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ADOPTION CANNOT BE REFORMED

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I. INTRODUCTION

Five years ago, co-author Ashley Albert surrendered her parental rights to her two youngest children to the State of Washington.[1] In lawyer-speak, what Ashley signed is termed a "voluntary" surrender, to distinguish it from an "involuntary" termination of parental rights entered after a contested hearing. But as Ashley sees it, what she did was anything but voluntary. Rather, on January 5, 2016, in a small conference room on the ninth floor of the King County Superior Court in Seattle, Ashley made the only choice she thought she had available to her at the time. Her case was supposed to go to trial in just a few weeks, but her court-appointed attorney was unable to tell her what they were going to argue and confessed that she had not actually read through all the discovery materials—the record was "too long" for that. Meanwhile, the state's attorney was telling her that if she went to trial on the termination petition and lost, she would never see her children again. Ashley could not live with that eventuality, and she did not want her kids to live with that either.

Since Ashley and her children lived in Washington—one of approximately twenty-nine states whose laws allow for enforceable post-adoption contact agreements[2]—she had another alternative. The other parties told her she had five minutes to decide what she wanted to do: go to trial and take the risk that she would lose her children forever, or agree to surrender her rights on the condition that she be permitted post-adoption visitation. Ashley felt like she'd been hit with a crane; she had no idea how she could make this kind of decision in just five minutes. Her lawyer was no help. Ashley left the room and went into the stairwell. She kicked, screamed, sobbed, spit, and slapped the walls until her hands ached. She felt completely powerless. Every part of her wanted to fight back—to fight for her children just as she had been fighting for them ever since they had been removed from her care—but she knew she could not. As her allotted five minutes came to an end, Ashley took a deep breath and walked back to the conference room. She signed the paperwork, agreeing to give up her parental rights in exchange for an agreement that she could continue to have at least four visits and twelve phone calls with her six-year-old son and four-year-old daughter per year, that she would be able to write to them, and that their names would not be changed upon adoption.

In the current moment, long-standing ideas of abolishing rather than reforming prisons and the police have made it into mainstream discussions of police brutality and mass incarceration. Similarly, as this Symposium itself shows, critics of the family regulation system—including activists, scholars, attorneys, and those who have been directly affected—have begun to press harder to bring discussions of abolition of that system

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[1] Because both co-authors will be including details from their own lives in this Essay, we will be using the third person when writing about ourselves, to avoid confusion.

[2] For a relatively up-to-date survey of state laws regarding post-adoption contact agreements, see CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES (2019), https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/cooperative/ [https://perma.cc/5LEH-7D7F].

into the mainstream.[3] In both contexts, the case for abolition rests on two primary principles: (1) that the system in question is so inherently harmful that it should not—cannot—be reformed; and (2) that there are viable alternatives to address the issues the system currently purports to address. In the case of the carceral state, abolitionists have made headway regarding the first element; there is growing agreement among all but the most ardent defenders of policing and incarceration that both are central features of a larger system that causes substantial harms.[4] Yet the second element remains a sticking point for many who might otherwise support abolition: while abolitionists have long articulated a robust vision of a world without policing,[5] many progressives still lack the imagination required to accept it.

This Essay will address one specific feature of the family regulation system that must be abolished, namely the practice of permanently severing the legal bonds between a parent and child and "replacing" them with new ones via formalized adoption. The argument for abolishing adoption merits consideration independent of discussions regarding the family regulation system as a whole for a number of reasons, not the least of which is the severity of the harms caused by termination of parental rights—the "death penalty" of the family regulation system.[6] Moreover, while the vast majority of family regulation cases do not end with

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[3] Alongside other participants and contributors to the Symposium, we use the language of "family regulation system" to refer to a "regime of public, private, and faith-based agencies and institutions, courts, and individuals authorized by force of law to surveil and intervene in families, remove children from their parents temporarily or permanently, terminate the parent-child relationship, and create new legal families." Nancy D. Polikoff & Jane M. Spinak, Foreword, *Strengthened Bonds: Abolishing the Child Welfare System and Re-Envisioning Child Well-Being*, 11 COLUM. J. RACE & L. 427, 433 (2021). Except when historical context requires otherwise, this Essay will refer to the "family regulation" system rather than the "child welfare" or "child protective" system, as that title more accurately reflects the operation and effect of this system. *See also, e.g.*, Emma Williams, *'Family Regulation,' Not 'Child Welfare': Abolition Starts with Changing our Language*, IMPRINT (July 28, 2020), https://imprintnews.org/opinion/family-regulation-not-child-welfare-abolition-starts-changing-language/45586 [https://perma.cc/QHE9-DU2Y].

[4] *See, e.g.*, Sam Levin, *'It's Not About Bad Apples': How US Police Reforms Have Failed to Stop Brutality and Violence*, GUARDIAN (June 16, 2020), https://www.theguardian.com/us-news/2020/jun/16/its-not-about-bad-apples-how-us-police-reforms-have-failed-to-stop-brutality-and-violence [https://perma.cc/WBY4-K2J8] (pointing both to increased research and to increased public momentum concluding that reforms fail to address systemic harms); Ram Subramanian & Leily Arzy, *State Policing Reforms Since George Floyd's Murder*, BRENNAN CTR. FOR JUST.: RSCH. & REPORTS (May 21, 2021), https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder [https://perma.cc/A6JU-WNWE] (detailing many failures of reform but suggesting that "transformative change in policing remains elusive").

[5] For historic analyses by abolitionists directing us to post-policing futures, see generally Ruth Wilson Gilmore, *Abolition Geography and the Problem of Innocence*, *in* FUTURES OF BLACK RADICALISM (Gayle Theresa Johnson & Alex Lubin eds., 2017); MARIAME KABA, WE DO THIS 'TIL WE FREE US: ABOLITIONIST ORGANIZING AND TRANSFORMING JUSTICE (2021); DEAN SPADE, MUTUAL AID: BUILDING SOLIDARITY DURING THIS CRISIS (AND THE NEXT) (2020); ALEX S. VITALE, THE END OF POLICING (2017); Ruth Wilson Gilmore & James Kilgore, *The Case for Prison Abolition*, MARSHALL PROJECT (June 19, 2019), https://www.themarshallproject.org/2019/06/19/the-case-for-abolition [https://perma.cc/H2VT-MMG2].

[6] *See, e.g.*, Drury v. Lang, 776 P.2d 843, 845 (Nev. 1989) (characterizing the severance of the parent-child relationship as "tantamount to imposition of a civil death penalty").

termination of parental rights and adoption, the potential that any case *could* so end is ever-present. Both the threat of an eventual termination proceeding and the conception of adoption as the idealized, ultimate form of "permanency" for children in the foster system affect the trajectory of family regulation cases right from the beginning, as agencies, parents, and advocates assess and negotiate their options in the shadow of these possibilities.

More fundamentally, adoption must be addressed separately from the family regulation system as a whole because adoption exists both inside and outside of that system. In the United States, domestic adoptions can be either "public"—adoptions of children out of the family regulation system—or "private," arranged without the direct involvement of the state.[7] Private adoptions may be arranged directly between the child's birth and adoptive parents[8] or, more commonly, with the assistance of an adoption facilitator or adoption agency. While there are significant differences between these two types of adoption—primarily, the fact that private adoption is not the result of literal, violent state intervention into the family—they are fundamentally intertwined, both historically and today. As will be discussed further below, the underlying causes and social functions of both types of adoption are the same, as are many of the harms they cause.

When it comes to adoption, the second element of the argument for abolition has already been addressed. We already have alternatives to adoption for those children whose parents truly are unable to care for them on a day-to-day basis, including formalized legal structures such as guardianship or third-party custody, and both legal and social science scholars have described the ways in which these permanency options serve children at least as well as, if not better than, termination of parental rights and adoption.[9] In addition, there is growing recognition of the ways

[7] This Essay will not explicitly address international adoption, both because of space limitations and because our own personal and professional experiences are limited to domestic adoption. It is important to note, however, that international adoption has played an important role in the development of adoption in the United States and that many of the fundamental points made in this Essay apply to international adoption as well. For critical discussions of international adoptions, see, e.g., LAURA BRIGGS, SOMEBODY'S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION 129–240 (2012) [hereinafter BRIGGS, SOMEBODY'S CHILDREN]; KATHRYN JOYCE, THE CHILD CATCHERS: RESCUE, TRAFFICKING, AND THE NEW GOSPEL OF ADOPTION (2013) [hereinafter JOYCE, CHILD CATCHERS]; David M. Smolin, *The Case for Moratoria on Intercountry Adoption*, 30 S. CAL. INTERDISC. L.J. 501 (2021); David M. Smolin, *Child Laundering: How the Intercountry Adoption System Legitimizes and Incentivizes the Practices of Buying, Trafficking, Kidnaping, and Stealing Children*, 52 WAYNE L. REV. 113, 115 (2006). For a powerful memoir by an international adoptee, *see* JANE JEONG TRENKA, THE LANGUAGE OF BLOOD (2003).

[8] The co-authors both strongly prefer to call the birth parents of adopted children what they are: *their parents*. When talking about adoption, however, there are times when we must apply a label to make our meaning clear. We will therefore refer to "birth" and "adoptive" parents at various points throughout this Essay. Moreover, while this Essay uses the term "birth parents" because it is the term used most often in adoption literature and research, it is important to note that many persons in this role prefer other language, such as "first parent," "natural parent," or simply "parent."

[9] There are a number of law review articles—and a growing body of social science research—addressing the many reasons for prioritizing alternate forms of permanency, such as guardianship and third-party (non-parental) custody arrangements, over termination of parental rights and adoption. For a selection of important sources in the literature and

that adoption has failed both adoptees and their families, as advocates have pushed for adoptee access to their own records, enforceable post-adoption contact agreements, and better training and support for transracial adoptive parents, especially around race and culture.[10] After ignoring the needs of birth parents and adoptees for decades, adoption and foster care agencies, adoptive parent groups, and other groups that benefit

research, *see generally* Cynthia Godsoe, *Permanency Puzzle*, 2013 MICH. ST. L. REV. 1113 (2013); Josh Gupta-Kagan, *The New Permanency*, 19 U.C. DAVIS J. JUV. L. & POL'Y 1 (2015); Sarah Katz, *The Value of Permanency: State Implementation of Legal Guardianship Under the Adoption and Safe Families Act of 1997*, 2013 MICH. ST. L. REV. 1079 (2013); Randi Mandelbaum, *Re-Examining and Re-Defining Permanency from a Youth's Perspective*, 43 CAP. U. L. REV. 259 (2015); Eliza Patten, *The Subordination of Subsidized Guardianship in Child Welfare Proceedings*, 29 N.Y.U. REV. L. & SOC. CHANGE 237 (2004); Mark Testa, *New Permanency Strategies for Children in Foster Care*, *in* CHILD WELFARE RESEARCH: ADVANCES FOR PRACTICE AND POLICY 108 (Duncan Lindsey & Aron Shlonsky eds., 2008); Mark F. Testa & Jennifer Miller, *Evolution of Private Guardianship as a Child Welfare Resource*, *in* CHILD WELFARE FOR THE 21ST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 405, 415–19 (Gerald P. Mallon & Meg McCartt Hess eds., 2005); Mark F. Testa, *The Quality of Permanence - Lasting or Binding? Subsidized Guardianship and Kinship Foster Care As Alternatives to Adoption*, 12 VA. J. SOC. POL'Y & L. 499 (2005). Yet, there has been only the most limited movement in this direction, perhaps because the mythology of adoption exerts such a strong pull. This Essay is intended primarily as a case *against* adoption, rather than a case *for* alternate permanency arrangements, so it will not discuss those alternatives in detail.

[10] *See, e.g.*, DONALDSON ADOPTION INST., LET'S ADOPT REFORM REPORT: ADOPTION IN AMERICA TODAY (2016), https://go.usa.gov/xPJPB [https://perma.cc/547Q-SR38]; Michael Fitzgerald, *Adoption Secrecy Has Ended for Thousands Since New York Unsealed Birth Records*, IMPRINT (Feb. 17, 2021), https://imprint news.org/adoption/adoption-new-york-unsealed-birth-certificates/51893 [https://perma.cc/KDS7-ZLEC]; Jordan Gass-Poore, *Most American Adoptees Can't Access Their Birth Certificates. That Could Soon Change*, MOTHER JONES (Mar. 13, 2019), https://web.archive.org/web/20191211162448/https://www.motherjones.com/politics/2019/03/most-american-adoptees-cant-access-their-birth-certificates-that-could-be-about-to-change/.

For accounts of historical activism to make adoption more open, see BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 238–86 (2002) (describing reform efforts beginning in the 1970s) [hereinafter MELOSH, STRANGERS AND KIN]; RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES 103–38 (2001) [hereinafter SOLINGER, BEGGARS AND CHOOSERS] (describing the organizing efforts of Concerned United Birthparents beginning in the 1970s).

On the harm and trauma experienced by children raised in transracial adoptions, see Rebecca Carroll, Opinion, *As a Black Woman Raised by White Parents, I Have Some Advice for Potential Adopters*, WASH. POST (Apr. 5, 2021), https://www.washingtonpost.com/opinions/2021/04/05/black-woman-raised-by-white-parents-advice-potential-adopters/ [https://perma.cc/8Y89-74Q4] (describing harmful nuances of even well-intentioned white adoptive parents' treatment of Black children because of failure to understand social realities of racism); SunAh M. Laybourn & Carla Goar, *Abby Johnson's Comments About her Adopted Black Son are Problematic. Here's Why.*, BROOKINGS (Aug. 26, 2020), https://www.brookings.edu/blog/how-we-rise/2020/08/26/abby-johnsons-comments-about-her-adopted-black-son-are-problematic-heres-why/ [https://perma.cc/M8ZK-WRSN] (discussing the deeper implications of a white adoptive parent's comment about law enforcement racial profiling of her "brown son"); J.S. Lee, *My Experience With Transracial Adoption as an Asian Person in a White Family*, HEALTH (May 19, 2021), https://www.health. com/mind-body/my-experience-with-transracial-adoption-as-an-asian-person-in-a-white-family [https://perma.cc/GV8J-GX2T]; Nikita Stewart, *2 Officials Who Were Both Adopted Clash Over an Adoption Law*, N.Y. TIMES (Aug. 7, 2019), https://www.nytimes.com/2019/08/07/nyregion/adoption-laws-new-york.html [https://perma.cc/G92R-RSG6].

from and advocate for adoption have begun to actively call for changes in adoption and in approaches to parenting adopted children.[11]

Yet there has been little to no call for the abolition of adoption.[12] As a matter of constitutional doctrine, it can be argued that the practice of termination of parental rights and adoption cannot withstand a strict scrutiny analysis, because there are alternatives that are just as effective for protecting children.[13] But constitutional doctrine is not enough; so long as the harms caused by termination and adoption are not fully understood,

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[11] Even Bethany Children's Services, which has long been seen as one of the most conservative—and coercive—private adoption agencies, recently came out with a report that acknowledged racial disproportionality in the family regulation system, emphasized the importance of placing children with families who are able to affirm their racial and cultural heritage, and recommended the overhaul of the Multiethnic Placement Act, which restricts agencies' ability to take race into account when making foster and adoptive placements. *See* BETHANY CHRISTIAN SERVS., WHAT THE PANDEMIC TAUGHT US: INNOVATIVE PRACTICE REPORT 5, 13–19 (2021). *Cf.* Olga Khazan, *The New Question Haunting Adoption*, ATLANTIC (Dec. 19, 2021), https://www.theatlantic.com/politics/archive/2021/10/adopt-baby-cost-process-hard/620258 [https://perma.cc/AT36-B4RN] (detailing Bethany Christian Services' history and role as the "largest Protestant adoption agency"); Kathryn Joyce, *Shotgun Adoption*, NATION, (Sept. 14, 2009), https://web.archive.org/web/20220128032335/https://www.thenation.com/article/archive/shotgun-adoption/ (placing Bethany in the context of the Christian adoption industry's "history of coercing women to relinquish their children"). *See also* Cheri Williams & Nathan Bult, Opinion, *We Celebrate Transracial Adoption. But Child Welfare Can't Ignore Race*, NEWSWEEK (May 6, 2021), https://www.newsweek.com/we-celebrate-transracial-adoption-child-welfare-cant-ignore-race-opinion-1589058 [https://perma.cc/S8RU-V4KJ] (defending the report against critics).

[12] For some exceptions, *see, e.g.*, Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425 (1983); Dru Sefton, *Anti-adoption Activists Defy Popular Opinion*, CHI. TRIBUNE (Aug. 11, 2004), https://www.chicagotribune.com/news/ct-xpm-2004-08-11-0408110320-story.html [https://perma.cc/F9RP-UUZS]. *Cf.* Emily Matchar, *Meet the Anti-Adoption Movement*, NEW REPUBLIC (Sept. 1, 2013), https://newrepublic.com/article/114505/anti-adoption-movement-next-reproductive-justice-frontier [https://perma.cc/H3BM-HL9C; Gretchen Sisson & Jessica M. Harrison, *What We Get Wrong About Adoption*, NATION (Dec. 7, 2021), https://web.archive.org/web/20220221232140/https://www.thenation.com/article/society/adoption-politics/.

[13] Parents' interest in the care, custody, and control of their children is "perhaps the oldest of the fundamental liberty interests recognized." Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)). The Supreme Court has recognized that "[f]ew consequences of judicial action are so grave as the severance of natural family ties." M.L.B. v. S.L.J., 519 U.S. 102, 119 (1996) (quoting the Court's "unanimous[]" view articulated in Santosky v. Kramer, 455 U.S. 745, 774 (Rehnquist, J., dissenting)) (affirming the right in connection with appellate review of the termination of parental rights).

