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# The Endurance of Biological Connection: Heteronormativity, Same-Sex Parenting and the Lessons of Adoption

Annette R. Appell\*

## I. INTRODUCTION

United States family law is largely based on the modern family in that the foundation of family law is the patriarchal, heterosexual nuclear family, and biology and marriage define family relationships and regulate rights, privileges, and benefits among family members and against the state. However, the lived relations that constitute postmodern families are much more expansive, increasingly fluid, and include adult-adult and adult-child relationships that do not have the sanction of marriage or biological connection. Lesbian and gay families are prime, but not the only, examples of these postmodern families.<sup>1</sup> As a reflection of this disconnect between law and society, family law has entered a postmodern phase in which society is seeking to accommodate these complex and unstable family constellations both by changing law to govern family formation and dissolution and by protecting extralegal relationships that are formed intentionally and consensually.<sup>2</sup> Thus, postmodern family law is changing to reflect social, and not merely biological and marital, relationships. These postmodern families are pushing us away from biological connectivity, a movement which is not entirely unproblematic,<sup>3</sup> but provides significant benefits.

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1. Postmodern families include a variety of family formations that are not nuclear and patriarchal; in other words, they include families headed by single or divorced parents, families with working mothers, and stepparent families. See JUDITH STACEY, *IN THE NAME OF THE FAMILY* 6–7 (1996) (noting the wide array of families that are not headed by a wife who stays home to rear the children and a husband who works outside the home to support the family).

2. These changes include de facto parent protections and domestic partnership and civil union laws that provide some quasi-marital benefits to unmarried partners. See Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 720–37 (2001).

3. See discussion *infra* at Sec. II.B–C, III (describing the failed attempt to disregard biological connection and assessing the complications of accommodating biology in families in which the child has only one biologically related parent).

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This article considers the role of absent biological parents in lesbian and gay families and the lessons adoption law and practice provide for these families. Instead of taking a position on the method or propriety of these changing family formations, this article explores how children in lesbian and gay families might experience their absent birth relations and how these families can, and often do, respond to their children's longing for their biological kin. This exploration reflects conventional adoption norms which, like many lesbian and gay families, both mimic and disregard biological family formation and embrace unitary or binary exclusive parenting while pretending the absent biological parent does not exist. These norms, however, have not fully withstood the test of time.

The American experience with adoption law, which was institutionalized during the rise of the modern family, illustrates that biology cannot be ignored. Adopted children and adults, as well as people born through donor-insemination, have challenged this disconnect and have pushed adoption practice and law to better accommodate the tensions between parental autonomy and the persistent push and pull of biological connection.<sup>4</sup> These tensions and accommodations contain a number of lessons for families that are not fully biologically defined or contained, such as families headed by single or coupled lesbians and gay men. The most important lessons adoption can share are the failures attendant to the pretense of rebirth and anonymity and the apparent successes of blending birth and adoptive kin to create new family systems. The legal regulation of post adoption contact among family members, also known as "cooperative adoption" or "adoption with contact," provides another set of lessons.

This article traces the intersecting and diverging paths of the legal norms regarding adoption and legal recognition of same sex parents. It compares how adoption law, which for much of its relatively short life tried to replicate the modern family by ignoring biology, is now embracing biology and how lesbian and gay family law is replicating the postmodern family form while moving away from its biological roots. Lesbian and gay families, many of them adoptive, appear, however, to be heeding lessons about the endurance of biology and acknowledging and even embracing their children's biological families. Section II reveals the tenacity of biological connection and its deep and wide significance in United States culture, history, and law. To illustrate this tenacity, the section rehearses the failed attempt to close adoption and the resulting

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4. Birth and adoptive parents too have been part of these movements. *See infra* text accompanying notes 34-42.

corrective actions. Section III explores lesbian and gay families with children, noting ways these families reflect heteronormativity through two, rather than plural, parent families and yet still value and honor biological connections by including reproductive partners, such as sperm donors and surrogates, into their family systems. These largely unregulated family systems suggest that same-sex parents are cognizant of the important role of biological connections and of the benefits that can come from enlarging the circle of adults connected to the child. The article concludes, in Section IV, with lessons open-adoption law and practice might offer lesbian and gay families with children, particularly regarding the possible benefits of developing legal schemes regarding these family systems.

## II. BIOLOGICAL PRIVILEGE AND VALUE

This article is part of a larger project that aims to anchor postmodern family law 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. In this context, biological privilege is not necessarily a symbol and tool of oppressive patriarchal power and traditional family values, but instead offers the only wealth and power to which people have relatively equal access regardless of their gender, class, or race.<sup>5</sup> The biological connection and the value family law still places on those connections benefit the most vulnerable families.<sup>6</sup> Moreover, biology remains important for a host of affective, psychological, and existential reasons.

### A. *The Existential Value of Biological Ties*

The social and legal privilege of biology serves deep and wide political and moral purposes, as critical parental rights proponents have explored elsewhere,<sup>7</sup> and also meets social and psychological needs. This is not to say that biology and biological connections are not constructed or are inherently important, somehow true, or otherwise absolute. It is to

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5. Appell, *supra* note 2.

6. This is because parental status is based primarily on biological connections, including the relationship to a biological parent (e.g., through marriage), and such status cannot be revoked except on the grounds of parental neglect or abuse. Parental rights belong to parents regardless of race, socioeconomic status, age, sexual orientation or identity. *Id.* at 758–79.

7. See PEGGY COOPER DAVIS, *NEGLECTED STORIES THE CONSTITUTION AND FAMILY VALUES* (1997); Appell, *supra* note 2; Dorothy Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171 (2003).

say that in our cultural, medical, and legal context, biological ties and genetic make-up—for better and for worse—matter. Genes, genetic background, and family history increasingly inform medical science.<sup>8</sup> In addition, people are fascinated by their genetic background and what it reveals about where they came from and who their ancestors were.<sup>9</sup> Even the construction of race is based on a set of social norms or understandings relating to blood lines, national heritage, and often skin pigment.<sup>10</sup> For these and perhaps other reasons, biological connection and family history are extraordinarily important to the formation of identity. Accordingly, the disruption of these connections is not without consequence.<sup>11</sup>

Identity is a complex, oppositional, non-linear construct that operates on psychological, political, personal, and social levels and takes shape by contemplating difference and sameness.<sup>12</sup> For example, as a psychological matter, identity is part of human cognitive and emotional development through which a person begins to understand him- or herself as separate from but related to others: as a person who has a past, present, and future—a person with race, ethnicity, sex, gender, likes, dislikes, and personal experiences, and other aspects of one's sense of self.<sup>13</sup> As a social matter, identity relates to one's membership in a social group, such as doctor, lawyer, woman, white.<sup>14</sup> Similarly, political identity includes claims arising out of membership in a group, and claims for benefits arising out of difference and belonging.<sup>15</sup> The navigation of

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8. James Lindemann Nelson, *Genetic Narratives: Biology, Stories, and the Definition of the Family*, 2 HEALTH MATRIX 71 (1992).

9. Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 219–20 (1995) [hereinafter Roberts, *The Genetic Tie*]. *But see id.* at 231–38 (highlighting the relative lack of interest African Americans have in genetic ties when compared to cultural and political identity). Of course, race is not biological, but socially constructed. *See* Dorothy E. Roberts, *Legal Constraints on the Use of Race in Biomedical Research: Toward a Social Justice Framework*, 34 J. L. MED. & ETHICS 526, 526 (2006) (“Social scientists’ conclusion that race is socially constructed was confirmed by genomic studies of human variation, including the Human Genome Project, showing high levels of genetic similarity within the human species.”).

10. Roberts, *The Genetic Tie*, *supra* note 9, at 223–30.

11. As explored *infra* Sec. II.C, these consequences relate to the adoptee's identity formation, the pervasive cultural value of biological connection, and the futility of seeking to erase or ignore these connections.

12. *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).

13. *Id.*

14. *Id.* at 81–84; *see also* Eric J. Mitnick, *Law, Cognition, and Identity*, 67 LA. L. REV. 823, 845–47, 857–69 (2007) (discussing social and personal identity in similar terms as Richards, though more extensively, and characterizing personal identity also with individual traits, such as being charming).

15. *E.g.*, civil rights arising out of the Reconstruction Amendments and Civil Rights Acts; *see also* Convention on the Rights of the Child, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989) (protecting identity); *see also* Roberts, *The Genetic Tie*, *supra* note 9, at 232–33 (noting the

these various aspects of external projections and belonging and of personal experiences, relationships, and constitution give us a sense of identity—how we are like and unlike others, what makes us distinct, and what makes us belong.

Law and culture construct biology and biological connections as meaningful and hence meaningful for purposes of identity. In this country, racial categories have been defined socially and legally around country of origin,<sup>16</sup> the status or “race” of parents,<sup>17</sup> and skin color.<sup>18</sup> These categories and control of their parameters and content are sites of political, legal, and social struggles.<sup>19</sup> Not surprisingly, persons with the most privilege control these sites and determine the value of family connections and the flow of children, which normally runs from the disadvantaged to the advantaged.<sup>20</sup> This separation reflects a sort of market perspective, an idea that certain human beings are untethered, moveable, and blank enough to be remade into another image. But from the perspective of these transferable human beings, biological ties, race, culture, and history are an important part of their identity.<sup>21</sup>

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political content of Black identity).

16. LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 76–77, 105 (1999); Roberts, *The Genetic Tie*, *supra* note 9, at 223–30.

17. *E.g.*, children born to enslaved women were the property of the slave-owner. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* 18 (1991); Roberts, *The Genetic Tie*, *supra* note 9, at 226, 250. Children born into a family with a Black ancestor were considered Black regardless of the race of other ancestors. *Id.* at 228–30. Children born to a Native American parent are likely to be considered Native American. Indian Child Welfare Act, 25 U.S.C. § 1903(4) (2000); Annette R. Appell, *Uneasy Tensions Between Children’s Rights and Civil Rights*, 5 NEV. L.J. 141, 162 (2004) (discussing Indian family exception doctrine); *see also* Carlos A. Ball, *The Blurring of the Lines: Children and Bans on Interracial Unions and Same-Sex Marriages*, 76 FORDHAM L. REV. 4 (2008) (rehearsing the connection among anti-miscegenation laws, white supremacy and discouraging white women from bearing biracial children).

18. Roberts, *The Genetic Tie*, *supra* note 9, at 225–38.

19. Annette R. Appell, *“Bad” Mothers and Spanish-Speaking Caregivers*, 7 NEV. L. J. 759, 759–65 (2007).

20. *See, e.g.*, GORDON, *supra* note 16 (rehearsing the child savers’ treatment of children of immigrants and the use of orphan trains generally, and more specifically, the prohibition of Mexican American families from adopting European “orphans”); Annette R. Appell, *Disposable Mothers, Deployable Children*, 9 MICH. J. RACE & L. 421, 440–64 (2004) (discussing connections between welfare and children welfare reform and the one-way transfer transracial adoption from poor African American families to white families); Joan C. Callahan & Dorothy Roberts, *A Feminist Social Justice approach to Reproduction-Assisting Technologies: A Case Study on the Limits of Liberal Theory*, 84 KY. L.J. 1197, 1217–18 (1996) (noting tendency of courts to uphold powerful, rich men’s rights over birth mothers in surrogacy contracts and how poor people’s reproductive freedom is often compromised); Judith Stacey, *Gay Parenthood and the Decline of Paternity as We Knew It*, 9 SEXUALITIES 27, 39 (2006) (“Independent adoption agencies enable middle-class gay men, again primarily but not exclusively white and coupled, to adopt healthy infants of a variety of hues.”); *see also* Callahan & Roberts, *supra*, at 1199 (noting that non-Hispanic white women are by far the primary consumers of reproductive technology).

