

PERFECT SUBSTITUTES OR THE REAL THING?

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ABSTRACT

This Article traces the development of adoption law using recent scholarship in history and sociology, as well as nineteenth century legal sources. The early history of American adoption provides a novel and useful context to analyze the complicated relationships between “traditional” and “alternative” family forms. The Article discusses how judicial interpretations of the meaning of adoption were cabined by the traditional significance of blood relationships, and examines the treatment of adopted and biological children in three contexts: parental consent to adoption, inheritance, and the civil and criminal laws governing incest. The Article argues that the challenge today, as was true more than a century ago, is how to expand the meaning of family without destabilizing families.

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The contemporary debates on adoptive, single parent, and gay and lesbian families, as well as on the rights within families formed by new reproductive technologies, are grounded in this history; but the history also provides critical insights for structuring the legal response to these newly forming families. The Article examines post-adoption grandparent visitation disputes, single parents by choice, and gay and lesbian second parents. Finally, the Article concludes that “like” relationships should be treated similarly while respecting and accommodating the differences.

TABLE OF CONTENTS

Introduction	1079
I. Methodology	1082
A. The Two-Parent Marital Family Approach	1082
B. The Problems with the UPA Approach	1084
C. Recognition of the Paradox.....	1087
II. The Social Context of Adoption, 1800–1900.....	1088
A. The Child Savers.....	1089
B. Foster Family Placements.....	1097
C. Social Status of Adoption.....	1099
III. Adoption Law in Nineteenth-Century America.....	1102
A. Adoption before 1851	1104
1. Adoption Petitions.....	1104
2. Charitable Adoptions	1106
3. Informal Adoption.....	1107
4. Indenture.....	1110
B. The Development of General Adoption Legislation.....	1112
1. The Massachusetts statute.....	1113
2. The Conservative Nature of General Adoption Legislation.....	1115
IV. Analogies: Tensions between Blood and Adoption in Nineteenth-Century Adoption Law.....	1117
A. Parental Consent	1118
1. Parents’ Rights	1118
2. Legal Issues of Parental Consent	1122
B. Sameness and Difference: Inheritance	1126
1. Statutes.....	1128
2. Court Challenges by Disappointed Heirs Seeking to Disinherit Adoptees.....	1132
C. Sameness/Difference: Incest	1139

1. Civil Sanctions	1140
2. Criminal Sanctions	1142
V. Analogies: Tradition and New Family Forms.....	1147
A. Adoptive Families and Assimilation.....	1148
1. Creation of Adoptive Families	1148
2. Continuing Contact.....	1151
3. Transracial Adoption.....	1152
4. Stigma	1152
B. Family Models: Lessons from History	1154
1. Post-Adoption Visitation by Grandparents.....	1156
2. Single Parents	1159
3. Gay and Lesbian Second-Parent Families	1161
Conclusion.....	1164

INTRODUCTION

What is happening to the American family?

In contemporary culture, there are highly visible signs of discomfort about the decline of the nuclear family and ambivalence about the increasing numbers of alternative families.¹ Although one of the fundamental premises of contemporary welfare reform is the disap-

1. For differing perspectives on these developments, see generally MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 112–15 (1996) (“Quite apart from the social pathology of broken families and missing fathers, national surveys conducted in the 1950s and 1970s found a growing tendency among Americans to conceive their identities as independent of familial or parental roles.”); Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 *COLUM. L. REV.* 337 (2002) (suggesting that “the weakening of a set of institutional moral arbiters, including schools, churches, and voluntary communal groups, has exacerbated social perplexity about the scope of family life”); Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 *HARV. L. REV.* 835 (2000) (proposing “a new model for analyzing legal issues arising from technological conception”); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 *CAL. L. REV.* 1479 (2001) (suggesting that the law has ignored the multiple existing understandings of marriage); Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 *UTAH L. REV.* 537 (criticizing the recent debate over “family values,” which seems to assume that the nuclear family is the norm and the ideal); Joanna L. Grossman, *Separated Spouses*, 53 *STAN. L. REV.* 1613 (2001) (reviewing HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* (2000)); Joan Oleck, *All You Need is Love—and a Marriage License*, at <http://www.salon.com/mwt/feature/1999/07/09/adoption> (July 9, 1999) (on file with the *Duke Law Journal*).

The term “traditional families” refers to families formed through marriage and biology. The term “alternative families” refers to all other families, and includes adoptive families, gay and lesbian families, families formed through new and old reproductive technologies, and single-parent families.

proval of single-parent, non-marital families,² on the other hand, more states are allowing single parents and gay and lesbian couples to adopt.³ The development and regulation of alternative family forms is not, however, a novel phenomenon in American society.

This Article provides a new perspective on the integration of alternative families into existing law and culture by examining adoption history. Early adoption law confronted the formation of families without blood ties by relying on the paradigm of the nuclear family as the method for assimilating other family forms. This historical process provides insight into contemporary policy debates on the future of the American family. The law continues to use the nuclear family paradigm rather than welcome the multiple configurations of relationships between adults and children. This attempt to regulate differently formed families by developing principles based on an idealized vision of the family, without accounting for the settled expectations of those living within the families, appears in contemporary scholarship as well as policy.⁴

The Article begins in Part I with a brief discussion of the methodology of these contemporary regulatory attempts. In Part II, the Article turns to a reexamination of the conventional history of adoption. Many legal scholars ascribe the origins of modern adoption to the enactment of an 1851 statute in Massachusetts that was a radical rupture of existing law.⁵ Contrary to the claims of these scholars, I

2. President George W. Bush proposed spending several hundred million dollars to promote marriage as part of welfare reform. Editorial, *Bush's Family Plan*, BOSTON GLOBE, Mar. 4, 2002, at A14; Robin Toner, *Sort of Deserving: Helping the Poor in the Post-Welfare Era*, N.Y. TIMES, Mar. 3, 2002, at 1. See generally Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999).

3. Compare Garrison, *supra* note 1, at 906 (“[O]ur legal system grants no parent, male or female, the right to be a sole parent.”), with Nancy D. Polikoff, *Breaking the Link Between Biology and Parental Rights in Planned Lesbian Families: When Semen Donors Are Not Fathers*, 2 GEO. J. GENDER & L. 57, 59 n.6 (2001) (“On this point, [Garrison] is simply wrong. No state restricts the availability of single-parent adoptions. . . . Although certainly *some* adoption agencies employ such a preference, others do not.”).

4. See *infra* notes 8–16 and accompanying text.

5. This claim oversimplifies adoption history. The 1851 legislation was simply one step—albeit a significant one—in the development of contemporary adoption law. Legislatures had actually enacted broader adoption statutes prior to 1851. See *infra* Part III.A. Early adoption served many purposes, ranging from the adult-focused rationale of finding an heir to the child-focused rationale of saving children. To some extent, these differing reasons exist today. Adoption of older children from the public abuse-and-neglect system involves protecting children, while adopting infants through a more private system often serves adult goals. See generally Jill Elaine Hasday, *Parenthood Divided: A Legal History of the Bifurcated Law of Parental Relations*, 90 GEO. L.J. 299 (2002) (identifying two traditions in American law’s regulation of par-

emphasize the continuity of adoption law with cultural and legal norms, showing how the law reacted to changes in family status, rather than revolutionizing the family itself.⁶

In Part III, the Article shows how judicial interpretations of the meaning of adoption were cabined by the traditional significance of blood relationships, even as these interpretations struggled to accord respect to functioning parent-child relationships with settled expectations. To illustrate the tensions that arose as the law responded to cultural changes in the family, Part IV examines the treatment of adopted and biological children in three contexts: parental consent to adoption, inheritance, and the civil and criminal laws governing incest. No other scholar has systematically examined the development and interpretation of adoption law during the latter half of the nineteenth century for the purposes of articulating the norms that shaped the law's treatment of these "artificial" families.

Finally, Part V argues that the challenge today, as was true more than a century ago, is to determine how to expand the meaning of family without destabilizing families. The contemporary debates on adoptive,⁷ single-parent, and gay and lesbian families, as well as on

enthoud: one tradition which is "extremely deferential to parental prerogatives and highly reluctant to intervene," and another tradition of "massive legal intervention into the parental relation"); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development and Present Status* (pts. 1 & 3), 16 STAN. L. REV. 257 (1964), 17 STAN. L. REV. 614 (1965) (identifying and discussing "two systems of family law in California . . . [one] public, the other private").

6. See *infra* Part III.

7. For discussion of some of these issues, see generally Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (positing that "current racial matching policies represent . . . the idea that what is 'natural' in the context of the biological family is what is normal and desirable in the context of adoption"); Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150 (1999) (questioning "the assumption that life-long secrecy serves the interests of biological parents, adoptive parents, and adoptees"); Garrison, *supra* note 1, at 890–91 ("Independent (nonagency), international, transracial, and older child adoptions have all increased markedly, while secrecy is increasingly replaced with open records and even open adoptions, in which the adopted child retains some form of contact with her biological family."); Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13 (1999) (suggesting that the growing concern for "the best interest of the child" has fueled support for "open" or "cooperative adoptions"); Naomi R. Cahn, *Family Issue(s)*, 61 U. CHI. L. REV. 325, 328–29 (1994) (reviewing ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* (1993)) (identifying feminist jurisprudential issues surrounding contemporary adoption law).

In the wake of *Troxel v. Granville*, 530 U.S. 57, 64–65 (2000) (holding that a visitation order failed to accord with due process because the Court did not give any deference to the parent's determination of the child's best interests), courts have been presented with new issues

the rights within families formed by new reproductive technologies, are grounded in a history of the family. Not only does this history provide the backdrop for understanding these debates, but it also provides critical insights for structuring the legal response to these newly forming families. Issues involving the formation and recognition of same-sex families and the respect to be accorded single-parent families have similar resonance with nineteenth-century attempts to manage “artificial” families.

A new understanding that adoption did not spring fully formed into American consciousness in 1851 will not lead to the instantaneous acceptance of other forms of “artificial” families. Nonetheless, this history does show that alternative family forms can be accepted without threatening other structures of the family and that family law moves, albeit slowly, to acknowledge demographic and cultural changes in society. Adoption law can be viewed as a development that conserved and respected already-existing and otherwise normatively acceptable social relationships; contemporary family law should similarly seek to protect these settled expectations.

I. METHODOLOGY

As a reflection of the concern over social, cultural, and technological developments in the family, there have been a series of recent attempts to articulate policies for managing these changes. This section discusses and critiques several of these approaches as a basis for understanding how the history of adoption helps in developing an alternative model.

A. *The Two-Parent Marital Family Approach*

In her highly influential article, Professor Marsha Garrison argues that applying an “interpretive approach,” or “legal casuistry,”⁸ to the development of technological family forms provides the most rational method of regulation.⁹ She argues that contemporary “law governing the status of those who conceive sexually and those who adopt

concerning the meaning of adoption, such as the visitation rights of the former grandparents post-adoption. *See, e.g., Ex parte D.W.*, 835 So. 2d 186, 190 (Ala. 2002) (allowing visitation); *Lopez v. Martinez*, 102 Cal. Rptr. 2d 71, 72 (Ct. App. 2000) (terminating visitation). Such cases question the paradigmatic nuclear family by allowing a child to have three recognized sets of grandparents.

8. Garrison, *supra* note 1, at 873.

9. *Id.* at 882.

thus becomes critically important: unless there is a justifiable basis for distinguishing technological conception from those other methods of achieving parentage, fairness demands that status be determined by similar legal standards.”¹⁰ She describes adoption law as designed “to ensure that children have two parents with obligations of care and support, and that children’s interests take precedence over those of their parents.”¹¹

The Uniform Parentage Act (UPA), promulgated in 2000, and enacted shortly thereafter by Texas and Washington,¹² similarly adopts a preference for a two-parent marital family.¹³ Article 7, which concerns assisted conception, only addresses parenthood in the context of married couples.¹⁴ Article 8, which validates surrogacy arrangements, only discusses these arrangements when they occur between a married couple and a surrogate.¹⁵ Single people or gay and lesbian couples using assisted conception or surrogacy are completely omitted from the model law. The emphasis on establishing paternity which is evident throughout the entire UPA similarly contemplates one mother and one father for every child.¹⁶

10. *Id.*

11. *Id.* at 892.