If the state wishes to infringe upon the family's fundamental interest in its integrity—indeed, to permanently destroy it—the state bears the burden of establishing that its actions stand up to strict scrutiny. The state must show not only that it has a compelling state interest, but also that the statute it relies upon is narrowly tailored to accomplish that interest. In order to be narrowly tailored, a statute that infringes upon a fundamental right must "eliminate[ ] no more than the exact source of the evil it seeks to remedy." Frisby v. Schultz, 487 U.S. 474, 485 (1988). Where a statute is under- or over-inclusive, or where the state has other available means to achieve its goal, the statute is not narrowly tailored. Zablocki v. Redhail, 434 U.S. 374, 389–90 (1978). Yet, neither termination of parental rights nor adoption are necessary to achieve any of the purported goals of the family regulation system. Even assuming, solely for the purposes of the argument, that the point of termination and adoption is to protect children from harm and to provide them with stable, alternative family arrangements once their biological parents have been deemed unable to safely care for them, there are alternative permanency options available, such as permanent guardianship, that can achieve both of these goals without requiring the complete legal destruction of the original family unit. *See supra* note 9.

courts will continue to uphold the practice on the basis that it is somehow more "permanent" than guardianship or custody,[14] and advocates for adoption reform will continue to expend extensive effort to achieve legislative and other changes that are insufficient to address the fundamental problems of adoption.

To even begin the fight for abolition, we must reframe adoption in the public mind, connecting its modern form to its roots in orphan trains, Native American boarding schools, and the like, and showing how adoption has not only failed to transcend those roots but in fact never could. This is an uphill battle, as adoption—unlike policing, unlike prisons, and unlike the family regulation system as a whole—holds an overwhelmingly positive perception in the public eye.[15] The common view is that, even if the occasional adoption may be unjust or the occasional adoptive parent cruel or abusive—and even if the practice of adoption may require certain reforms, mainly around the opening of records and adoptions themselves—adoption is a positive, life-affirming act: the creation of a family and the salvation of a child.

This Essay is our contribution to the fight. We will begin in Part II by briefly situating modern adoption in the United States within the context of the country's lengthy history of using the forced separation of families as a tool of oppression and assimilation against racial and ethnic "others" and against those whose behavior did not conform to the cultural norms for their racial and class status. In Part III, we will then address the specific harms caused by adoption today. Adoption legally severs parents from their children and children from their parents, siblings, extended families, and communities. It reinforces racist, classist, ablest, and misogynistic ideas about which families matter and which do not. And, as noted above, the idea of adoption as the ideal form of "permanency" has a pervasive impact on case planning and judicial decision-making for families caught up in the family regulation system, resulting in a push to terminate parental rights based on timelines alone, without a real assessment of whether reunification is possible, and a preference for

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[14] *See, e.g.*, Cody B. v. Dep't of Child Safety, No. 2 CA-JV 2016-0105, 2016 WL 4987103 (Ariz. Ct. App. Sept. 19, 2016) ("The evidence showed that C. would benefit from the permanency available from severance and adoption—permanency that cannot be accomplished via guardianship because it is subject to revocation."); *In re* Jose V., 58 Cal. Rptr. 2d 684, 688 (Cal. Ct. App. 1996) (applying a "well established" reasoning that because "there is a strong preference for adoption as the most permanent, and thus best, plan," then "if the court finds the child is adoptable . . . it is presumed, even in the absence of a specific finding by the court, that adoption is the choice that is in the child's best interests"); *In re* Weidman, Nos. 354550, 354551, 2021 WL 2026217, at *23 (Mich. Ct. App. May 20, 2021) (upholding trial court's termination of mother's parental rights because "guardianship is not a permanent option, and, therefore, it would not provide the stability that the trial court found the child needed" whereas "adoption would provide the child with the stability and permanence that he needed").

[15] As adult adoptees critical of adoption sarcastically describe it on social media, adoption is "all unicorns and rainbows" in the public mind. *See, e.g.*, Rohan Simmons-Barr (@rohanSMCbarr), TWITTER (Sept. 12, 2018, 4:47 AM), https://twitter.com/rohanSMCBarr/status/1039797560880189445 (last visited Nov. 26, 2021); Rachel Marie (@highschoolfor2), TWITTER (Mar. 5, 2021, 1:20 PM), https://twitter.com/highschoolfor2/status/1367902898500239362 (last visited Nov. 26, 2021); Vik (@stoweyvik), TWITTER (July 17, 2020, 6:04 AM), https://twitter.com/stoweyvik/status/1284066315528032256 (last visited Nov. 26, 2021).

termination and adoption over other options, such as guardianship and third-party custody.

Finally, in Part IV, we will discuss growing efforts to reform adoption. With a focus on the seemingly most radical change to the practice of adoption in this country over the past few decades—namely, the shift from closed to open adoptions and the creation of enforceable post-adoption contact agreements—we will explain why reform is not only insufficient to address the harms caused by adoption, but also likely to increase such harms in the long run, by staving off more direct criticism of adoption and reaffirming its legitimacy. Rather than working to "fix" a practice that is doing exactly what it was designed to do, we need to broaden our vision to truly embrace alternate forms of caretaking for children that do not treat them as objects whose "ownership" can be transferred or whose identities can be erased.

II. ADOPTION AS FAMILY REGULATION

With very limited exceptions,[16] adoption in the United States is framed as a "fictive birth" at the center of a regime requiring the complete severance of the adoptee's legal ties to their parents and the substitution of the adoptive parents as their sole legal parents.[17] Upon adoption, the

[16] California, Minnesota, and Washington have laws recognizing tribal customary adoptions for Native youth; in a customary adoption, the child is adopted by new parents without having all of their biological parents' rights severed. Paula Polasky, *Customary Adoptions for Non-Indian Children: Borrowing from Tribal Traditions to Encourage Permanency for Legal Orphans Through Bypassing Termination of Parental Rights*, 30 LAW & INEQ. 401, 403 (2012) (citing CAL. WELF. & INST. CODE § 366.24 (2012); MINN. STAT. § 259.67, subd. 4(a)(3)(iii) (2010); and WASH. REV. CODE ANN. § 13.38.010 et seq. (2012)). Tribal customary adoption is similar to the concept of "simple adoption," discussed *infra* note 22. Oregon recently passed a bill to recognize tribal customary adoption. S.B. 562, 2021 , Leg. Assemb., 81st Reg. Sess. (Or. 2021); *see also Unanimous Oregon House Backs Tribal Customary Adoption*, IMPRINT (May 4, 2021), https://imprintnews.org/child-welfare-2/unanimous-oregon-house-backs-customary-tribal-adoption/54113 [https://perma.cc/C5XS-AR62]. As of 2014, California allows any birth and adoptive parents to agree that the decree of adoption will not fully terminate all of the parental duties and responsibilities of the child's birth parents. CAL. FAM. CODE § 8617(b); *see also* Adoption of E.B., 291 Cal. Rptr. 3d 409 (Cal. Ct. App. 2022) (applying the statutory provision to uphold a petition to adopt a child as a third parent, and stating that the provision authorizes an independent adoption involving multiple parents).

[17] *See, e.g.*, N.Y. DOM. REL. LAW § 117(1)(a)–(c). *See also* Annette Ruth Appell, *The Myth of Separation*, 6 NW. J. L. & SOC. POL'Y 291, 294 (2011) (referring to the dominant mid-twentieth century construction of adoption as the "creation of a new life . . . by operation of the adoption decree," under which "adoptive parents have full, legal autonomy regarding their new child" as if they are biological offspring, while the "former birth parents cease to exist as parents or kin under the law and, theoretically, as a matter of fact"); Mary Lyndon Shanley, *Toward New Understandings of Adoption: Individuals and Relationships in Transracial Open Adoption*, *in* CHILD, FAMILY, AND STATE 15, 20–21 (Stephen Macedo & Iris Marion Young eds., 2003) ("The dissolution of the child's legal ties to [their] original parents made possible the construction of the adoptive family as an 'as-if' biological family."); JUDITH S. MODELL, A SEALED AND SECRET KINSHIP: THE CULTURE OF POLICIES AND PRACTICES IN AMERICAN ADOPTION 5–8 (2002) [hereinafter MODELL, SEALED AND SECRET KINSHIP] (discussing the "as-if begotten" structure of adoption); JUDITH S. MODELL, KINSHIP WITH STRANGERS: ADOPTION AND INTERPRETATIONS OF KINSHIP IN AMERICAN CULTURE 2–6 (1994) [hereinafter MODELL, KINSHIP WITH STRANGERS] (explaining that adoption in this country rests on the principle of "substitutability").

Notably, as revolutionary as it is in some ways, second-parent or stepparent adoption is not really a deviation from this model, since it requires the complete severance

adoptee is issued a new birth certificate that lists their true time and place of birth, but substitutes the adoptive parents' names for their birth parents' and, in many cases, replaces the adoptee's birth name with a new one chosen by their adoptive parents.[18] Even today, all but nine states deny or restrict adoptees' access to their original birth certificates; before some of these states will release an adult adoptee's own birth certificate to them, both their birth *and* adoptive parents must consent.[19] Thus, the process of adoption entails not only the full severance of the adoptee's legal connections to their family of origin and the substitution of the adoptive family in its place, "as if" the adoptee had been "born to" their adoptive parents, but also the complete erasure of that occurrence from the public record.

The legal treatment of adoption as a "fictive birth" corresponds with a cultural conception of adoption as a "rebirth" for the adoptee—a new and "better" beginning that is somehow existentially different than other forms of substitute caretaking for children, even legally binding forms such as permanent guardianship.[20] Because the adoptive family is legally constructed "as if" it were a biological family, adoption is also viewed as inherently more stable and permanent than other substitute caretaking arrangements[21]—an irony, given that adoption itself could be considered evidence of the *impermanence* of the biological parent-child relationship.

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of the adoptee's relationship to one parent, where the adoptee has two legal parents prior to adoption; it remains a process of substitution rather than addition. *See* Katharine T. Bartlett, *Rethinking Parenthood As an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 917–18 (1984).

[18] *See, e.g.*, N.Y. PUB. HEALTH LAW § 4138(1)(c). *See also* Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1007 (1995) ("From this severance springs a series of secrets designed to support this fictional rebirth. The original birth certificate is sealed and the child is given a new name and birth certificate, stating that he or she was born to the adoptive parents. All records of the adoption proceedings are also sealed.").

[19] For a survey of state laws governing adoptees' access to their own records, *see generally* CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ACCESS TO ADOPTION RECORDS (2019), https://www.childwelfare.gov/pubPDFs/infoaccessap.pdf [https://perma.cc/V6W4-X396]. Minnesota attorney, advocate, and adoptee Gregory Luce provides detailed information regarding state laws governing the release of original birth certificates (along with helpful infographics) on his website. *The United States of OBC*, ADOPTEE RTS. LAW CTR., https://adopteerightslaw.com/united-states-obc/ [https://perma.cc/DN5F-6B8L].

For a comprehensive history of the development of sealing statutes in the United States, *see* Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001) [hereinafter Samuels, *The Idea of Adoption*]; for a different take on the same topic, *see* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION (1998). *See also infra* note 46.

[20] *See, e.g.*, Marsha Garrison, *Parents' Rights vs. Children's Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 387–88 (1996) (describing the "adoption order" as a "legal rebirth" or "legal[] reincarnat[ion]" not only defined by a new name, identity, and family, but symbolically characterized by "good parents and good life" with a "redemptive quality not unlike a baptismal or conversion experience" and an "offer[] [of] a permanent improvement in socioeconomic status in a socially preferred family structure"). Of course, this "redemption that adoption confers upon the child is also dependent upon the severance of ties with her biological parents; rebirth necessitates the death of past identity and familial bonds." *Id.*

[21] In the United States, it is a cultural conviction that "where the proverb 'blood is thicker than water' measures kinship, it is not surprising that 'blood' symbolizes strong and true ties," which underlies the sense that "the more evidently an adoptive family replicates

This approach to legal adoption—involving the full "substitution" of the adoptive parents for the adoptee's birth parents—is not inherently necessary. Other societies have different approaches.[22] Nor is it particularly longstanding. The formal, legal adoption of children did not exist at the founding of the United States.[23] Each fundamental element of the practice of adoption in this country was developed over the course of a roughly hundred-year period of this country's history and each developed to serve interests *other* than those of adoptees themselves. Whether public or private—and even before the development of the family regulation system as we now know it—adoption has consistently served as a means of family regulation, defining and reinforcing the boundaries between ostensibly "good" and "bad" families and communities. Adoption has also generated both income and authority for the institutions and individuals carrying it out—along with societal and personal affirmation from ostensibly doing good work and helping children in need.

What follows is not intended to be a comprehensive history of adoption in the United States. The ensuing sections will briefly review key periods in that history in order to highlight the way in which each of the central elements of the practice of adoption in this country—including the legal process of full severance and substitution; an emphasis on secrecy and the sealing of adoptees' birth records; and the conception of adoption as the ideal form of "permanency" and stability for children not in their parents' care—developed not to serve the best interests of children or their biological families, but rather to serve the interests of those already in power and to reinforce existing race, gender, and class hierarchies.

A. Child-Saving and the Creating of Legal Adoption

While legal adoption was unknown at common law, substitute care for children was common from the early days of the United States. From the colonial period onward, children lived apart from their parents for a variety of reasons. Temporary indenture or apprenticeship arrangements were common for free children of many classes,[24] and both free and

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a blood family, the more enduring it is likely to be." MODELL, SEALED AND SECRET KINSHIP, *supra* note 17, at 6–7.

[22] To give just one example, in France, there are two forms of legal adoption: *adoption simple*, or ordinary adoption, and *adoption pleniere*, or plenary adoption. While plenary adoption is similar to adoption in the United States, with the adoptee taking the same legal relationship to the adoptive parents as they would have had if they had been born to those parents, ordinary adoption in France gives the adoptee a legal relationship to their adoptive parents without fully severing their legal ties to their birth parents. Kerry O'Halloran, *France*, *in* THE POLITICS OF ADOPTION: INTERNATIONAL PERSPECTIVES ON LAW, POLICY AND PRACTICE 575, 576 (Ius Gentium Book Ser. 4th ed. 2021).

[23] Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J.L. GENDER, & SOC'Y 73, 87–88 (2010) [hereinafter Appell, *Controlling for Kin*]; JULIE BEREBITSKY, LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950, at 20 (2000) [hereinafter BEREBITSKY, LIKE OUR VERY OWN]; Samuels, *The Idea of Adoption*, *supra* note 19, at 368. In fact, England did not enact its first adoption statute until 1926, well after the United States. *See* E. WAYNE CARP, ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 3 (2002).

[24] *See* Susan L. Porter, A *Good Home: Indenture and Adoption in Nineteenth-Century Orphanages*, *in* ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 27, 27–28 (E. Wayne Carp ed., 2002) (discussing historical practice suggesting that adoption "may have been understood more as an offshoot of indenture"); *see also* Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 NEW ENG. L. REV. 1113, 1124 (1997)

enslaved families regularly took in related children or the children of community members who died or could not otherwise care for them.[25] These arrangements were sometimes formalized on an ad hoc basis by means of indenture contracts;[26] by the "adoptive" parents simply naming the child as an heir;[27] or by individualized legislative enactments permitting individuals who had taken in an unrelated child to change the child's surname or take other legal steps to guarantee the child would be able to inherit from their caretakers.[28] Yet, there is no indication that these legal formalities were viewed as somehow creating a new relationship between the adult and child.[29] Rather, they functioned primarily as makeshift solutions to pressing practical concerns—a landowning family's attempt to protect the inheritance rights of an unrelated child who had become part of the household,[30] or a formerly enslaved person's request to have his cousin bound to him in indenture so as to prevent the child from being indentured to a former enslaver.[31]

The first general adoption statutes in the United States were not enacted until the mid-to-late nineteenth century, against the background of a prominent "child-saving" movement aimed at removing poor and working-class immigrant children from their families and placing them with more "suitable" caretakers.[32] While using the rhetoric of preventing cruelty to children, the work of the child-savers primarily focused not on

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(detailing colonial apprenticeship arrangements, under which "most children received basic parts of their moral and practical education away from 'home'" as apprentices who "lived with the families of their masters, [and] owed those masters reverence and obedience"); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 453–56 (1972) (describing the New England Puritans' custom of "putting out" their children from one wealthy household to another); VIVIANA A. ZELIZER, PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN 171–72 (1985) [hereinafter ZELIZER, PRICELESS CHILD] (examining the "widespread system" of apprenticeship and indenture, both as a private choice and as a public method of dealing with orphaned or indigent children).

[25] BEREBITSKY, LIKE OUR VERY OWN, *supra* note 23, at 20; MELOSH, STRANGERS AND KIN, *supra* note 10, at 15.

[26] Naomi Cahn, *Perfect Substitutes or the Real Thing?*, 52 DUKE L.J. 1077, 1110–12 (2003) [hereinafter Cahn, *Perfect Substitutes*].

[27] *Id.* at 1107–08 (referring to making a child an heir as a "general practice of informal adoption").

[28] *Id.* at 1108–09. *See also* MODELL, KINSHIP WITH STRANGERS, *supra* note 17, at 22 (explaining how "[t]hrough a private legislative act, a child could become a full member of a family").

[29] *See, e.g.*, Appell, *Controlling for Kin*, *supra* note 23, at 87 ("Adoption law, itself a modern creation, has evolved over its relatively short life from a simple way to legally recognize de facto parent-child relationships to a rigid, almost mythic, imitation of the birth family.").

[30] BEREBITSKY, LIKE OUR VERY OWN, *supra* note 23, at 40–43.

[31] *See* Ira Berlin, Steven F. Miller, & Leslie S. Rowland, *Afro-American Families in the Transition from Slavery to Freedom*, 42 RADICAL HIST. REV. 89, 116–18 (1988) (presenting primary historical evidence of the practice).