21. *See, e.g.*, SANDRA PATTON, *BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA* 2 (2000) (observing that “transracial adoptees . . . struggled with questions of history,

Those whose own or whose ancestors' biological connections have not been valued and who have been separated from their genetic, cultural, political, or historic past experience a longing for and interest in those connections. For example, African Americans whose ancestors were forcibly torn from their families, tribes, villages, communities, and cultures and brought to the Americas experienced profound disruptions of identity.<sup>22</sup> Their family names, language, childrearing, food, and other customs were breached both through sales that tore children from kin and through brutal imposition of a new way of life.<sup>23</sup> These breaches, the lack of names, and the simple lack of family history so many generations ago have driven African Americans today to uncover these mysteries and find the missing pieces of their identities—whence they came, to what group they belong, and what journey preceded the past few generations.<sup>24</sup>

Native Americans too experienced forced disruptions in their history and cultural life in many ways, including the several-century-long policy of removing Native American children from their homes and tribes to boarding schools and Anglo-American families.<sup>25</sup> These disruptions led to personal, cultural, and political loss. Separated Native American children experienced emotional trauma and feelings of disconnection and alienation.<sup>26</sup> Tribal cultures suffered, as there was a dearth of young

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origin, and the meaning of adoption as they continually engaged in processes of identity construction and maintenance"); *OUTSIDERS WITHIN: WRITING ON TRANSRACIAL ADOPTION* (Jane Jeong Trenka, Julia Chinyere Oparah & Sun Yung Shin eds., 2006) (collection of reflections of transracial and international adoptees regarding their navigation of their birth and adoptive cultures, particularly growing up in white, middle class, American families and neighborhoods).

22. DAVIS, *supra* note 7, at 90–91; E. Christi Cunningham, *Exit Strategy For The Race Paradigm*, 50 *HOW. L.J.* 755, 764 (2007). This is not to suggest that African-Americans did not create new and diverse cultures and traditions in the Americas. *See, e.g.*, IRA BERLIN, *MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 17–28* (1998) (describing rich and complex social relations, practices, hierarchies and communities).

23. For discussions of African and African-American children in and after slavery, *see, e.g.*, HERBERT G. GUTMAN, *THE BLACK FAMILY IN SLAVERY AND FREEDOM, 1750-1925* (1976); WILMA KING, *STOLEN CHILDHOOD: SLAVE YOUTH IN NINETEENTH-CENTURY AMERICA* (1995); STEVEN MINTZ, *HUCK'S RAFT: A STORY OF AMERICAN CHILDHOOD* (2004); MARIE JENKINS SCHWARTZ, *BORN IN BONDAGE: GROWING UP ENSLAVED IN THE ANTEBELLUM SOUTH* (2000).

24. For example, the African American DNA and history project of leading African and African American studies expert Henry Louis Gates examines the historical records of the slave trade and later census, voting and other records of the ancestors of present day African Americans, and uses DNA testing to trace individual DNA back to various regions in Africa and Europe. *AFRICAN AMERICAN LIVES 2* (Kunhardt Productions, Inkwell Films & Thirteen WNET New York 2008), available at <http://www.pbs.org/wnet/aalives/> (last visited June 11, 2007).

25. Appell, *supra* note 17, at 148–50; H.R. REP. NO. 104–808, at 16 (1974). At least fifty thousand Indian children were adopted by non-Indians in the twentieth century. MINTZ, *supra* note 23, at 172 n.45.

26. William Byler, *The Destruction of American Indian Families*, in *THE DESTRUCTION OF AMERICAN INDIAN FAMILIES* 1, 7–9 (Steven Unger ed., 1977); Sandra C. Ruffin, *Postmodernism, Spirit Healing, and the Proposed Amendments to the Indian Child Welfare Act*, 30 *MCGEORGE L. REV.* 1221, 1222 (1999).

people to carry on tradition.<sup>27</sup> The result was a political crisis in which tribes themselves were losing members.<sup>28</sup> Here, the diminution of biological connection, the vehicle for culture, was felt deeply and widely among children and their elders, while well-meaning missionaries thought those ties could be ignored when they placed children in settings where they would learn the dominant norms of the colonists.<sup>29</sup> Individual children, families, and entire tribes struggled with identity after these interventions.<sup>30</sup>

Though less violent, less inherently hegemonic, and not entirely concentrated in non-dominant racial or cultural groups,<sup>31</sup> adoption itself is similar to these group-based fissures because adoption frequently involves poor children, often of color, who are transferred to families with more power and resources, and because adoption represents a complete break from the adoptee's past or a part of her past. The phenomenon of closed, anonymous adoption overlooked—or perhaps underestimated—the depth, breadth, and complexity of identity. Even viewed from the narrow psychological perspective of the adoption professionals, the pretense that a child has no life before adoption is built on an unwitting commodification of the adopted child—the view of a human being without ties, without a past, without race, an object that simply and seamlessly can be taken from one place and put in another.<sup>32</sup> In a culture in which biological relations provide the first principle of the parent-child relationship and *exceptions* to that principle provide for alternate parent-child relationships, it is still unimaginable that a child's birth connections would not be experienced by all members of the triad even when those birth connections are legally void.

It is not surprising then that social scientists, birth parents, adoptive parents, and adoptees have discovered that knowledge regarding these connections plays an important role in the development of adoptees' identities.<sup>33</sup> It is common for adoptees to experience a deep and ongoing

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27. Appell, *supra* note 17, at 145–48.

28. *Id.*

29. *Id.* at 147–48.

30. *Id.*

31. This is not to say that substitute care and adoption were not used to undermine or destroy culture. Beside using these tools to “civilize” Native American Children, the child saving, and later the Progressive movements removed children from poor Catholic European immigrants (usually mothers) to teach them protestant values and ways of living. Appell, *supra*, note 20.

32. See Barbara Yngvesson, *Placing the “Gift Child” in Transnational Adoption*, 36 *LAW & SOC'Y REV.* 227, 239 (2002) (explaining that it 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).

33. DAVID BRODZINSKY ET AL., *BEING ADOPTED: THE LIFELONG SEARCH FOR SELF* (1992); MIRIAM REITZ & KENNETH W. WATSON, *ADOPTION AND THE FAMILY SYSTEM* (1992); ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE: THE EFFECTS OF THE SEALED RECORD ON ADOPTEES*,

desire for “roots, for existential continuity, and for a sense of completeness.”<sup>34</sup> This “genealogical bewilderment”<sup>35</sup> is common among adoptees, regardless of the quality of their adoptive family relationships, and do not detract from those relationships. This sense of connection and wonder are simply part of the adoption experience.<sup>36</sup> This interest in connections is not limited to adoptees; birth parents and adoptive parents experience them as well. Birth parents often feel deep and ongoing or episodic connection to the children they relinquished.<sup>37</sup> Adoptive parents too experience the gap between their child’s original family or community and the child’s adopted one and have their own curiosities about the child’s birth family.<sup>38</sup> Although adoptees are most likely to return to seek information about their birth kin, many adoptive parents also seek to bridge these information and experiential gaps through contact with the adoptive agency<sup>39</sup> and contact with the child’s home community or country.<sup>40</sup> Birth parents as well commonly seek information and connection about the children they relinquished or otherwise lost legal connection to.<sup>41</sup>

Indeed, the entire adoption triad—the adoptive parents, child, and birth parents—experience each other in fact or in imagination and are changed by each other. For example, transracial adoptees both retain and lose their race upon adoption in complicated and contingent ways, depending on where and with whom they are.<sup>42</sup> It is not uncommon for parents who adopt internationally to try to experience the country whence their child came and to introduce the child to his or her home language or culture.<sup>43</sup> Birth parents seek pictures and even ongoing

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BIRTH PARENTS, AND ADOPTIVE PARENTS (1978); Fernando Colon, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 302 (1978); H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964).

34. Colon, *supra* note 33, at 302.

35. Sants, *supra* note 33.

36. BRODZINSKY ET AL., *supra* note 33, at 12–14; REITZ & WATSON, *supra* note 33.

37. SOROSKY ET AL., *supra* note 33, at 220.

38. Mardell Groth et al., *An Agency Moves Toward Open Adoption of Infants*, 66 CHILD WELFARE 247 (1987).

39. E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 75–77 (1998); Groth et al., *supra* note 38.

40. Barbara Yngvesson, *Going “Home” Adoption, Loss of Bearings, and the Mythology of Roots*, 21 SOC. TEXT 74 (2003).

41. CARP, *supra* note 39, at 76–79.

42. African Americans adopted into white families report being perceived as Black when in white communities and white when in Black communities. RUTH G. MCROY & LOUIS A. ZURCHER, JR., *TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS 13–14* (1983); PATTON, *supra* note 21, at 13–14; Yngvesson, *supra* note 32, at 238–40, 248–52 (noting that a transracially, internationally adopted Korean adoptee may be Korean when with his or her Swedish parents but Swedish when among Koreans).

43. See Yngvesson, *supra* note 40, at 14–23 (describing such practices among Swedish

relationships with the adoptive parents or child after adoption.<sup>44</sup> Increasingly, birth and adoptive families form extended kin networks in which they might vacation together,<sup>45</sup> attend each other's family functions,<sup>46</sup> and babysit for each other.<sup>47</sup> The experience of adoption, however, was not always so open and dynamic.

### *B. Adoption's (Failed) Attempt to Escape Biological Ties*

Adoption was, arguably, the first legal diversion from the patriarchal family and primogeniture in recent history. Adoption did not exist in England until 1926.<sup>48</sup> Thus, it was not part of the lexicon the United States carried over from England and was unknown at common law. The first general adoption statutes in the United States, enacted in the 1850s, established the hallmark of adoption: the termination of one family and creation of another, when in the interests of the child.<sup>49</sup> Before enactment of these general adoption statutes, persons who wanted to create a legal relationship with a child did so through private legislative acts.<sup>50</sup> The general adoption statutes permitted adopters to petition the courts rather than the legislature to establish a parent-child relationship.<sup>51</sup> This

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adopters of Chilean children).

44. See Annette R. Appell, *Blending Families through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1018–19 (1995) (describing birth parent ongoing interest in relinquished children).

45. Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents' Feelings Seven Years Later*, 48 SOC. WORK 409, 414 (2003).

46. For example, the adoptive family may attend the birth mother's wedding. *Id.* at 415; Murray Ryburn, *A Study of Post-Adoption Contact in Compulsory Adoptions*, 26 BRIT. J. OF SOC. WORK 627, 632 (1996).

47. Siegel, *supra* note 45, at 414; CAROLE SMITH & JANETTE LOGAN, AFTER ADOPTION: DIRECT CONTACT AND RELATIONSHIPS 121 (2004). Extended birth family members may also be part of this extended kin group. *Id.* at 92; Ryburn, *supra* note 46; Siegel, *supra* note 45, at 414.

48. E. Wayne Carp, *Introduction to ADOPTION IN AMERICA* 1, 3 (E. Wayne Carp, ed., 2004). Of course, like the United States, in England there were other methods for transfer of custody to other persons outside the family, a transfer that could be, in effect, irreversible. See, e.g., Danaya Wright, *A Crisis of Child Custody: A History of the Birth of Family Law in England*, 11 COLUM. J. GENDER & L. 175, 183–90 (2002) (describing custody disputes between parents and third parties in the 1700s).

49. Annette R. Appell, *Legal Intersections*, 3 ADOPTION Q. 85, 88 (2000); see also Carp, *supra* note 48, at 5–6 (describing this movement and how the early statutes permitted adoption by “fit and proper” parents).

50. Carp, *supra* note 48, at 4; Appell, *supra* note 44, at 1004; Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 461–60 (1971); see also CARP, *supra* note 39, at 6–7 (discussing private acts and the use of testamentary adoption prior to the generalized adoption statutes). Note that Texas and Mississippi were the first states to adopt general adoption statutes but they were less robust statutes than Massachusetts and its progeny. Carp, *supra* note 48, at 5. These earlier statutes merely permitted adopters to make public a private adoption arrangement, “analogous to recording a deed for a piece of land.” *Id.*

51. CARP, *supra* note 39, at 5.

disruption of biological connections to create a new set of legal family relationships was, arguably, a modern creation; this development became conceivable as society was undergoing a shift in political philosophy from one based on divine rule to one based on consent.<sup>52</sup> This turn itself was tied to a notion that children were undeveloped and in need of care.<sup>53</sup> This shift toward adoption also coincided with the transition from an agricultural to an industrial and more urban economy that increasingly separated home and work, creating the social conditions for the modern nuclear family.<sup>54</sup> Children without such a family, those born to single mothers, other families without the means to care for children, and those children themselves working to support the family, became objects of the child saving movement.<sup>55</sup> This movement, which would eventually evolve into our present-day child welfare system,<sup>56</sup> coincided with, if not contributed to, the enactment of adoption laws.<sup>57</sup> It would be some time, however, until the child welfare establishment embraced adoption as a service for children in need of protection.<sup>58</sup>

Although adoption law has remained unchanged in its core principle, which was to terminate and recreate a legal parent-child relationship, adoption became confidential and anonymous over time. It was not until early in the twentieth century when adoption court proceedings and records became confidential.<sup>59</sup> Eventually, authorities began to issue new

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52. HOLLY BREWER, *BY BIRTH OR CONSENT* 17–44 (2005).