12. Uniform Parentage Act, TEX. FAM. CODE ANN. § 160 (Vernon, LEXIS through 2003 Sess.); Uniform Parentage Act, WASH. REV. CODE ANN. § 26.26 (West, WESTLAW through 2003 Sess.).

13. As this Article went to press, the National Conference of Commissioners on Uniform State Laws (NCCUSL) revised the UPA because of objections that “the 2000 version did not adequately treat a child of unmarried parents equally with a child of married parents.” UNIF. PARENTAGE ACT prefatory note at 2 (2002); see, e.g., Am. Bar Ass’n, Comments on the Revised Uniform Parentage Act (UPA) of 2000 (Mar. 7, 2002) (on file with the *Duke Law Journal*) (objecting that “[t]he 2000 UPA disadvantages children born outside of marriage”). For example, Section 703 in the 2000 version adopted by NCCUSL was titled “Husband’s Paternity of Child of Assisted Reproduction”; it was retitled “Paternity of Child of Assisted Reproduction” in the 2002 version. Unless otherwise indicated, this Article discusses the 2000 version.

14. UNIF. PARENTAGE ACT art. 7, 9B U.L.A. 354–59 (2000).

15. For example, in the 2000 Act, Section 801(b) stated: “The intended parents must be married, and both spouses must be parties to the gestational agreement.” UNIF. PARENTAGE ACT § 801(b), 9B U.L.A. 362 (2000). In the 2002 Act, the same section provided: “The man and the woman who are the intended parents must both be parties to the gestational agreement.” UNIF. PARENTAGE ACT § 801(b) (2002). Even the revisions require that the intending parents be a man and a woman.

16. For further critiques of this concept, see generally Naomi Cahn, *Children’s Interests and Information Disclosure: Who Provided the Egg and Sperm? Or Mommy, Where (and Whom) Do I Come From?*, 2 GEO. J. GENDER & L. 1 (2000) (emphasizing the growing number of potential “parents” beyond paternity through developments in adoption and reproductive technology). The American Bar Association notes that the UPA actually increases the difficulty of establishing legal parenthood for nonmarital children because it relies on proof of a genetic link.

B. *The Problems with the UPA Approach*

This two-parent preference, regardless of context, relies on the heterosexual marital family as the only norm (as the “like case”) for deriving regulatory standards. The history of adoption shows, however, the fallacies of this use of “legal casuistry,” or analogical reasoning. Analogical reasoning is based on applying principles derived from past cases to future developments.¹⁷ Consequently, this narrow application of the interpretive method, or legal casuistry, to newly emerging family forms is methodologically problematic, because the interpretive method can only work where there are two comparatively similar “things.” Instead, laws that apply to new family forms must examine the actual function, and functioning, of these families to ensure the fairest regulation.

The interpretive method, like casuistry, first requires recognition of like cases.¹⁸ Indeed, in their book, *The Abuse of Casuistry*, Professors Albert Jonsen and Stephen Toulmin outline basic principles of casuistry, the first of which is that similar factual cases should be treated similarly.¹⁹ But, they observe, casuistry requires recognition that a “like case” cannot always be found and that there may be both

See Am. Bar Ass’n, *supra* note 13 (“[T]he 2000 UPA makes it more difficult . . . for nonmarital children to have two legal parents.”). This reliance on genetic connection rather than affection or function is reminiscent of the early adoption law discussed in this Article, when courts and legislatures struggled, for example, with the inheritance rights of adoptees versus those with a blood connection to the decedent. See *infra* Part IV.B.

17. Emily Sherwin, *A Defense of Analogical Reasoning in Law*, 66 U. CHI. L. REV. 1179, 1179–83 (1999). Although this explains much of the reasoning underlying the common law, analogical reasoning has limitations. See JAMES F. CHILDRESS, PRACTICAL REASONING IN BIOETHICS 18 (1997) (“[A]nalogical reasoning illuminates features of morally or legally problematic cases by appealing to relevantly similar cases. . . . Of course, much of the moral (or legal) debate hinges on determining which similarities and differences are both relevant and significant.”); John D. Arras, *Principles and Particularity: The Roles of Cases in Bioethics*, 69 IND. L.J. 983, 986–87 (1994) (noting the interplay between principles and precedent in deciding particular cases); Cass R. Sunstein, *On Analogical Reasoning*, 106 HARV. L. REV. 741, 742–43 (1993) (critiquing, but ultimately defending, analogical reasoning). If it precludes examining and listening to the story told in and through any individual case, then it becomes overly rigid. As narratives of alternative family forms illustrate, one principle does not fit all—the principle must be adapted to changing circumstances.

18. See, e.g., Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926 (1996) (noting the special prominence of “reasoning by analogy” in legal reasoning); Sunstein, *supra* note 17, at 744–45 (illustrating analogical reasoning in law through examples of fact patterns with shared characteristics).

19. ALBERT R. JONSEN & STEPHEN TOULMIN, *THE ABUSE OF CASUISTRY: A HISTORY OF MORAL REASONING* (1988).

morally significant differences as well as similarities between cases.²⁰ The challenge is to identify the relevance of those similarities and differences. Moreover, there may be two “like” cases, each with different principles.²¹

Another principle set forth by Jonsen and Toulmin is that the facts may have changed so dramatically that the first principle no longer applies. The example they use involves a married man who wishes to change his sex, and the question they ask is whether, following biological change, he is still married to his wife.²² Although marriage is traditionally defined as the union of a man and a woman, they argue that it is important to look at “the deeper purposes of marriage,” rather than the “normal” definition.²³ Although the background of common rules and precepts cannot always be subject to question, they conclude:

we have to reconcile ourselves to the fact that the conditions of human life are always changing and that from time to time new historical circumstances are liable to put us in situations of moral embarrassment where we can no longer continue relying on the “common sense” and “common morality” that have served us more or less well hitherto, and are forced to reconsider the goals of moral life and reflection at a deeper level.²⁴

The ability of a man to change his sex is an already-existing fact that must be recognized in reasoning; the reasoning follows the cultural fact rather than creating it. It is only the legal implications that are unclear, not the existence of the actual case.

Further, the interpretive method requires consensus about widely acknowledged and shared background principles. In the law, *stare decisis* seems to supply such background principles.²⁵ It is a mis-

20. *Id.* at 7–8, 14 (stressing “the ambiguities that arise in marginal cases”).

21. *See, e.g.*, Paul Tremblay, *The New Casuistry*, 12 *GEO. J. LEGAL ETHICS* 489, 519, 534–35 (1999) (emphasizing the difficulty of pairing “paradigm cases” with exact principles).

22. JONSEN & TOULMIN, *supra* note 19, at 318; *see also* RICHARD B. MILLER, *CASUISTRY AND MODERN ETHICS: A POETICS OF PRACTICAL REASONING* 240 (1996) (“Novel cases produce fresh occasions for interpreting presumptions and paradigms.”).

23. JONSEN & TOULMIN, *supra* note 19, at 322.

24. *Id.*

25. Larry Alexander, *Bad Beginnings*, 145 *U. PA. L. REV.* 57, 82–85 (1996) (arguing, however, that legal principles do not have “the virtue of correct moral principles, since they are not necessarily morally correct”); Sherwin, *supra* note 17, at 1190–91 (“Reliance creates a reason for the judge to conform her own decisions to past decisions, even when she believes the past decisions were wrong.”); Tremblay, *supra* note 21, at 489, 518–20 (“Like their use of precedent in

take to think of casuistry as a technique that allows one to jump directly from the difficult conversations about governing norms to applying specific principles to cases, as if the principles spoke for themselves.²⁶

There is a subtext—an ideology—that shapes the use of interpretation and analogy.²⁷ Norms about adoption, like norms about gay, lesbian, and single-parent families, are not, however, universally shared. Adoption shows the development of “new historical circumstances,” as does the growing number of single-parent and gay and lesbian families today. Consequently, rather than analogizing unlike cases to one another, it becomes important to examine the underlying purpose of families, rather than their specific form. When it comes to these purposes, it is somewhat easier to develop consensus principles that should inform, and serve as a background for, legal decision-making. Contrary to Professor Garrison’s somewhat superficial use of the interpretive method as well as the UPA’s reliance on rote principles, it is important to first identify the background norms before articulating the principles. Moreover, in using past principles and cases as a guide, it is critically important to examine their development to ensure that there were no “bad beginnings.”²⁸

common-law jurisprudence, paradigm cases establish a common shared basis from which to craft moral arguments and to make moral choices.”).

26. Alexander, *supra* note 25, at 86 (recognizing that in determining which cases are “like” the current case, an outside norm is still necessary to determine the similarities and differences between the cases). Professor Alexander argues that, when analogical reasoning is based on bad cases, it should not guide future cases. *Id.* I am indebted to my colleague Professor Robert Tuttle for his helpful comments on, and phrasing of, this point.

27. MILLER, *supra* note 22, at 130. As an example, Professor Miller explores Pope Paul VI’s encyclical on sexuality and parenthood, showing how it enshrines a particular ideology; he believes that casuistry must involve “ideological analysis.” *Id.* at 134.

28. Alexander, *supra* note 25, at 86. History thus helps provide a reasoned basis for examining why principles are as they are and whether this trajectory should be followed. As sociobiologists observe, it is not necessarily the “best” genes that continue, but rather only those that enhance survival; thus, individuals have the ability to move “beyond” their genetic heritage. *See, e.g.*, STEVEN PINKER, *THE BLANK SLATE: THE MODERN DENIAL OF HUMAN NATURE*, at ix, 52–53, 422 (2002) (“Natural selection favors organisms that are good at reproducing in some environments.”); June Carbone & Naomi Cahn, *Which Ties Bind? Redefining the Parent-Child Relationship in an Age of Genetic Uncertainty*, 11 WM. & MARY BILL RTS. J. (forthcoming 2003) (“Sociobiology starts with the assumption . . . that the genes that increase the prospects for reproductive success are more likely to be replicated in the next generation.”). Similarly, the “best” principles may not have developed, but rather only those most likely to survive appellate review at any given time. We have some choice as to how to apply those principles.

C. Recognition of the Paradox

When the legal system struggled with interpreting early adoption statutes, past cases involving biologically based families could provide only limited guidance. Adoption was a newly developing status, even though it created an otherwise recognizable relationship and, in many cases, ratified an existing relationship. Similarly, today, when the law struggles with issues relating to single-parent families, or the visitation rights of gay and lesbian parents to non-biologically related children, past decisions must be carefully limited based on their sets of sufficiently dissimilar (“un-like”) facts. If the law defines families as two parents (one man and one woman) with their child(ren), then legal actors will try to change the new families to fit into this image. If families are defined as intimate arrangements for the protection of adult intimacy and/or nurturing of children, then there is an obvious need for protecting and promoting such arrangements. To apply accurately the interpretive method, one must examine both what is like, and what is unlike, between the cases before deciding how to approach them.

Examining what is like and unlike between adoptive and biological families confronts a central paradox in adoption history. Seeking to treat adoptive families like biological families is, in some ways, quite radical, because it is an acknowledgement that familial relationships can be formed in different ways. Yet this approach has, historically, been seen as conservative, because it seeks assimilation rather than a recognition of difference. Moreover, the radical aspect of this action is undercut by the narrowness of the assimilative process; only certain types of adoptive families could ultimately be recognized as legitimate. The “assimilation without recognition of difference” model does provide short-term benefits for a specific group. It is, however, ultimately flawed for three reasons: (1) the failure to recognize differences precludes responding to alternative needs; (2) groups with differences are foreclosed from those benefits; and (3) the model itself remains reified and unable to change.