[32] *See* Cahn, *Perfect Substitutes*, *supra* note 26, at 1091–92; Presser, *Historical Background*, *supra* note 24, at 465, 474–87. For a general history of the child-savers and the families of the children they sought to "save," *see* LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE (1988) [hereinafter GORDON, HEROES OF THEIR OWN LIVES]; LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999) [hereinafter GORDON, ORPHAN ABDUCTION]. For stories of the child-savers told by the children themselves, *see* MICHAEL PATRICK ET AL., WE ARE A PART OF HISTORY: THE STORY OF THE ORPHAN TRAINS (1990).

physical abuse or other deliberate harms, but rather on the living conditions and parenting choices of the families they "helped." For child-savers like Charles Loring Brace, the founder of New York City's Children's Aid Society,[33] the explicit goal of this work was to save children from growing up in homes where they would not be raised according to middle and upper class, white, Protestant parenting norms.[34] Brace was the originator of the orphan trains that transported poor children from urban communities in the eastern United States to farms in the rural Midwest and West, where they could be raised in what Brace and his colleagues thought were more wholesome environments, by better and more "American" parents.[35]

As the description above indicates, there was an explicitly racialized nature to this child-saving work. While Black children were generally excluded from the child-savers' services,[36] the children of Italian, Irish, and other European immigrants—who had not yet been deemed fully "white" and who were largely Catholic rather than Protestant—bore the brunt of the movement's efforts.[37] By taking these children away from the

[33] The Children's Aid Society is still in operation as one of a number of non-profit agencies to which New York City's Administration for Children's Services (ACS) contracts out responsibility for providing foster care and adoption services for children who have been removed from their parents. Notably, the agency's website has a discussion of its history that describes Brace and his work in an entirely positive light, *see A History of Innovation*, CHILDREN'S AID, https://www.childrensaidnyc.org/about/history-innovation [https://perma.cc/Y58N-8FXY], even though Brace's xenophobia, racism, and willingness to outright kidnap children from the streets of New York City are well-known, *see* GORDON, ORPHAN ABDUCTION, *supra* note 32, at 8–12.

[34] *See* GORDON, HEROES OF THEIR OWN LIVES, *supra* note 32, at 27–58; GORDON, ORPHAN ABDUCTION, *supra* note 32, at 10–12; MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 110–11 (1996); Brenda G. McGowan, *Historical Evolution of Child Welfare Services*, *in* CHILD WELFARE FOR THE TWENTY-FIRST CENTURY: A HANDBOOK OF PRACTICES, POLICIES, AND PROGRAMS 14, 16–17 (Gerald P. Mallon & Peg McCartt Hess eds., 2d ed. 2014).

[35] GORDON, ORPHAN ABDUCTION, *supra* note 32, at 8–12.

[36] DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 204–05 (1997); Amy Mulzer & Tara Urs, *However Kindly Intentioned: Structural Racism and Volunteer CASA Programs*, 20 CUNY L. REV. 23, 54–57 (2017). For discussions of the treatment of Black children by public agencies and private charitable organizations through the mid-twentieth century, and the Black community's efforts to care for its own children in the face of white disregard, discrimination, and subjugation, see ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE (1972) [hereinafter BILLINGSLEY & GIOVANNONI. CHILDREN OF THE STORM]; HERBERT G. GUTMAN, THE BLACK FAMILY IN SLAVERY & FREEDOM: 1750-1925 (1976); CRYSTAL LYNN WEBSTER, BEYOND THE BOUNDARIES OF CHILDHOOD: AFRICAN AMERICAN CHILDREN IN THE ANTEBELLUM NORTH (2021). The few child-saving institutions that were established for Black children in the nineteenth century were targets for racial violence by white mobs. *Id.* at 58–63.

[37] GORDON, ORPHAN ABDUCTION, *supra* note 32, at 11–13; GORDON, HEROES OF THEIR OWN LIVES, *supra* note 32, at 14–16; Mulzer & Urs, *supra* note 36, at 56. For a discussion of racialized ideas about Irish Catholic and other immigrants in nineteenth century America, and their eventual admittance into "whiteness," *see* NELL IRVIN PAINTER, A HISTORY OF WHITE PEOPLE 132–211 (2010). Family violence historian Linda Gordon's history of the "orphan abduction" tells of a group of Irish Catholic children who were sent to Arizona by a Catholic child-saving organization—New York Foundling, also still in operation as a contracted foster care agency in New York City. New York Foundling's goal was to keep Catholic children with Catholic families, in opposition to Protestant child-savers' intent to convert and assimilate them, and the organization had arranged for the children to be taken in by a group of Mexican-American Catholic families who worked at a local mine. GORDON,

"corrupting" influence of their families—many of whom never intended to give them up—and placing them in more "suitable" homes outside of urban centers, the child-savers sought to assimilate the children into the cultural and racial majority. They also sought status and authority for themselves. While the organizations' leaders were men, much if not most of the day-to-day work was done by middle-and-upper-class white women, who relied on their presumed moral authority over matters of the home to find a role for themselves in the world outside of their own homes—to the detriment of the families they found there.[38]

The adoption statutes that were enacted during this time reflected the language and ideals of the child-saving movement, emphasizing the need for courts to ensure that prospective adoptive parents were "of sufficient ability to bring up the child, and furnish suitable nurture and education."[39] These statutes also reflected the ultimate goal of the child-savers' most ambitious plans, such as the orphan trains: to completely sever children from their families and communities and place them in homes where they could be fully assimilated into the American cultural majority. According to these statutes, upon adoption, the child was to become the legal child of the adoptive parents, as if he had been born to them, and the child's birth parents were to be deprived of all legal rights and obligations.[40] Ironically, although states passed these statutes as a result of the influence of the child-saving movement, the child-savers themselves rarely relied on the adoption statutes during that time, using older, more ad hoc means of formalization instead. Moreover, many of the children placed by child-saving organizations were not, in fact, treated "as if" they had been born to their new midwestern and western parents, many

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ORPHAN ABDUCTION, *supra* note 32, at 12–19. However, when the children arrived, white residents were outraged to see these children—whom they, unlike the New York City child-savers, considered "white"—being placed with Mexican families, and forcibly abducted them.

[38] *See* Mulzer & Urs, *supra* note 37, at 45–58.

[39] An Act to Provide for the Adoption of Children. ch. 324, 1851 Mass. Gen. Court 816, *reprinted in* FAMILIES BY LAW: AN ADOPTION READER 9–10 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004). *See also, e.g.*, Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 25 (1999) (quoting an early-twentieth-century Wisconsin statute, 1929 Wis. Sess. Laws ch. 439, § 322.07, which provided that the adopted child would be deemed "same to all intents and purposes as if the child had been born in lawful wedlock of such parents by adoption" and that "[t]he natural parents of such child shall be deprived, by such order of adoption, of such legal rights, if any, of whatsoever nature which they may have respecting such child and its property"); Wright S. Walling, *Adoption Law in Minnesota: A Historical Perspective*, 33 WM. MITCHELL L. REV. 871, 883–84 (2007) (describing the 1878 Minnesota statute, MINN. STAT. ch. 124, §§ 26–32, which provided that where the court found that the petitioners were of "suitable nature and ability to provide for, nurture, and educate the child," then a decree of adoption would be issued, and the adopted child was to be deemed, as to "all legal consequences and incidents," the natural relation of the adoptive parents, as if he had "been born to them in lawful wedlock" and the child's birth parents deprived "of all legal rights respecting the child"); *see also* Appeal of Wolf, 13 A. 760 (Pa. 1888) (issuing order of adoption pursuant to Pennsylvania statute, where "it appear[ed] to the court that the interests and welfare of the said minor child will be promoted by being adopted as the child and heir of the said petitioner," and declaring that the child was now to have "all the rights of a child and heir" of the adopting parent, to be "subject to all the duties of such child," and to take the name of the adopting parent"). By 1929, all states had adopted general adoption laws. MODELL, KINSHIP WITH STRANGERS, *supra* note 17, at 19–20.

[40] See *supra* note 39 and sources cited therein.

of whom took in children primarily as a means of generating an additional source of labor for their farms.[41]

B. Georgia Tann and the Development of Sealed Records

Reliance on the general adoption statutes grew over time, alongside the increasing sentimentalization of the concept of childhood and efforts to place children in families—rather than in orphanages—at younger and younger ages.[42] Adoption records, however, remained open for decades, if not to the public then at least to those involved in the adoption,[43] and adoptees retained their original birth certificates.[44] The practice of sealing adoptees' records even from the parties themselves is still regularly depicted as a benevolent—if misguided—attempt to protect the privacy of mothers who chose to place their children for adoption, ensuring that even their own children would not be able to track them down and reveal their secrets.[45] In fact, the practice originated around 1930 as the result of an agreement between the Tennessee Department of Vital Statistics and a social worker named Georgia Tann, who used it as a method to conceal her own criminal behavior[46]—although Tann herself did present the practice

[41] "The demand for children's labor that made these placements so popular simultaneously yielded abuse and violated even nineteenth-century standards, judging from the mounting complaints: children were beaten and overworked and sexually assaulted." GORDON, ORPHAN ABDUCTION, *supra* note 32, at 10. *See also* PATRICK ET AL., PART OF HISTORY, *supra* note 32, at 53–54 (stories of mistreated children).

[42] *See* ZELIZER, PRICELESS CHILD, *supra* note 24, at 169–70, 175–207.

[43] *See* Samuels, *The Idea of Adoption*, *supra* note 19, at 374–75.

[44] *Id.* at 376.

[45] Opponents of open records legislation, including various anti-abortion groups and the National Council for Adoption, regularly base their opposition on an insistence that such legislation would violate the privacy rights of birth parents who were "promised confidentiality" under the existing sealed-record regime and would "undermine the strength of the adoptive family." Thomas C. Atwood, *Consent or Coercion? How Mandatory Open Records Harm Adoption*, *in* NAT'L COUNCIL FOR ADOPTION, ADOPTION FACTBOOK IV 463–64 (Lee A. Allen & Virginia C. Ravenel eds., 2007).

In Texas in 2015, open records legislation was killed by a state senator who was also the adoptive parent of a daughter via a closed adoption, on the ground that "a decision that was made at the time [of adoption] needs to be respected." *See* Erin Cargile, *Adoption Group Supports Bill to Access Original Birth Certificates*, KXAN AUSTIN (Jan. 19, 2015), https://web.archive.org/web/20150124233913/http://kxan.com/2015/01/19/adoption-group-pushing-for-access-to-original-birth-certificates/. Yet as Elizabeth Samuels shows in her thorough exploration of the history of sealed birth records, opponents' concern about birth parent privacy is not supported by the historical record; the sealing of original birth certificates had little to do with birth parents' desire that their identities be kept secret from their children, and few birth parents were ever promised such anonymity. *See* Samuels, *The Idea of Adoption*, *supra* note 19, at 369–71, 387.

[46] *See* BARBARA BISANTZ RAYMOND, THE BABY THIEF: THE TRUE STORY OF THE WOMAN WHO SOLD OVER FIVE THOUSAND NEGLECTED, ABUSED, AND STOLEN BABIES IN THE 1950S 204–207 (2013) [hereinafter BISANTZ RAYMOND, BABY THIEF]; GABRIELLE GLASSER, AMERICAN BABY: A MOTHER, A CHILD, AND THE SHADOW HISTORY OF ADOPTION 127–32 (2021) [hereinafter GLASSER, AMERICAN BABY]. For a comprehensive history of the shift from open records to closed records in adoption, *see* Samuels, *The Idea of Adoption*, *supra* note 19, at 370–72, which calls attention to the fact that while adoption records began to be sealed from all parties in the mid-twentieth century and amended birth certificates began to be issued around the same time, as discussed above, adult adoptees were permitted access to their original birth certificates in many states until the later decades of the twentieth century, when all but a few states passed laws restricting their access in reaction to the growing adoptee rights movement.

to government employees and legislators as a way to protect mothers and children against the taint of illegitimacy. [47]

Tann's story is instructive, both because of the extent of her influence on the development of modern adoption and because many of her motives and methods, while extreme, are not categorically different from those of other, less overtly criminal, proponents of adoption throughout U.S. history. Much like the middle- and upper-class women who served as the backbone of the child-saving organizations, Tann went into social work to fulfil her desire for respect and influence in the world outside her home.[48] And Tann was wildly successful at this goal. Between 1930 and 1950, Tann's Tennessee Children's Home Society, which placed the infants and children of low-income, rural women for adoption by wealthy couples around the country, delivered over 1,000 children to new homes in at least fifteen states, earning more than a million dollars profit,[49] and making Tann an influential figure both in Tennessee and beyond.[50] Tann's clients included Hollywood stars of the time, high-ranking businessmen, and a number of government officials.[51]

Yet, while Tann claimed to be finding homes for abandoned, orphaned, or neglected children, her methods of obtaining these children actually ranged from coercion to outright kidnapping, paying nurses to tell new mothers that their babies had died in childbirth or even snatching children from front lawns when their parents weren't looking.[52] The sealing of the children's records—and the issuance of new birth certificates listing their adoptive parents—served as a means of protecting Tann from discovery both by the children's birth parents and by their adoptive parents, to whom she often lied about the "pedigrees" of the children she placed with them, sending "six- and seven-year-olds with no musical ability to couples who, because of her falsification of their records, expected them to become concert pianists."[53]

Tann found customers for her baby-selling business by placing advertisements in newspapers with photographs of children and headlines like "Are You in the Market for a 14-Month-Old Boy?" and "Dan, Jimmy,

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[47] *See* GLASSER, AMERICAN BABY, *supra* note 46, at 130; BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 206.

[48] *See* BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 50, 52, 57–58.

[49] ZELIZER, PRICELESS CHILD, *supra* note 24, at 199. Bisantz Raymond estimates that Tann facilitated the placement of roughly 5,000 children, rather than Zelizer's more conservative 1,000. BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 11*; see also* GLASSER, AMERICAN BABY, *supra* note 46, at 128–30.

[50] *See* BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 57, 92–93.

[51] *See id.* at 57, 95–96, 109; GLASSER, AMERICAN BABY, *supra* note 46, at 127, 129, 130.

[52] *See* GLASSER, AMERICAN BABY, *supra* note 46, at 128–31; BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 54, 56, 59, 94–95, 110–11, 123–29, 132, 138–39, 178–79.

[53] BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 84*; see also id.* at 105, 158–60 (further discussing Tann's deceptions). Notably, Tann was "consistently unreliable in her representation of her babies' religions." Although "[m]ost of her children were born to Protestant young women," her attorney had connections that led her to have a clientele that was mostly Jewish and "wanted to adopt Jewish babies", so Tann "falsely represented many of her children as Jewish." *Id.* at 160. *See also* GLASSER, AMERICAN BABY, *supra* note 46, at 130.

Ray . . . Want One of Them?"[54] Notably, the organizers of the orphan trains used a similar technique, placing advertisements in local papers, describing available children that could be picked up from the train station and sometimes offering them on a "ninety-day trial basis."[55] The children placed by Georgia Tann were just as much of a commodity as the children plucked from the orphan train by farmers in need of additional sources of labor; they just served a different purpose: "[w]hile in the nineteenth century a child's capacity for labor had determined its exchange value, the market price of a twentieth-century baby was set by smiles, dimples, and curls."[56]

Tann's scheme was eventually uncovered, although she died of cancer days before the results of the investigation into her actions were made public in 1950.[57] By that time, however, Tann had already made her mark, not only significantly contributing to the popularization of adoption in the United States,[58] but also fundamentally impacting the process by which they are finalized. Following the example set by Tann in Tennessee, state after state passed laws requiring the sealing of adoptees' birth records and the issuance of falsified birth certificates listing their adoptive parents.[59] Notably, one of the first states to do so was New York—and the governor who signed the bill into law, Herbert Lehman, received at least one of his three adopted children from Tann herself.[60]

C. The "Baby Scoop" Era

Georgia Tann's "innovation" of sealing birth records helped to pave the way for the post-war "baby scoop" era of adoption, the era when the concept of adoption reflected in the mid-nineteenth century adoption statutes and those that followed—that is, the concept of adoption as a deliberate means of family formation, in which a child's previous connections were deliberately erased to make room for their "rebirth" to new (and improved) parents—fully took root. Much like the efforts of the child-savers themselves, the baby scoop occurred in the context of societal efforts to define and regulate the bounds of proper childbearing and rearing. Much like Tann's work, it also served as big business for the institutions undertaking to arrange adoptions—descendants of the child-saving organizations established to rescue the immigrant children of New York and other urban centers a hundred years earlier.

Now, however, the reproductive choices under scrutiny were not those of the immigrant urban poor—or the rural white poor, as in Georgia Tann's money-making scheme—but rather white, middle-class women themselves. During the post-World War II "baby scoop" era—lasting from

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[54] BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 113–16; *see also* GLASSER, AMERICAN BABY, *supra* note 46, at 129.

[55] GORDON, ORPHAN ABDUCTION, *supra* note 32, at 10.

[56] ZELIZER, PRICELESS CHILD, *supra* note 24, at 171.

[57] *See* BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 7–11. Although Tann's children's home was closed down following the investigation, only two of the children she had stolen were reunited with their parents, and the state of Tennessee passed a law retroactively legalizing all of the adoptions she had illegally carried out. *Id.*

[58] *See id.* at xiii, 67.

[59] *See* GLASSER, AMERICAN BABY, *supra* note 46, at 130.

[60] *See id.* at 130–31.

roughly 1945 until *Roe v. Wade* in 1973[61]—more than three million young, mostly unmarried middle-class white women were coerced by adoption agencies, religious leaders, and even their own parents into "voluntarily" surrendering their babies for adoption by infertile married couples deemed to be more appropriate parents for their children.[62] These women were forced to "endure[] their pregnancies in secret, sometimes with distant relatives . . . as servants to strangers" or in maternity homes run by the adoption agencies themselves.[63] They were then made to surrender their newborn children to employees at private, non-profit adoption agencies, who undertook a complex project of purportedly assessing the infants' IQs and personalities, then "matching" them to their best possible parents—all in the service of defining and reinforcing the postwar ideal of the middle-class, white, suburban nuclear family.[64] Records of the adoption were sealed, amended birth certificates were issued for the adopted children, and all parties were expected to move on completely,[65] with the child's birth mother protected against the revelation that she had failed to maintain her sexual purity and the adoptive parents protected against the revelation of their infertility.

While scholars have long, and correctly, recognized the control exercised over these women and their children as a means of protecting the patriarchal conception of the ideal heterosexual, married nuclear family, they have less often identified it as also a form of racial regulation, controlling and defining the boundaries of proper white womanhood in order to reinforce the superiority of those deemed "white" over those deemed "not-white."[66] By the 1950s, single motherhood had begun to be defined as a problem of the Black community, making young, single, pregnant white women a threat not just to the post-war family ideal but to white supremacy itself. As historian Rickie Solinger explains, "Black women, illegitimately pregnant, were not shamed but simply blamed, blamed for the population explosion, for escalating welfare costs, for the existence of unwanted babies, and blamed for the tenacious grip of poverty on [B]lacks in America. There was no redemption possible for these women."[67] White women, by contrast, were shamed—and coerced into giving up their children. But in exchange for their (unwilling) sacrifice,

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[61] 410 U.S. 113 (1973).