53. *See id.* (tracing the changing view of political authority from the seventeenth to nineteenth centuries in America from birth right to consent, and the corresponding change in the conception of childhood as one of incompetence rather than entitlement dictated by birth).

54. STACEY, *supra* note 1, at 38–40. Indeed, in pre-modern colonial times, family boundaries were porous and not dictated by blood, primarily because of the pervasiveness of voluntary and involuntary indentured servitude. CARP, *supra* note 39, at 6. Adoption historian Wayne Carp explains that “colonial American family life was far from the stable, nuclear family so idealized by many twentieth-century Americans: a substantial number of colonial American children grew up in families other than their own, many with the consent of their parents.” *Id.*

55. *See* DUNCAN LINDSEY, *THE WELFARE OF CHILDREN* 13–14 (2d ed. 2004); Gordon, *supra* note 16; JOSEPH M. HAWES, *THE CHILDREN’S RIGHTS MOVEMENT: A HISTORY OF ADVOCACY AND PROTECTION* 17–24 (1991) (each describing this movement).

56. Appell, *supra* note 17, at 158–59.

57. Presser, *supra* note 50, at 488–89; Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 748 (1956). Wayne Carp notes that the early adoption laws were developed in response to an “increase in the number of middle-class farmers who wished to legalize the addition” to their family of out-placed children the child savers sent out west as farm laborers. CARP, *supra* note 39, at 11.

58. CARP, *supra* note 39, at 15–18 (describing the preference for keeping families together and the stigma attached to adoption as being unnatural and “second-rate”).

59. *Id.* at 38–39. In the early days of adoption, birth records were not routinely or uniformly kept. *Id.* at 36–39. In fact, it was not until the 1930s that states began to issue new birth certificates that reflected the adoption and even then, the original certificates remained unsealed for decades. Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 376 (2001).

birth certificates for the adoptee and sealed the original certificates.<sup>60</sup> Initially, the point of sealing birth and adoption records from the public view was to protect the unwed mother and the “illegitimate” child, but the records remained open to the parties to the adoption.<sup>61</sup> Indeed, as late as the mid-1900s adoption professionals expected that adult adoptees would seek information about their family origins.<sup>62</sup> By that time though infant adoption had become more common, and even dominant, in response to a series of social changes relating to a growth in infertility, the availability of infant formula, and changing psychological theories that began to view environment as more important than genes in child development.<sup>63</sup> It was not too long after infant adoption became normative that courts, public officials and agencies sealed birth and adoption records from the parties themselves.<sup>64</sup>

Before the sealing of adoption records, first from the public and then from the parties, social workers assumed that a child during his or her childhood would be firmly within the new family, but that adoptees might be interested in their origins once they were adults.<sup>65</sup> Yet even during the adoptee’s minority, social workers would accommodate the requests of adoptive parents to find information about birth relatives and even viewed the birth mothers as still connected to the child.<sup>66</sup> For example, social workers might reflexively inform a birth parent when the child she gave up for adoption was ill or had died.<sup>67</sup> Implicitly these

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60. CARP, *supra* note 39, at 52–55. Even after these new birth certificates were issued, there was no intention initially and as late as the middle of the twentieth century to keep a child’s original birth certificate or identity from the adoptee. *Id.* 53–55. On the contrary, adoption professionals “anticipated that children born out of wedlock would naturally inquire about their family origins when grown and believed that there was something inherently right about preserving an accurate account of the past.” *Id.* at 52. *See also* Samuels, *supra* note 59, for a thorough legal history of the confidentiality of adoption records.

61. CARP, *supra* note 39, at 48–55.

62. *Id.* at 52. While it became standard practice to issue new birth certificates reflecting that the adoptee was the child of the adoptive parents “[t]here [was] no evidence that child welfare or public health officials ever intended that issuing new birth certificates to adopted children would prevent them from gaining access to their original one.” *Id.* at 54–55; *see also* Samuels, *supra* note 59, at 387–92 (describing the differences between child welfare and vital statistics views regarding access to birth records).

63. Appell, *supra* note 44, at 1004–05; *see also* CARP, *supra* note 39, at 27–29 (noting the change in the view of adopted children as genetically inferior and doomed during the 1920s and 1930s, the drastic increase of out-of-wedlock births and during and after World War II, and the ability to diagnose infertility by the 1950s); Appell, *supra* note 17, at 158–59.

64. Samuels, *supra* note 59, at 406–08. Most states closed their adoption court records by the 1950s. *Id.* at 377–78. In 1960 though, adult adoptees in twenty states still had access to their original birth certifications. *Id.* at 378. Birth records remained open to adult adoptees in most of these states until 1979. *Id.* at 382.

65. *Id.* at 374–78.

66. CARP, *supra* note 39, 74–80.

67. *Id.* at 79.

social workers understood that the ties between mother and child were deep and lasting. Similarly, adoption agencies might provide information about an adopted child's siblings at the request of the adoptive parents.<sup>68</sup> There appeared to be no doubt that adopted adults should have access to identifying and other information about their birth families.<sup>69</sup>

The real break between birth and adoptive families seems to have arisen with the development and popularization of psychoanalytic and child development theories after World War II.<sup>70</sup> Those theories pathologized unwed mothers, designating them as "neurotic" women who were immature and would neglect their children.<sup>71</sup> Moreover, psychological theories favored nurture over nature, holding that the unmarried mother's immorality and other perceived defects would not genetically transmit to her children.<sup>72</sup> According to this zeitgeist, it was best to separate white non-marital children<sup>73</sup> from this pathology and immorality and place them into a new, normal family.<sup>74</sup> In addition, child development theory suggested that this transfer occur as soon after birth as possible.<sup>75</sup> Thus, the child, unburdened by genetic determinism, could be raised without knowledge or the influence of the birth mother's pathology and be reared instead in the healthy and wholesome, new, marital, adoptive family.

Finally, the post-war emphasis on family and the non-normativity of childless couples also militated toward an anonymous adoption solution.<sup>76</sup> Infertile couples could adopt infants and raise them as their own. As adoption scholar Elizabeth Samuels asserts, adoption became the "perfect and complete substitute for creating a family through childbirth."<sup>77</sup> Under these new social conditions, the adoption paradigm

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68. *Id.* at 75 (reporting on a adoptive parents requesting adoption agencies to help them put children in touch with their siblings or mothers). This is not to suggest that adoption agencies encouraged post-adoption contact, but merely that they may have responded openly and helpfully to inquiries from adoptive parents, adopted adults and even birth parents, at least in the early to mid-1900s. *Id.* at 71–89.

69. *Id.* at 73–74; Samuels, *supra* note 59, at 377–78.

70. Samuels, *supra* note 59, at 406–10.

71. CARP, *supra* note 39, at 113–17.

72. Samuels, *supra* note 59, at 406; *see also* CARP, *supra* note 39, at 113–17 (tracing the rise of psychological theories that held that unwed mothers were neurotic and whose children should be removed for their own sake and for the sake of the mother's mental health).

73. *See* RICKIE SOLINGER, WAKE UP LITTLE SUZIE: SINGLE PREGNANCY AND RACE BEFORE ROE V. WADE (1992) (describing differential legal and social responses to African-American and white single mothers and their children).

74. CARP, *supra* note 39, at 115–16; Samuels, *supra* note 59, at 402–07.

75. CARP, *supra* note 39, at 116.

76. Samuels, *supra* note 59, at 406–08.

77. *Id.* at 406–07; *see also*, Naomi Cahn, *Perfect Substitutes or the Real Things?*, 52 DUKE L. J. 1077 (2003) (tracing and contextualizing the social and legal history of adoption law).

became one of fictive birth that substituted the adoptive parents for the birth parents on the birth certificate and eventually sealed the original birth certificate even from adoptees of any age.<sup>78</sup> Under this view, it was best for the birth mother to go on with her life and have nothing to do with the child; for the child to have no contact with or contamination by the birth mother; and for the adoptive parents to act as if the adopted child were their own genetic offspring.<sup>79</sup>

In substance, this unitary approach provided solely for confidential, static adoptive relationships that terminated all pre-birth connections and sealed all birth records. This rebirth paradigm and its accompanying anonymity became the normative model of adoption even for related adoptions and adoptions of older children.<sup>80</sup> The only major changes in adoption law until the 1990s related to the inclusion of putative fathers as legal parents<sup>81</sup> and stepparent adoption.<sup>82</sup> Otherwise, the law of secrecy and anonymity persisted, even as older children were adopted from foster care and stepparents adopted their stepchildren, many of whom knew their birth parents.

What has remained in most states is adoption's heteronormative frame that views families as heterosexual, marital, and exclusively two-parent. Although single people can adopt, two persons may only adopt if they are married.<sup>83</sup> Moreover, adoption terminates the parental rights of the biological parents, except in the case of a stepparent adoption in which case the custodial parent could retain his or her parental rights while her spouse adopted the child.<sup>84</sup> In the process, the child loses the

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78. Samuels, *supra* note 59, at 367–437. Still, at least two states never sealed these records and several states have since opened them. *Id.* at 380–81, 431–34. For a current list of open records laws, see the American Adoption Congress website, <http://www.americanadoptioncongress.org/state.php> (last visited Mar. 30, 2008).

79. *See infra*. Sec. II.C (describing changes in adoption starting in the 1990s, including same-sex couple adoption and adoption with contact).

80. *See* Samuels, *supra* note 59, at 403–08 (describing the social and legal norms that portrayed adoptive families as a simple substitute for birth families).

81. These changes occurred as a result of the United States Supreme Court holding in *Stanley v. Illinois*, 405 U.S. 645 (1972), which held that a non-marital father had a right to process before the state could remove his children.

82. Professor June Carbone marks the beginning of stepparent adoption in 1925 with *Marshall v. Marshall*, 239 P. 36 (Cal. 1925). June Carbone, *The Role of Adoption in Winning Public Recognition for Adult Partnerships*, 35 CAP. U. L. REV. 341, 385 (2006).

83. Annette R. Appell, *Lesbian & Gay Adoption*, 4 ADOPTION Q. 75, 79–80 (2001). This marriage requirement probably reflects the normativity of the connection between marriage and childrearing rather than any conscious attempt to prohibit two unmarried people from adopting. *See, e.g.*, Adoption of Tammy, 619 N.E.2d 315, 319 (Mass. 1993) (finding no legislative intent to prohibit non-marital couples from adopting); *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006) (same). *But see, e.g.*, *In re Adoption of Baby Z.*, 724 A.2d 1035, 1060 (Conn. 1999) (holding that the Connecticut legislature intended for only married couples to adopt).

84. Appell, *supra* note 83, at 79.

legal connection, including the right to visitation and to one of his or her parents. In its attempt to replicate heteronormativity, adoption provided that adoptive children could have no more than two parents, as if they were born through the union of their adoptive parents.

### C. Opening Adoption

Changing social norms and family structures in the last half of the twentieth century and early part of the twenty-first century have challenged this heteronormative model of adoption as families are increasingly and legally formed and reformed without mutual biological connection, as in the case of stepparent and lesbian and gay adoption. In fact, courts and even legislatures are permitting same-sex couples to adopt children together.<sup>85</sup> These changes preserve the core aspects of parental status and rights, including the prohibition on more than two legal parents, but they cut off almost every legal tie between the adoptee and his or her birth family—parents, siblings, aunts, uncles, and grandparents.<sup>86</sup> Yet while law largely retains a heteronormative, nuclear family structure, families that are non-heterosexual, reformed, or simply non-nuclear are quite common. In addition, the children of these families—as children and adults—have pushed against this structure in their pursuit of biological family relations, challenging the secrecy and myth in adoption.<sup>87</sup> Thus, despite the tenacity of the nuclear, heteronormative family, lesbian and gay parenthood and other economic and social changes have diluted heteronormativity and destabilized nuclear families such that social family boundaries are more permeable.