Examining the “deeper purposes” of the particular familial arrangement, together with the actual, and already-existing, case, should result in analogizing the similarities and respecting the differences. Instead of assimilation, a more accurate application of the interpretive method would result in “adaptation with recognition of difference.” Thus, this Article argues, the interpretive method requires

respect for the situation of diverse families.²⁹ Using one example drawn from adoption law—the visitation rights of birth grandparents post-adoption—and two examples from other alternative families—the rights of single parents and the rights of second parents in gay or lesbian families—I show how respect for function requires adapting the rules applicable to the two-parent, heterosexual, biological family.

II. THE SOCIAL CONTEXT OF ADOPTION, 1800–1900

The value of children, as well as the meaning of childhood, changed dramatically during the nineteenth century.³⁰ Similarly, the goals of the child-saving movements underwent significant transformation, reflecting the changing meaning of childhood. When children were economically valuable during the first half of the century, the child-saving movement tried to improve them, remove them from their poor backgrounds, and train them to be better individuals. By the end of the nineteenth century, as the value of children came to be seen (at least rhetorically) in their vulnerability, rather than in their productivity,³¹ the child-savers attempted to protect children from abuse and cruelty, so as to preserve their innocence. The early adoption laws were enacted as the child-saving movements began to change their focus from poverty to physical abuse and neglect.³² Al-

29. A challenge to the interpretive method itself, given the changing assumptions with respect to family, is also feasible.

30. See VIVIANA A. ZELIZER, *PRICING THE PRICELESS CHILD: THE CHANGING SOCIAL VALUE OF CHILDREN* 138–68 (1985) (examining the “profound transformation in the economic and sentimental value of children . . . between the 1870s and the 1930s”); Janet L. Dolgin, *Transforming Childhood: Apprenticeship in American Law*, 31 *NEW ENG. L. REV.* 1113, 1163 (1997) (suggesting that society reconceptualized childhood as a time of protected innocence); Ruby Takanishi, *Childhood as a Social Issue: Historical Roots of Contemporary Child Advocacy Movements*, 34 *J. SOC. ISSUES* 8, 11–15 (1978) (identifying and tracing various sources of childhood as a time of innocence, to be protected from harm and toil); Catherine J. Ross, *Society’s Children: The Care of Indigent Youngsters in New York City, 1875–1903*, at iii (1977) (unpublished Ph.D. dissertation, Yale University) (on file with the *Duke Law Journal*).

31. See, e.g., ZELIZER, *supra* note 30, at 138–68 (observing that, as children were removed from the labor force, “new sentimental criteria were gradually developed to determine the cash value of an economically useless child”). Ruby Takanishi points out that the older view of children considered children as “economic assets,” while, under the newer view, childhood became a time for development. Takanishi, *supra* note 30, at 15.

32. Intervention in families based on abuse and neglect has historically been connected to poverty, gender, and race. See, e.g., LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* 32 (1988) (“The [upper-class, female] reformers saw themselves as gracious, privileged big sisters, not only of children, but of adult women of the lower classes.”); ELIZABETH PLECK, *DOMESTIC TYRANNY: THE MAKING OF SOCIAL POLICY AGAINST FAMILY VIOLENCE FROM COLONIAL TIMES TO THE PRESENT* 70 (1987)

though the mid-nineteenth-century child-saving organizations developed a system of placing-out children (placing them in new homes) as a means of providing them with stable, middle-class families, they were also respectful of children's relationships to their biological families.

This Part places nineteenth-century adoption in its sociological context; the legal development of adoption, discussed in Part III, was intertwined with these cultural developments. This Part examines first the changing goals of the child-saving movement as well as the relationship between the child-savers, biological families, and the children who were being rescued. Then, this Part turns to the foster-family system, and, finally, to nineteenth-century cultural attitudes toward adoption.

A. *The Child Savers*

The widespread development of adoption during the nineteenth century emerged, at least in part, from the benevolent societies established to care for poor and neglected children. Saving children often meant removing them from their poor birth parents so that they could live with, or work for, parents of a different class.³³ Yet their parents

(noting that “the sudden explosion of social concern about child cruelty” during the nineteenth century was rooted in both growing humanitarian concerns and the efforts of “a wealthy, urban elite [that was] fearful of social disorder and dismayed by the poverty, disease, and lawlessness of urban life”); Hasday, *supra* note 5, at 306 n.14 (2002) (illustrating that Elizabethan poor laws had an impact on the development of American family law); Gwendolyn Mink, *Welfare Reform in Historical Perspective*, 26 CONN. L. REV. 879, 891–92 (1994) (identifying the role race played in welfare politics and parenthood); Martha Minow, *The Welfare of Single Mothers and Their Children*, 26 CONN. L. REV. 817, 839 (1994) (criticizing social policies that are based on unquestioned assumptions about class, gender, and race); Roberts, *supra* note 2, at 112 n.2 (identifying growing support for adoption rather than reunification with biological families); Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249, 1250–51 (1999) (focusing on intervention due to poverty); Martin Guggenheim, *Somebody's Children: Sustaining the Family's Place in Child Welfare Policy*, 113 HARV. L. REV. 1716, 1738–42 (2000) (reviewing ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE (1999)) (discussing the impact of poverty on the abuse and neglect of children); Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1577 (1996) (reviewing LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE (1994)) (criticizing government interference with the morality of welfare recipients).

33. Naomi Cahn, *Race, Poverty, History, Adoption, and Child Abuse: Connections*, 36 LAW & SOC'Y REV. 461, 464–67 (2002) (reviewing ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES (E. Wayne Carp ed., 2002) and DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2001)).

were active participants in this system, sometimes seeking temporary aid from the child savers or resisting removal. This Section addresses the differing relationships within the child-saving movement between the benefactors, the children, and their biological parents, showing the development of the tensions between biological and alternative family forms that recurred once adoption became a more formal status. While the child protection system and adoption are often seen as separate—child protective services protect children from abuse and neglect, while adoption finds new families for children—they are, of course, integrally related. Adoption developed while the abuse and neglect system came of age as a means for taking care of orphaned and abandoned children. Adoption historically served as a means of socializing culturally disfavored children—of removing them and placing them in middle-class homes, a practice quite similar to many child-saving efforts.

At the beginning of the nineteenth century, child savers focused on removing children from neglect or poverty and placing them in institutions or apprenticeships.³⁴ Organizations tried to find foster homes as part of the apprenticeship process.³⁵ The first children's house of refuge was established in New York in 1825 as a place for neglected children,³⁶ although institutions for dependent children had been established earlier,³⁷ and many women's organizations were already established to care for dependent widows and children.³⁸ Through these and other institutions, as well as through public

34. HOMER FOLKS, *THE CARE OF DESTITUTE, NEGLECTED, AND DELINQUENT CHILDREN* 167–68 (1902); GORDON, *supra* note 32, at 32; PLECK, *supra* note 32, at 75.

35. ANNE FIROR SCOTT, *NATURAL ALLIES: WOMEN'S ASSOCIATIONS IN AMERICAN HISTORY* 18–19 (1991) (noting the work of the Salem Female Charitable Society); Carol S. Lasser, *A "Pleasingly Oppressive" Burden: The Transformation of Domestic Service and Female Charity in Salem, 1800–1840*, 116 *ESSEX INST. HIST. COLLECTIONS* 156, 156–58 (1980) (same).

36. PLECK, *supra* note 32, at 74.

37. *See* 2 GRACE ABBOTT, *THE CHILD AND THE STATE* 7 (1938) (mentioning four institutions in service by the end of the eighteenth century); FOLKS, *supra* note 34, at 7–9 (same); 4 HASTINGS H. HART, *PREVENTIVE TREATMENT OF NEGLECTED CHILDREN: CORRECTION AND PREVENTION* 1–5 (1910) (listing a chronology of child-protective services). In 1807, the New York State legislature allowed for the incorporation of an orphan asylum society at the "petition presented to the legislature, from a number of ladies in the city of New York . . . [for] a society for the very humane, charitable, and laudable purposes of protecting, relieving, and instructing orphan children in said city." An Act to Incorporate the Orphan Asylum Society in the City of New York (Apr. 7, 1807), *reprinted in* 2 ABBOTT, *supra*, at 31–32.

38. *See, e.g.*, William Pryor Letchworth, *The History of Child-Saving Work in the State of New York*, in *HISTORY OF CHILD SAVING IN THE UNITED STATES* 154, 156 (Nat'l Conference on Soc. Welfare ed., 1893) (observing that the New York Society for the Relief of Poor Widows with Small Children was founded in 1797 by Isabella Graham).

schools, the philanthropists believed that wayward children could be reformed.³⁹ By the end of the nineteenth century, triggered in large part by the highly publicized 1874 case of the abuse and neglect of one child in New York City named Mary Ellen, the focus of many organizations was to prevent cruelty against children, rather than to remove children from the negative influences of poverty and neglect.⁴⁰ The tension in child saving between removing children from their homes and providing services to them within their homes remains today.

The early general adoption laws arose in the mid-nineteenth century, developing within the context of a child-saving movement dedicated to removing children from unsuitable backgrounds (rather than the later goals of preventing abuse and keeping children in their homes).⁴¹ During the early part of the century, benevolent societies often helped poor children by placing them as servants with women devoted to charity.⁴² Mid-nineteenth-century child-saving organizations provided houses of refuge for children, and often attempted to place them with foster families, either locally or in other parts of the country. The most famous of these societies, the New York Children's Aid Society founded by Charles Loring Brace,⁴³ developed an extremely ambitious "Emigration Plan," so that poor children could move west. Through his child-saving organization, Brace hoped to match "vagrant" children with families who needed an extra working hand.⁴⁴

39. Lee E. Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135, 1152. Notwithstanding this belief in the possible transformation of these children, the conditions in the institutions were generally undesirable and filthy. See, e.g., FOLKS, *supra* note 34, at 28 (describing unsanitary conditions at an institution); LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 8–9 (1999) (same). The system of placing-out children, through indenture or foster families, helped remove children from these environments. See *infra* notes 56–64 and accompanying text.

40. PLECK, *supra* note 32, at 69; Susan Vivian Mangold, *Protection, Privatization, and Profit in the Foster Care System*, 60 OHIO ST. L.J. 1295, 1302 (1999).

41. According to one prominent history of adoption, the problems of the child-saving movement were at least partially responsible for the general adoption statutes. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 460–61 (1972).

42. As the relationship between master and servant changed, becoming more like an employer/employee relationship than a domestic arrangement, Lasser, *supra* note 35, at 158, the child savers sought other methods of providing aid.

43. CAROLYN J. LAWES, *WOMEN AND REFORM IN A NEW ENGLAND COMMUNITY, 1815–1860*, at 85 (2000) (“[A]rguably the most famous American child-saving organization in the nineteenth century.”).

44. Charles Loring Brace, *The Children's Aid Society of New York: Its History, Plans, and Results*, in *HISTORY OF CHILD SAVING IN THE UNITED STATES*, *supra* note 38, at 1, 3. See

Nonetheless, this putative goal—that of finding a suitable home for children⁴⁵—differed from the practices of these organizations, and the adoption laws may have been influenced by the rhetoric of child saving, more than the reality of their actual practices. When members of the child-saving organizations began working with families, they found that, notwithstanding their initial assumptions, the parents were not necessarily “bad”; instead, they were simply poor. The goal, in many cases, became saving existing families, rather than simply saving the children from those families.