[62] For comprehensive histories of the baby scoop era, *see* ANN FESSLER, THE GIRLS WHO WENT AWAY: THE HIDDEN HISTORY OF WOMEN WHO SURRENDERED CHILDREN FOR ADOPTIONS IN THE DECADES BEFORE *ROE V. WADE* (2006) [hereinafter FESSLER, GIRLS WHO WENT AWAY]; RICKIE SOLINGER, WAKE UP LITTLE SUSIE: SINGLE PREGNANCY AND RACE BEFORE *ROE V. WADE* (2000) [hereinafter SOLINGER, WAKE UP]; GLASSER, AMERICAN BABY, *supra* note 46.

[63] GLASSER, AMERICAN BABY, *supra* note 46, at 6.

[64] *See id.* at 95–113; MELOSH, STRANGERS AND KIN, *supra* note 10, at 51–104.

[65] *See* GLASSER, AMERICAN BABY, *supra* note 46, at 50–93, 117–18; FESSLER, GIRLS WHO WENT AWAY, *supra* note 62, at 147–54.

[66] One notable exception is historian Rickie Solinger. *See generally* SOLINGER, WAKE UP, *supra* note 62 (examining history of racialized differences in the oppressive reproductive and welfare policies surrounding Black and white women's single pregnancy).

[67] *Id.* at 25.

they were given a second chance to do things the "right" way and maintain their place in the racial order.[68]

D. The Rise of Transracial Adoption, the Modern Family Regulation System, and the "Permanency" Ideal

If white women's reward for relinquishing their babies at birth was the ability to maintain their status as productive members of the white social order, that did not mean that Black mothers, blamed for a wide variety of social ills, would in fact be permitted to keep their children. The late 1950s and 1960s marked the beginning of a period of significant growth in the transracial adoption of both Black and Native children by white parents, as well as the rise of the contemporary family regulation system. Both of these developments began as explicit means of racial control—and both allowed white adoptive parents to affirm and display their commitment to equality and integration through their willingness to adopt a non-white child. Ultimately, by the 1990s, they also led to the establishment of the idea of adoption as the ultimate form of "permanency" and the ideal solution for children in foster care.

1. The Indian Adoption Project

In 1958, the federal Bureau of Indian Affairs ("BIA") worked with the Child Welfare League of America—a national organization of child welfare and adoption agencies—to create the Indian Adoption Project ("IAP"), designed to place Native children from sixteen western states into homes with white families in the East.[69] As with the federal government's earlier efforts to remove Native children from their communities and place them into boarding schools that stripped them of their tribal languages and cultures and raised them to assimilate into the dominant white culture,[70] the IAP was founded on the principle that Native children were inherently better-off with white people than with their own families.[71] It also served the larger policy aims of the U.S. government during the period, "which sought to terminate the unique tribal status of many Indian communities, to undermine Indian claims to communal land and sovereignty, and to detribalize thousands of Indian people."[72]

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[68] *See id.* at 20–40 (explaining white women's place in the "family imperative" through "socially productive" childbirth).

[69] For a comprehensive history of the Indian Adoption Project and the women-led Native activist movement that led to the passage of the Indian Child Welfare Act, *see generally* MARGARET D. JACOBS, A GENERATION REMOVED: THE FOSTERING & ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD (2014) [hereinafter JACOBS, GENERATION REMOVED].

[70] For a history of Indian Boarding Schools in the United States, *see* LAURA BRIGGS, TAKING CHILDREN 45–75 (2020) [hereinafter BRIGGS, TAKING CHILDREN]; BRENDA J. CHILDS, BOARDING SCHOOL SEASONS: AMERICAN INDIAN FAMILIES, 1900–1940 (2000); MARGARET D. JACOBS, WHITE MOTHER TO A DARK RACE: SETTLER COLONIALISM, MATERNALISM, AND THE REMOVAL OF INDIGENOUS CHILDREN IN THE AMERICAN WEST AND AUSTRALIA, 1880–1940 (2009); CLIFFORD E. TRAFZER ET AL., BOARDING SCHOOL BLUES: REVISITING AMERICAN INDIAN EDUCATIONAL EXPERIENCES (2000).

[71] *See* Margaret D. Jacobs, *Remembering the "Forgotten Child": The American Indian Child Welfare Crisis of the 1960s and 1970s*, 37 AM. INDIAN Q. 136, 137, 139, 142, 144 (2013) [hereinafter Jacobs, *Remembering the "Forgotten Child*"]; *see also* JACOBS, GENERATION REMOVED, *supra* note 69, at 19, 26, 85–86.

[72] Jacobs, *Remembering the "Forgotten Child"*, *supra* note 71, at 139.

Administrators of the IAP facilitated the program by working to increase interest in the adoption of Native children among middle-class, white families and to increase the number of Native children placed for adoption by state agencies.[73] The administrators accomplished the former by framing the adoption of Native children by white families as a way of promoting equality and integration.[74] The IAP placed articles in both professional social work journals and popular magazines that "invoked longstanding images of the unfit Indian family as the basis of Indian poverty," and published a newsletter with photographs of Native children "available" to be adopted.[75] According to the IAP's depiction, "Indian children were denied equality not because their communities . . . still suffered from colonial policies on the part of the US government but because they lacked the opportunity to be adopted."[76]

The IAP provided that "opportunity" by "enlisting BIA and state social workers to convince or coerce Indian mothers to relinquish their infants at birth as well as to intervene in Indian families to remove older children who they deemed to be neglected."[77] It also "relied on the courts to place removed Indian children with non-Indian families and to terminate parental rights."[78] Social workers and judges refused to place removed children with their extended families and even removed children directly from the care of extended family members, placing them for adoption with white, middle-class parents who conformed to their image of the ideal nuclear family.[79] IAP administrators were so confident in their abilities to obtain children in this way that they "promised interested adoptive families that they could generate Indian children to be adopted."[80] As Joseph Reid, the executive director of the Child Welfare League of America during the time when it was operationalizing the IAP, put it, "In the event the BIA did not have an Indian child suitable to meet the needs of an interested family, we are sure that arrangements could be worked out with a few of the state welfare departments to find an appropriate child."[81]

2. The Adoption of Black Children and the Development of the Modern Family Regulation System

Black children had been largely excluded from both public and private child welfare and adoption services for decades, even when their families actively sought out such services: they were turned away from both nineteenth-century white child-saving organizations and the vast majority of post-war adoption agencies.[82] Black families were not permitted to adopt children through these agencies, while pregnant Black women

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[73] *See* JACOBS, GENERATION REMOVED, *supra* note 69, at 39–64; Jacobs, *Remembering the "Forgotten Child"*, *supra* note 71, at 140–41.

[74] *See* JACOBS, GENERATION REMOVED, *supra* note 69, at 48–49, 59–62; Jacobs, *Remembering the "Forgotten Child"*, *supra* note 71, at 142–44.

[75] JACOBS, GENERATION REMOVED, *supra* note 69, at 48.

[76] Jacobs, *Remembering the "Forgotten Child"*, *supra* note 71, at 143.

[77] *Id*. at 144.

[78] *Id.*

[79] *See id*. at 146–47.

[80] *Id*. at 150.

[81] *Id*. *See also* JACOBS, GENERATION REMOVED, *supra* note 69, at 26, 83–86.

[82] *See* BILLINGSLEY & GIOVANNONI, CHILDREN OF THE STORM, *supra* note 36, at 21–86.

who wanted to place their babies for adoption were denied the opportunity to do so on the ground that there were not any adoptive families available for them[83]—and then, when they kept and raised their children, depicted as the cause of all of the social and economic ills plaguing the Black community.[84]

In the mid-to-late 1950s, the National Urban League and others launched a series of initiatives aimed at increasing Black families' access to adoption.[85] While large numbers of Black families applied to adopt through the programs, they were referred to agencies where social workers continued to regularly reject them on grounds such as their residence in "overcrowded" neighborhoods, their age, their inability to produce marriage or birth certificates, their "inadequate" income, or the fact that both members of the couple worked outside the home.[86] Thus, while these initiatives did lead to an increase in the adoption of Black children, the increase was far smaller than initially hoped by the programs' creators. The initiatives also led to a small number of transracial adoptive placements, with white families who could not obtain a white baby for adoption accepting a Black child instead. Follow-up studies on these families later revealed that most continued to live in all-or-mostly-white neighborhoods and that many had not told their adopted children they were Black.[87]

Around the same time, in the early 1960s, as the Civil Rights Movement began to make inroads against de jure segregation, southern state governments began to take a more violent approach to the purported "epidemic" of single motherhood and illegitimacy in the Black community. Using concerns about the supposed immorality of single Black mothers and the "unsuitability" of their homes as a basis, states responded to the Civil Rights Movement's challenges to the structures of white supremacy first by removing thousands of Black families from the welfare rolls and then by removing their children for "neglect" and placing them in out-of-home care.[88] In less than a decade, the "number of [B]lack children in out-of-home care had skyrocketed"[89]—the result of concerted efforts by state officials to undermine Black resistance.[90]

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[83] *See id.* at 142, 144–45; BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 35. Sometimes it went even further than simply being turned away. According to historian Rickie Solinger, "the mandate for a [B]lack woman to keep her child was so strong and enforceable that when a [B]lack unwed mother tried to put her baby up for adoption . . . the court charged her with desertion." SOLINGER, WAKE UP, *supra* note 62, at 27.

[84] *See supra* note 67 and accompanying text.

[85] BILLINGSLEY & GIOVANNONI, CHILDREN OF THE STORM, *supra* note 36, at 139–73; BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 32–37.

[86] BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 30–35.

[87] *Id.* at 37.

[88] *See* BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 38–44; BRIGGS, TAKING CHILDREN, *supra* note 70, at 32–44; Claudia Lawrence-Webb, *African-American Children in the Modern Child Welfare System: A Legacy of the Flemming Rule*, in SERVING AFRICAN AMERICAN CHILDREN: CHILD WELFARE PERSPECTIVES 9, 9–30 (Sondra Jackson & Sheryl Brissett-Chapman eds., 1999) (discussing the implementation of the Flemming rule on home "suitability" requirement for public welfare).

[89] BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 56.

[90] *See id.* at 29–30, 38–44; BRIGGS, TAKING CHILDREN, *supra* note 70, at 32–44.

The massive increase in the numbers of Black children in state care was unquestionably the result of systemic over-removal—which was, in turn, the result of states' not-quite-unspoken policy of using child removal as a punitive means of asserting control over their Black residents. Yet, as "mounting evidence" demonstrated that Black children were overrepresented in foster care, "public debate centered on why these children were not being adopted," [91] rather than the need to decrease the number of children removed from their families in the first place or to increase the rate of reunification. More specifically, public debate centered on the need for more *transracial* adoption of Black children by white families.[92] In complete disregard of both the "long tradition of Black people accepting needy Black children into their homes,"[93] and the ongoing racial discrimination against prospective Black adoptive parents, concerns were raised that there were not enough suitable Black families "willing" to adopt Black children and that social workers were allowing these children to languish in foster care rather than let them be adopted by white families.[94]

This narrative not only reinforced racist ideas about Black families, but also provided a new and improved way to bolster white supremacy—one that echoed the rhetoric of the IAP regarding the best way to bring "equality" to Native children. This allowed even purportedly anti-racist white people to support transracial adoption, because it was done in the service of "integration" of Black children.[95] It also provided children for white adoptive parents who were no longer able to find "enough" white children for adoption, as changes in social norms for middle-class white woman and increased access to birth control and abortion brought the baby scoop era to a close.[96] As historian Laura Briggs writes:

> [There is] a certain bitter irony in the fact that over the long century after the end of slavery, few white people took any interest in the fate of [B]lack children on their own—at best, sponsoring a few segregated orphanage slots for them, at worst, consigning them to labor on the chain gang—but when, through the concerted efforts of [civil rights organizations], [B]lack babies began being made available for adoption, there was an unseemly scramble to make them

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[91] MICAL RAZ, ABUSIVE POLICIES: HOW THE AMERICAN CHILD WELFARE SYSTEM LOST ITS WAY 81 (2020).

[92] *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 165–72 (2002) [hereinafter ROBERTS, SHATTERED BONDS]; BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 46–48, 54–58 (discussing civil rights organizations' opposition to the systemic dynamics of transracial adoption of black children by white families).

[93] Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subjugation*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 88 (1993) [hereinafter Perry, *Transracial Adoption Controversy*]. *See also* BILLINGSLEY & GIOVANNONI, CHILDREN OF THE STORM, *supra* note 36.

[94] *See* Perry, *Transracial Adoption Controversy*, *supra* note 93, at 82–89 (taking apart the "[d]iscourse that promotes the myth that white families are needed to rescue Black children from foster care").

[95] *See id.* at 89–92, 94–95, 106.

[96] Of course, these families were generally only interested in healthy infants and young children, not the older ones—both Black and white—who made up the majority of children in foster care. Perry, *Transracial Adoption Controversy*, *supra* note 93, at 46–47, 86–87.

> available to white families rather than [B]lack families, notwithstanding the sometimes heroic efforts by [B]lack communities to support [B]lack orphans with few resources in the previous century."[97]

3. ASFA and Adoption as "Permanency"

Public discourse over the overrepresentation of Black children in foster care and the need for an increase in transracial adoption culminated in a series of laws, beginning with the Multi-Ethnic Placement Act ("MEPA") in 1994.[98] MEPA was the result of "aggressive lobbying by supporters of transracial adoption," who depicted transracial adoption as "a critical step in increasing the numbers of adoptions of Black children" and "argued that race-matching policies forced Black children to languish in foster care."[99] MEPA prohibited agencies from refusing or delaying foster or adoptive placements "solely" because of a child's or foster/adoptive parent's race, color, or national origin.[100] The Interethnic Placement Provisions ("IEP") of the Adoption Promotion and Stability Act, enacted two years later, strengthened and clarified MEPA's "anti-discrimination" provisions by, among other things, removing the word "solely" from the statute.[101] Pursuant to these amendments, agencies have been found in violation of the statute for "[r]equir[ing] parents who adopted transracially to prepare a plan for addressing the child's cultural identity" or "to evaluate the racial composition of the neighborhood in which they lived."[102]

Notably—and unsurprisingly—discussion of the need to eliminate racial consideration in adoption "focuse[d] on making it easier for white people to adopt Black children."[103] As Dorothy Roberts notes, advocates for transracial adoption "don't mention the possibility of Blacks adopting white children" or "acknowledge that most race-matching in adoption involves matching white adoptive parents with white children," so even as "the end of race-matching was defended as serving the interests of Black foster children, it has helped to create a system that protects the rights of white adults to have access to the children of their choice."[104] In fact, it did even more than that. MEPA-IEP and the rhetoric around it—framing transracial adoption as the ideal way of improving the prospects of Black children—allowed white prospective adoptive parents to have their choice

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[97] BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 48.

[98] Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 551-554, 108 Stat. 4056, 4056-57 (codified as amended at 42 U.S.C. § 1996b and 42 U.S.C. § 5115a (1994)).

[99] ROBERTS, SHATTERED BONDS, *supra* note 92, at 166. *See also* BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 115–21.

[100] SUSAN LIVINGSTON SMITH ET AL., EVAN B. DONALDSON ADOPTION INST., FINDING FAMILIES FOR AFRICAN-AMERICAN CHILDREN: THE ROLE OF RACE & LAW IN ADOPTION FROM FOSTER CARE 4, 15 (May 2008) [hereinafter LIVINGSTON SMITH ET AL., FINDING FAMILIES].

[101] Adoption Promotion and Stability Act of 1996, in the Small Business Protection Act of 1996, Pub. L. No. 104-188, 1808I, 110 Stat. 1755, 1904 (codified as 42 U.S.C. § 1996b). For a discussion of the passage of MEPA and the IEPs amending it, see BRIGGS, SOMEBODY'S CHILDREN, *supra* note 7, at 115–21; LIVINGSTON SMITH ET AL., FINDING FAMILIES, *supra* note 100, at 15–16.

[102] LIVINGSTON SMITH ET AL., FINDING FAMILIES, *supra* note 100, at 36.

[103] ROBERTS, SHATTERED BONDS, *supra* note 92, at 167.

[104] *Id.*

of children to adopt, while also allowing those who chose to adopt transracially to understand and present this choice as evidence of their commitment to racial equality.

In 1997, just a year after the IEP amendments to MEPA, President Bill Clinton signed the Adoption and Safe Families Act ("ASFA") into law.[105] Activists and scholars have called attention to the connections between ASFA and two other cornerstones of the Clinton presidency: the 1994 crime bill and the Personal Responsibility and Work Opportunity Reconciliation Act ("PRWORA"), which "ended welfare as we know it."[106] They are right to do so. ASFA, the crime bill, and PRWORA all constituted violent attacks on low-income communities and communities of color, attacks that were bolstered by the same racist rhetoric, with supporters framing the laws as necessary to address an epidemic of drug addiction, violent crime, single motherhood, child abuse and abandonment, welfare fraud, and general dysfunction in urban—predominantly Black and brown—communities.[107]

Yet ASFA was also closely connected to MEPA-IEP. As ASFA's primary author, the late child welfare advocate Richard Gelles, later admitted, the Act was originally "not really an adoption bill at all."[108] Rather, ASFA was a "safe families bill,"[109] meant to limit family preservation and reunification, facilitating the quick termination of parental rights on the assumption that the disproportionately Black and brown parents of the thousands of children in foster care at the time were inherently unfit and simply unable to care for them, no matter what services they were offered.[110] So long as these children were protected against the risk that they might be returned to their parents, what happened to them afterwards was not the central concern—as indicated by House Speaker Newt Gingrich's proposal that the United States bring back

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[105] Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2155 (1997). For a discussion of the rhetoric surrounding the passage and implementation of ASFA, *see generally* Naomi Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999); Dorothy E. Roberts, *Poverty, Race, and New Directions*, 1 WASH. U. J.L. & POL'Y 63 (1999); *see also* ROBERTS, SHATTERED BONDS, *supra* note 92, at 104–133. For a discussion of the implementation of ASFA that focuses on its impact on child welfare agencies and outcomes for families, *see* Olivia Golden & Jennifer Macomber, Framework Paper, *The Adoption and Safe Families Act (ASFA), in* INTENTIONS AND RESULTS: A LOOK BACK AT THE ADOPTION AND SAFE FAMILIES ACT 8–34 (Ctr. for the Study of Soc. Pol'y, Urban Inst., Paper Series, 2009).