These postmodern families and the porousness of their affective, if not legal, family relations are part of a larger set of movements that have challenged adoption's myth of rebirth and mandate of secrecy. What goes around comes around and so it has been with adoption. Where once unwed, stigmatized, birth mothers' only choice was to relinquish their

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85. *E.g.*, CAL. FAM. CODE § 9000(f) (West 2005); CON. GEN. STAT. ANN. § 45a-724 (West 2004); D.C. CODE ANN. § 16-312(a) (LexisNexis 2000); VT. STAT. ANN. tit. 15 § 1204 (2002); Sharon S. v. Superior Court, 73 P.3d 554 (Cal. 2003); *In re M.M.D.*, 662 A.2d 837 (D.C. 1995); *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. Ct. App. 2006); *In re Adoption of K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004); *In re M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Adoption of M.A.*, 930 A.2d 1088 (Me. 2007); *In re Adoption of Two Children by H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (N.Y. App. Div. 2004); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993); *see also* Tenn. Atty Gen. (Oct. 10, 2007). Op. No. 07-140. (opining that if the adoption is “found to be in the best interest of the child, there is no prohibition in Tennessee adoption statutes against adoption by a same sex couple”).

86. *See infra* Sec. III.B and text accompanying notes 173–184.

87. Appell, *supra* note 44, at 1008–13.

babies for adoption and there was a corresponding abundance of infants available for adoption, in their stead arose greater reproductive choice and acceptance of single, unwed motherhood.<sup>88</sup> These changes resulted in a near dearth of infants but also an abundance of older children in the adoption pool.<sup>89</sup> These older children, primarily step and foster children, often knew and even continued to know their birth parents, thus making the rebirth theme of adoption less tenable.<sup>90</sup> Moreover, as a result of increased reproductive choice and changing legal and social mores regarding the validity of anonymous adoption, there has been a rise of openness in adoption.<sup>91</sup>

In addition, mental health and adoption experts have noted that adoptees have great and nearly universal interest in their origins.<sup>92</sup> Quantitative and qualitative studies, as well as the theoretical literature, have found that the vast majority of adoptees are curious about their birth families,<sup>93</sup> think about them at various rites of social and developmental passage,<sup>94</sup> and have an interest in meeting their birth parents.<sup>95</sup> Social science research points to the importance of knowledge about birth connections to the development of adoptees' identity.<sup>96</sup> Psychologists understand that questions about birth families and birth histories play an important and persistent role in an adoptive child's development and that adoptees have ongoing questions about their adoption.<sup>97</sup> These questions may include why they were adopted, what their birth parents are like and what they look like, their national heritage, whom they resemble, and what genes they may be passing on to their children.<sup>98</sup> It is now widely

88. Psychological and social theories evolved to view single parenthood as less pathological. CARP, *supra* note 39, at 201. This view that single mothers are pathological, however, is still widely held, primarily in the context of poor and African American families. Appell, *supra* note 17.

89. CARP, *supra* note 39, at 201–03; Appell, *supra* note 44, at 1008–09.

90. Appell, *supra* note 44, at 1014–20.

91. See CARP, *supra* note 39, at 196–201 (tracing the critiques of adoption and the movement toward openness).

92. *E.g.*, RUTH MCROY ET AL., CHANGING PRACTICES IN ADOPTION 20 (1994).

93. *E.g.*, *id.* (describing a large, longitudinal study which revealed 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.”); PETER L. BENSON ET AL., GROWING UP ADOPTED 26 (1994) (one of the largest studies of adolescent adoptees found that over 80% of adoptees adopted as infants were curious about their birth parents).

94. BRODZINSKY ET AL., *supra* note 33.

95. BENSON ET AL., *supra* note 93, at 26 (finding that 70% of adolescent girls and 57% of adolescent boys expressed an interest in actually meeting their birth parents).

96. See BRODZINSKY ET AL., *supra* note 33, at 12–14; REITZ & WATSON, *supra* note 33; Sants, *supra* note 33; Kenneth W. Watson, *The Case for Open Adoption*, Fall PUB. WELFARE 24 (1988).

97. BRODZINSKY ET AL., *supra* note 33, at 12–14; REITZ & WATSON, *supra* note 33; Sants, *supra* note 33.

98. BRODZINSKY ET AL., *supra* note 33.

understood among mental health experts that adoptees continue to be members of their adoptive *and* birth families.<sup>99</sup>

Thus, adoption has entered yet another phase as it seeks to accommodate these new perspectives on identity, family, and biological connection. Although records continue to be sealed in most states (even from adult adoptees)<sup>100</sup> and confidentiality continues to envelop court proceedings and adoption agency records, adoptive and birth families, on their own and increasingly with the assistance of child welfare and adoption agencies, are forging new adoption practices and even new adoption and biological kin networks. These open relationships run a spectrum from the exchange of information between the two sets of parents to ongoing exchange of letters and pictures or visits all the way to shared vacations.

Generally, these post-adoption relationships are privately ordered and maintained. In other words, open adoption arrangements are informal and based on the agreement of those people involved, agreements that do not carry the force of legal sanction should any of the parties chose to discontinue or otherwise stray from the agreed terms.<sup>101</sup> In other cases, these ongoing contact relationships are court-ordered or court-sanctioned.<sup>102</sup> Court-ordered open adoption is an incursion into family autonomy and may be problematic in light of research that suggests that the adoptive parents' comfort with and sense of control over post-adoption contact is a significant indicator of success of such relationships.<sup>103</sup> Court sanctioned post-adoption contact is arguably preferable because it allows the persons involved in the contact to determine what is best for them in the first instance, with resort to the court as an option should disagreements later arise.<sup>104</sup>

This latter type of open adoption provides a new form of adoption in which the parties agree, as part of the adoption, to be bound by their post-adoption contact agreements. In part a response to the prevalence of

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99. *See id.* at 12–14; REITZ & WATSON, *supra* note 33; Sants, *supra* note 33, at 133; Watson, *supra* note 96, at 24.

100. MADELYN FREUNDLICH, FOR THE RECORDS: RESTORING A RIGHT TO ADULT ADOPTees 10–11 (Nov. 2007), available at [http://www.adoptioninstitute.org/publications/2007\\_11\\_For\\_Records.pdf](http://www.adoptioninstitute.org/publications/2007_11_For_Records.pdf) (last visited Mar. 8, 2008).

101. Annette R. Appell, *The Move Toward Legally Sanctioned Cooperative Adoption: Can it Survive the Uniform Adoption Act?*, 30 FAM. L. Q. 483, 500–01 (1996).

102. Annette R. Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, 4 ADOPTION Q. 101 (2000) [hereinafter Appell, *Part II*]; Annette R. Appell, *Enforceable Post-Adoption Contact Statutes, Part I: Adoption with Contact*, 4 ADOPTION Q. 82 (2000) [hereinafter Appell, *Part I*].

103. HAROLD D. GROTEVANT & RUTH G. MCROY, OPENNESS IN ADOPTION 16 (1998).

104. Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, 6 ADOPTION Q. 75 (2003).

open adoption and concerns regarding fairness issues in the private ordering prevalent in open adoption,<sup>105</sup> this new statutory form of adoption reflects the different but deep and pervasive roles of social and biological kinship. These statutes do not supplant the private arrangements, but instead make clear which arrangements are formal and enforceable and which are informal and unenforceable. Those open adoption agreements entered into outside these mechanisms continue to be unregulated and are most likely more common than the statutory agreements.

This codification, known also as cooperative adoption or adoption with contact, represents a model of accommodation of family privacy and the existential facts of adoption: that the birth family and adoptive family are tied together through the child; and adopted children are members of two families. Approximately twenty states have adoption with contact statutes.<sup>106</sup> These statutes allow 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.<sup>107</sup> The statutes do not permit approval or enforcement of post-adoption contact plans unless the adoptive parents and the party who will have contact agree to such a plan at or before the time of adoption.<sup>108</sup> Nor do they permit the failure of post-adoption contact to invalidate the adoption.<sup>109</sup> They do present a significant incursion into the legal and social paradigm of adoption as rebirth. Adoption with contact both acknowledges the child's pre-adoptive birth ties and brings these connections forward into the adoption, often as a part of the adoption decree itself. In this way, the statutes in effect create a new type of adoption in the sense that from the start, the parties are committed to ongoing cooperation around the child.

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105. *Id.* at 79 (finding that these concerns have led a number of states to codify such adoptions).

106. Ariz. Rev. Stat. Ann. § 8-116.01 (1999); Cal. Fam. Code § 8616.5 (West 2008); Conn. Gen. Stat. Ann. § 45a-715(h)–(n) (West 2000); Fla. Stat. Ann. § 63.0427 (2001); Ind. Code Ann. § 31-19-16-1 to 8 (1994); La. Child. Code. Ann. art. 1269.1–1269.7 (2001); Md. Fam. Code. Ann. §§ 5-308, 5-3A-08, 5-3B-07 (West 2006); see also Md. Code Ann., Fam. Law §§ 5-331, 5-345 (West 2006); Mass. Gen. Laws Ann. Ch. 210, §§ 6C, 6D, 6E (West 1999); Minn. Stat. Ann. § 259.58 (West 1997); Mont. Code Ann. § 42-5-301 (1997); Neb. Rev. Stat. §§ 43-162 to 165 (1993); Nev. Rev. Stat. §§ 127.187, 127.1875, 127.188, 127.1885, 127.189, 127.1895 (2005); N.M. Stat. Ann. § 32A-5-35 (West 1993); N.Y. Dom. Rel. Law § 112-b (McKinney 2005); N.Y. SOC. SERV. LAW § 383-c(5)(b)(ii) (McKinney 2005) (as amended in 2005); OR. REV. STAT. § 109.305 (1993); R.I. GEN. LAWS § 15-7-14.1 (1997); S.D. CODIFIED LAWS § 25-6-17 (1997); VT. STAT. ANN. tit. 15A, § 4-112 (1995); WASH. REV. CODE § 26.33.295 (1990); W. VA. CODE § 48-22-704(e) (1997).

107. Appell, *supra* note 104 at 76–77.

108. *Id.* at 76.

109. *Id.* at 76–77.

Open adoption, particularly as it is regulated through adoption with contact, exemplifies preciousness of biological connections and the various types of parenting relationships adults can have with children that are both non-exclusive but also deeply protective of family privacy and autonomy. The open adoptive family preserves the connection between parent and child while creating at least one new non-biological parent in the child's life. Adoption with contact serves both to regulate these relationships and make clear whether the non-legal parent has any enforceable right to ongoing contact should disagreements regarding the contact arise.<sup>110</sup> As discussed below, such a regime could help clarify the rights (or lack of rights) of the biological parents in the satellite of same-sex couple families.<sup>111</sup>

These changes in adoption law and practice hold lessons for lesbian and gay single parents and same-sex couples who cannot reproduce without the reproductive tissue or labor of someone with whom they are not intimate. These families and adoptive families are similar in that they deviate from the two-biological-parent (in this sense, heterosexual) family, even while they reflect that family form; lesbian, gay, and adoptive families are frequently created through the non-sexual reproduction of children using assisted reproductive technologies (ART) and adoption or other legal mechanisms;<sup>112</sup> and they each contain the actual or lurking presence of other relations (e.g., biological mother or father, siblings). Nevertheless, families in open-adoption are not trying to escape the pull of biology; on the contrary, they are embracing it.<sup>113</sup> It appears that lesbian and gay families too may be embracing biological connections.<sup>114</sup>

### III. SAME-SEX PARENTS: LESBIAN AND GAY FAMILIES AND THE MISSING BIOLOGICAL PARENT

Lesbian and gay couples cannot create children together without assistance from third (and even fourth) parties. Yet many lesbian and gay couples are parenting children.<sup>115</sup> These parenting relationships may have

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110. *Id.* at 83–84.

111. *See infra* Sec. IV.

112. Fiona Tasker, *Lesbian Mothers, Gay Fathers, and Their Children: A Review*, 26 DEV. & BEHAV. PEDIATRICS 224, 224–25 (2005).

113. *See infra* text accompanying notes 102–116.

114. *See infra* Sec. III.A–B.