Indeed, studies of the practices of child-saving organizations show client families using the services of the organizations to help them over difficult times, such as the death of a husband or the mother’s illness.⁴⁶ Client families were not necessarily resistant, or even passive, recipients of unwanted intrusion and child removal. Instead, throughout much of the nineteenth century, they were often consumers of the opportunities provided by the child savers because they had no other “choices.”⁴⁷

generally STEPHEN O’CONNOR, *ORPHAN TRAINS: THE STORY OF CHARLES LORING BRACE AND THE CHILDREN HE SAVED AND FAILED* (2001) (tracing Charles Loring Brace’s efforts on behalf of poor children and the widespread influence of his preference for foster care over institutions for housing children).

45. See Presser, *supra* note 41, at 474 (“Around 1850, however, private agencies began to be founded with the avowed purpose of placing younger children in a suitable family atmosphere.”).

46. LAWES, *supra* note 43, at 133–34. Professor Linda Gordon makes similar observations about victims of family violence who often requested intervention to stop the violence. GORDON, *supra* note 32, at 295. These studies challenge the notion of overly interventionist elite organizations “doing good” through social control of their clients. Instead, although these organizations often were not responsive to the needs of their clients, and although clients often were unable to control what happened after they asked for help, family members were not passive recipients of aid. *Id.*

47. Separation was the least desirable option, but the possibility of temporary separation was better than a more permanent relinquishment of parental rights. Bruce William Bellingham, “Little Wanderers”: A Socio-Historical Study of the Nineteenth Century Origins of Child Fostering and Adoption Reform, Based on Early Records of the New York Children’s Aid Society 94–95 (1984) (unpublished Ph.D dissertation, University of Pennsylvania) (on file with the University of Pennsylvania Library). The Children’s Friend Society of Worcester (CFS) at least provided parents with an option other than abandoning their children to an orphanage. See *infra* notes 51–55 and accompanying text.

The notion of “choice” in this context is problematic, of course. For discussions of the complexity in contemporary choice rhetoric, see, for example, RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* 67 (stating that “adoption is rarely about mothers’ choices;” but is instead often about a resourceless woman’s lack of choices); Kathryn Abrams, *Cross-Dressing in the Master’s Clothes*, 109 *YALE L.J.* 745, 760 (2000) (reviewing JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* (2000)) (describing a lack of “choice” for both women and men).

Parents—frequently poor mothers—placed their children through the child-saving organizations in order to provide support and training for them.⁴⁸ They were not abandoning their children, but rather they were trying to secure help, based on a concept of temporary care, as opposed to a permanent relinquishment of rights.⁴⁹

Affirmative client use of the child-saving organizations is apparent in studies of the actual practices of the Children's Friends Society of Worcester (CFS) and the Children's Aid Society of New York (CAS) between 1850–1880.⁵⁰ Mothers frequently asked the CFS to board their children temporarily as they looked for a job or following the desertion of the father.⁵¹ Men also used the organization's services, requesting temporary help after the death of their wives.⁵² Although the CFS charged for these services, the fees were adjusted or waived when parents could not afford to pay.⁵³ Client families of other social agencies seem similarly to have needed and used these services for

48. Professor Janet Dolgin suggests a comparable usage of indenture by poor, single mothers in the nineteenth century. Dolgin, *supra* note 30, at 1151–52.

49. An early-nineteenth-century Philadelphia committee that was formed to investigate the situation of poor people complained that families sent their children to the city's public institution, where the children were provided food and shelter; but once the children were capable of labor production, the parents reclaimed them. FOLKS, *supra* note 34, at 27–29 (reporting on an 1827 Philadelphia study). The report recommended that the guardians of the children asylum receive permission to bind out children without the consent of their parents. *Id.* at 27. In his 1865 report on the need for a new Civil Code in New York, David Dudley Field complained that parents who had placed their children for informal adoption often returned to reclaim the children when they were capable of productive labor. HELEN L. WITMER ET AL., INDEPENDENT ADOPTIONS: A FOLLOW-UP STUDY 24–25 (1963). The Ohio Children's Homes found that children who were placed near their families of origin frequently returned home. S.J. Hathaway, *Children's Homes in Ohio*, in HISTORY OF CHILD SAVING IN THE UNITED STATES, *supra* note 38, at 131, 133–34 (bemoaning that placed out children all too frequently returned to their earlier, and lower class, surroundings).

50. See JUDITH A. DULBERGER, "MOTHER DONIT FORE THE BEST": CORRESPONDENCE OF A NINETEENTH-CENTURY ORPHAN ASYLUM 9–13 (1996) (describing similar studies in Albany); *infra* notes 193–203 and accompanying text.

51. LAWES, *supra* note 43, at 133–34.

52. *Id.* at 135–36.

53. *Id.* at 134.

temporary support.⁵⁴ Reformers recognized this need for their services.⁵⁵

In his study of the New York Children's Aid Society, Bellingham found that families often used the child-saving organization as a temporary means for helping them through difficult times by providing food and shelter and, frequently, instruction.⁵⁶ He asserts that the temporary needs of the clients, rather than social control or even humanitarian child saving, provides a better explanation for child placement.⁵⁷ Even when children were placed out through the organization, they frequently returned home; the biological parents—generally the mother—remained central to the children's lives.⁵⁸ Bellingham challenges the orthodoxy that the child-savers were overly interventionist, finding instead that families voluntarily placed their children and that children often returned to their biological parents.⁵⁹ Instead of relinquishing their rights, parents temporarily “delegated” those rights to foster families, frequently reclaiming those rights (and their children).⁶⁰ Even when children had emigrated through the efforts of the Children's Aid Society, workers at the organization understood and respected children's connections to their

54. Susan L. Porter, *A Good Home; Indenture and Adoption in Nineteenth-Century Orphanages*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES*, *supra* note 33, at 29–30. Bruce Bellingham found that in one-third of the cases where the child savers asserted custody in order to improve a child's “moral control,” the parents had initiated the contact to help them control their children. Bruce Bellingham, *Institution and Family: An Alternative View of Nineteenth-Century Child Saving*, 33 *SOC. PROBS.* S33, S48 (1986).

55. Leaders of the CFS were deeply affected by the needs of the parents they met, and, rather than seeking to remove children, the CFS often changed its goal, attempting to keep families together. LAWES, *supra* note 43, at 113–14. Consequently, the organization allowed parents to use their “Home” as a temporary place for children when the parents were unable to care for them, rather than requiring parents to relinquish all custodial rights. *Id.* at 133–34.

56. Bellingham, *supra* note 47, at 87. Elizabeth Pleck notes that parents often asked the New York Society for the Prevention of Cruelty to Children to help them with “incorrigible” children. PLECK, *supra* note 32, at 85.

57. Bellingham, *supra* note 47, at 86–88. The most common reason for use of the Children's Aid Society during its early period was a child's need for a job. *Id.* at 119. Letters to the New York Foundling Hospital show mothers desperate to help their children through a placement, with the hope of being able to reclaim them. Lisa Lipkin, *The Child I've Left Behind*, *N.Y. TIMES MAG.*, May 19, 1996, at 44 (reprinting letters).

58. Bellingham, *supra* note 47, at 69 (“Usually the birth parent was the center of gravity and placed out children . . . circled back to the parental home.”).

59. *See also* Ross, *supra* note 30, at 91 (finding that 58 percent of children in orphanages were discharged to their family and friends).

60. Bellingham, *supra* note 47, at 78.

families of origin.⁶¹ Although the Children's Aid Society became famous for its placing-out program, it also helped families migrate together.⁶² The norm for mid-nineteenth-century child-saving organizations remained the return of children to their biological parents, even though the few relevant appellate cases from this time period examine the child's functional relationship with her foster family.⁶³ As a background to the development of a formal adoption process, child-saving organizations recognized the need to regularize child placement and manage the birth parent-child relationship.⁶⁴

Throughout the nineteenth century, regardless of the goals of the child-saving organizations, class remained an important factor in intervention. The early-nineteenth-century benevolent societies were formed to aid destitute children. In describing the work of the Ohio Children's Homes for a national conference in the late nineteenth century, S.J. Hathaway explained, quite earnestly, that it was important to remove children from their earlier "degrading influences" and place them, instead, in the homes of "well-to-do people."⁶⁵ It was gen-

61. See O'CONNOR, *supra* note 44, at 154 (noting CAS workers' realization that emigration "did not diminish children's obligations or bonds to their birth families"). The CAS rarely removed children without the consent of the parents, and there are few cases in which the foster family or the CAS prevented children from returning home. *Id.*; see also Bellingham, *supra* note 47, at 237 (noting the rarity of cases in which the CAS attempted to defeat efforts by birth parents to retrieve their child from a placement).

62. Ross, *supra* note 30, at 131.

63. See Bellingham, *supra* note 47, at 74–75 (disputing the claims of other historians who rely on appellate records). On the dangers of using appellate case records as determinate of legal norms, see HARTOG, *supra* note 1, at 317 n.4 (2000) (discussing the criticism that legal texts have distorted the ordinary lives of wives); Naomi Cahn, *Faithless Wives and Lazy Husbands: Gender Norms in Nineteenth-Century Divorce Law*, 2002 U. ILL. L. REV. 651, 657 (noting, in the context of divorce cases, that case reports are not always complete accounts).

64. The plea of one late-nineteenth-century mother dramatizes the issues at stake for the child-savers, the birth parents, and the children:

Alone and deserted, I feel to put my little one with you for a time. I would willingly work and take care of her but no one will have me and her too. . . . [N]ot knowing what to do with her and not being able to pay her board, I bring her to you knowing you will be as kind to her as to the many others who are under your care, and I will get work and try hard to be able to relieve you of the care, when she is so I can take her to work with me. . . .

No one knows how awful it is to separate from their child but a mother, but I trust you will be kind. . . .

Lipkin, *supra* note 57, at 44. Additional letters are collected in DULBERGER, *supra* note 50.

65. Hathaway, *supra* note 49, at 134. A 1922 article in the *Columbia Law Review* summarized one benefit in the majority of adoptions as "[taking] a child from a home of poverty or a charitable institution and placing that child in an environment tending to his physical, mental and moral uplift and betterment." John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 341 (1922).

erally believed that only children who were poor—and, as a corollary, many believed that these children came from dysfunctional families—were actually available for adoption and would be greatly benefited by adoption.⁶⁶ Although societies for the prevention of cruelty to children claimed the general right to intervene in existing families, this intervention occurred only in poor families.⁶⁷

It was only in 1938 that Grace Abbott, the former Director of the U.S. Children's Bureau, was able to note: "The practice of taking children from their parents solely on the ground of poverty is rapidly disappearing."⁶⁸ She also provided an alternative basis for adoption laws—one more focused on child protection—observing that the laws may have been motivated by an effort to prevent parents and agencies from consenting to the adoption of children by "persons wholly unsuitable or even unscrupulous."⁶⁹

During the latter half of the nineteenth century, the child-saving movements developed paradoxical theories and practices. They simultaneously respected the biological ties between parents and chil-

66. For a discussion of the changing views of birth mothers and their children, see generally REGINA G. KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890–1945* (1993); RICKIE SOLINGER, *BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION, AND WELFARE IN THE UNITED STATES* (2001); Naomi Cahn, *Birthing Relationships*, 17 *WIS. WOMEN'S L.J.* 163 (2002) (mentioning that poor women often had to give up their children to avoid starvation). As one early-twentieth-century social worker explained, "[a]doption is largely a problem of the young child who is also either illegitimate or the child from the 'broken' home. . . . [T]he children dealt with are the group of dependent children which is made up of those most seriously handicapped socially." ELINOR NIMS, *THE ILLINOIS ADOPTION LAW AND ITS ADMINISTRATION* 94 (1928). Another study of Massachusetts adoption observed that potential adoptive parents "begin the search for a child fully determined to choose one of good inheritance, and are surprised to discover that normal families of good stock seldom give away their children." IDA R. PARKER, "FIT AND PROPER"?: A STUDY OF LEGAL ADOPTION IN MASSACHUSETTS 26 (1927), *reprinted in* *THE ORIGINS OF ADOPTION* (David J. Rothman & Sheila M. Rothman eds., 1987).