[106] *See, e.g.*, Martin Guggenheim, *How Racial Politics Led Directly to the Enactment of the Adoption and Safe Families Act of 1997*, 11 COLUM. J. RACE & L. 711, 719–22 (2021); Dorothy Roberts, *The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting*, 5 STAN. J. C.R. & C.L. 191, 193 (2009); Shanta Trivedi, *Adoption and Safe Families Act is the 'Crime Bill' of Child Welfare*, IMPRINT (Jan. 28, 2021), https://imprintnews.org/adoption/adoption-safe-families-act-crime-bill-child-welfare/51283 [https://perma.cc/R8AH-3EYR].

[107] *See, e.g.*, Guggenheim, *supra* note 106, at 721–28. For a contemporaneous example of this rhetoric, *see* Richard Cohen, *Orphanages: Giving Gingrich the Dickens*, WASH. POST (Dec. 6, 1994), https://www.washingtonpost.com/archive/opinions/1994/12/06/orphanages-giving-gingrich-the-dickens/c1d4b747-aff0-4036-9a69-fb214eba022b/ [https://perma.cc/79CQ-K4F8].

[108] Richard Wexler, *Take the Child and Run: Tales from the Age of ASFA*, 36 NEW ENG. L. REV. 129, 146 (2001).

[109] *Id.*

[110] *See* ROBERTS, SHATTERED BONDS, *supra* note 92, at 104–21, 167–68.

orphanages.[111] But this approach was not necessarily widely palatable, as indicated by the *reaction* to Gingrich's proposal.[112] Adoption, however, was "a very popular concept in the country" at the time[113]—particularly transracial adoption. Thus, in order to "santiz[e]" the bill and "make it more appealing to a broader group of people,"[114] ASFA's proponents transformed it into an adoption bill, adding a variety of measures intended to promote adoption, and connecting it rhetorically to MEPA-IEP and the push for increased transracial adoption of Black children.[115]

In this form, ASFA provided the final element of the contemporary idea of adoption: adoption as the ultimate form of "permanency" for children in foster care. Taking the conception of adoption as a rebirth to new parents—a conception fully accepted during the baby scoop era, when millions of *infants* were first being placed for adoption—and applying it explicitly to older children in foster care, the proponents of ASFA maintained that limits on reunification services, for the speedy termination of parental rights, were necessary so that children in foster care could start their lives anew, in their "forever" homes, with "better" parents.[116] The Act established bonus payments to states that placed over a certain baseline number of children for adoption each year. In order to realize the adoption-as-rebirth ideal for these children, ASFA explicitly required that other potential options for children who were not being reunified with their parents—such as legal guardianship, third-party custody, or long-term foster care—be treated as second-choice alternatives.[117]

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[111] *See, e.g.*, Charles Doersch, *Bring Back the Orphanage?*, N.Y. TIMES UPFRONT 10–11 (Mar. 10, 1995) (reporting on then-Speaker of the House Newt Gingrich's speech proposing to cut welfare payments to poor single mothers and set up orphanages to care for "abandoned" children).

[112] *See, e.g.*, Editorial, *Orphanages Are No Solution*, N.Y. TIMES (Dec. 12, 1994), https://www.nytimes.com/1994/12/12/opinion/orphanages-are-no-solution.html [https://perma.cc/8XQQ-MAPC]; *The Fight Over Orphanages*, NEWSWEEK (Jan. 15, 1995), https://www. newsweek.com/fight-over-orphanages-181934 [https://perma.cc/35QB-8MTM] (printing Hillary Clinton's response); Jack Anderson & Michael Binstein, *Gingrich's Ill-Thought Scheme for Orphanages is Scaring Kids*, DESERET NEWS (Dec. 27, 1994), https://www.deseret.com/1994/12/27/19150152/gingrich-s-ill-thought-scheme-for-orphanages-is-scaring-kids [https://perma.cc/N5HV-V2K4]; Anthony A. Cupaiuolo, *Gingrich's Orphanages Don't Come Cheap*, N.Y. TIMES (Dec. 8, 1994), https://www.nytimes.com/1994/12/08/opinion/l-gingrich-s-orphanages-don-t-come-cheap-049697.html [https://perma.cc/TM3K-PBW5]; Vanessa Gallman, *Republicans, States Show Little Interest in Orphanage Plan*, SEATTLE TIMES (Dec. 11, 1994), https://archive.seattletimes.com/archive/?date=19941211&slug=1946617 [https://perma.cc/5GNG-GLJ7]. *But see, e.g.*, Richard McKenzie, *Gingrich Was Right About Orphanages*, L.A. TIMES (Dec. 24, 1998), https://www.latimes.com/archives/la-xpm-1998-dec-24-me-57202-story.html [https://perma.cc/Y268-JNG4].

[113] Wexler, *supra* note 108, at 146.

[114] *Id.*

[115] *See* ROBERTS, SHATTERED BONDS, *supra* note 92, at 165–72.

[116] *See, e.g.*, Guggenheim, *supra* note 106, at 722–28.

[117] *See, e.g.*, 42 U.S.C. § 673b(d)(1). For a discussion of the subordination of other permanency options to adoption in the ASFA and subsequent federal child welfare legislation, *see generally* Gupta-Kagan, *supra* note 9. The law has since been amended to provide bonuses for legal guardianships as well, although in some cases these bonuses are lower than those for adoption. *See* Kathleen Creamer & Chris Gottlieb, *If ASFA Can't Be Repealed, Here's How To At Least Make It Better*, IMPRINT (Feb. 9, 2021), https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490 [https://perma.cc/9NH4-SH2P].

E. The Present Day

If you go online, you can find photographs and biographies of children available for adoption from foster care across the country; every state and the federal government run at least one of these websites, which seek to match families looking to adopt with children whose parents' rights have been terminated.[118] These children are variously described as "freed" for adoption—as if their legal ties to their families of origin were something they needed to escape—and waiting for their "forever" homes—as if a vast majority of them did not have siblings, extended family, and, most importantly, parents who fought for years to bring them back home.

Similarly, in the context of private adoptions, a quick search will uncover dozens of regularly-updated lists of "situations" posted by adoption agencies and facilitators around the country—primarily describing babies who have not yet been born and whose parents therefore have not yet actually placed them for adoption.[119] To get more details, prospective adoptive parents have to pay a fee to the facilitator in question or sign up for a paid subscription to their website.[120] "Second Chance Adoptions," run by a private adoption agency in Utah, posts photographs of and detailed information about older children whose adoptions have been "disrupted"—that is, whose adoptive parents have decided *not* to provide them with "forever" homes—and whom the agency works to match with new adoptive parents.[121]

These listings—disturbing in and of themselves—are disconcertingly reminiscent of the newspaper announcements posted by child-savers in advance of the orphan train's arrival in each new town,[122] the advertisements placed by Georgia Tann—"Yours for the Asking!"[123]—and the newsletters published by the administrators of the Indian Adoption Project featuring pictures of children "willing to live in any state

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[118] The federal government's site is located at ADOPTUSKIDS, https://www.adoptuskids.org [https://perma.cc/25NQ-PFAG]. The federal site compiles information about children from across the country and also provides links to each of the individual state sites at *State Photolists*, ADOPTUSKIDS, https://www.adoptuskids.org/meet-the-children/search-for-children/state-photolists [https://perma.cc/LQY8-3QD4].

[119] *See, e.g.*, *Adoption Situations*, ACT OF LOVE ADOPTIONS, https://aactoflove adoptions.com/adoption-situations/ [https://perma.cc/TLY7-NYEV]; PREMIER ADOPTION, https://www.premieradoption.org/adoption-situations [https://perma.cc/28FA-Z359]; *Available Situations*, ADOPTION FOR MY CHILD, https://www.adoptionformychild.com/ available-situations/ [https://perma.cc/5DL7-4UQX]; *Birth Parents Seeking Families*, LIFETIME ADOPTION, https://lifetimeadoption.com/adoptive-families/birthparents-seeking-families/ [https://perma.cc/E2QU-7EB9].

[120] *See, e.g.*, *A Plan for Every Family*, ADOPTION FOR MY CHILD, https://www. adoptionformychild.com/access-denied/ [https://perma.cc/L2ES-4PK9].

[121] *See, e.g.*, *Adoption Dissolution*, WASATCH INT'L ADOPTION, https:// wiaa.org/adoption-dissolution/ [https://perma.cc/G7A8-7K98]; *Waiting Children*, WASATCH INT'L ADOPTION, https://wiaa.org/2nd-chance-adoption/waiting-children/ [https://perma.cc/ UB4S-VCMT]. These children are often as young as six or seven years old, and most were originally adopted internationally or out of foster care.

[122] GORDON, ORPHAN ABDUCTION, *supra* note 32, at 10.

[123] *See* BISANTZ RAYMOND, *supra* note 46, at 130 (photographs of advertisements that ran in local papers). *See also supra* note 54 and accompanying text.

that could offer them parents."[124] They also highlight a number of important continuities between adoption's past and its present.

First, adoption always has been and still is seen as a way of "saving" children from less-than-ideal circumstances, parents, and communities.[125] At its worst, this child-saving mentality reflects the exact same racism, classism, and moral judgment displayed by the original child-savers and their progeny—evangelical Christians adopting from overseas in order to spread the gospel,[126] or adoption advocates like Elizabeth Bartholet, who explicitly argue that children in foster care should be quickly stripped of their parents and placed for adoption by middle-class white families because adoption will improve the children's material circumstances and give them the ability to move more fluidly in majority-white spaces.[127]

At its best, it displays a lack of imagination. Even many of those who know enough to oppose adoption from the family regulation system, because of the harms that the system causes, accept private adoption on the assumption that the parents of children placed for private adoption did not want to raise them or chose to give them a "better life"— without thinking about the economic and social conditions that led to this decision, or about the decades of social messaging about ostensibly "good" and "bad" parenting that made these parents believe their children would have a better life with parents who were married, more stably employed, of a different race, or who had more money. And many of those who oppose private adoption—including some birth mothers and adult adoptees—nevertheless think adoption from the family regulation system is acceptable because children in foster care need permanent homes.

Second, adoption is a business. From the very beginning, adoption has been deeply intertwined with money and power, specifically the respect and authority that "adoption professionals" obtain by their role in the process. Financial status indisputably plays a role in which children are removed by the state or placed for adoption by their parents, and those adopting are nearly always financially better-off than those losing their children to adoption. Adoption regularly moves children from marginalized communities to privileged ones. It also generates billions of dollars in fees

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[124] JACOBS, GENERATION REMOVED, *supra* note 69, at 48.

[125] *See, e.g.*, David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 606 (2009) ("The law takes underclass families to be inferior, and '[u]nder nuclear family-based adoption policy, the law terminates the birth parents' rights before it engrafts parental rights in the adoptive parents.' When children then move to bourgeois nuclear families, the law assumes that this move must be good for the children.") (quoting Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1674 (1995)).

[126] *See, e.g.,* JOYCE, CHILD CATCHERS, *supra* note 7, at 39–74; Kathryn Joyce, *The Evangelical Adoption Crusade*, NATION (May 9, 2011), https://web.archive.org/web/20201022000344/https://www.thenation.com/article/archive/evangelical-adoption-crusade/; Kathryn Joyce, *The Evangelical Orphan Boom*, N.Y. TIMES (Sept. 21, 2013), https://www.nytimes.com/2013/09/22/opinion/sunday/the-evangelical-orphan-boom.html [https://perma.cc/G2WF-2Y2W]; Kathryn Joyce, *Orphan Fever: The Evangelical Movement's Adoption Obsession*, MOTHER JONES (May/June 2013), https://web.archive.org/web/20220614222937/https://www.motherjones.com/politics/2013/04/christian-evangelical-adoption-liberia/.

[127] *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1217–23 (1991).

from prospective adoptive parents (in private adoptions)[128] and reimbursements and bonus payments from the government (in adoptions from foster care).[129] And while many adoption and foster care agencies are non-profit, this money is essential to these agencies' continued existence and the jobs of the people who work there—jobs that can be extremely well-paying for those at the higher levels of these organizations and that bring respect and admiration to those who do them.[130]

Third, adoption commodifies children and the separation of children from their parents. This can be seen all the way from Georgia Tann to her most obvious descendants, the independent adoption "facilitators" and for-profit agencies that charge prospective adoptive parents tens of thousands of dollars for their adoption "services"[131] and run advertising campaigns encouraging pregnant women to make the "brave" and "selfless" decision to place their babies for adoption.[132] It can also be seen in the efforts of IAP administrators to "generate" Native children for adoption by white liberals who believed that they would be saving these children from a life of poverty and neglect—and whose choice to adopt served as visible evidence of their devotion to equality and integration. The

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[128] *See, e.g.*, Tik Root, *The Baby Brokers*: *Inside America's Murky Private Adoption Industry*, TIME (June 3, 2021), https://time.com/6051811/private-adoption-america/ [https://perma.cc/CVJ4-ATM7]; Jessica Stites, *The Adoption-Industrial Complex*, IN THESE TIMES (Nov. 4, 2013), https://inthesetimes.com/article/the-adoption-industrial-complex [https://perma.cc/5NAU-JDUU]. According to the Children's Bureau of the U.S. Department of Health and Human Services, in 2016, the cost of a private agency adoption ranged from $20,000 to $40,000, plus additional expenses for legal and homestudy fees. CHILD. BUREUA, U.S. DEP'T OF HEALTH & HUM. SERVS., PLANNING FOR ADOPTION: KNOWING THE COSTS AND RESOURCES 3 (2016), https://www.childwelfare.gov/pubpdfs/s_costs.pdf [https://perma.cc/5CD5-P8Y6].

[129] The Children's Bureau has also reported that between 1998 and 2019, qualifying states and the District of Columbia earned $815,773,875 in adoption incentive awards. CHILD. BUREAU, U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION AND LEGAL GUARDIANSHIP INCENTIVE PAYMENT PROGRAM – EARNING HISTORY BY STATE: FY 1998–FY 2019 (Sept. 2020), https://www.acf.hhs.gov/sites/default/files/documents/cb/adoption_incentives_earning_history_2020.pdf [https://perma.cc/LH7S-XDT9]. *See also* Elizabeth Brico, *The Government Spends 10 Times More on Foster Care and Adoption Than Reuniting Families*, TALK POVERTY (Aug. 13, 2019), https://talkpoverty.org/2019/08/23/government-more-foster-adoption-reuniting/ [https://perma.cc/X5QP-SMEW].

[130] For example, according to public tax filings, the executive director of one New York City foster care and adoption agency makes well over $500,000 per year. *Jewish Child Care Association of New York*, PROPUBLICA: NONPROFIT EXPLORER, https://projects.propublica.org/nonprofits/organizations/131624060/202001969349305755/full [https://perma.cc/FGV2-MUZ7]. Another makes a little over $400,000. *The Childrens Aid Society*, PROPUBLICA: NONPROFIT EXPLORER, https://projects.propublica.org/nonprofits/organizations/135562191/201413149349306068/IRS990 [https://perma.cc/JU2W-5RE8].

[131] There has been extensive reporting on the independent adoption "services" industry. *See* Khazan, *supra* note 11; Root, *supra* note 128; Sheelah Kolhatkar, *How an Adoption Broker Cashed in on Prospective Parents' Dreams*, NEW YORKER (Oct. 18, 2021), https://www.newyorker.com/magazine/2021/10/25/how-an-adoption-broker-cashed-in-on-prospective-parents-dreams [https://perma.cc/SA7U-HUFC].

[132] *See, e.g.*, Claudia Corrigan D'Arcy, *BraveLove.Org – Another Front for Adoption Profits*, MUSINGS OF THE LAME BLOG: ADOPTION & BIRTH MOTHERS (Nov. 9, 2012), https://www.adoptionbirthmothers.com/bravelove-org-another-front-for-adoption-profits/ [https://perma.cc/JA2B-9AW5] (exposing a private investment group behind a domestic adoption agency that promoted "want[ing] to witness an increase in domestic adoptions" and "conveying how courageous it is for a woman to place her child"); Kathryn Joyce, *Shotgun Adoption*, *supra* note 11 (describing Bethany Christian Services' "profuse praise of [mothers'] 'selflessness'").

fundamentally violent nature of the transaction at the heart of adoption is impossible to escape even when prospective adoptive parents are going into it with the most seemingly straightforward motive: simply wanting to become a parent. When a prospective adoptive parent is waiting to be "matched" with a baby or to receive a pre-adoptive foster care placement, what they are waiting for is the separation of a child from their parents—for a mother or father to decide that they are unable to parent, be coerced into that conclusion, or have that choice taken from them by a court.

Fourth, while ASFA's proponents may have succeeded in framing adoption as the ultimate form of "permanency" for children in foster care, adoption does not necessarily create a permanent familial bond between the adoptee and their new parents. Not all of the households that took in children from the orphan train did so in order to add another member to their family; many were seeking a farmhand or a household servant.[133] More than one of Georgia Tann's clients sent their adopted children back to her after deciding that they were not as talented or intellectually gifted as the clients were led to believe.[134] And even today, many adoptive parents do not view themselves as having the same obligation to their children as biological parents do. This is reflected by the number of "disrupted" and "broken" adoptions;[135] the number of adoptees in therapeutic boarding schools, wilderness programs, and other institutional settings;[136] and the

[133] *See supra* note 41 and accompanying text.

[134] BISANTZ RAYMOND, BABY THIEF, *supra* note 46, at 158–59.

