supra note 138, at 78-80. Several years later, just as this correspondence was gaining steam and increased depth, the Repository refused to continue mediating the communications and they ended. Id. at 80. The mother felt a great sense of loss. Id. at 80-83. Eventually, with the help of David Plotz, Donor White and the mother reconnected via email. Id. at 131-32.
385 PLOTZ supra note 138, at 205-07.
386 Id. at 205-212. Included in this multifaceted band was Donor White’s wife who became kin as well. Even to Joy’s mother, Donor White was “not a sperm donor anymore. . . . He was a dad.” Id. at 211. Joy and her mother visited Donor White again, this time with her stepfather in tow. Id. at 257.
387 As do many lesbian and gay-headed families formed with assisted reproduction. Appell, Endurance, supra note 74, at 306-15.
as models for, other postmodern families.\footnote{\textit{See} Grotevant, \textit{et al.}, \textit{Adaptive Behavior}, \textit{supra} note 283 (suggesting that the open adoption kinship networks “could be useful in the investigation of other complex family forms that involve the child’s linkages to multiple sets of adults, such as found in post divorce families.”)\n}\n
These families follow in the steps of early adoption law and practice, mimicking biological ordering while disregarding the biological connections of their children in structuring their legal relationships, even while including biological relations in their social kinship network. These patterns create two potential problems. First, those families that disregard the missing biological connections risk closing doors that may better serve them and their children if open. Second, those families who have kept those doors open, who have included biological relatives in their family circle, risk some uncertainty regarding the boundaries, conditions and future of these relationships.\footnote{\textit{E.g.}, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. App. Div. 1994) (dispute between lesbian mothers and the sperm-donor father); LaChapelle v. Minton, 607 N.W.2d 151 (Minn. Ct. App. 2000) (same); \textit{see also} Polikoff, \textit{supra} note 8, (describing such relationships and disputes).\n}

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

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

At the same time, adoption with contact illustrates the enduring importance and relevance of both biological and social families and provides an example of how parental rights and relationships need not be all or nothing. Instead, parents can lose (or never gain) their parental rights or status, but they can nevertheless receive the right to maintain

---

390 In contrast to court imposed post adoption contact. Annette, *Enforceable Post Adoption Contact Statutes, Part II, supra* note 103.

391 Compare to Rosenbury, *supra* note 5, who makes a converse point that family functions can be disaggregated from family relations. My point is that family relations can be disaggregated from family functions.
a relationship with their children under terms agreeable to both sets of parents. In effect, it provides an opening, creating a more complex, though still largely private and autonomous, family system.

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

Most open adoption studies involve informal (not legally enforceable or court-ordered) open adoption. British researchers study court-ordered open adoption after foster care and contested termination of parental rights. Lessons for legal regime changes are not yet clear in the adoption context or in the context of other post-modern families. And these lessons are not necessarily intuitive. For example the most open of the open adoptions may be those involving adoption of infants; while the more fraught ones may be those arising out of coercive state intervention. In each case, the contact is important for the child on some level, though it can be disconcerting. The birth parents in the foster

---

392 The U.K. permits courts to order postadoption contact. Children’s Act 1989, Ch. 41, Pt. II, Sec. 8. Studies of these open adoptions include SMITH & LOGAN, supra note 236; Logan & Smith, supra note 368; Carole Smith, Trust v. Law: Promoting and Safeguarding Post-Adoption Contact, 27 J. SOCIAL WELFARE & FAMILY LAW 315 (2005); Neil, supra note 281; Ryburn, supra note 236, at 639.

393 Moreover, despite the steady growth in growth in adoption with contact – 20 statutes so far, social scientists have not studied these adoptions. Legal studies suggest that there is little litigation regarding the statutes. Appell, Adoption with Contact, supra note 103.

394 E.g., foster care adoptions. Wright, et al., supra note 238.
care adoptions may share less in common with the adopters in terms of race, class, culture and mental health than the infant adoptions and be angrier about the adoption.\footnote{395 Ge, et al., supra note 227.} Yet these adoptions may have lessons for post divorce families, particularly those that experience high conflict. The infant open adoptions may have more lessons for the families of assisted reproduction.

**Conclusion**

This Article anchored the postmodern family law movement in the physical, social and economic conditions that affect the most disaffected among us: those who are socially, economically and politically disadvantaged and those who have experienced the legal loss of a biological parent or child. This is not to say that biological and social relationships are dichotomous. On the contrary, it is not necessary to undermine or devalue biology as basis of family to protect or recognize other family formations, including adoptive families, kinship networks, and same-sex or plural parent families. Nor is it necessary to devalue non-biologically connected families. Such devaluations are unnecessary under our current doctrines and not helpful for adults or children. Of greater utility is an enhanced notion of biological connection—one that accounts for existential issues, the body work of bearing a child, the physicality of tissue and genetic connections for both the adults (adoptive and biological) and the children. Yet as important as it is to reorganize family law to reflect social, and not merely biological and marital, relationships, it is useful to take into account the existential value and equalizing aspects of biological ordering in the recognition and protection of families.

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

---

396 APPIAH, supra note 171, at xvi (“And so I write neither as identity’s friend nor as its foe.”)