115. The 2000 census estimated that 27% of same-sex couples have a minor child living in the home. GARY J. GATES ET AL., ADOPTION AND FOSTER CARE BY GAY AND LESBIAN PARENTS IN THE UNITED STATES (2007), available at <http://www.law.ucla.edu/williamsinstitute/publications/FinalAdoptionReport.pdf>. The census did not count children in those homes, but estimates place the number of children living with lesbian and gay parents anywhere from just under two million to

originated in a variety of ways including during previous heterosexual relationships, foster care or adoption, and assisted reproduction. Moreover, states are beginning to give lesbian and gay couples quasi- or actual marital status that entitles these couples to be treated the same as married couples under all aspects of family law.<sup>116</sup> For example, a handful of states apply marital presumptions to children born to couples in civil unions<sup>117</sup> and permit lesbians and gays to adopt their partner's child just as a stepparent would.<sup>118</sup> Thus, the newly recognized homosexual families resemble traditional notions of intimate adult relationships as coupled, monogamous, and financially productive and intertwined unions. In all of these instances, the children reared by lesbian and gay couples have more than two parents. Yet, the law recognizes at most two parents.<sup>119</sup> So far lesbian and gay families receiving family status appear to be quite conventional—almost heteronormative except that they are same-sex.<sup>120</sup> Indeed, the Massachusetts Supreme Judicial Court defined the same-sex relationships that are entitled to marital recognition as those couples who “are willing to embrace marriage’s solemn obligations of exclusivity, mutual support, and commitment to one another . . . .”<sup>121</sup>

Despite concerns of social conservatives that recognizing lesbian and gay couples will undermine heterosexual norms,<sup>122</sup> the assimilation

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fourteen million. William Meezan & Jonathan Rauch, *Gay Marriage, Same-Sex Parenting, and America's Children*, 15 FUTURE OF CHILD. 97, 98 (2005) (estimating one-hundred sixty-six thousand); Tasker, *supra* note 112, at 224 (estimating two to fourteen million).

116. CAL. FAM. CODE § 297.5 (West 2001); CONN. GEN. STAT. §§ 46b-38aa-38pp, 2006; New Jersey, An Act Concerning Civil Unions, 37 P.L. 2006, Art. 6, 15; VT. STAT. ANN. tit. 23 § 1204 (2000). Regarding marriage: *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

117. *E.g.*, CAL. CIV. CODE § 1714.01 (West 2001) (permitting domestic partners to recover like spouses for negligent infliction of emotional distress); New Jersey, An Act Concerning Civil Unions, 37 P.L. 2006, Art. 6, ¶ 92 (“Whenever in any law, rule, regulation, judicial or administrative proceeding or otherwise, reference is made to ‘marriage,’ ‘husband,’ ‘wife,’ ‘spouse,’ ‘family,’ ‘immediate family,’ ‘dependent,’ ‘next of kin,’ ‘widow,’ ‘widower,’ ‘widowed,’ or another word which in a specific context denotes a marital or spousal relationship, the same shall include a civil union pursuant to the provisions of this act.”).

118. *E.g.*, CAL. FAM. CODE § 9000(b); New Jersey, An Act Concerning Civil Unions, 37 P.L. 2006, Art. 6, ¶ 5(d).

119. *See infra* Sec. II.

120. *Infra* text accompanying notes 124–132. Their children appear to have appropriated heterosexual norms as well. *See* Beth Perry et al., *Children's Play Narratives: What They Tell Us About Lesbian-Mother Families*, 74 AM. J. ORTHOPSYCHIATRY 467, 476 (2004) (noting that children in both single heterosexual and lesbian parent families, children chose a male doll to represent the second parent. Thus even these lesbian-parented children “have a clear idea of what constitutes a traditional family and of social norms” either because they are conforming to social expectations or that “parents are just seen as parents regardless of their sex.”).

121. *Goodridge*, 798 N.E.2d at 965.

122. *E.g.*, Lynn D. Wardle, *Parentlessness: Adoption Problems, Paradigms, Policies, and Parameters* 4 WHITTIER J. CHILD & FAM. ADVOC. 323, 362–68 (2004) (expressing concerns that, among other things, same-sex adoption does not reflect traditional heterosexual parenting).

reflected in same-sex parent adoption appears to reinforce notions that families are nuclear, monogamous, and economically autonomous.<sup>123</sup> In fact, feminist, gay, and other critical theorists identify and question the exclusionary and, perhaps, stultifying, aspects of assimilation. By embracing dominant liberal norms that naturalize and privatize the family, these critics suggest that legal recognition of these traditional non-traditional families fails to acknowledge, let alone address, the problematic aspects of this model.<sup>124</sup> These problems include the model's failure to counter the inequality-producing and inequality-maintaining aspects of the economically and legally private family<sup>125</sup> or to account for the variety of family formations and lesbian and gay identities.<sup>126</sup> Instead, same-sex adoption appears to reinforce social and legal norms regarding adult and family relationships, protecting individual relationships while leaving legal, social, and economic structures intact. Moreover, even the frameworks for assessing lesbian and gay parented families utilize "heterosexual-parent households as the gold standard and implies that differences equal deficits."<sup>127</sup> This measure thus masks differences between heterosexual and homosexual parenting and avoids assessments that same-sex parent families may provide different and positive social and psychological lessons.<sup>128</sup>

Still, even those lesbian and gay couples who are modeling heteronormativity—binary couples, mutual support, relationships toward children that reflect adult intimate relationships, and even exclusive (legal) parenting—can and do provide examples of more complex and less domesticated kinship networks that recognize expansive kin networks. Thus, though critics like Katherine Franke accurately lament that the lesbian and gay political "investment in the politics of kinship has resulted in the atrophy of an ability to critically and creatively think sexuality outside the domestic couple",<sup>129</sup> it may be that in the

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123. Angela Harris, *From Stonewall to the Suburbs*, 14 WM. & MARY BILL OF RTS. J. 1539, 1567–71 (2006).

124. E.g., MARTHA FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 138–145 (2008); MICHAEL WARNER, *THE TROUBLE WITH NORMAL* (1999); Harris, *supra* note 123.

125. Harris, *supra* note 123, at 1567–71.

126. MICHAEL WARNER, *THE TROUBLE WITH NORMAL* 25–52 (1999); Katherine M. Franke, *The Politics Of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 246 (2006) [hereinafter Franke, *Politics*]; Katherine M. Franke, *The Domesticated Liberty Of Lawrence v. Texas*, 104 COLUM. LAW. REV. 1399 (2004).

127. Abbie E. Goldberg, *(How) Does it Make a Difference? Perspectives of Adults With Lesbian, Gay, and Bisexual Parents*, 77 AM. J. ORTHOPSYCHIATRY 550, 550 (2007).

128. Judith Stacey and T.J. Biblarz, *(How) Does the sexual orientation of parents matter?*, 65 AM. SOCIOLOGICAL REV. 159 (2001).

129. Franke, *Politics*, *supra* note 126, at 247.

context of kinship, lesbian and gay families, despite their apparent emulation of the private, heterosexual family, are pushing the boundaries of kinship to be more inclusive and reflective of larger communities around children.<sup>130</sup> This embrace and enlargement of kinship holds the promise of leading to a broader sense of kinship with broader communities rather than exclusive nuclear families.

This is because even when lesbian and gay couples have children, they still do not neatly fit into that two parent biologically-based norm. The adoption fiction of rebirth is, therefore, more difficult to sustain simply by virtue of the sex of the parents. There are other people out there who have reciprocal biological if not affective relationships with the children. Lesbian adoptions often involve known birth fathers or sperm donors and gay male adoptions are likely to be as open as other adoptions.<sup>131</sup> Indeed, unlike many heterosexual families created through ART, lesbians and gays may be more likely to make informal arrangements with known donors or surrogates to create their families.<sup>132</sup> In these cases, the birth parents or donors may be involved with the child on an ongoing basis.<sup>133</sup> Even when the birth relatives are not active members of the child's life, the adoptive parents, and sometimes the adoptee, know who the child's parents are and can ensure that the child will know from whence he or she came. In other cases, for example adoptions from foster care or adoptions by gay male couples, the adoption may be open with ongoing visitation or other contact. This contact may be with the birth mother or the extended family.

Still, in all of these cases, the exclusive one or two-parent family prevails as a legal matter. Thus, despite the physical impossibility of two parents of the same sex being the exclusive parents of a child, the law regarding adoption and much reproductive technology recognizes only two parents; and the law usually defines parents in those contexts around their relationship with each other, rather than a biological relationship with the child. As a result, these families may be facing cognitive dissonance regarding social and biological connections similar to that faced within adoption under the myth of rebirth. To the extent that homosexual families are normative in their nuclear structure, they are in

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130. See Alenka Švab, *New Ways of Parenting: Fatherhood and Parenthood in Lesbian Families*, 38 *REVUIA ZA SOCIOLOGIJU* 43, 47 (2007) (Although lesbian parents are reflecting conventional notions of fatherhood, they are also "playing a subversive role as they are redefining these discourses and family relations. . . [including] the separation of parenting from the dominant social meanings of gender and the . . . separation of mothering and fathering from the idea of common residency . . . [and a] shift . . . to multiple parenthood by including other social parents.").

131. See *supra* Sec. II.B.

132. See *supra* Sec. II.A.

133. See *supra* Secs. II.A–B.

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danger of falling into the trap of the closed adoption model. On the other hand, these lesbian and gay families who are not wedded to the nuclear structure are finding themselves and their children in larger genetic and social kinship networks. Thus, although controversy surrounds same-sex marriage and lesbian and gay families with children, these families appear to be remarkably similar structurally to other post-modern families formed through adoption, ART, and remarriage. Many appear to hew both toward heteronormativity in terms of adult-affective binary and mutual relationships and toward post-modernity in their expansive kin networks and embrace of social and biological kin.

*A. Lesbian and Gay Families and ART*

Lesbians and gays use various reproductive technologies to create families. Lesbians might use anonymous or known sperm donation and gay men might engage a surrogate. The children born from these arrangements have at least two parents: a legal biological parent and a biological parent. Thus, even for single parent families, the child has connections to at least one other person who is a parent at least in a genetic sense. In same-sex couple families who use more exotic reproductive technologies, children can have a slew of parents: the two who raise him or her, any gamete donors, and even birth parents. These families created through reproductive technologies represent perhaps the biggest departure from the family created as a result of biological procreation between married couples. Yet, these newest of families too are rooted in and have not escaped biology; they replicate heteronormativity through their experience of biological loss and connection and also in their choices of donors and of family structure.

Sperm donation, and to a lesser extent egg donation, has traditionally been anonymous, particularly when health care professionals are involved, and anonymity remains the legal norm in this country.<sup>134</sup> This anonymity arguably promotes donations,<sup>135</sup> but also helps to deny biological relatedness to the donor, protect the autonomy of the intended family, and reinforce heteronormativity. Indeed, to further preserve the nuclear family ideal and mask the missing genetic ties, reproductive

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134. Joanna E. Scheib & Rachel A. Cushing, *Open-identity donor insemination in the United States: is it on the rise?* 88 FERTILITY & STERILITY 231, 231–32 (2007) (noting there are only nine open donor insemination banks in the United States).

135. See Amy Harmon, *Are You My Sperm Donor? Few Clinics Will Say*, N.Y. TIMES, Jan. 20, 2006, at A1, available at <http://www.nytimes.com/2006/01/20/national/20donor.html> (last visited Oct. 22, 2007) (reporting that donations have dipped in Great Britain since it outlawed anonymous donations); Scheib & Cushing, *supra* note 134, at 232 (noting concerns that sperm donations would dip if the law banned anonymity).

technology legal regimes often cut off any potential legal relationship between the donor and the child.<sup>136</sup> This, like adoption, is a departure from biologically-based parenthood norms and yet recalls normative family forms and structures.