[135] *See, e.g.*, *Myka Stauffer: Backlash After Youtubers Give Up Adopted Son*, BBC NEWS (May 28, 2020), https://www.bbc.com/news/world-us-canada-52839792 [https://perma.cc/2ZPJ-A5Y9]; Kathryn Joyce, *Foster Families Keep Getting Child Welfare Payments Despite Broken Adoptions*, N.Y. DAILY NEWS (Nov. 20, 2017), https://www.nydailynews.com/new-york/foster-families-child-welfare-money-broken-adoptions-article-1.3645466; Kathryn Joyce, *The Worst Adoption Therapy in the World*, DAILY BEAST (Mar. 14, 2015), https://www.thedailybeast.com/the-worst-adoption-therapy-in-the-world [https://perma.cc/8XW6-NW5T]; Diane Mapes, *It Takes More Than Love: What Happens When Adoption Fails*, TODAY (Aug. 1, 2012), https://www.today.com/parents/it-takes-more-love-what-happens-when-adoption-fails-918076 [https://perma.cc/2N69-LFKH]; Jenn Morson, *When Families Un-Adopt a Child*, ATLANTIC (Nov. 16, 2018), https://www.theatlantic.com/family/archive/2018/11/children-who-have-second-adoptions/575902/ [https://perma.cc/8K4Y-WHLZ]; Anita Tedaldi, *I Gave Back My Adopted Baby*, GUARDIAN (Nov. 20, 2009), https://web.archive.org/web/20150804003909/https://www.theguardian.com/lifeandstyle/2009/nov/21/adoption-anita-tedaldi . Statistics on the number of adoptive parents who give up their adopted children—known as "broken," "failed," or "dissolved" adoptions—are difficult to track, given the changing of adoptees' names and the sealing of their records. Dawn J. Post & Brian Zimmerman, *The Revolving Doors of Family Court: Confronting Broken Adoptions*, 40 CAP. U. L. REV. 437, 441 (2012). Estimates range from one to ten percent of finalized adoptions nationwide. *Id.* at 443; *see also* Emily Matchar, *Broken Adoptions: When Parents "Re-Home" Adopted Children*, TIME (Sept. 20, 2013), https://ideas.time.com/2013/09/20/broken-adoptions-when-parents-re-home-adopted-children/ [https://perma.cc/HP56-GWWK] (citing statistics from the federal Children's Bureau). A large percentage of youth voluntarily placed into foster care in New York City are the result of broken adoptions. Post & Zimmerman, *supra* note 135, at 452–53.

[136] For an exploration of the over-diagnosis of "reactive attachment disorder" among adoptees and their over-placement in therapeutic boarding schools, *see generally* RACHEL STRYKER, THE ROAD TO EVERGREEN: ADOPTION, ATTACHMENT THERAPY, AND THE PROMISE OF FAMILY (2010).

multiple websites dedicated to assisting adoptive parents who want to informally or formally "re-home" their adopted children.[137]

III. THE HARMS OF ADOPTION

As other pieces in this Symposium have addressed, the surveillance imposed on families by the family regulation system and the removal of children into foster care are harmful in and of themselves.[138] But adoption causes additional harm, meriting a separate critical consideration. Under the model developed in the United States since the mid-nineteenth century, described in Part II, adoption—unlike other potential means of resolving a family regulation proceeding—completely severs the link between the parent and the child, substituting the child's adoptive parents in every way for their birth parents. The reality stemming from this model is starkly illustrated by the profiles of children posted on the "Second Chance Adoptions" website, nearly all of whom must have at least some living biological family members. Some of these children were adopted just a few years before their adoptive parents decided to list them for "re-adoption," and many were adopted domestically.[139] Yet instead of attempting to reunite these children with their parents or extended family—a solution that might address much of the trauma reported in their profiles—their adoptive parents and the agency are choosing instead to find them yet another "forever" home. It is as if their actual parents—parents who may have fought against the termination of their rights, or who may have placed them for adoption thinking that adoption would provide a "better life"—no longer exist at all.

This severance has an obvious impact on the individual children and families involved. Both the adoptee and their birth family experience the grief and trauma of losing each other, and the adoptee endures feelings

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[137] *See, e.g.*, CBC News, Fifth Estate, *A Boy Named Moses*, YOUTUBE (NOV. 12, 2014), https://www.youtube.com/watch?v=4RsBCw11Rdo (reporting on unregulated "rehoming"); Megan Twohey, *Americans Use the Internet to Abandon Children Adopted From Overseas*, REUTERS (Sept. 9, 2013), https://www.reuters.com/investigates/adoption/#article/part1 [https://perma.cc/TBS9-725U] (first part of a series reporting on an investigation into the "underground market for adopted children")); Megan Twohey, *In a Shadowy Network, a Pedophile Takes Home a "Fun Boy,"* REUTERS (Sept. 9, 2013), https://www.reuters.com/investigates/adoption/#article/part2 (second part); Megan Twohey, *With Blind Trust and Good Intentions, Amateurs Broker Children Online*, REUTERS (Sept. 10, 2013), https://www.reuters.com/investigates/adoption/#article/part3 (third part); Megan Twohey, *Despite Grave Dangers, Government Allows Internet Forums to Go Unchecked*, REUTERS (Sept. 10, 2013), https://www.reuters.com/investigates/adoption/#article/part4 (fourth part); Megan Twohey, *Orphaned in Russia, Brought to America, and then Abandoned Time and Again*, REUTERS (Sept. 11, 2013), https://www.reuters.com/investigates/adoption/#article/part5 (fifth part).

[138] *See, e.g.*, Charlotte Baughman, Tehra Coles, Jennifer Feinberg, & Hope Newton, *The Surveillance Tentacles of the Child Welfare System*, 11 COLUM. J. RACE & L. 501 (2021); Angela Olivia Burton & Angeline Montauban, *Toward Community Control of Child Welfare Funding: Repeal the Child Abuse Prevention and Treatment Act and Delink Child Protection from Family Well-Being*, 11 COLUM. J. RACE & L. 639 (2021); Clara Presler, *Mutual Deference Between Hospitals and Courts: How Mandated Reporting from Medical Providers Harms Families*, 11 COLUM. J. RACE & L. 733 (2021).

[139] The profiles on the Second Chance Adoptions website change regularly, making it difficult to provide citations to examples that would be accessible to future readers of this Essay. It also seems inappropriate to link to the individual profiles of the children, whose private information presumably has been posted on the website by their adoptive parents without their knowledge and consent.

of abandonment, confusion about their identity and background, and loss of the "mirroring" that most children growing up with their biological relatives take for granted—the affirmation of seeing one's own features and personality traits reflected in one's parents, siblings, and extended family.[140] These losses take on a precise character for children adopted out of foster care, who almost always had a relationship with their parents prior to the termination of their parents' rights and the process of adoption. The losses are further magnified for transracial adoptees, who face the potential loss of culture, language, and necessary survival skills for growing up in a racist society.[141] Adult adoptees have been clear that their feelings of loss are not necessarily contingent upon or connected to their feelings about their adoptive parents—they can love their adoptive families *and* continue to be affected by the losses from being adopted.[142]

Adoption also has an impact on adoptees' wider communities. As the child-savers, the architects of the Indian Adoption Project, and the southern politicians whose strategy of massive resistance to desegregation led to the creation of the modern-day foster care system were aware, taking a community's children takes away its future. "Stripping people of their children attempts to deny them the opportunity to participate in the progression of generations into the future—to interrupt the passing down of languages, ways of being, forms of knowledge, foods, culture."[143]

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[140] *See, e.g.*, Reagan Curtis & Frances Pearson, *Contact with Birth Parents: Differential Psychological Adjustment for Adults Adopted as Infants*, 10 J. SOC. WORK 347, 348 (2010) (pointing to literature establishing that "[s]eparation from birth parents is the root of many of the psychological issues that persist into adulthood for individuals who were adopted," including feelings of "loss and grief" that are "rarely completely resolved and may intensify during milestone events," as well as difficulties with identity development, low self-esteem, and feelings of rejection); Susan M. Henney et al., *Evolution and Resolution: Birthmothers' Experience of Grief and Loss at Different Levels of Adoption Openness*, 24 J. SOC. & PERS. RELATIONSHIPS 875, 882 (2007) ("Twelve to 20 years following the placement of the adopted child, most birthmothers in this [study] continued to experience at least some feelings of grief and loss related to the adoption.").

Many adoptees and parents whose children were adopted have written about the short- and long-term effects of these experiences. *See, e.g.*, Elizabeth Brico, *"The Civil Death Penalty"—My Motherhood is Legally Terminated*, FILTER (July 13, 2020), https://filtermag.org/motherhood-legally-terminated/ [https://perma.cc/8KSE-PEWW]; Cathy Heslin, *We Were All Good Adoptees . . . Once*, LOST DAUGHTERS (July 23, 2015), http://www.thelostdaughters.com/2015/07/we-were-all-good-adoptees-once.html [https://perma.cc/H29J-JBGN]; Liz Latty, *What We Lost: Undoing the Fairy Tale Narrative of Adoption*, RUMPUS (Nov. 16, 2017), https://therumpus.net/2016/11/forced-into-fairy-tales-media-myths-and-adoption-fallacies/ [https://perma.cc/XB8Y-U9S8]; Deborah McCabe, *Signing Away My Son: I Had to Give Up My Rights Because I'm Incarcerated*, RISE (May 19, 2016), https://www.risemagazine.org/2016/05/signing-away-my-son/ [https://perma.cc/J39S-AB3H].

[141] *See, e.g.*, Carroll, *supra* note 10; * medina, *Searching for Connection, Identity, and Community as a Honduran-Born Adoptee*, CATAPULT (Aug. 8, 2019), https://catapult.co/stories/adoption-searching-for-identity-and-community-as-a-honduran-american-adoptee-essay-by-medina [https://perma.cc/3BGN-J8HL]; Asher D. Isaacs, *Interracial Adoption: Permanent Placement and Racial Identity — An Adoptee's Perspective*, 14 NAT'L BLACK L.J. 126 (1994); SANDRA PATTON-IMANI, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 62–98 (2000); Perry, *Transracial Adoption Controversy*, *supra* note 93, at 62–65.

[142] *See, e.g.*, Nicole Chung, *People Want to Hear That I'm Happy I Was Adopted. It's Not That Simple*, BUZZFEED NEWS (Oct. 1, 2018), https://www.buzzfeednews.com/article/nicolechung/being-korean-and-adopted-by-white-parents-nicole-chung [https://perma.cc/X45A-CUVA].

[143] BRIGGS, TAKING CHILDREN, *supra* note 70, at 8.

The fact that adoption is still viewed as a form of child-saving only increases both the individual and community-wide harms of the practice. On an individual level, it creates an assumption that adoptees should be "grateful," that they should not feel loss or grief as a result of not having been raised as part of their biological families, in the communities into which they were born—and that if they do grieve, they should never express it. This message is ever-present in society even when individual adoptive parents do not reinforce it.[144] The expectation of gratitude is, of course, founded on the assumption that adoptees' lives are necessarily "better" because they were adopted, not just different—and certainly not worse.[145]

On a community level, the message of adoption as child-saving reinforces long-standing, race-and-class-based notions about which communities and families matter—which parents are better, which childhoods are the right ones, and who deserves (or does not deserve) to be a parent. Adoption disproportionately moves children from poor communities and communities of color into the homes of richer, whiter people; that this is supposedly done in the service of the children's best interests both confirms existing prejudices against the families and communities into which those children were born and "legitimizes the[] parenthood [of adoptive parents] over that of the poorer women who birthed the[] children" adopted by them.[146]

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[144] A number of adoptees have written about the pressure to be "grateful." *See, e.g.*, Ana Maria Guay, *"Suffer the Little Children": Adoption and Toxic Gratitude*, THE TOAST (Nov. 19, 2015), https://the-toast.net/2015/11/19/adoption-and-toxic-gratitude/ [https://perma.cc/7EQL-T3VZ]; Grace Newton, *On Gratitude and Adoption*, WORDPRESS: RED THREAD BROKEN (May 1, 2019), https://redthreadbroken.wordpress.com/2019/05/01/on-gratitude-and-adoption/ [https://perma.cc/6BTN-JZT7]; Matthew Salesses, *"I Never Asked for This": On Adoption, Luck, and Thankfulness*, THE TOAST (Nov. 25, 2015), https://the-toast.net/2015/11/25/adoption-luck-thankfulness/#idc-container [https://perma.cc/V799-LMHB]; Amanda Woolston, *Who Is Entitled to My Gratitude?*, DECLASSIFIED ADOPTEE (Feb. 13, 2013), http://www.declassifiedadoptee.com/2013/02/who-is-entitled-to-my-gratitude.html [https://perma.cc/L84B-KWPZ].

[145] One specific variant of this expectation of gratitude—namely, the suggestion that adoptees must be grateful that they were adopted rather than aborted—has become a topic of conversation in the national media this year, following Supreme Court Justice Amy Coney Barrett's comment at oral argument that safe-haven laws allowing women to surrender their newborn babies with no questions asked would "take care of" advocates' concerns about limitations on access to abortion. *See, e.g.*, Irin Carmon, *Amy Coney Barrett's Adoption Myths – "They're Co-opting Our Lives and Our Stories."*, N.Y. MAG.: INTELLIGENCER (Dec. 3, 2021), https://web.archive.org/web/20211203152935/https://nymag.com/intelligencer/2021/12/amy-coney-barrett-adoption-myths.html?utm_source=tw .

[146] JOYCE, CHILD CATCHERS, *supra* note 7, at 95. *See also, e.g.*, Appell, *Controlling for Kin*, *supra* note 23, at 89–90 (detailing adoption's consistent function as a "mechanism to regulate race, and women's sexuality and reproductive choices, imposing or prohibiting the right to place a child for adoption depending on the mother's race and affording pregnant girls more freedom to relinquish their babies for adoption than to obtain an abortion"); Dorothy E. Roberts, *Why Baby Market' Aren't Free*, 7 U.C. IRVINE L. REV. 611, 612 (2017) (arguing that "baby markets aren't free" because they "operate within a context of interlocking systems of race, gender, and disability oppression" and in turn inherently "impose tangible and intangible costs on parents and children who are devalued and marginalized by those systems"). *Cf.* SOLINGER, BEGGARS AND CHOOSERS, *supra* note 10, at 7 (arguing that, in the "era of choice," as "babies—and pregnancy itself—became ever more commodified, some women were defined as having a legitimate relationship to babies and

The *idea* of adoption causes additional harms. Specifically, the concept of adoption as a complete "rebirth" of the adoptee that is inherently more permanent than any other form of alternate caretaking has a significant, negative impact on case planning and judicial decision-making for families caught up in the family regulation system. Legal scholars and journalists have outlined the details of this impact, describing the ways in which ASFA's explicit prioritization of adoption leads agencies and courts to eagerly pursue termination of parental rights and adoption for children who are placed in "pre-adoptive" homes regardless of the strength of the parent-child bond; the fact that guardianship or third-party custody is an available (and potentially superior) option for the family in question; the fact that the parent is making progress on their service plan; or even the fact that the parent has reunited with or maintained custody of other children and is successfully parenting them.[147] As has been made clear in the over two decades since its passage, ASFA's focus on adoption as the ideal form of "permanency" for children in foster care—an aspect of the statute that was added merely to sanitize it and make it more appealing to liberals who might not want to see themselves as eager to aggressively terminate the parental rights of low-income parents without some greater purpose in mind—incentivizes agencies and courts to pursue adoption whenever adoption is a possibility, separate and apart from other considerations—such as the actual best interests of the child.

Co-author Ashley Albert's experience illustrates this dynamic. Ashley is the mother of three children, but was made to surrender her rights to two of them—her two youngest, who were placed with a foster

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motherhood status, while others were defined as illegitimate consumers" by reinscribing racialized social hierarchies).

The particular function of adoption should be placed in the context of a recent historical shift in the dominant discourse about poverty; the past several decades have seen the rise of the "view that poverty, problems attendant to poverty, and racial affiliation are matters of individual choice that have individualized solutions," such that "poverty, homelessness, child neglect, and economically blighted and isolated communities reflect personal pathology." Annette R. Appell, *Disposable Mothers, Deployable Children Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption*, 9 MICH. J. RACE & L. 421, 421 (2004) (further elaborating this point by identifying manifestations of this discourse and pathology in "federal legislation that limits welfare benefits, promotes adoption of poor children, and removes barriers to transracial adoption," all of which carry the "notion that poor (Black) families are pathological so they should be discouraged from having children and the children that they do have would be better off with other parents");

[147] For detailed examinations of ASFA that caution against its preference for the permanency of adoption, *see* Lily Adler, *The Meanings of Permanence: A Critical Analysis of the Adoption and Safe Families Act of 1997*, 38 HARV. J. LEGIS. 1, 11–12 (2001); Dorothy E. Roberts, *Kinship Care and the Price of State Support for Children*, 76 CHI.-KENT L. REV. 1619, 1638 (2001); Dorothy E. Roberts, *Poverty, Race, and New Directions*, 1 WASH. U. J.L. & POL'Y 63, 65 (1999); ADMIN FOR CHILD & FAMS., U.S. DEP'T OF HEALTH & HUM. SERVS., ACYF-CB-IM-20-09, ACHIEVING PERMANENCY FOR CHILDREN AND YOUTH (Jan. 5, 2021); *see also* Kathleen Creamer & Chris Gottlieb, *If Adoption and Safe Families Act Can't Be Repealed, Here's How to At Least Make it Better*, IMPRINT (Feb. 9, 2021), https://imprintnews.org/uncategorized/afsa-repealed-how-make-better/51490 [https://perma.cc/5XY2-2QT8]; Eli Hagar & Anna Flagg, *How Incarcerated Parents Are Losing Their Children Forever*, MARSHALL PROJECT (Dec. 2, 2018), https://www.themarshallproject.org/2018/12/03/how-incarcerated-parents-are-losing-their-children-forever [https://perma.cc/2ZU7-6QJJ]; Shanta Trivedi, *Adoption and Safe Families Act is The 'Crime Bill' of Child Welfare*, IMPRINT (Jan. 28, 2021), https://imprintnews.org/ adoption/adoption-safe-families-act-crime-bill-child-welfare/51283 [https://perma.cc/99BC-G5F4].

parent who wanted to adopt them at the time that the termination of parental rights petition against her was filed. Because her oldest son was not in a "pre-adoptive" home—and, as an older child, was not as likely to find an adoptive home—the agency never filed a termination petition as to him. His dependency proceeding was ultimately resolved with an order of custody to his grandfather—a resolution that allowed Ashley to remain his legal parent and for him to eventually return home. Ashley's younger children were not, of course, more in need of "permanency" than their older brother, and no reason was ever given to explain why Ashley was unfit to be their mother yet fit to remain their brother's.