67. See Hasday, *supra* note 5, at 333 (noting that the caseload for the New York Society for the Prevention of Cruelty to Children consisted exclusively of dealings with the poor).

68. 2 ABBOTT, *supra* note 37, at 167. Even today, however, the accuracy of this statement is doubtful. See, e.g., ROBERTS, *supra* note 33, at 27 (noting that poverty is the "single most important predictor of placement in foster case").

69. 2 ABBOTT, *supra* note 37, at 165. The definition of who was unsuitable to adopt changed during the first half of the twentieth century. Even in 1920, single women were praised as adoptive parents. JULIE BEREBITSKY, *LIKE OUR VERY OWN: ADOPTION AND THE CHANGING CULTURE OF MOTHERHOOD, 1851–1950*, at 115 (2000). Class and race figured prominently in determining suitability to adopt. See *id.* at 9 ("When private individuals founded the first adoption agencies in the 1910s and 1920s . . . they focused on serving white clients like themselves.").

dren while also seeking to remove children from those families to prevent further contamination.

B. Foster Family Placements

In addition to trying to protect children, the child-saving organizations also attempted to provide foster homes for them. The foster families' reaction to these children varied, from relief in having help with extra work to resignation to rejection. Frequently, when the child-saving organizations sought to find homes for the children, they were told that the children would never be treated in the same way as biological children. Indeed, "the remark so often heard at the home, from persons applying for a child, [was] 'I do not expect to love or treat this boy or this girl as I do my own children.'"⁷⁰

Many families, in accepting children from the aid societies, explicitly indicated their interest in labor help.⁷¹ The parents who accepted children from the "orphan trains"—the trains that brought children from New York City to western towns for placing-out—were frequently looking for cheap labor, and there were many complaints that the foster children were overworked.⁷² Placing-out children did serve to provide a permanent home for poor children, but it also guaranteed permanent labor for their adoptive parents. During the middle part of the nineteenth century, children were wanted for their ability to perform household labor. Indeed, even at the turn of the century, more than 15 percent of children between the ages of ten and fifteen were working, and this number does not include children who helped their parents on farms or in sweatshops, or who worked, but were under the age of ten.⁷³ Biological children were expected to perform a fair amount of labor within their families, but, with the decline in indentured servitude, some families sought foster children. In some

70. LAWES, *supra* note 43, at 142 (quoting unpublished records of the Worcester Children's Friend Society).

71. *See id.* at 143 (noting that, although the CFS took steps to prevent children from being exploited, many applicants wanted "cheap labor"); Ross, *supra* note 30, at 134–35 (commenting that many participants sought children as farm help, and specified that they would only take children old enough to work).

72. *See* GORDON, *supra* note 39, at 9–10 (describing how the demand for child labor contributed to the rise of orphan trains, and noting the deluge of complaints about overworking); Bellingham, *supra* note 47, at 165 (concluding that one of the main motivations for surrender of custody was that CAS services could be used as a stepping stone toward obtaining adult occupational status).

73. ZELIZER, *supra* note 30, at 56.

situations, of course, the children were accepted as family members, and even changed their names.⁷⁴

The gap between blood and adoption, however, remained wide throughout this period.⁷⁵ In addition to the traditional Anglo-Saxon emphasis on blood relationships, there was a profound fear in nineteenth-century America of the confidence man, the swindler, who was not what he appeared to be,⁷⁶ and a strong belief in eugenics.⁷⁷ As individuals became more mobile, reestablishing themselves in new communities, the possibilities of fraud were increasingly available. Indeed, a “cult of sincerity” developed to counteract the fear of hypocrisy,⁷⁸ and social anxiety over the development of false identities led to a feeling that crimes such as bigamy and swindling were profoundly threatening.⁷⁹

These anxieties manifested themselves in fears over taking in unknown children who might revert to their parents’ ways. Indeed, throughout the nineteenth and early twentieth century, there was a strong belief that the child would turn out like her biological parents.⁸⁰ Moreover, social workers assumed that a “definite link existed between illegitimacy and inherited feeble-mindedness.”⁸¹ Fear of taking unknown children into their families, however, conflicted with the

74. See LAWES, *supra* note 43, at 145 (noting one instance where a child took the name of his adoptive family).

75. *Id.* at 143 (commenting on the strength of the “prejudice against equating birth children and adopted children”).

76. See KAREN HALTTUNEN, CONFIDENCE MEN AND PAINTED LADIES: A STUDY OF MIDDLE-CLASS CULTURE IN AMERICA, 1830–1870, at 1–32 (1982) (discussing the publication of “advice manuals” warning American youth against joining the ranks of confidence men); Laura Hanft Korobkin, *The Maintenance of Mutual Confidence: Sentimental Strategies at the Adultery Trial of Henry Ward Beecher*, 7 YALE J.L. & HUMAN. 1, 23–24 (1995) (stating that the “socially successful hypocrite . . . became America’s supreme criminal”). Professor Lawrence Friedman notes that “confidence crimes and swindling” increased during the nineteenth and early twentieth centuries. Lawrence M. Friedman, *Crimes of Mobility*, 43 STAN. L. REV. 637, 653 (1991).

77. See *infra* note 79.

78. See HALTTUNEN, *supra* note 76, at 51 (describing the use of advice manuals in developing the cult of sincerity, in order to fight hypocrisy).

79. See Friedman, *supra* note 76, at 639 (assuming the task of determining why “bigamy and swindling posed such a profound threat during this period”).

80. See BEREBITSKY, *supra* note 69, at 28–31 (discussing early-nineteenth-century adoptive parents’ concerns about heredity); KUNZEL, *supra* note 66, at 52–54 (commenting on how, by giving birth to illegitimate children, “feeble-minded” women were thought to transmit their defective traits into the gene pool); BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 15–16, 39 (2002) (noting the common fear of adopting a “bad seed,” and describing the influence of hereditarian views on social work practice).

81. BEREBITSKY, *supra* note 69, at 130.

developing belief in the innocence of childhood. Indeed, in the “orphan’s tales,” which frequently appeared in women’s sentimental fiction during the mid-nineteenth century, the apparently poor orphans are revealed, by novel’s end, to be members of the middle class.⁸² Their new families are thus reassured that they have not been swindled by a child who does not belong.

In her 1927 study of adoption in Massachusetts, Ida Parker noted that, while adoptive parents generally searched for a child of “good inheritance,” they were unlikely to find one because “normal families of good stock seldom give away their children even in the face of poverty, death, or other adversity.”⁸³ Prominent child-saving advocates assured society that even children of questionable heritage could become upstanding citizens,⁸⁴ so long as the families were appropriate.⁸⁵

C. Social Status of Adoption

Popular literature during the middle nineteenth century illustrated cultural attitudes to the status of adopted children, showing the uncertainty attendant to children who did not have a blood tie to their families.⁸⁶ For example, in the 1860 novel, *Myra, the Child of*

82. See DIANA LOERCHER PAZICKY, *CULTURAL ORPHANS IN AMERICA*, at xvi (1998) (discussing how the orphans in these stories were commonly used as an allegory for the middle class to which they are restored).

83. PARKER, *supra* note 66, at 26. As Parker’s comment indicates, by the 1920s, the demand for white children to adopt was beginning to outpace the supply, in contrast to the mid-nineteenth-century need to find families for children. See ZELIZER, *supra* note 31, at 169 (stating that no market for babies existed in the 1870s, and individuals even *received* money for taking unwanted children); Cahn, *supra* note 66, at 175 (noting “the increasing demand for adoptable infants” in the early 1930s).

84. See Cahn, *supra* note 66, at 178 n.82 (citing Hastings H. Hart, *The Child-Saving Movement*, 58 *BIBLIOTHECA SACRA* 520, 521–22 (1901)).

85. An influential training manual for social workers published in 1919 urged them to look for “well-ordered homes” which were “altruistic enough to receive homeless and destitute children and to bestow upon them the affection and training that will develop them into useful members of society.” W. H. SLINGERLAND, *CHILD-PLACING IN FAMILIES: A MANUAL FOR STUDENTS AND SOCIAL WORKERS* 195 (1919). Dr. Slingerland was a special agent in the Department of Child-Helping at the Russell Sage Foundation, and his book was introduced by Hastings Hart, one of the most well-known children’s advocates during the early twentieth century. Although he recognized that people of “modest income” could still provide appropriate placements, *id.*, the finances of the receiving home remained critical, *see id.* at 122 (noting that the ability of the household to provide for a child financially is one of the three main determinants of the quality of that household as an adoptive home).

86. Some of the most famous nineteenth-century British Victorian novels centered around orphans, or children of unknown parentage, including *Silas Marner* by George Eliot, *Great Expectations* and *Bleak House* by Charles Dickens, and *Doctor Thorne* by Anthony Trollope. See Marianne Novy, *Imagining Adoption*, in *IMAGINING ADOPTION: ESSAYS ON LITERATURE AND*

Adoption, the unmarried and wealthy birth parents are unable to keep their child because of the shame that her birth might cause them.⁸⁷ Shortly after Myra's birth, her parents send her to live with some childless friends. The child calls her adoptive parents "Mother" and "Father," and has no knowledge that she is not their biological child. Not until she seeks to marry someone of whom her father disapproves does she find out that she is not his blood relative, and thus not entitled to any of his property.

"Thank God!" he muttered, turning furiously upon the terrified girl—"Thank God, no drop of *my* blood runs in your veins."

....

A faint cry burst from Myra's lips. She staggered back and fell upon a chair, her eyes distended

....

Little by little, as her shattered nerves could bear it, the truth was revealed to Myra. It was a sad, sad trial, the uprooting of her pure domestic faith, the tearing asunder of those thousand delicate fibers that had so long woven, and clung, and rooted themselves around the parents who had adopted her. . . . Then came other thoughts and more thrilling anxieties. The beloved one, the man of her choice, whom she had dreamed of endowing with riches, from which she now seemed legally dispossessed—how would he receive the news of her orphanage—of her dependent state?⁸⁸

Myra writes her lover that she is "orphaned and without inheritance—her very birth loaded with doubt."⁸⁹ When her adoptive cousins come to visit after this revelation, they treat her coldly, viewing

CULTURE 1, 2–3 (Marianne Novy ed., 2001) (discussing currently relevant adoption issues addressed in some of these works).

87. ANN S. STEPHENS, MYRA, THE CHILD OF ADOPTION: ROMANCE OF REAL LIFE 8–15 (New York, I. P. Beadle & Co. 1860). The reasons prompting the married parents, Zulima and Daniel, to relinquish their child are appropriately complicated and sentimental. Zulima had previously married a man who was already married; until this man was convicted of bigamy, her marriage to Daniel retained an appearance of impropriety. *Id.* at 8–10. Zulima is utterly distraught at giving up her baby, and finds ways to visit Myra in her new adoptive home without revealing her identity.

88. *Id.* at 80–83.

89. *Id.* at 84. Though her adoptive father eventually forgives her, she retains her status as a non-heir.

her as someone who had attempted to “defraud” them of their inheritance.⁹⁰

On the other hand, in the 1886 Victorian novel, *King Arthur: Not a Love Story*, an American physician characterizes adoption in the United States quite differently.⁹¹ He explains that adoption makes the adoptee the legal heir of the adoptive parents, and the “real parents have no more right” to their child.⁹² Certainly in popular culture, the legal and social implications of adoption remained unsettled.⁹³

Anne of Green Gables,⁹⁴ published in 1908, almost fifty years after *Myra*, illustrates both of these earlier stereotypes, as well as the more modern possibilities of adoption. The book reports on the suspicions not just of Marilla, the potential adoptive mother, but also of her neighbors in greeting this orphan. By the end of the book, however, Marilla tells Anne that she feels toward her as though Anne were part of her “flesh and blood.”⁹⁵

Popular culture reflected legal reality with respect to the uncertainty of adoption.⁹⁶ For example, the 1873 New York adoption legislation originally included provisions pertaining to the inheritance rights of adopted children, but these provisions were ultimately

90. *Id.* at 86. Though the novel is not necessarily an accurate representation of the legal reality, it does reflect popular conceptions of adoption.