Children born through gamete donation experience similar themes of connection and identity as adoptive children.<sup>137</sup> It is not surprising then that as assisted reproduction becomes more common and less secretive, children of donor insemination are expressing interest in having knowledge of and even contact with their donor parents and siblings.<sup>138</sup> These children (and adults) of donor insemination want such knowledge and contact with the donor to learn more about themselves and complete their sense of identity.<sup>139</sup> Parents choosing open donor insemination do so to provide their children the option of contacting the donor and to help ensure that should the child need medical or other information in the future, it will be accessible.<sup>140</sup>

Perhaps reflecting the move toward openness in adoption, there is some movement toward openness in ART.<sup>141</sup> This openness extends to telling the children about their ART origins and to openness regarding the identity of the donor.<sup>142</sup> Although there are differences regarding disclosure issues in families created through ART and adoption,<sup>143</sup> many of the same lessons of closed, anonymous adoption underlay this move toward more honesty regarding genetic parentage.<sup>144</sup> Advances in genetic

136. See Mary Patricia Byrn, *From Right to Wrong: A Critique of the 2000 Uniform Parentage Act*, 16 UCLA WOMEN'S L.J. 163, 169–76 (2007) (tracing these changes).

137. Katrina Hargreaves & Ken Daniels, *Parents Dilemmas in Sharing Donor Insemination Conception Stories with their Children*, 21 CHILD. & SOC'Y 420 (2007); Joanna E. Scheib et al., *Choosing Between Anonymous and Identity-Release Sperm Donors: Recipient and Donor Characteristics*, 10 REPROD. TECH. 50, 54 (2000).

138. E.g., Joanna E. Scheib et al., *Adolescents with Open-Identity Sperm Donors: Reports from 12–17 Year Olds*, 20 HUM. REPROD. 239, 239–52 (2005).

139. E.g., *id.* at 248.

140. Scheib et al., *supra* note 137, at 54.

141. Scheib & Cushing, *supra* note 134. In other parts of the world, the move is clearly toward openness. See, e.g., Hargreaves & Daniels, *supra* note 137, at 421–22 (noting legal and practice changes in New Zealand, UK, and Australia toward making donor identities available to adults born through donor insemination).

142. *Infra* text accompanying notes 155–174. “Guidelines for clinical practice now tend to include recommendations for openness” to children regarding their donor origins. Rachel Cook et al., *Disclosure of Donor Insemination: Parental Attitudes*, 65 AM. J. ORTHOPSYCHIATRY 549, 549 (1995) (citing American Fertility Society, 1993; Human Fertilisation and Embryology Authority, 1993); see also Scheib & Cushing, *supra* note 134 at 231–32 (noting openness is on the rise); Nanette Gartrell et al., *The National Lesbian Family Study: 4. Interviews With the 10-Year-Old Children*, 75 AM. J. ORTHOPSYCHIATRY 518 (2005) (noting that families were evenly divided between choosing known and unknown donors).

143. Cook et al., *supra* note 142, at 558; Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 533–35 (2006).

144. See Hargreaves & Daniels, *supra* note 137, at 420 (discussing reasons for openness

science and testing have also no doubt influenced this movement toward openness, as DNA testing is able to identify parentage and so many other aspects of a person's life.<sup>145</sup>

Increasingly then, parents and children in families created through reproductive technologies involving gamete or womb donors experience second, third, fourth and fifth parents who are not formally part of the family. For example, a gay male couple might seek a woman to donate an egg for them to inseminate with one or both of their sperm or the sperm of another donor; the egg might then be implanted into another woman's womb, producing a child with two to three fathers and two mothers. Yet, in other ways these families tend to hew toward the modern family and heteronormativity. Even those who cannot pass as a traditional family, such as same-sex partners, are likely to choose a donor with characteristics similar to the non-genetically related parent.<sup>146</sup> Lesbian couples make these choices also to increase the partner's involvement with the donor insemination process and the child they will share.<sup>147</sup>

Judith Stacey's study of gay male parenting in Los Angeles revealed the presence both of heteronormative practices and themes and of blended biological and social families.<sup>148</sup> For example, one Catholic white male couple comprised two affluent professionals raising three children born to the same surrogate mother.<sup>149</sup> The men, Eddie and Charles, have joint legal custody.<sup>150</sup> While they share childcare duties, Charles is the main breadwinner who works outside the home while Eddie is the primary caregiver for the children.<sup>151</sup> Eddie expresses great satisfaction with the arrangement but fears that he "may have committed career suicide by joining the mom's club in the neighborhood."<sup>152</sup>

Despite this most traditional, nuclear family arrangement, the family's non-nuclear biological connections have produced an extended

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regarding donor insemination).

145. See Byrn, *supra* note 136, at 171–76 (discussing the development of genetic testing in the late 1960s and subsequent developments in reproductive technology).

146. Scheib et al., *supra* note 137, 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.

147. *Id.* at 55; Caroline Jones, *Looking Like a Family: Negotiating Bio-Genetic Continuity in British Lesbian Families Using Licensed Donor Insemination*, 8 *SEXUALITIES* 221, 225–29 (2005).

148. Stacey, *supra* note 20.

149. *Id.* at 27.

150. Stacey, *supra* note 20.

151. *Id.* at 36.

152. *Id.*

kin network with much social interaction. The eggs of another woman, a known donor, created all three children. Charles's sperm fertilized the egg that became the daughter; and Eddie's sperm fertilized the egg that would become the twins.<sup>153</sup> The same surrogate mother, Sally, carried these three fertilized eggs to birth. When the twins were born, both Eddie and Charles, the egg donor, and the Sally's husband attended the surrogate's birth.<sup>154</sup> This five-some has stayed in touch since the children's birth.<sup>155</sup> Sally and her family have become close to Charles and Eddie's family—close to the point of vacationing together.<sup>156</sup> The children of each family see each other as siblings.<sup>157</sup> The egg donor is not as close, but she visits the children occasionally and has even joined the extended family on one of their vacations.<sup>158</sup> Eddie, the man who fills the traditional maternal role, and Sally have forged “an extraordinary, deep, familial bond” and have long, daily phone calls when they are not otherwise together.<sup>159</sup>

Lesbian couples creating families through ART also reflect heteronormativity and challenge it by creating more porous family boundaries.<sup>160</sup> Lesbian couples simultaneously tend to prefer and use known donors, to choose donors who reflect them or their partners, and to want ongoing relationships with the donors.<sup>161</sup> Whether lesbians privilege the biological connection or the ability to have an ongoing social relationship with the donor may depend on the level of social acceptance of homosexuality.<sup>162</sup> For example, lesbian parents in Sweden, which has laws permitting same sex civil unions and adoptions, are more likely to choose known, participatory donors than lesbians in Ireland, a country that is more socially conservative and does not provide for

153. *Id.* at 34–36.

154. *Id.* at 35–36.

155. *Id.* at 36.

156. *Id.*

157. *Id.* at 36.

158. *Id.*

159. *Id.*

160. *See, e.g.,* Gartrell et al., *supra* note 142, at 518 (mothers in the study “were equally divided in selecting known and unknown donors, [and] expected to discuss the insemination process with the children when they reached an appropriate age.”). It is also widely believed that lesbians are more egalitarian and less role-bound than heterosexuals. Gillian A. Dunne, *Opting into Motherhood: Lesbians Blurring the Boundaries and Transforming the Meaning of Parenthood and Kinship*, 14 GENDER & SEXUALITY 11 (2000). *But see* Julie Shapiro, *A Lesbian-Centered Critique Of Second-Parent Adoptions*, 14 BERKELEY WOMEN'S L.J. 17, (1999) (critiquing regressive effects of heteronormativity among lesbian parents).

161. Dunne, *supra* note 160, at 15; Scheib et al., *supra* note 138; Švab, *supra* note 130, at 47–48.

162. *See* Švab, *supra* note 130, at 46–48 (comparing lesbian choices regarding donor involvement in Ireland and Sweden).

lesbian and gay partnership or co-parenting.<sup>163</sup> This was true even though Irish lesbians valued known, involved donors and even though non-marital fathers have much more limited rights in Ireland than they do in Sweden.<sup>164</sup> Moreover, Swedish lesbian parents valued donors for the social role they might play in the child's life while Irish lesbian parents had more restrictive views of the importance of the donor—equating it primarily with the biological connection.<sup>165</sup>

In one study of British lesbian couples raising children created through donor insemination, forty percent of the families had regular contact with the donors and less frequently the donor was co-parenting, including providing financial support for the child.<sup>166</sup> This contact also made it more likely that the children would have relationships with the sperm donors' families as well.<sup>167</sup> The couples often chose donors who were friends or family, and the donors took on an avuncular role and often were referred to as “uncle.”<sup>168</sup> In a family where the father was more involved and saw the child every day, one of the mothers stated the “he has become part of the family . . . in a sense, or we've become part of his. But we live in two separate homes.”<sup>169</sup>

Like Charles and Eddie, above, who took turns providing sperm to inseminate the children, many lesbian couples alternate childbearing.<sup>170</sup> In this way, it appears that same-sex couples create less direct heteronormative biological connection: instead of a man and a woman producing a child to whom they are both biologically related, the same-sex couples create this connection by trading reproductive roles regarding the children born into the family. Taking the family as a whole, then, each parent is biologically related to at least one of the children and socially related to each of the children. It also enables each parent to experience biological parenthood. In addition, one of the reasons lesbians choose known donors and want continued relationships between them

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163. Róisín Ryan-Flood, *Contested Heteronormativities: Discourses of Fatherhood among Lesbian Parents in Sweden and Ireland*, 8 *SEXUALITIES* 189, 191–93 (2005).

164. *Id.* at 193.

165. *Id.* (“the most dramatic difference between Irish and Swedish participants [in the study] was that Swedish lesbians were far more likely to choose an involved donor” than Irish lesbians).

166. Dunne, *supra* note 160, at 16, 27.

167. *See id.* at 24 (describing sperm donor's mother as a grandmother to both her son's child and the child's sibling, born through the sperm of another donor and to a different mother).

168. *Id.* at 18, 22. Compare with the gay male family where the surrogate mother was called “Mama, Sally.” Stacey, *supra* note 20, at 38. It was not uncommon for the sperm donor to be a friend of one of the partners, even the one who did not give birth. Dunne, *supra* note 160, at 17–18, 22–24.

169. Dunne, *supra* note 160, at 26.

170. *Id.* at 21–22. They may also combine the maternal functions of egg donation and gestation while utilizing ART to implant one woman's fertilized egg into her partner's womb. *E.g.*, *K.M. v. E.G.*, 117 P.3d 673 (Cal. 2005).

and their offspring is to provide the child with male role models.<sup>171</sup> Indeed, the very “ideology of parenting whereby children require access to a ‘male role model’ father”<sup>172</sup> suggests a significant amount of conventionality among lesbian families who seem to be tweaking, rather than rejecting, heteronormativity. Other lesbian parents who do not want donor involvement may replicate the binary parent aspects of heteronormativity by rejecting the notion of three parents.<sup>173</sup>

### B. Lesbian and Gay Adoption

In addition to using ART, lesbians and gays create families while in heterosexual relationships and through adoption, even while openly acknowledging their sexual orientation.<sup>174</sup> Sources estimate that fifty-two thousand lesbians and gay men in the United States have become legal parents through adoption.<sup>175</sup> When lesbians and gays bring children to the relationship from a prior relationship, adoption law governs their options for establishing parental rights and responsibilities for the second parent. State adoption laws, however, closely reflect remarkably similar norms regarding families and parenting in that they model exclusive parenting, two-parent marital families, or single parents.<sup>176</sup> Adoption generally does not countenance as parents persons who are not romantically intimate with each other, such as a gay male couple and the birth mother, two siblings, or a grandmother and her daughter;<sup>177</sup> instead, most states’ adoption laws contemplate single or married parents or persons who act like married couples.<sup>178</sup>

Four states have statutes that specifically permit or prohibit lesbian and gay adoption: Florida, which prohibits lesbian and gay adoption;<sup>179</sup>

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171. Dunne, *supra* note 160; Ryan-Flood, *supra* note 163, at 196. Studies also revealed that lesbians preferred gay men as involved fathers because they shared a “common history of oppression” and lesbians perceived gay men to be more committed to the child and less likely to seek custody. *Id.* at 199–200; Catherine Donovan, *Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination*, 3 *SEXUALITIES* 149, 155 (2000).

172. Ryan-Flood, *supra* note 163, at 198. According to Fiona Tasker, one older “study reported that children from lesbian mother families were more likely than children from single heterosexual mother families to visit their nonresident father on a regular basis.” Tasker, *supra* note 112, at 25.