The idea of adoption does more than just impact agency and judicial decision-making, leading to unnecessary terminations of parental rights and the destruction of families caught up in the family regulation system. Rather, just as it "sanitize[d]" the bill that became ASFA—making it acceptable to those who might otherwise be uncomfortable with the outcomes it promoted—the idea of adoption sanitizes the decisions made by agencies and courts in pursuit of that idea. The idea of adoption as a complete "rebirth" for the adoptee allows the individuals involved in the decision-making process to view themselves as child-savers rather than family-destroyers, and in that way allows them to continue doing the work they do each day. As law professor Sacha Coupet explains: "Many seem to prefer adoption precisely because it leaves nothing behind. Only adoption … offers the promise of "rebirth," wiping the slate clean and permitting … children to start anew with healthier, untainted families. Once a new and improved parent-child dyad is constructed, the system is redeemed and the status quo is reinstated."[148] Without *adoption* as the ultimate goal, caseworkers, attorneys, and judges—the individuals who actually make terminations of parental rights happen—might be forced to look more closely at what they are doing when they choose to pursue termination over other options.

IV. REFORM IS NOT ENOUGH

As described in Part I, when Ashley surrendered her parental rights to her younger children, she did so on the condition that she could continue to speak with and visit them. This possibility is available to parents who surrender their rights in Washington and a number of other states,[149] as the result of an adoptee rights movement that began in the late 1970s and grew through the 1980s and 1990s. Led by adult adoptees and mothers who had lost their children to private adoptions during the baby scoop era, this movement pushed for an end to secrecy in adoption, the unsealing of adoptees' records and original birth certificates, support for adoptees who chose to search for and reunite with their birth parents. Ultimately, it brought about a shift toward "open" adoptions, in which the adoptee's birth and adoptive families share identifying information and potentially maintain contact with each other throughout the adoptee's

[148] Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for Impermanence*, 34 CAP. U. L. REV. 405, 406 (2005).

[149] *See supra* note 2.

childhood.[150] These reforms were framed as a way to lessen some of the fundamental harms of adoption, including the adoptee's sense of lost identity and the grief and loss suffered by adoptees and their parents.[151]

Open adoption is now the norm in private placements, with the majority of domestic agencies encouraging open adoption or employing it as standard practice, placing children in closed adoptions only upon request of the birth parents.[152] According to a 2008 survey of one hundred domestic private agencies with infant adoption programs, from 2006 to 2008, only five percent of infant adoptions were completely closed, fifty-five percent were "completely open" (defined as involving the exchange of identifying information and direct contact between the birth and adoptive families), and forty percent involved some form of mediated openness, such as sharing of information or photographs via the adoption agency.[153] Open adoption has also become much more common in adoptions from foster care, at least in cases like Ashley's, where parents agree to surrender their rights instead of exercising their right to a trial on the termination of parental rights petition filed against them.[154]

Open adoption has been depicted as "nothing less than a revolution."[155] In addition to helping to repair the loss suffered by both adoptees and their parents and allowing the adoptee access to their full identity—"healing the split between biology and biography," as one

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[150] *See* MELOSH, STRANGERS AND KIN, *supra* note 10, at 238–86 (describing the beginnings of the adoptee rights movement); MODELL, SEALED AND SECRET KINSHIP, *supra* note 17, at 24–71 (same); SOLINGER, BEGGARS AND CHOOSERS, *supra* note 10, at 103–38 (same); Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 309–14 (2012) (same).

[151] *See, e.g.*, Annette Baran & Ruben Pannor, *Open Adoption as Standard Practice*, 63 CHILD WELFARE 245, 246–48 (1982) (discussing the benefits of open rather than closed adoption); Annette Baran & Ruben Pannor, *Perspectives on Open Adoption*, 3 FUTURE OF CHILD. 119, 122–23 (1993) (same); DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 16–21 (Mar. 2012) [hereinafter SIEGEL & LIVINGSTON SMITH, OPENNESS IN ADOPTION], https://go.usa.gov/xPSNF [https://perma.cc/7YYN-6YFV] (same).

[152] *See* Susan M. Henney et al, *Changing Agency Practices Toward Openness in Adoption*, 1 ADOPTION Q. 45, 55 (1998); Lisa A. Tucker, *From Contract Rights to Contact Rights: Rethinking the Paradigm for Post-Adoption Contact Agreements*, 100 B.U. L. REV. 2317, 2323–24 (2020) [hereinafter Tucker, *Contract Rights to Contact Rights*].

[153] SIEGEL & SMITH, OPENNESS IN ADOPTION, *supra* note 151, at 7, 22–23. According to another survey from 2007, nearly two-thirds of private adoptions involve some contact between adoptive and birth families. *Id.* at 15; Sharon Vandivere et al., *Adoption USA: A Chartbook Based on the 2007 National Survey of Adoptive Parents*, U.S. DEP'T OF HEALTH & HUM. SERVS. 45 (2009) [hereinafter Vandivere et al., Adoption USA], http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf [https://perma.cc/C94F-HDRE].

[154] Despite the increase in open adoptions from foster care—and despite the fact that children adopted from foster care are generally older than children adopted privately and are significantly more likely to have lived with their birth family at some point—openness remains more common in private adoption than in public adoption. *See* Vandivere et al., *Adoption USA*, *supra* note 153, at 45 ("67 percent of privately adopted U.S. children have pre-adoption agreements compared with 32 percent of children adopted from foster care. . . . [O]ver two-thirds of privately adopted U.S. children (68 percent) have had contact with their birth families following the adoption, as have almost two-fifths of children adopted from foster care (39 percent).").

[155] *See, e.g.*, ADAM PERTMAN, ADOPTION NATION: HOW THE ADOPTION REVOLUTION IS TRANSFORMING AMERICA 4–5 (2000).

advocate for open adoption puts it[156]—open adoption has been described as a solution to the "inherent[] power imbalance[]" between birth and adoptive parents,[157] and as a way of ensuring that transracial adoptees are able to grow up with racial mirrors and a connection to their cultural heritage.[158] Legal scholars have approached open adoption as one of a series of radical changes not only to the American conception of adoption, but to the very idea of the nuclear family itself, viewing it as one example of a "multiparental family structure."[159]

Yet open adoption is not as radical as it may seem. First, there is the unsettled issue of what it means for an adoption to be "open."[160] The definition of an open adoption is broad. An adoption is "open" if the adoptive and birth families view each other as extended family and are involved in each other's day-to-day lives—celebrating birthdays together, attending school pageants and graduations, possibly even babysitting each other's children—or where the families, although not as close, make an effort to stay in regular contact through phone calls, social media sites, letters and visits. An adoption is also "open" if the adoptive and birth parents simply meet each other prior to placement and possibly exchange last names or other identifying information, without ever meeting again, or if they communicate only through the adoption agency, without ever meeting face-to-face or exchanging any identifying information. Using definitions from the 2008 survey discussed above, an adoption could be described as "completely open"—the most "open" category in the survey—even if that "openness" was limited to annual letters sent directly from the adoptive parents to the birth parents, with no direct contact at all between the *adoptee* and any member of her birth family.[161] In adoptions from foster

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[156] LORI HOLDEN, THE OPEN-HEARTED WAY TO OPEN ADOPTION 9 (2013).

[157] *Id.* at 5–6 ("Adoptions in the past were inherently power imbalanced. One set of parents was shamed and minimized, while the other was idealized and legitimized. Open adoptions, however, are created when two sets of parents come together . . . [and] [n]either is in a superior position, and neither is a supplicant. Instead, there is an inherent equality over time.").

[158] *See, e.g.*, Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 323, 330–56 (2008) (arguing that post-adoption contact "may be particularly beneficial for transracially adopted children").

[159] *See, e.g.*, Haim Abraham, *A Family Is What You Make It? Legal Recognition and Regulation of Multiple Parents*, 25 AM. U. J. GENDER SOC. POL'Y & L. 405, 406, 419 (2017); Alison Harvison Young, *Reconceiving the Family: Challenging the Paradigm of the Exclusive Family*, 6 AM. U. J. GENDER & L. 505, 506–508, 537–38 (1998).

[160] As researchers Deborah H, Siegel, Ph.D., and Susan Livingston Smith, LCSW, explained in a report on openness in infant adoptions, it can be difficult to draw definite conclusions because the term "open adoption" is "used to describe a variety of contact arrangements" that can consist of anything from relationships with regular in-person contact, to once-a-year arrangements without any in-person contact, to even no contact at all after finalization of the adoption and exchange of contact information. As they say, "[s]ome people consider an adoption to be truly open only when the child is included in contact with members of the biological family, and others believe an adoption is open when the adoptive and birthparents know each other, regardless of whether the child knows about the relationship or has contact." SIEGEL & SMITH, OPENNESS IN ADOPTION, *supra* note 151, at 14. *See also* Tucker, *Contact Rights*, *supra* note 152, at 2322–23 (discussing the "wide variety of relationships" that fall under the term "open adoption").

[161] According to their report, Siegel and Smith relied on the openness continuum established by researchers Harold Grotevant and Ruth McRoy, which defines a "fully disclosed" adoption as one in which "[t]he parties are or have shared identifying information and/or contact directly, without agency mediation." SIEGEL & SMITH, OPENNESS IN

care, post-adoption contact agreements are generally extremely limited. Ashley's allowed her four visits and twelve phone calls per year with her two children. Many agreements allow for significantly less contact than that: co-author Amy Mulzer has represented parents who were offered as little as one visit a year in exchange for surrendering their parental rights. Quite obviously, an adoption that permits the child's parent a single visit per year or an occasional phone call does not address the harms of adoption.

Second, an adoption that is open at the outset or for some period may or may not stay that way, regardless of the parties' understanding or explicit agreement at the time of placement. Currently, only twenty-nine states and the District of Columbia have legislation allowing the enforcement of post-adoption contact agreements.[162] Of those, many place restrictions on the types of adoptions in which enforceable agreements may be entered.[163] If an agreement for post-adoption contact is not legally enforceable, the adoptive parents can "close" the adoption whenever they want, for whatever reason, with no repercussions—and can even enter into an agreement knowing full well that they do not intend to maintain openness.

Of course, even if an adoption is finalized in a state that provides for enforceability, that does not mean the parties' agreement will be enforceable, or that the parents will be able to enforce it. To negotiate and enter into an enforceable post-adoption contact agreement, the parties—particularly the birth parents—need to be aware of the option. Yet most states do not require or provide for separate legal counsel for the birth parent in a private adoption proceeding, and few of the twenty-nine states that allow enforcement statutorily require that any party to the adoption be specifically notified of the availability of an enforceable agreement.[164] Information about the option of an enforceable agreement—indeed, information about the entire range of available options—is generally in the agency's hands, and the agency has plenty of reasons not to be completely

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ADOPTION, *supra* note 151, at 10; Susan Ayers-Lopez et al., *Evolution and Reoslution: Birthmothers' Experience of Grief and Loss at Different Levels of Adoption Openness*, 24 J. SOC. & PERS. RELATIONSHIPS 875, 881 tbl. 1 (2007).

[162] Amy Whipple, *The Dubious Ways Parents Are Pressured to Give Up Their Children for Adoption*, VICE (Aug. 13, 2019), https://www.vice.com/en/article/qvg45m/the-devious-ways-parents-are-pressured-to-give-up-their-children-for-adoption [https://perma.cc/4GRZ-5972].

[163] For example, Utah and Vermont limit enforceable agreements to children who have been adopted from foster care. *See* UTAH CODE ANN. § 78B-6-146; VT. STAT. ANN. tit. 33, § 5124. Wisconsin limits such agreements to adoptions by relatives and stepparents. *See* WISC. STAT. ANN. § 48.925. Indiana limits enforceable contact agreements to children ages two and older, *see* IND. ANN. CODE § 31-19-16-2, and only permits non-enforceable agreements for children under two if the agreement does not include visitation, *see* IND. CODE ANN. § 31-19-16-9. The vast majority of states limit enforceable agreements to situations in which parents voluntarily surrender their parental rights—a statutory framework that creates pressure for parents facing involuntary termination of their parental rights to surrender rather than go to trial. *See, e.g.*, ALASKA STAT. § 47.10.089; IND. CODE ANN. § 31-19-16-1; N.H. REV. STAT. ANN. § 170-B:14; VT. STAT. ANN. tit. 33, § 5124; WASH. REV. CODE § 26.33.295. *See also* Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, 6 ADOPTION Q. 75, 82 (2003) (discussing concerns that the option of post-adoption contact was being coercively "misused" as a settlement tool).

[164] *See* 23 PA. CONS. STAT. § 2733 for an example of the rare exception.

upfront.[165] After Amy adopted her daughter through private adoption—with an agency that she chose specifically because it publicly presented itself as committed to open adoption—she discovered that the post-adoption contact agreement she had made with her daughter's parents was not enforceable, and that they had signed papers waiving enforceability without ever actually having had the option explained to them.[166]

Then there is the issue of enforcement itself. Enforceability does not have much meaning if parents cannot get into court. And while there is no way to know for sure how many parents are unable to enforce their post-adoption contact agreements because of a lack of access to the courts, there is reason to believe the number is not insignificant. Only one state enforceability statute specifically provides for appointment of counsel when a parent moves to enforce a contact agreement.[167] The various procedural hurdles required to enforce these agreements in particular states make the situation more difficult. In some states, for example, parents are required to establish that they have tried to resolve the dispute via mediation or another form of alternate dispute resolution before filing a motion.[168] Some states require the party petitioning for enforcement to pay both parties' costs if they lose.[169]

In nearly all states, the standard for enforcement makes it difficult for parents to prevail. Many states have a "best interests" standard for enforcement of post-adoption contact agreements.[170] Thus, before a court may enforce an agreement, it must find not only that the adoptive parents have failed to comply with its terms, but also that enforcement would be in the child's best interests. Most of these states also place the burden of establishing that enforcement would be in the child's best interests on the party moving for enforcement, rather than requiring the opposing party to

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[165] *See, e.g.*, Tucker, *Contract Rights to Contact Rights*, *supra* note 152, at 2325–29 (discussing the power dynamics in adoption and their effect on the behavior of adoption agencies and other adoption professionals); Whipple, *supra* note 162 (discussing limitations on the information and counseling given to expectant parents, considering adoption agencies' motives to not be upfront about all of the parents' rights and what parents should expect).

[166] *Cf.* SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 22 (2007) [hereinafter BIRTHPARENTS IN THE ADOPTION PROCESS] (describing the experience of a young mother who decided to place her child for adoption through a "well-known internet adoption provider" but never received any counseling—despite her child's adoptive parents being charged for "birthparent counseling expenses"—and was never told that she had the right to independent legal counsel, that there was a revocation period in her state, or that the open adoption agreement she had entered into was unenforceable).

[167] ALASKA STAT. § 47.10.089(i). Additionally, New York State has a general provision regarding the appointment of counsel for certain indigent parties in Family Court proceedings, N.Y. FAM. CT. ACT § 262, which would apply to a parent petitioning for enforcement of a contact agreement.

[168] *See, e.g.*, CAL. FAM. CODE § 8616.5(f); CONN. GEN. STAT. § 17a-112(g); LA. CHILD. CODE ANN. art. § 1269.8(B); MINN. STAT. § 259.58(c); N.H. REV. STAT. ANN. § 170-B:14(II)(i); OR. REV. STAT. ANN. § 109.268.

[169] *See, e.g.*, CAL. FAM. CODE § 8616.5(i); GA. CODE Ann. § 19-8-27(h); WASH. REV. CODE § 26.33.295(4).

[170] *See, e.g.*, ALASKA STAT. § 47.10.089(g); CAL. FAM. CODE § 8616.5(f); D.C. CODE § 4-361(b)(1); GA. CODE § 19-8-27(e); MD. CODE ANN., FAM. LAW § 5-308(f)(1); MO. REV. STAT. § 453.080(4); NEB. REV. STAT. § 43-166; N.Y. DOM. REL. LAW § 112-b(4).

establish that enforcement would *not* be in the child's best interests.[171] At least one state requires that the elements of the enforcement statute be established by "clear and convincing evidence"—a higher standard than that required to temporarily remove a child from their parent's care or make a finding of abuse or neglect in all but ICWA proceedings.[172] One state allows the court to decline to enforce a post-adoption contact agreement not only if such enforcement would be "detrimental" to the child, but also if enforcement would "undermine the adoptive parent's parental authority" or be "unduly burdensome."[173]

The results of all this are unsurprising. As journalist Kathryn Joyce put it, "It's hard to find an honest account of an open adoption that works: one where adoptive parents and birthparents have agreed that they will stay in touch and share the milestones of their child's life, and then do so."[174] Even when all of the adults involved go into it with the best of intentions, truly open adoption can be difficult—especially in a society that still views adoption as a complete rebirth of the adoptee to their adoptive parents. When things get complicated, it is easier for the adoptive parents to pull back, or even close the adoption entirely. And while many adoptive parents do go into open adoption with the best of intentions, it is clear many do not.[175] At best, open adoption is a reluctant compromise; at worst, it is

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[171] *Compare, e.g.*, CAL. FAM. CODE § 8616.5(f) ("The court may not order compliance with the agreement absent a finding that . . . the enforcement is in the best interests of the child.") *with, e.g.*, LA. CHILD. CODE ANN. art. § 1269.8(D) ("The court shall order continuing compliance in accordance with the agreement and refuse to modify or terminate it unless it finds that there has been a change of circumstances and the agreement no longer serves the best interest of the child.").

[172] ALASKA STAT. § 47.10.089(g).

[173] MONT. CODE ANN. § 42-5-301(3).

[174] Kathryn Joyce, *Why Does Open Adoption Rarely Work?*, NEW REPUBLIC (July 14, 2015), https://newrepublic.com/article/122298/why-does-open-adoption-rarely-work [https://perma.cc/XC8Y-GXXX]. *See also* BIRTHPARENTS IN THE ADOPTION PROCESS, *supra* note 166, at 19 (summarizing a study's finding that "only 37 percent of the adults in open adoptions had had in-person contacts in the previous two years and only in half . . . did children have any type of contact with their birthparents"); Tucker, *Contract Rights to Contact Rights*, *supra* note 152, at 2335 ("Several studies have found that an increasing number of adoptive parents promise birth parents ongoing post-adoption contact with the children they relinquish for adoption. Follow-ups in waves over several years demonstrate, however, that contact tends to decrease as time goes on.").