91. DINAH CRAIK, *KING ARTHUR: NOT A LOVE STORY* 40 (1886); *see also* Tess O’Toole, *Adoption and the “Improvement of the Estate” in Trollope and Craik*, in *IMAGINING ADOPTION: ESSAYS ON LITERATURE AND CULTURE*, *supra* note 86, at 17, 20–21 (quoting from this passage, and discussing the relationships of the adopted child in the novel).

92. CRAIK, *supra* note 91, at 40. Adoption was not legalized in England until 1926, and part of the author’s goal may have been to present an extremely favorable depiction of American adoption. *See* O’Toole, *supra* note 91, at 20 (describing the physician’s comments as a “pitch for the institution of legal adoption”).

For other discussions of the use of adoption narratives in literature, *see generally* Carol J. Singley, *Building a Nation, Building a Family: Adoption in Nineteenth-Century American Children’s Literature*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES*, *supra* note 33.

93. *See* BEREBITSKY, *supra* note 69, at 108–09 (discussing late-nineteenth- and early-twentieth-century short stories on adoption by single women). *See generally* *IMAGINING ADOPTION: ESSAYS ON LITERATURE AND CULTURE*, *supra* note 86 (compiling essays that explore the role of adoption in various literary works).

94. L.M. MONTGOMERY, *ANNE OF GREEN GABLES* (1908).

95. *Id.* at 381; *see also* Beverly Crockett, *Outlaws, Outcasts, and Orphans: The Historical Imagination and Anne of Green Gables*, in *IMAGINING ADOPTION: ESSAYS ON LITERATURE AND CULTURE*, *supra* note 86, at 57, 73–75 (discussing Marilla’s original suspicions and eventual love for Anne).

96. *See* Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 *YALE L.J.* 1579, 1595 (1989) (discussing how popular culture can communicate messages about forms of authority, including the law).

deleted.⁹⁷ As one proponent of the adoption provisions explained, “It is a case of not unfrequent occurrence, that a child is trained up tenderly and in luxury, then left in utter poverty, because the adopted parent has made no will. In the case of a daughter it works much hardship.”⁹⁸

The social suspicion attendant to adoption, and the lack of legal inheritance rights, were deeply entrenched notions. In his 1876 commemoration of Abraham Lincoln’s death, Frederick Douglass told his white audience that they were ““the children of Abraham Lincoln. We [African-Americans] are at best only his step-children; children by adoption, children by forces of circumstances and necessity.””⁹⁹

III. ADOPTION LAW IN NINETEENTH-CENTURY AMERICA

In 1851, Massachusetts enacted what is generally characterized as the first modern adoption statute.¹⁰⁰ The 1851 Massachusetts act was

97. J.B. Varnum, Letter, 8 ALB. L. REV. 383, 383 (1873) (“[T]he bill, as at first passed, *included the right of inheritance*, but was altered at the request of Gov. Dix.”).

98. *Id.*; see also *The Law of Adoption*, 9 AM. U. L. REV. 74, 80 (1874) (“A man, having adopted, educated, and reared a child, with tastes and habits only comporting with a competence in the future, would sometimes die intestate, leaving the child not provided for. Evidently, in such a case, the adoption was an injury rather than a benefit to the child.”).

99. PAZICKY, *supra* note 82, at 185–86 (quoting ERIC FONER, TOM PAINE AND REVOLUTIONARY AMERICA 312 (1976)). The equation of step-children and adopted children was a common means of noting the creation of nonbiological families.

100. See, e.g., Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958–1983*, 17 FAM. L.Q. 173, 176–77 (1983) (stating that the statute became a “model for legislation in most of the common law states”); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 426 (1997) [hereinafter Howe, *TRA*] (commenting that the Massachusetts law was the first to make adoption a “public” issue by giving jurisdiction to the probate courts); Yasuhide Kawashima, *Adoption in Early America*, 20 J. FAM. L. 677, 678–90 (1982) (discussing the influence of the statute in modern American adoption law); Burton Z. Sokoloff, *Antecedents of American Adoption*, FUTURE OF CHILDREN, Spring 1993, at 17, 18 (commenting that “for the first time, the interests of the child were expressly emphasized”); Ann T. Lamport, Note, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 110 (1988) (calling the statute the first codification of public adoption); *infra* note 154. Professor Howe notes that some scholars believe that the 1851 statute was a significant step in the development of the *parens patriae* doctrine. Howe, *TRA*, *supra*, at 426–27. For example, Professor Jane Maslow Cohen (whose work I respect immensely) explains that adoption’s “development in this country dates from the enactment of the earliest adoption statute, passed by the Massachusetts legislature in 1851.” Jane Maslow Cohen, *Race-Based Adoption in a Post-Loving Frame*, 6 B.U. PUB. INT. L.J. 653, 660 n.16 (1997). For other examples, see Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 17 n.16 (1999) (“Massachusetts enacted the first modern adoption statute by providing a process for judicial confirmation that any proposed adoption was in the child’s best interest.”); Anne Wiseman French, Note, *When Blood Isn’t Thicker than Water: The Inheritance Rights of Adopted-Out*

not, however, widely noted at the time, and what recognition it did garner appears not to have focused on its authorization of adoption.¹⁰¹ Although the statute was certainly significant, many of the deeply held beliefs about it¹⁰² are not supported by the legal history of adoption.

The 1851 statute is claimed to have made the best interests of the child paramount, and to have made adoptive families equivalent to biological families. These are overstated claims that evade the tensions inherent in mid-nineteenth-century adoption law. First, some form of adoption was recognized by various types of statutes prior to 1851,¹⁰³ and second, modern adoption did not emerge fully formed as a result of this statute. Although the 1851 statute was a significant advance over prior statutes, the story of adoption has far more layers and texture and a much more complex historical pedigree. This Part provides an overview of the different meanings and forms of adoption that existed throughout the nineteenth century, and that presaged the development of the mid-nineteenth-century general statutes that

Children in New York, 53 BROOK. L. REV. 1007, 1011 & n.8 (1988) (“Massachusetts, in 1851, was the first state to enact an adoption law the purpose of which was to improve the situation of a needy child, rather than merely to create an heir for the adoptive parent in the Roman tradition.”).

In his groundbreaking 1972 article—which is often cited as the source of these statements about the 1851 statute—Professor Stephen Presser is careful to point out that there were earlier private acts that authorized adoption. Presser, *supra* note 41, at 461–64. See also Joan Heifetz Hollinger, *Introduction to ADOPTION LAW AND PRACTICE* § 1.02[2] (Joan H. Hollinger ed., 1996).

101. See WITMER ET AL., *supra* note 49, at 19 (“[C]hances are that the advent of [the early adoption] statutes, landmarks though they now seem to us, created little stir because they were then looked upon as little more than a normal and desirable next step in a development that was already taking place.”); Presser, *supra* note 41, at 470–71 (noting the lack of discussions in the press about the statute’s implications, and quoting from one article in a Boston newspaper that focused more on the grant of name-changing power to probate court judges); *infra* Part III.A (discussing the state of adoption law prior to 1851). Professor Ben-Or suggests that the Massachusetts legislature was motivated to enact the 1851 statute because of an explicit request for permission to adopt contained in an 1850 name-change petition. Joseph Ben-Or, *The Law of Adoption in the United States: Its Massachusetts Origins and the Statute of 1851*, 130 NEW ENG. HIST. & GENEALOGICAL REG. 259, 266–67 (1976) (reprinting the petition requesting to adopt a child as a legal heir rather than simply requesting a name change).

Professor Zainaldin notes that the Massachusetts House of Representatives was considering the possibility of adoption legislation as early as 1847. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851*, 73 NW. U. L. REV. 1038, 1042 (1979) (quoting from a Massachusetts House Report ordering the Committee on the Judiciary to investigate the expediency of enacting an adoption law).

102. See *supra* note 100 and accompanying text; *infra* Part III.B.

103. As Joseph Ben-Or indignantly noted in 1976, “[b]y 1851, adoption had been recognized for one hundred fifty years in Massachusetts.” Ben-Or, *supra* note 101, at 260.

authorized the judicial adoption process. The general adoption statutes that were enacted mid-century did not create the social form of adoption, although they were part of the process of clarifying and regularizing the status. The 1851 statute should be seen as transferring power over the family from the legislature to the courts, and as trying to regulate the multiple existing forms of “adoption.”

A. *Adoption before 1851*

Adoption existed in a variety of forms prior to the 1851 Massachusetts legislation. First, statutes authorized individuals to adopt children. Second, other statutes authorized agencies to place children for adoption. Third, families practiced informal adoptions. Finally, indenture contracts often served to legalize functional parent-child relationships.

1. *Adoption Petitions.* Earlier statutes concerning adoption had been enacted in many states, although they differed from the 1851 Massachusetts act in that they focused on individual adoptions in response to specific legislative petitions. The right to petition for individual redress was deeply rooted in early American law,¹⁰⁴ and families used this action of petition in order to effect legal recognition of a child’s changed status.¹⁰⁵

This individually focused legislation authorized name changes or other methods to ensure that children were able to inherit from their adoptive parents. Although these acts centered on inheritance rights, the underlying relationships were generally familial, rather than mercenary. For example, in 1837, the Louisiana legislature provided: “That Pierre Jean Baptiste Vidal, and Felicite Blanche Power, of the parish of Orleans, be authorised to adopt a young orphan child named Adelle, aged about seven years, who has been brought up by

104. See generally Gregory A. Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153 (1998) (arguing that the right to petition resulted from the polity of the colonies and early national America); Julie M. Spanbauer, *The First Amendment Right to Petition Government for a Redress of Grievances: Cut from a Different Cloth*, 21 *HASTINGS CONST. L.Q.* 15, 27–33 (1993) (describing the development of the right to petition in the American colonies); Stephen A. Higginson, Note, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 *YALE L.J.* 142 (1986) (providing a history of the right to petition, beginning with colonial America).

105. See, e.g., Ben-Or, *supra* note 101, at 266 (discussing name-change petitions as the standard method of securing legislative ratification of adoption).

them”¹⁰⁶ More than twenty years later, Adelle sought to be named the intestate heir of her adoptive mother.¹⁰⁷ Though the lower court held that nephews and nieces related to her mother through blood were the intestate heirs, the appellate court held that adoption meant more than simply allowing an orphan to live with a family; instead, adoption meant establishing a new parent-child relationship, and thus, Adelle was entitled to inherit from her adoptive mother.¹⁰⁸ Similarly, Texas enacted a generally applicable statute in 1850 that was designed to protect the inheritance rights of adopted children by allowing any individual to file a statement with the court to adopt another person.¹⁰⁹ In other states, the legislatures authorized individuals to change their names, thereby providing the individuals with full inheritance rights from their new families.¹¹⁰ Between 1804 and the end of the Civil War, Vermont enacted approximately three hundred such acts, one for each person adopted.¹¹¹ In Massachusetts, where 101 acts of private adoption were enacted between 1781 and 1851,¹¹² petitions

106. Act of Mar. 11, 1837, No. 65, § 2, 1837 La. Acts 62, 63.

107. *Vidal v. Commagere*, 13 La. Ann. 516, 516 (1858).

108. *Id.* at 519. In construing the legislative act of adoption, the court explained:

Now, if this formal act is to be construed to confer merely a right to take the orphan into the family to reside, it gives it, as we think, a slight significance. It was a right with which no one would likely interfere, even in the absence of any action of the sovereign power.

Id. at 517. The court thus construed the adoption act broadly.