173. Donovan, *supra* note 171, at 158.

174. Approximately 35% of lesbians and 16% of gay men have children, for a total of 65,500 children being raised by a lesbian or gay parent. GATES ET AL., *supra* note 115, at 7.

175. *Id.* at 7. That amounts to 4% of adopted children in the United States. *Id.* at 11.

176. Appell, *supra* note 83, at 79.

177. *See, e.g., In re Adoption of Garrett*, 841 N.Y.S.2d 731 (N.Y. Surr. Ct. 2007) (refusing to permit the mother’s brother to adopt the child as a co-parent).

178. Appell, *supra* note 83, at 79.

179. Florida’s ban, enacted in 1977, states: “No person eligible to adopt under this statute may

Mississippi, which prohibits “couples of the same gender” from adopting;<sup>180</sup> and Connecticut and California, which provide explicit procedures for lesbian and gay couples to adopt.<sup>181</sup> Oklahoma was a fifth state, but its prohibition of the recognition of same-sex couple adoptions from foreign jurisdictions<sup>182</sup> may be null since the Tenth Circuit Federal Court of Appeals found that it violated the Constitution’s Full Faith and Credit Clause.<sup>183</sup> In addition, Utah has a ban that would preclude many lesbian and gays from adopting.<sup>184</sup>

Other states have more traditional adoption laws that do not expressly refer to single or same-sex couple adoption. The biggest roadblock to same-sex couple adoptions may be the absence of special provisions for non-marital couple adoption. The heteronormativity of virtually all adoption statutes contemplates adoption by one person or two married persons and mandates that the legal parents will lose parental rights before an adoption can occur, except in stepparent adoptions.<sup>185</sup> On their face, these statutes appear to require termination of parental rights of the legal parent seeking to have her lesbian partner adopt the child.<sup>186</sup> Similarly, the literal language of the statutes might suggest that same-sex couples cannot jointly adopt an infant or foster child not related to either of them because the statutes provide for a “person” or “married couple” to petition for adoption.<sup>187</sup> Although a number of courts have read “person” in the plural,<sup>188</sup> other states courts have interpreted the statute to permit only one member of the couple to adopt, for in all states but Massachusetts (and arguably Iowa), lesbians

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adopt if that person is a homosexual.” FLA. STAT. ANN. § 63.042(3) (West 2000).

180. MISS. CODE ANN. § 93-17-3(5) (West 2000).

181. Cal. Fam. Code 9000(f) (West 2004 & Supp. 2007); Conn. Gen. Stat. 45a-724(a)(3) (West 2004).

182. Okla. Stat. Ann. tit. 10, 7502B1.4(A) (West 2007) (prohibiting the “state, any of its agencies, or any court of this state . . . [to] recognize an adoption by more than one individual of the same sex from any other state or foreign jurisdiction.”).

183. *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007).

184. Utah Code Ann. § 78-30-1(3)(b) (Lexis 2002 & 2007 Supp.). Utah prohibits adoption “by a person who is cohabiting in a relationship that is not a legally valid and binding marriage under the laws of this state. For purposes of this Subsection (3)(b), ‘cohabiting’ means residing with another person and being involved in a sexual relationship with that person.” Single lesbians and gays presumably could adopt.

185. Appell, *supra* note 83, at 79 (citing *e.g.*, N.J. Stat. Ann. § 9.3-43 (“any person may institute an action for adoption . . .”); N.Y. Dom. Rel. Law §110 (an “adult unmarried person or an adult husband and his adult wife together may adopt another person”); Vt. Stat. Ann. tit. 15A, § 1-105 (“all parental rights of each former parent of the adoptee terminate” upon adoption); D.C. Code Ann. § 16-312(a) (“A final decree of adoption establishes the relationship of natural parent and natural child between adopter and adoptee for all purposes . . .”)).

186. Appell, *supra* note 83, at 75.

187. *Id.* at 79.

188. *Id.* at 83.

and gays cannot get married.<sup>189</sup>

The trend appears to be in favor of permitting lesbian and gay and same-sex adoption.<sup>190</sup> Even though the best interests of the child standard may provoke more scrutiny for lesbian and gay adoptions,<sup>191</sup> it has more often than not been utilized to grant adoptions.<sup>192</sup> In fact, the reported decisions suggest that courts confronted with lesbian and gay families that embody dominant marital norms of monogamy, financial security, mutual care and support, and psychological parenting<sup>193</sup> find adoption to be in the child's best interest despite lack of clear statutory support for such non-marital, two-parent adoptions.<sup>194</sup>

In any event, adoption law and practice appear to require lesbians and gay men to conform to modern heterosexual norms to adopt. For example, adoption agencies may deem a gay man unsuitable to adopt if he has a domestic partner who does not want to be an adoptive parent.<sup>195</sup> This happened with one gay man Judith Stacey studied who wanted to adopt a child but his live-in lover did not.<sup>196</sup> The county adoption agency

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189. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Varnum v. Brien*, Case No. CV5965 (Aug. 30, 2007, Iowa Dist. Ct., Polk County).

190. Compare, e.g., *In re K.M. & D.M.*, 653 N.E.2d 888 (Ill. App. 1995), and *In re Infant Girl W.*, 845 N.E.2d 229 (Ind. App. 2006), and *In re K.S.P.*, 804 N.E.2d 1253 (Ind. Ct. App. 2004), and *In re M.M.G.C.*, 785 N.E.2d 267 (Ind. Ct. App. 2003), and *In re Sharon S.*, 31 Cal. 4th 417, 73 P.3d 554 (Cal. 2003), and *In re R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002), and *In re H.N.R.*, 666 A.2d 535 (N.J. Super. Ct. App. Div. 1995), and *In re M.M.D. & B.H.M.*, 662 A.2d 837 (D.C. 1995), and *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995), and *In re Tammy*, 619 N.E.2d 315 (Mass. 1993), and *In re Adoptions of B.L.V.B. & E.L.V.B.*, 628 A.2d 1271 (Vt. 1993) (all permitting same-sex couple adoption under traditional adoption statutes), with *In re Luke*, 640 N.W. 2d 374 (Neb. 2002), and *In re Adoption of Baby Z.*, 724 A.2d 1035 (Conn. 1999), and *Matter of Adoption of T.K.J.*, 931 P.2d 488 (Colo. Ct. App. 1996), and *In re Angel Lace M.*, 516 N.W.2d 678 (Wis. 1994) (all rejecting same-sex partner adoption under traditional adoption statutes). Recently, over half a dozen states have extended marital rights, including same-sex parent adoption, to same-sex couples. Cal. Fam. Code § 297.5 (West 2005); Conn. Gen. Stat. §§ 46b-38bb (West Supp. 2007); N.H. Rev. Stat. Ann. ch. 457-A (Supp. 2007); N.J. Stat. Ann. 9:3-37 (West Supp. 2007); Oregon Family Fairness Act, Oregon Laws 2007, ch. 99; Vt. Stat. Ann. tit. 15, § 1204 (2002); *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). As noted above, fewer states ban lesbian and gay single or couple adoption.

191. E.g., *In re C.M.A.*, 715 N.E. 2d 674 (Ill. App. Ct. 1999) (noting that same-sex couple adoptions receive greater scrutiny than stepparent adoptions). In any event, it is difficult to assess conclusively how courts are responding to petitions lesbian and gay single and same-sex couple adoptions because adoption proceedings are closed, sealed and usually uncontested so they rarely yield published decisions. Because the proceedings themselves are sealed, research is challenging.

192. E.g., *In re Adoption of Carolyn B.*, 774 N.Y.S.2d 227 (N.Y. App. Div. 2004); *In re R.B.F. & R.C.F.*, 803 A.2d 1195 (Pa. 2002).

193. See Jane Spinak, *When Did Lawyers For Children Stop Reading Goldstein, Freud And Solnit? Lessons From The Twentieth Century On Best Interests and The Role Of The Child Advocate*, 41 FAM. L.Q. 393 (2007) (providing an excellent overview and assessment of the influential work of Goldstein, Freud and Solnit which privileged children's affective relationships with their care givers, also known as the psychological parent standard).

194. Appell, *supra* note 83.

195. Stacey, *supra* note 20, at 37.

196. *Id.*

required the prospective adoptive parent to terminate his relationship with the partner who did not want parent in order to be considered as an adoption resource.<sup>197</sup> The agency could not fathom that one man would adopt and his partner would not, so it required the non-paternal half of the couple to participate in the adoption as a condition to permitting the man who wanted the children to adopt.<sup>198</sup> In other words, to adopt as a single person, the adoption seeker would have to be single in fact, even if marriage was not legally available to him.<sup>199</sup> In this way, the agency appropriated heterosexual norms that couple adult intimacy with child bearing and raising.

In addition, rearing children may provide some measure of heterosexual privilege, acceptance, and naturalness. That was the case for this same adoption seeker whose partner did not want to adopt. Once he and his partner separated, in large part because the agency required it, the county allowed the adoption seeker to become licensed and eventually adopt.<sup>200</sup> After that, he gained great currency with his family and especially his mother who initially did not accept her son's homosexuality.<sup>201</sup> After he became a parent she came to admire him over all of her other children for his good parenting and treatment of her, his mother.<sup>202</sup>

Despite their apparent tendency toward conventionality, the adoption fiction of rebirth is more difficult to sustain for same-sex adoptive families simply by virtue of the sex of the parents.<sup>203</sup> Moreover, these lesbian and gay families, like other adoptive families and families created through ART, do not have complete biological connections with the children. There remain people outside of the legal family who have reciprocal biological, and sometimes affective, relationships with the children. Birth fathers, birth mothers, and gamete donors are often known in these adoptions and, like their heterosexual counterparts, lesbians and gays may have ongoing relationships with the known donors or surrogates.<sup>204</sup>

It is not clear whether these relationships in the adoption context are as rich or enduring as the studies suggest they are in the ART cases.

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197. *Id.*

198. The county would not allow him to become a pre-adoptive foster parent as long as he lived with an intimate partner who would not participate in the foster care licensing process. *Id.*

199. *Id.*

200. *Id.* at 36–37.

201. He reported his mother telling him that “there’s nothing to accept. You’re natural, you’re normal.” *Id.* at 38.

202. *Id.*

203. See discussion and notes *supra* Sec. II.2.

204. *E.g.*, Thomas S. v. Robin Y., 618 N.Y.S.2d 356 (N.Y. App. Div. 1994).

There may be something about the legal and psychic aspects of the adoption process that discourages these relationships,<sup>205</sup> or it simply may be that the case law and studies do not yet reflect these practices. At any rate, there is some evidence that open adoptions are occurring among lesbian and gay parents. For example, a gay couple who adopted a child in Washington agreed “[a]s part of the adoption proceedings” to “bring [the child] back to Oklahoma to visit her birth family.”<sup>206</sup> In another reported case, a white male gay couple who adopted an African American infant had an agreement with the birth mother, who lived with them while pregnant, for ongoing visitation after adoption.<sup>207</sup>

Mostly though, the reported decisions permitting same-sex couple adoption reflect traditional adoptive family relationships, primarily lesbian second parents seeking to adopt their partners’ biological children.<sup>208</sup> These cases do not reveal any suggestion that the adoptive families had ongoing contact with the donors or birth parents. Because the female reproductive roles (gestation and egg donation) are more intense and intrusive than that of the men (sperm donation) gay male co-parents are at more of a disadvantage in obtaining children for adoption. Thus, gay men may be more likely to have relationships to birth mothers because gay men have less access to children and are more likely to negotiate with birth mothers for ongoing contact after adoption.<sup>209</sup>

#### IV. LESSONS OF ADOPTION WITH CONTACT

The expansive kinship networks of so many same-sex couple families suggest that it is not necessary to undermine or devalue biology as a primary basis of family to achieve protection or recognition for other

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205. It may be that the very formality and publicness of the processes of terminating parental rights and creating new parents may require adoptive parents to project normalcy rather than messy, rambling extended families, in order to gain the sanction of social services and courts.

206. *Finstuen v. Edmondson*, 497 F. Supp. 2d 1295, 1301 (W.D. Okla. 2006) *affirmed in part, reversed in part*, *Finstuen v. Crutcher*, 496 F.3d 1139 (10th Cir. 2007). This language suggests that the agreement may have been made pursuant to Washington’s adoption with contact statute, WASH. REV. CODE § 26.33.295 (1990).