[175] *See, e.g.*, Sharkkarah Harrison, *My Child Was Allowed to Choose Adoption at 9*, RISE (May 17, 2017), https://www.risemagazine.org/2017/05/my-child-chose-adoption-at-9/ [https://perma.cc/CY7D-LU3H] (story by a mother who was almost entirely cut off by the adoptive mother of her daughter after she surrendered her rights, despite having been reassured beforehand that both she and her daughter's siblings would be able to see her on weekends and holidays); Sara Werner, *My Daughter's Mother Broke Our Visiting Agreement*, RISE (May 18, 2017), https://www.risemagazine.org/2017/05/my-daughters-adoptive-mother-broke-our-visiting-agreement/ [https://perma.cc/VF86-JX62] (story by a mother whose daughter's adoptive mother stopped allowing her to have visits after reassuring her that she would be able to see her daughter "even more" after she signed the surrender documents); McCabe, *Signing Away My Son*, *supra* note 140 (story by a mother who was almost entirely cut off by her son's adoptive parents after she surrendered her rights, even though they had agreed that she could continue to visit and speak to him regularly). *See also* JOYCE, CHILD CATCHERS, *supra* note 7, at 117–21 (discussing the phenomenon of open adoptions being "closed" by adoptive parents, and sharing the story of a birthmother); Tucker, *Contract Rights to Contact Rights*, *supra* note 152, at 2329 (summarizing a small study of birth mothers who universally "felt betrayed, having entered into an agreement with prospective

a tool of coercion. Many prospective adoptive parents agree to enter into open adoptions in order to be able to adopt at all, while adoption agencies use the prospect of open adoption to convince expectant parents to place their children for adoption.[176] Foster care agencies, judges, and attorneys offer the prospect of an open adoption to parents like Ashley, who are facing the involuntary termination of their parental rights, in order to get them to surrender rather than take their cases to trial. Open adoption agreements—especially but not only in the case of parents facing involuntarily termination—are essentially plea bargains: "[l]ike plea bargains, postadoption visitation agreements are hard decisions made under hard circumstances. Like prisoners rolling the dice with regard to their liberty, mothers who are about to lose their children have a very small range in which to operate."[177]

In this way, open adoption is not a radical change in adoption as practiced in the United States or in the conception of family in this country. It is a reform, in the same way that de-escalation training and body-worn cameras are reforms to policing—a change in how the system operates that appears to address significant issues but instead neutralizes the concerns raised to preserve the system as a whole.[178] It is not a coincidence that the idea of "open adoption" first began to gain widespread support among agencies and other adoption professionals in the decades following the legalization of abortion, a decline in the stigma surrounding single motherhood among middle-class white women, and a significant decrease in the placement of infants for private adoption[179]—nor that organizations that advocate for the interests of foster and adoptive parents speak eloquently about the need to maintain bonds between adopted children and their families of origin while aggressively organizing against legal changes

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adoptive parents to maintain some form of contact . . . only to have that contact ultimately blocked") (quoting email from study's author).

[176] Unsurprisingly, agencies and other adoption advocates rarely speak explicitly about this motivation. They occasionally do, however. A particularly explicit discussion of open adoption as a reluctant compromise can be found in the National Council for Adoption's "Consider the Possibilities" training program for social workers conducting "options counseling" with pregnant women. *Consider the Possibilities*, NAT'L COUNCIL FOR ADOPTION, https://adoption.mclms.net/en/package/2924/course/1697/view [https://perma.cc/7DDT-PZLA]. One of the readings explains that openness is for the benefit of the child, not on the grounds that it allows the child to know "where she came from" or otherwise assists with healthy identity development, but instead "on the grounds that the birth mother would refuse the adoption if not granted the open context." Dr. Terry Olson, Adoption Practices in the Humane World 3 (2005) (unpublished article made available through online training program) (copy on file with co-author). Openness, then, is "acceptable or desirable because it is an alternative that either preserves the life of the child outright, or at least provides a better daily atmosphere and opportunity for growth and development in a mature, stable family," but as the reading explains, "practically speaking, the welfare of the child is being held hostage by a mother who has chosen not to parent, but wants some degree of access to the child." *Id*.

[177] *See, e.g.*, Sanger, *Bargaining for Motherhood*, *supra* note 150, at 332.

[178] For examinations of the way that reforms such as trainings and body-worn cameras have worked to actually perpetuate systemic oppression in the policing and prison context, see Amna A. Akbar, *An Abolitionist Horizon for (Police) Reform*, 108 CAL. L. REV. 1781, 1802–14 (2020); Mariame Kaba, *Toward the Horizon of Abolition*, in WE DO THIS 'TIL WE FREE US, *supra* note 5, at 95–98 (2021); Dorothy E. Roberts, Foreword, *Abolition Constitutionalism*, 133 HARV. L. REV. 1, 42–43, 114–19 (2019).

[179] *See, e.g.*, Sanger, *Bargaining for Motherhood*, *supra* note 150, at 314–15.

that would allow judges to enter enforceable post-adoption contact orders over the objection of the child's pre-adoptive foster parents.[180]

Moreover, in addition to propping up the practice of adoption and potentially insulating it against valid critiques, open adoption—even when it "works"—fails to actually solve the problems it purports to solve. Take, for example, the claim, quoted above, that open adoption addresses the "inherent power imbalance" between birth and adoptive parents—a power imbalance that, as we have seen, has been at the heart of adoption in this country since the beginning.[181] Rather than correcting this imbalance, open adoption merely changes the nature of it, shifting (or perhaps reproducing) the systemic inequality of adoption on a small scale, in each of the parks, McDonald's play spaces, and backyards where mothers visit with their children under the watchful gaze of the adoptive parents. Particularly when their post-adoption contact agreements are unenforceable but even when they are, given the difficulty of actually enforcing such agreements, birth parents have to be careful when interacting with their children and are under pressure to reassure their children's adoptive parents that they are not a threat to their parental status.[182] This dynamic is especially problematic in the case of transracial adoptions, which often place Black and brown mothers' interactions with their children under the scrutiny of their children's white adoptive parents—a miniature, privatized

[180] In 2019, the New York State Legislature passed a law that would have given Family Court judges the ability to issue enforceable post-adoption contact orders after a parent's rights were involuntarily terminated where such contact would be in the best interests of the child. *See, e.g.*, Stewart, *supra* note 10. The loudest voices calling for the Governor to veto the bill came from a group claiming to represent adoptive and foster families in New York state—a group whose own website waxes poetic about the importance of maintaining connections between adopted children and their families of origin. Following such strong opposition, the bill was vetoed at the Governor's desk. Megan Conn, *New York Governor Gives Adoptive Parents 'Full Right' to Decide if Childre May Have Contact with Birth Parents*, IMPRINT (Jan. 25, 2022), https://imprintnews.org/child-welfare-2/new-york-governor-gives-adoptive-parents-full-rights-to-decide-if-children-may-have-contact-with-birth-parents/62157 [https://perma.cc/B7FF-65KU].

[181] *Cf.* Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 106 (1998) ("[A] feminist analysis of adoption must view adoption as more than an individual transaction in which one or two adults legally become [parents]. . . . [It] involves issues of hierarchy and power . . . among women . . . . [that] must be retrieved from the background, where they have existed largely in silence, and must be confronted in the open.").

[182] *See* Elsbeth Neil, *The Corresponding Experiences of Adoptive Parents and Birth Relatives in Open Adoptions*, *in* INTERNATIONAL ADVANCES IN ADOPTION RESEARCH FOR PRACTICE 269, 287 (Gretchen Miller Wrobel & Elsbeth Neil eds., 2009) ("Relationships between adoptive parents and birth relatives are not based on an equality of power, but on recognition by birth relatives that adoptive parents have more power and willingness by adoptive parents to share some of this power."). *See also, e.g.*, Jacquelyn B, *Forever Grieving as a Birth Mother*, THE MIGHTY (May 6, 2021), https://the mighty.com/2021/05/adoption-lifelong-grief-birth-mother/ [https://perma.cc/L95F-WWCQ] ("Being a birth mother you are constantly on egg shells. I always felt like a nervous wreck. You worry you will say the wrong thing and the family cut you out of the open adoption. . . . I never wanted to come off as needy, or trying to 'co-parent.' I understood she was their daughter."); Joyce, *Why Does Open Adoption Rarely Work?*, *supra* note 174 ("For many birthmothers at this stage, there's a pressure to remain compliant: to avoid complaining or talking about their regrets, and instead to practice a Panglossian gratitude, lest their relationship with the adoptive parents closes down.").

replication of the very surveillance exercised by the family regulation system itself.

Similarly, while openness may help with the grief and loss of identity caused by adoption—and arguably does so more effectively than other reforms, such as open records and support for adult adoptees who wish to find and reunify with their families of origin—it is not a magic solution to the harms caused by adoption, as it is sometimes depicted. Adoption records and adoptees' original birth certificates should be open in all states as a matter of basic fairness; there is simply no justification for denying adoptees access to documents regarding their own identity and history. But even when unsealed, such records are not generally available until the adoptee in question turns eighteen years old. A reunion at that point will never get back the years that were lost. Open adoption, by contrast, allows the adoptee to have an ongoing relationship with their family of origin throughout childhood—albeit an extremely limited one in many cases. Yet at the same time, the ongoing nature of the relationship carries with it its own form of grief, as parent and child are made to say goodbye to each other over and over again.[183] If anything, this grief is especially acute in the case of an adoptee whose parent is doing well or even raising other children, having gotten past whatever circumstances led to their adoption, as the adoptee is left to wonder why they are not being raised with their family.

Ashley's open adoption was not one that "worked." Despite the conditions of her surrender, giving her the right to four visits and twelve phone calls with her children per year, and requiring that their names not be changed, she did not see either of her younger children again for over two years after she signed the papers. Her daughter's name was changed upon adoption. The children's adoptive mother and other relatives told them that it was Ashley's choice not to see them, and that she had surrendered her rights because she did not want to be their mother anymore.

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[183] *See, e.g.*, Jacquelyn B, *supra* note 182 ("Visits with my (birth) daughter were challenging. I would put on a happy face, when in actuality I was mourning her. After my visits with my daughter I would fall into a deep depression."); Reader Note, *The Open Wounds of an Open Adoption*, ATLANTIC (Oct. 12, 2015), https://www.theatlantic.com/notes/2015/10/the-open-wounds-of-an-open-adoption/410143/ [https://perma.cc/FH5X-KWH4] ("As the years progressed, I found it more and more difficult to watch someone else raise my child . . . . I had no voice in the choices they made for her. . . . while my child grew without me in a home that was entirely foreign to my own. It has been the ultimate form of psychological and emotional torture. The worst hit me when my daughter considered suicide and ended up in a hospital, and I wasn't allowed to contact her because I wasn't a direct relative.").

In a memoir by a birth mother who placed her son in an open adoption and was able to remain a part of his life throughout his child, she addresses her grief and the difficult parts of the relationship. AMY SEEK, GOD AND JETFIRE: CONFESSIONS OF A BIRTH MOTHER (2015). In a series of entries on the Sister Wish blog, open adoption adoptees have posted about their experience. *See Meeting my Real Mom and Sisters,* SISTER WISH (Apr. 9, 2013), http://www.sisterwish.com/meeting/ [https://perma.cc/2N2T-PMRN] (describing the inability to be with "bio mom and sisters" as "soul crushing"); *Jealousy Over Pictures*, SISTER WISH (July 19, 2013), https://www.sisterwish.com/28-jealousy-over-pictures/ [https://perma.cc/B7YT-WQH5] (describing the grief at the end of each visit, as an adult adoptee who grew up in an open adoption).

Ashley fought back, taking her children's adoptive mother to court and becoming one of the first parents to enforce and modify a post-adoption contact agreement in the state of Washington. Since the enforcement order was issued in January 2018, Ashley has been able to visit with her children—although she has had nowhere near the number of visits dictated in the order, which provided for make-up visits in addition to those required under the original agreement. Ashley was close to her children prior to their adoption, even following their removal from her care, and they were used to seeing each other multiple times a week for up to three or four hours per visit. The fact that they have been able to maintain their bond even after the state's legal dismantling of their family is a testament not to the benefits of open adoption, but to their own resilience and the strength of their love for each other. Now that Ashley's children are a little older, they have reached out on their own, just as Ashley reached out to her own mother when she was in foster care as a teenager. In addition to communicating with each other via social media, Ashley and her children have figured out ways to see each other outside of their rare, legally sanctioned visits by meeting up at the homes of extended family or mutual friends.

V. CONCLUSION: BROADENING OUR VISION

Twelve years ago, co-author Amy Mulzer began to work as a family defense attorney, defending parents against allegations of child neglect and abuse in Kings County Family Court in Brooklyn. A week later, Amy's now-adopted son was placed in her home. And while it was impossible to completely disregard the seeming contradiction between her professional and personal life—working to keep children in their parents' care while simultaneously raising another mother's son as her own—Amy was able to reconcile the two for several years, even adopting another child through the same agency. After all, her children's parents had made a choice, albeit one they should not have had to make; their children were not taken from them by the state. And Amy was trying to do everything "right"—her children retain the names their parents gave them; they frequently spend time with their mothers and siblings, both on their own and with her and her partner; and discussions of adoption in the family's home are honest, direct, and detailed. Amy and her partner, who are white, live in a community where they, rather than their children, are in the minority and have committed not to move outside of the New York City area, where their children's families live, so they can easily remain in each other's lives.

Yet, while there *are* important differences between private adoptions and adoptions out of foster care, Amy eventually came to realize that the two types of adoption were not as distinct as she wanted to believe—especially when it came to her role. However much she loved her children, and however well-intentioned she was, as an adoptive parent she was still benefiting from a practice that had done a great deal of harm to families and children for decades—that was created to do harm—and that is still causing harm to the present day. After all, the societal forces that constrain the choices of the parents of Amy's children and others like them across the country—racial discrimination; the lack of a social safety net; restrictions on immigration and xenophobia; misogyny and a lack of

solutions for gender-based violence; and economic policies designed to keep a large segment of the American public at the bottom of the ladder, for the benefit of those at the top—are the same forces that had led to the creation and growth of the family regulation system, and the same forces that the practice of adoption serves to reinforce and cover.

While individual children may have benefited from having been adopted into loving families and while individual adoptive parents may love their children and mean well—even making attempts to address the harms caused by adoption for their children and their children's families of origin—adoption in this country has never been about serving the needs of children. On a societal level, it has always served interests other than the protection of children—maintaining racial order, assimilating immigrants, and defining and policing the boundaries of appropriate sexual behavior, family structure, and parenting. And on an individual level, it is structured to serve the desires of adoptive parents and those who stand to profit from them more than anyone else. *Children* don't need to have their legal ties to their families of origin severed, to be given new birth certificates and new names, and to be "reborn" as members of a completely new family unit. It is adoptive parents who want these things to happen, having been led to believe that the only way to bring children into their family and care for them is to make them *theirs*, as-if born to and in line with dominant ideas of the appropriate, heteronormative, biological family.

The drafters of ASFA got one thing right: children do need "permanency." But what they need is not legal permanency, or even necessarily a complete continuity of primary caretakers. What they need is *relational* permanency: the knowledge that they will be cared for and that their important relationships will be maintained.[184] When a child cannot be cared for by their parents on a day-to-day basis, those needs are best served not by adoption into an entirely new family, but rather by being cared for by adults who are able to love them without requiring that they be *theirs* alone, and who are able to respect and maintain both their identities and their relationships—even to the point of helping them transition back to their families of origin if circumstances change and their parents can care for them again.

There will always be children who need alternate caretakers for part or all of their childhood—although there would be considerably fewer if we lived in a society that truly supported all families, and that respected the rights of all parents to raise their children. And there will always be adults who cannot or do not want to have biological children, but who want to have children in their lives and to care for them. It has become increasingly clear that the American system of adoption—requiring the complete severance of adoptees' ties to their families of origin and their "rebirth" to their adoptive parents—is not a feasible way to address these seemingly complimentary needs. Multiple generations of adoptees have told us that. And while the reforms they and others have demanded—open records; better training for adoptive parents, especially transracial

[184] *See* Randi Mandelbaum, *Re-Examining and Re-Defining Permanency from A Youth's Perspective*, 43 CAP. U. L. REV. 259, 275–76 (2015) (defining "relational permanency").

adoptive parents; more consideration of race and culture in the adoption process; open adoption—seem to make sense, reform is not the answer. Open adoption might be "better" than closed adoption for a parent and child otherwise faced with the prospect of losing each other completely, but it is not a genuine solution for a parent who wants to raise their child and would do so, but for temporary circumstances at the time of their birth or removal—nor for the child who otherwise could be raised by their parent. Presented as a solution, open adoption serves primarily as a tool of the adoption industry itself, inducing parents outside the family regulation system to place their children for adoption based on the understanding that they will not completely lose them; pressuring parents in the family regulation system to surrender their rights rather than go to trial in order to maintain a connection to their children; convincing prospective adoptive parents that they can make a family out of other parents' children without causing harm; and taking the sting out of adult adoptees' criticisms because "things are different now."

What we need to do is not to "reform" adoption, but rather to broaden our vision of what it means to care for children—to broaden our vision of what it means to be a family—to include not only alternate forms of legal permanency, such as permanent guardianship, but also forms of alternate caretaking that are not legally permanent, but that give children whose parents are facing temporary obstacles to day-to-day parenting the stability and *relational* permanence they need to thrive, so they are able to return to their families of origin once the crisis is passed. In such a world, all of Ashley's children would have gone home, and she would be raising them now. These alternate caretaking options have always existed, outside of the family regulation system and the practice of adoption, and they continue to exist today, although in a diminished state after decades of active efforts to define and police the boundaries of the appropriate American family. Unsurprisingly, the grandmas and aunties have had it right all along, and we would all do well to learn from them—to be the proverbial village. We may not be able to become parents to other parents' children without causing harm, but we can give them what they need.