109. WILLIAM H. WHITMORE, *THE LAW OF ADOPTION IN THE UNITED STATES AND ESPECIALLY IN MASSACHUSETTS* 66 (1876) (reprinting GEORGE W. PASCHAL, *PASCHAL'S DIGEST OF THE LAWS OF TEXAS*, art. 3058 (1866)). The statute carefully specified that the adopted child could not inherit more than one-fourth of the adopting parent's estate, where the adopter also had a marital child. *Id.*; see also *Taylor v. Deseve*, 16 S.W. 1008, 1009 (Tex. 1891) (“Even when [legally] adopted, the relation between [the adopting father and the child] would not, under our statute, have been the same as paternity and filiation.”); *Eckford v. Knox*, 2 S.W. 372, 374 (Tex. 1886) (noting the inheritance limitation, and stating that although adoption makes the child an heir, it does not “constitute him a member of the [adopter's] family”). Other states enacted general legislation that authorized private agreements to an adoption. See WITMER ET AL., *supra* note 49, at 30 (calling this type of statute the first, although less important, class of adoption laws).

110. See NIMS, *supra* note 66, at 9 (observing that adoption to ensure the inheritance rights of children had been authorized by special legislation prior to the 1867 enactment of a general adoption statute); WITMER ET AL., *supra* note 49, at 29 n.1 (citing to an 1841 Kentucky statute and an 1848 Pennsylvania statute, each of which authorized specific adoptions and noted that the adopted child would become a legal heir).

111. BEREBITSKY, *supra* note 69, at 20.

112. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 269–70 (1985). Most of these private acts operated to change a child's name and to recognize an already existing parent-child relationship. See *id.* (quoting one act's recognition of past support provided by the adoptive parent).

were initially referred to the legislative committee on name changes, a tacit recognition that the legislature would be ratifying, rather than creating, a new family.¹¹³ Indeed, the Massachusetts name-change legislation of 1850 authorized numerous people, county by county, to change their names. Amidst the list, which appears to include whole families as well as individuals, are “Julia A. Hartshorn, an adopted child, of Walpole, may take the name of Julia Howard; Caroline Fellows Johnson, of Roxbury, an adopted child, may take the name of Elsey Susan Lewis.”¹¹⁴

2. *Charitable Adoptions.* An early, and additional, type of legislation relating to adoption centered on authorizing charitable organizations to place children for adoption.¹¹⁵ These statutes typically envisioned that parents would surrender custody to the charitable organization, which would then place the child in an appropriate family, subject to various safeguards.¹¹⁶ For example, in 1849, New York allowed the incorporation of the American Female Moral Reform and Guardian Society.¹¹⁷ Once parents had relinquished their children to the organization, the legislation authorized the Society to

place such child by adoption or at service in some suitable employment and with some proper person or persons . . . [I]n every such case the requisite provisions shall be inserted in the indenture or contract of binding, to secure the child so bound such treatment, education, or instruction as shall be suitable and useful to its situation and circumstances in life.¹¹⁸

113. *Id.*; see Ben-Or, *supra* note 101, at 267 (commenting that most petitions “stated that adoption already existed . . . [and] requested no more than the change of name”).

114. 1850 Mass. Acts 253. The legislation authorizes names changes for more than one hundred people for a variety of purposes. Several of the individuals are specifically designated as “minors,” probably indicating the ratification of additional adoptions.

115. *In re Thorne’s Estate*, 49 N.E. 661, 662 (N.Y. 1898) (discussing the 1849 act which incorporated the American Female Guardian Society and allowed it to place children for adoption with appropriate persons).

116. There is an uncanny resemblance between this method of adoption and contemporary methods of adoption through social service agencies.

117. The American Female Guardian Society, the successor to the American Female, Moral Reform, and Guardian Society, operated eleven industrial schools in New York City in 1875, and provided shelter and food for hundreds of poor women and children. *Lefevre v. Lefevre*, 59 N.Y. 434, 436–37 (1875).

118. Act of Apr. 6, 1849, ch. 244, § 6, 1849 N.Y. Laws 365. The act of incorporation also provided that the Society would be governed by a “board of female managers.” *Id.* § 3.

Moreover, the New York statute provided for oversight of the child's treatment, requiring the approval of either the commissioners of the almshouse or the surrogate of New York,¹¹⁹ all of whom were public officials. Similarly, the 1849 act of incorporation for the Worcester Children's Friend Society allowed for the placement of "children in the families of virtuous and respectable citizens, to be brought up in such families as adopted children and members thereof."¹²⁰ While finding other families¹²¹ who would provide the appropriate nurture and support was difficult, within its first five years of operation the Society had already placed sixty-two children who had a strong expectation of adoption within their foster families.¹²²

The language of these statutes is remarkably similar to that of the Massachusetts "general adoption" statute enacted two years later: all of the statutes are concerned that the child be placed with the "proper" person, and that the child be treated in a "suitable" manner. The 1849 Massachusetts statute even specified that the adopted children should become "members" of their new families.¹²³ Like the later adoption laws, these statutes required some public oversight to finalize a placement. Unlike the more general 1851 statute, however, the 1849 statute did not specify a precise interpretation of the effect of adoption. Nonetheless, the claim that the 1851 legislation was the first "modern" statute is suspect because it overlooks these prior legislative efforts, to say nothing of the questionable assertion that the 1851 Act was "modern."¹²⁴ Adoption as a public matter existed outside of the individual petition context.

3. *Informal Adoption.* The final form of adoption that existed before the 1851 legislation was more informal, and it did not become legal—or at least public—until judicially disputed. The general practice of informal adoption—of making someone else's child an

119. *Id.* § 6. Given that New York did not enact a general adoption statute until 1873, this legislation, in allowing for adoption, is somewhat prescient.

120. LAWES, *supra* note 43, at 125 (quoting MASS. GEN. LAWS ch. 88 (1849)).

121. Many of the Society's founding members volunteered to take in these children; indeed, not only did Ann Buffman Earle, a board member of the Society, agree to provide a home for six-year-old John Tyler, she convinced her sister to become a foster parent for nine-year-old Emma Tyler. LAWES, *supra* note 43, at 141–42.

122. *Id.* at 145.

123. *See supra* note 120.

124. *See supra* note 100 and accompanying text for discussion of later developments in adoption law and practice that may, more accurately, be described as "modern" adoption.

heir—appears to have been fairly common even before 1851.¹²⁵ European visitors to the United States frequently commented on the ease with which children were adopted into new families, although such adoptions typically occurred by relatives upon the death of a family member.¹²⁶ For example, in *Van Dyne v. Vreeland*,¹²⁷ John Van Dyne claimed that, in the early 1820s, his father had consented to his being adopted by his uncle and that his uncle had promised to leave his property to Van Dyne.¹²⁸ Van Dyne apparently did not even know that he was adopted until he was about ten years old.¹²⁹ The uncle executed several wills in favor of Van Dyne, including one in 1843, in which he referred to him as “my beloved adopted son.”¹³⁰ In reliance on this agreement of prospective inheritance, Van Dyne worked for his uncle on his farm for more than twenty years.¹³¹ The uncle remarried, however, and sought to deprive Van Dyne of his inheritance.¹³² The court held that Van Dyne could sue as a third-party beneficiary of the contract between his father and his uncle to receive all of the entitlements as though he had been adopted, even though the uncle had never filed any formal petition.¹³³

This type of informal adoption was fairly widespread.¹³⁴ In Massachusetts, frequent petitions for name changes were presented after

125. Ben-Or, *supra* note 101, at 260; Kawashima, *supra* note 100, at 688–96. Colonial Americans recognized adoptive parent-child relationships for both inheritance and affectional purposes, and colonial wills occasionally evidenced “testamentary adoption,” which affirmed an already functioning parent-child relationship, and assured the “adopted” child a share in a parent’s estate. *Id.* at 696.

Even in England, adoption existed to create heirs. See Randolph Trumbach, *The Rise of the Egalitarian Family: Aristocratic Kinship and Domestic Relations in Eighteenth-Century England* 49 (1978) (reporting on the eighteenth-century adoption by the Duke of Newcastle of his nephew, the earl of Lincoln). Professor Trumbach’s work has received increasing prominence through his work in support of the plaintiffs in a Canadian case concerning the right to gay marriage. Emily Eakin, *Did Cradles Always Rock? Or Did Mom Once Not Care?*, N.Y. Times, June 30, 2001, at B7.

126. 2 ARTHUR W. CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY* 23, 144–45 (1918) (noting that many visitors, including de Tocqueville, were surprised by the ease and acceptability of adoption in the United States).

127. 11 N.J. Eq. 370 (N.J. Ch. 1857).

128. *Id.* at 371.

129. *Id.* at 372.

130. *Id.* at 374.

131. *Id.* at 372.

132. *Id.* at 375.

133. *Id.* at 381–82.

134. WITMER ET AL., *supra* note 49, at 24 (“Thousands of children are actually, though not legally, adopted every year; yet there is no method by which the adopting parents can secure the

parents had informally adopted their children.¹³⁵ Indeed, the legislature's grant of the petitions served to recognize the ability of the individuals to effectuate the adoption themselves.¹³⁶ In her study of the Boston Female Asylum, Professor Susan Porter observes that some children were never formally admitted to the orphanage because, although known to the orphanage, the children had already been placed through informal adoptions.¹³⁷

Informal adoption also played an important role among African-Americans. Although groups like the Worcester Children's Friend Society occasionally took responsibility for African-American children, they were not enthusiastic about doing so, and, unlike the procedures they used for white children, the managers did not even record the names of the African-American children or their parents.¹³⁸ Therefore, informal forms of adoption provided parents for children within the African-American community.¹³⁹ Foster parents and "fictive kin" expanded the familial support available to children both during and after slavery.¹⁴⁰

A final form of informal adoption was through deed, in which children (like chattel) were deeded as property from their biological parents to their adoptive parents. In 1872, Pennsylvania legalized the existing practice of "adoption by deed," although courts continued to

children to themselves except by a fictitious apprenticeship." (quoting N.Y. COMM'RS OF THE CODE, THE CIVIL CODE OF THE STATE OF NEW YORK 36 (1865))).

135. LAWES, *supra* note 43, at 123 (noting that Massachusetts enacted more than one hundred bills for name changes between 1781 and 1851).

136. Ben-Or, *supra* note 101, at 266.

137. Porter, *supra* note 54, at 31–32.

138. LAWES, *supra* note 43, at 155–56.

139. See Twila Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminists Legal Theory*, 10 YALE J.L. & FEMINISM 101, 111–12 (1998) (discussing the methods by which African-American children, orphaned by the "sale or death of their parents," were informally adopted by families of slaves and former slaves); see also DEBORAH GRAY WHITE, *AR'N'T I A WOMAN? FEMALE SLAVES IN THE PLANTATION SOUTH* 133 (1985) ("[I]n friendship and dependency relationships women often treated nonblood kin as if a consanguineous tie existed. This is why older women were called Aunt and Granny."). For discussions of such practices in the twentieth century, see ANDREW BILLINGSLEY, *CLIMBING JACOB'S LADDER: THE ENDURING LEGACY OF AFRICAN-AMERICAN FAMILIES* 29–31 (1992); CAROL B. STACK, *ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY* 62–89 (1974) (discussing "child-keeping" in "The Flats," poor sections of African-American communities, in which non-parents provide nurture and may acquire decisionmaking powers); Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 269–71 (1995) (noting the different forms of informal adoption in African-American families beginning during slavery).

140. Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMP. L. REV. 1649, 1663–64 (1995).

struggle with the meaning of this term.¹⁴¹ The practice of deeding continued until at least the early twentieth century.¹⁴²

4. *Indenture*. Indenture performed a variety of functions in nineteenth-century America, ranging from the provision of hired help, to apprenticeship within the same social class, to adoption.¹⁴³ Masters owed to the indentured children for whom they were responsible many of the same duties that a parent owed a child. Correspondingly, the children owed to their masters the personal services otherwise due their parents.¹⁴⁴ Indenture thus served to alienate and divide parental responsibility between the biological parents and the master.