207. *In re M.M.D.*, 662 A.2d 837 (D.C. 1995).

208. *E.g.*, *In re K.M.*, 653 N.E.2d 888 (Ill. App. Ct. 1995); *In re Adoption of M.A.*, 930 A.2d 1088 (Me. 2007); *Adoption of Tammy*, 619 N.E.2d 315 (Mass. 1993); *In re Jacob*, 660 N.E.2d 397 (N.Y. 1995); *In re Adoption of B.L.V.B.*, 628 A.2d 1271 (Vt. 1993).

209. *See Tasker*, *supra* note 112, at 225 (“Many gay men have become fathers through co-parenting arrangements with lesbian mothers” with or without sperm donation, through surrogacy arrangements, and adoption of foster children.). However, in most of the few reported gay male same-sex couple adoption cases there was no indication that there was any post-adoption contact. *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002). Of course, post-adoption contact was not an issue in those cases, so if there was any such contact, it would not necessarily have been reflected in the proceedings.

family formations, including adoptive families, kinship networks, and same-sex or plural parent families. Nor is it necessary to discard these new family forms in favor of modern values. More helpful may be an enhanced notion of biological connection—one that accounts not only for the social and political importance of biological connection, but also for the existential aspects of biological ties and the palpability of genetic tissue for the adults and the children. The persistence of the profound existential and social importance of biological connections suggests we are not ready to define families through the relationship between the adults and disregard the child's connections to biological parents and gamete donors. This does not mean that legal parents should be recognized solely by biological relationship to the child or that children should have multiple parents with full parental status.

On the other hand, some rules may be helpful. Many of these blended lesbian and gay families live outside the law. As these relationships become more common, and lesbians and gays more visible, it is likely that disputes will arise regarding these satellite relationships. Already there are several reported decisions.<sup>210</sup> One case involving a bicoastal extended family started out as many same-sex parent families do—with a lesbian couple utilizing known donors to conceive their children.<sup>211</sup> Robin and her partner Sandra lived together with their two children, one born to Sandra who conceived through known donor insemination and the other born two years later to Robin also through known donor insemination.<sup>212</sup> Robin's donor orally agreed that he would not seek to establish parental rights to the child.<sup>213</sup> The mothers co-parented both children and gave them each both of their last names.<sup>214</sup> The fathers did not have much involvement in the early years of the children's lives, but when the oldest child was five and started asking about her father, the mothers arranged for the children to have more interaction with the fathers.<sup>215</sup> During the next six years, Robin's daughter Ry had significant contact with her father, Thomas, seeing him for a few days to two weeks at a stretch approximately twenty-six times; during that period, they appeared to develop a "warm and amicable relationship" and exchanged correspondence in which Ry expressed her

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210. *LaChapelle v. Minton*, 607 N.W.2d 151 (Minn. Ct. App. 2000); *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994); *see also* Cahn, *supra* note 77, at 1162 ("Repeatedly, sperm donors have received extensive visitation rights over the objection of the biological mother and her partner.")

211. *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356 (App. Div. 1994).

212. *Id.* at 357.

213. *Id.*

214. *Id.* at 358.

215. *Id.*

love for her father.<sup>216</sup> This amicable situation deteriorated after Robin and Sandra refused to allow Thomas to take Ry, then about nine-years-old, and her older sister Cade to visit with his parents without their mothers.<sup>217</sup> It was at this point that Thomas indicated he wanted to establish parental rights, a revelation that upset the delicate balance the family had established.<sup>218</sup> When negotiations regarding the father's role and relationship to Ry languished, Thomas sought a court order for filiation and visitation.<sup>219</sup>

So began a four-year legal battle during which the trial court dismissed the action on equitable estoppel grounds, refusing to grant legal parental status to Thomas; then the appellate court reversed on due process grounds.<sup>220</sup> Although the appellate court did not contemplate removing Ry to her father from her mothers,<sup>221</sup> the dispute had an all-or-nothing character to it. Either Thomas was the father and could press for increasing visitation or custody<sup>222</sup> or he was not and had no right to any relationship with the child. Neither option seems quite right because the primary family unit was the nuclear family of Robin and Sandra and their two daughters. It is one thing to have a dispute about the extent of visitation; it is quite another to have a third person, albeit a biological father, with full, legal parental status in what began as an exclusive, if not legally enforceable, parenting relationship among Sandra, Robin and their two daughters.<sup>223</sup> This exclusivity becomes even more poignant because, should something happen to one of the mothers, the other legal parent (here the father) would have a legal claim to the child while the social mother would not. Moreover, this four-year dispute must have taken an emotional and financial toll on all of the parties, not least of all the children.

A similar, but messier, more complex, and longer dispute arose involving a lesbian couple and a gay male couple.<sup>224</sup> In that case, a lesbian couple agreed in writing that one of the women, Mitten, would

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216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 358–62.

221. *Id.* at 358–59 (“Custody of the child is not now, and is unlikely ever to be, an issue between the parties. Rather the question is whether the rights of a biological parent are to be terminated.”).

222. This is despite the appellate court's assertion that custody would not be an issue; once Thomas had parental status, he would have standing to seek and possibly attain custody, particularly against Sandra should anything happen to Robin.

223. *Thomas S.*, 618 N.Y.S.2d at 358–59.

224. *LaChapelle v. Minton*, 607 N.W.2d 151 (Minn. Ct. App. 2000).

have a child conceived with the sperm of LaChapelle.<sup>225</sup> The four signed two agreements that defined the family such that Mitten and her partner Ohanian would have full custody of the child and LaChapelle would have no parental rights but he and his partner would have a “‘significant relationship’ with the child.”<sup>226</sup> The child, L.M.K.O., was born the year after they signed the second agreement; subsequently, the mothers obtained second parent adoption, without disclosing they had used a known donor.<sup>227</sup> Then, when L.M.K.O. was nineteen months old, her mothers terminated visitation with her father and his partner.<sup>228</sup> In response, LaChapelle successfully moved to vacate the adoption and subsequently petitioned to establish paternity.<sup>229</sup> Mitten and Ohanian then broke up and custody between them became an issue. Ultimately, the court awarded joint custody to Mitten and Ohanian, adjudicated LaChapelle to be the father, and ordered him to pay child support.<sup>230</sup> The litigation regarding this dispute lasted six years and, no doubt, carried a huge emotional and financial price tag that most likely inured also to the detriment of the child.

These cases reveal several problems that arise when family law does not match the lived lives of families. Families are, of course, fertile ground for disputes, but clarity regarding legal rights and responsibilities accompanied by some deviation from all-or-nothing parental status could help reduce these disputes and promote more stability for the children involved. Adoption with contact is a model of community or shared parenting that may have lessons for these same-sex parent families.<sup>231</sup> It undermines the heteronormative model of two-parent, exclusive parenting by recognizing the multiple people who have parental or parent-like relationships with children. At the same time, adoption with contact preserves parental status and its authority, subject to any voluntary agreements to allow contact or visitation with others. This type of adoption may provide a model for same-sex couples seeking to maintain a relationship with gamete donors.

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225. *Id.* at 157.

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Id.* at 157–58. LaChapelle withdrew his request for legal custody on the first day of trial. *Id.* at 160.

231. Of course, there are many other proposals for recognizing and regulating post-modern families. *E.g.*, Susan Frellich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL FORUM 393; Melanie B. Jacobs, *My Two Dads: Disaggregating Biological and Social Paternity*, 38 ARIZ. L.J. 810 (2006); Laura T. Kessler, *Community Parenting*, 24 WASH. U. J.L. & POL’Y 47 (2007).

In the dispute between Thomas and Robin, a written, enforceable agreement regarding visitation and Thomas's legal status might have narrowed the areas of dispute and perhaps prevented the dispute from ever reaching the courts. For example, had the law permitted Thomas to relinquish his parental rights and enter into a separate enforceable agreement for visitation with Ry, he would have had the right to enforce or perhaps modify that visitation agreement, but would not have litigated the other issues regarding paternity. Similarly in the Mitten and LaChapelle case, had Minnesota's adoption with contact statute been enacted at the time of the second parent adoption,<sup>232</sup> they could have simultaneously terminated LaChapelle's parental rights, established Ohanian as the second legal parent, and entered into a legally enforceable agreement that would have established the terms of the agreement and provided standards for enforcement or modification.<sup>233</sup> The child would have two legal parents, Mitten and Ohanian, who were also her social parents; LaChapelle's status would not have been litigated; and it would have been clear that he was not entitled to consideration for custody. The only issue for dispute would have been the terms of visitation, a dispute that probably would not have lasted six years.<sup>234</sup>

While lesbians and gays seek legal regulation of and benefits for their adult relationships through marriage or civil unions, they might also look to establishing rules for the relationships they create and maintain with biological parents outside the nuclear family dyad. Open adoption, but more specifically, adoption with contact, shows that it is possible to have bundles of rights, statuses, and connections that honor the parent-child and other biological and social relationships. Adoption with contact

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232. Minn. Stat. Ann. § 259.58 (West 1997).

233. Regarding enforcement and modification, the Minnesota statute provides:

An agreed order entered under this section may be enforced by filing a petition or motion with the family court that includes a certified copy of the order granting the communication, contact, or visitation, but only if the petition or motion is accompanied by an affidavit that the parties have mediated or attempted to mediate any dispute under the agreement or that the parties agree to a proposed modification. The prevailing party may be awarded reasonable attorney's fees and costs. The court shall not modify an agreed order under this section unless it finds that the modification is necessary to serve the best interests of the minor adoptee, and: (1) the modification is agreed to by the parties to the agreement; or (2) exceptional circumstances have arisen since the agreed order was entered that justify modification of the order.

MINN. STAT. ANN.. § 259.58(3)(c) (West 1997).

234. On the other hand, Mitten would not have been entitled to child support from LaChapelle, but one wonders whether that is a fair exchange for the years of litigation and the corresponding financial and emotional costs.

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also protects the authority of the primary legal parents who attain and retain 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. Even decisions regarding contact with the birth family are, under adoption with contact, voluntary—or at least they begin that way. Rejecting the myth of separation may help enlarge the parental figures to whom children relate—while still respecting some measure of family autonomy—and bridge the gap between exclusive parenting and the accelerating growth of non-traditional family systems..

The endurance of biological ties in society, if not in law, suggests that we are not so post-modern that we are ready to release these connections. There is, however, what appears to be an inexorable movement away from the older, modern values and practices of nuclear, heterosexual, patriarchal families as single parents, same-sex parents, stepparents, kin and adoptive parents are raising children.<sup>235</sup> Adoption is a legal institution that, though not without warts and missteps, bridges the modern and postmodern, creating legal stability for non-biological parental relationships and increasingly accommodating both biological ties and new family forms. Adoption's experiment with the complete subversion of biological connection is coming to an end as adoptive and birth families see and accept their interconnectedness. The practice of open adoption has moved nearly half of the states to add to their lexicon a form of adoption that recognizes the importance of family autonomy while acknowledging the endurance of biological connections. This adoption with contact is based on the knowledge that children's social and biological ties are important to the child and to the adults who love and are connected to the child, but that not all of these adults will have the same relationship to the child.

The lessons adoption can share for other post-modern families—those characterized by the absence of at least one biological parent—are significant. Indeed, as lesbians and gays form families that are not fully biological, they are already learning similar lessons as those learned in traditional adoption. Adoption with contact provides a method for regulating biological and non-biological relationships that privileges the modern family form while acknowledging and protecting those relationships that do not fit that narrow construct. This may be a model

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235. "More children are growing up in single-parent households and in a range of blended-family types—that is, those that include only one of the child's biological parents (usually the mother) and an adult (usually male) biologically unrelated to the child." Amy L. Wax, *Engines of Inequality: Class, Race, and Family Structure*, 41 *FAM. L.Q.* 567, 576 (2007).

of regulation for other post-modern families that seek still to have parental autonomy but want structure and predictability for relationships that are important to the child, but do not rise to full domestic status. Just as adoptive families are increasingly facing each other and seeking relationships that are balanced and respectful of the needs, rights, and roles of family members, lesbian and gay families comprise a rich and varied array of legal and extralegal relationships among birth relatives, legal parents, domestic partners, and the adoptee.