Orphaned and poor children were frequently placed out pursuant to indenture contracts, and courts typically supervised the indenture relationships.¹⁴⁵ For children of wealthier families, indentureship

141. Presser, *supra* note 41, at 498.

142. See SLINGERLAND, *supra* note 85, at 133:

[I]n some states the old process still obtains, and adoption is accomplished by a written agreement—the parents or a guardian, as “party of the first part,” consenting, and the foster parents, as “party of the second part,” accepting the child as though it were their own, the document being duly attested and recorded, like a deed to property.

143. See BEREBITSKY, *supra* note 69, at 19 (observing that indenture in the mid-1860s has been characterized as an “economic relationship”); MARY ANN MASON, FROM FATHER’S PROPERTY TO CHILDREN’S RIGHTS: THE HISTORY OF CHILD CUSTODY IN THE UNITED STATES 1–47 (1994) (discussing the grant of “custody” through indenture contracts and apprenticeships); Dolgin, *supra* note 30, at 1118 (noting that the practice of child indentures continued for almost a century after the American Revolution); Ross, *supra* note 32, at 1256 (discussing out-of-hand indenturement as a historical response to child poverty).

144. GROSSBERG, *supra* note 112, at 259–60; MASON, *supra* note 143, at 30–31. An 1853 indenture contract provided that the recipient family “shall well and properly diet, clothe and lodge the said [child] and in case of sickness will furnish her with proper medical advice, medicine, and attendance . . . and that he will also instruct her . . . in the elementary parts of the English language and education.” BEREBITSKY, *supra* note 69, at 25 (reprinting an indenture agreement). For examples of earlier indenture contracts, see 1 ABBOTT, *supra* note 37, at 203–13 (1938).

Many of the early treatises on familial relationships included the master-servant relationship too. The first edition of Tapping Reeve’s influential treatise, published in 1816, through the third edition, published in 1862, covered both topics. TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF COURTS OF CHANCERY (3d ed. 1862).

145. Kawashima, *supra* note 100, at 683–84; MASON, *supra* note 143, at 31, 76–77. Professor Mason comments that judges began applying legal doctrines developed in the context of the parent-child relationship. MASON, *supra* note 143, at 76; see Dolgin, *supra* note 30, at 1131 (noting that after the Industrial Revolution, “resolution of disputes about indenture agreements came increasingly to rest on conclusions about the scope and bases of fathers to bind their children as apprentices”).

helped inculcate cultural values appropriate to their class.¹⁴⁶ Colonial wills occasionally referred to nonbiological children who had been placed as servants or apprentices, and with whom the testator had developed a relationship akin to that of parent-child.¹⁴⁷ Although indenture continued throughout the nineteenth century for apprenticing poor children, wealthier families abandoned the practice, in part because of the developing ideology of middle-class motherhood, which required the mother to become intensively involved in raising her children.¹⁴⁸

Nonetheless, throughout the nineteenth century, indenture contracts served as a method for transferring custody of children from an orphanage or other institution to foster parents, and the early charitable adoption legislation frequently authorized the organizations to engage in both indenture and adoption.¹⁴⁹ Until the adoption process became more formalized, indenture contracts were used as one of the means for transferring custody of children to a foster family for a virtual adoption.¹⁵⁰ The statutes regulating placing-out and indenturing certainly disrupted both the indivisibility and the inalienability of parental rights prior to adoption law by, for example, allowing parents to retain some rights to receive economic compensation while sharing custody with someone else.¹⁵¹ The concept of indenture contracts clearly exemplified the possibility of dividing child custody and of allowing nonbiological parents to experience the same obligations as biological parents. By the early twentieth century, however, indenture

146. See GROSSBERG, *supra* note 112, at 259 (observing that colonial apprenticeships “served a variety of functions for all classes, ranging from moral and cultural training to poor-law relief”).

147. *E.g.*, Kawashima, *supra* note 100, at 683 (citing such wills).

148. See GROSSBERG, *supra* note 112, at 259 (observing that in the nineteenth century, “changing family attitudes—the importance of mother-child bonds, prolonged childhood, and the home as nursery and refuge—undermined the attractions of indentures”). Professor Grossberg explains that industrialization also served to make indenture contracts less desirable. *Id.* at 259–60. For further discussion of the impact of the ideology of domesticity, see *infra* note 173 and accompanying text.

149. See BEREBITSKY, *supra* note 69, at 25 (noting that in 1853, “indenture was the only available legal method to transfer custodianship of children in Washington, D.C.”); *supra* note 32 (discussing legislation chartering child-saving organizations).

150. See, *e.g.*, BEREBITSKY, *supra* note 69, at 33 (noting the process by which the Washington Hospital for Foundlings placed illegitimate children in families).

151. See Dolgin, *supra* note 30, at 1131 (“When indenture agreements did begin to provide for wages, it was unclear whether a noncustodial parent (the apprentice was in the custody of a master) had any right to the earnings of the minor child”).

had been displaced as adoption became more widely available and accepted.¹⁵²

B. *The Development of General Adoption Legislation*

The conventional view of adoption legislation identifies the Massachusetts statute as the first modern adoption statute. On this view, the statute enshrined the best-interest-of-the-child standard into adoption law, was designed primarily to benefit children, and provided for the complete integration of the child into her new family.¹⁵³ Many scholars have labeled the 1851 statute as the starting point for the development of modern adoption law.¹⁵⁴

This conventional view neglects, however, the evolving meanings attached to children's interests. The actual meaning of the children's interest under the Massachusetts statute did not necessarily refer to anything but an examination to ensure that the child would not be economically exploited, although, even then, the child could certainly be asked to work within the family.¹⁵⁵ Further, the conventional view

152. William Slingerland distinguishes between three different methods of placing-out children: "free homes," in which the foster parents were not paid for their child care; "on board," in which the biological parents or a public institution paid for the child's board; and "'working homes,' at wages which may or may not leave a surplus beyond the child's board and clothes." SLINGERLAND, *supra* note 85, at 41.

153. See Kawashima, *supra* note 100, at 678 (commenting on the "enduring characteristics" of American adoption law that derive from this early statute).

154. *E.g.*, Cohen, *supra* note 100, at 660 n.16 (adoption's "development in this country dates from the enactment of the earliest adoption statute, passed by the Massachusetts legislature in 1851"); Kathryn D. Katz, *Ghost Mothers: Human Egg Donation and the Legacy of the Past*, 57 ALB. L. REV. 733, 762 n.144 ("In 1851, Massachusetts enacted the first comprehensive adoption statute," providing for a complete severance of the relationship between the adopted child and her biological parents, a relationship which is still the "norm" today); Marci J. Blank, Note, *Adoption Nightmares Prompt Judicial Recognition of the Tort of Wrongful Adoption: Will New York Follow Suit?*, 15 CARDOZO L. REV. 1687, 1693 (1994) ("The first American statute regulating adoption was enacted in Massachusetts in 1851 . . ."); Thanda A. Fields, Note, *Declaring a Policy of Truth: Recognizing the Wrongful Adoption Claim*, 37 B.C. L. REV. 975, 977 (1996) ("The first adoption statutes in the United States were not passed until the mid-nineteenth century . . .").

155. See *supra* note 71 and accompanying text. Note that working class children remained a significant source of income to their families throughout this time period. See, e.g., Bellingham, *supra* note 47, at 175 (observing the Children's Aid Society was used by poorer families "as a resource facilitating their family wage economy strategies").

Moreover, the best-interest standard was not a firmly entrenched benchmark in adoption cases. Although the discourse of subsequent adoption law has recognized children's interests, those interests have varied depending on broader cultural concerns. Adoptive parents sought children for their economic worth at mid-century, while also attempting to help them escape the

treats the statute as a radical break from earlier practices. Instead, the development of general adoption legislation should be viewed as ratifying an existing situation, rather than creating a new status.

1. *The Massachusetts statute.* In his landmark 1971 article, Professor Stephen Presser identifies the 1851 Massachusetts statute as “[t]he first comprehensive adoption statute,”¹⁵⁶ although he speculates that the legislators “might not have thought of adoption as much more than a change of name for the adopted child.”¹⁵⁷ While the statute became a model for the adoption statutes of several other states,¹⁵⁸ there was enormous regional variation in the approaches taken to adoption.¹⁵⁹ The Massachusetts statute provided that the adopted child should be generally treated as though

he had been born to [his parents] in lawful wedlock; except that he shall not be capable of taking property expressly limited to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation.¹⁶⁰

The 1851 statute allowed Massachusetts residents to petition the probate judge for permission to adopt a child, and required written consent to the adoption from the child’s parents or guardian.¹⁶¹ The statute then provided that an adoption would be allowed if the judge

poverty of their birth families. By the early twentieth century, they sought children for their intrinsic value as well as in conformity with the larger cultural narratives of expected motherhood.

156. Presser, *supra* note 41, at 465; see also Fred L. Kuhlmann, *Intestate Succession by and from the Adopted Child*, 28 WASH. U. L.Q. 221, 223 (1943) (asserting the same). Indeed, Kuhlmann argues that it was only in the mid-nineteenth century that Americans began to develop dependent child care institutions and legislation, *id.*, a claim that has also been belied by subsequent historical examinations.

157. Presser, *supra* note 41, at 471.

158. In 1853, Wisconsin enacted its own adoption statute, which is an almost exact copy of the Massachusetts statute. 1853 Wis. Laws 85, reprinted in THE ORIGINS OF ADOPTION, *supra* note 66, at 107–08.

159. As Professor Renee Lettow Lerner points out, legal historians have become increasingly attentive to the distinctions among regions in development of the law. Renee Lettow Lerner, *The Transformation of the American Civil Trial: The Silent Judge*, 42 WM. & MARY L. REV. 195, 199–200 (2000).

160. Comment, *The Law of Adoption*, 9 AM. L. REV. 74, 77 (1874) (quoting MASS. GEN. LAWS, ch. 110, § 7 (1851)).

161. Act of May 24, 1851, ch. 324, §§ 1–2, 1851 Mass. Acts 815. If there were no parents or legal guardian, consent could be given by the next of kin; failing that, the probate judge was entitled to appoint someone to act “as the next of kin of such child” for purposes of handling the consent issues. *Id.* § 2.

was satisfied that the potential adopting parents “are of sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of its [*sic*] parents and that it is fit and proper that such adoption should take place.”¹⁶²

Nowhere does the statute mention the child’s best interests, nor does it specify procedures for evaluating the fitness of the adoption. Indeed, it was probably the 1855 Pennsylvania adoption statute which first mentioned promoting “the welfare of [the] child” as a concern in allowing an adoption.¹⁶³ Not until the late nineteenth and early twentieth centuries did statutes begin to establish procedures for evaluating the appropriateness of the adoption.¹⁶⁴

Instead, there is a focus in the original Massachusetts legislation on the ability of the adoptive parents to provide “suitable” nurture for the child, with the suitability explicitly varying on the “degree and condition of its [*sic*] parents.” The appropriateness of the placement thus varied according to the class and condition of the adoptee’s parents. Seventy-five years later, Evelyn Foster Peck of the federal Children’s Bureau commented that this provision suggested that some children were simply not suitable, by virtue of their background, for adoption.¹⁶⁵ Even the 1953 Uniform Adoption Act reflected this attitude. It provided that the pre-adoption investigation should determine whether the child “is a proper subject for adoption.”¹⁶⁶ Given the strong belief in heredity—that a child would turn out like her biological parents—throughout the nineteenth and early twentieth centuries,¹⁶⁷ issues surrounding the child’s background were particularly significant in the adoption process.

The requirement that the adopting family act suitably toward the child is also reminiscent of the much earlier laws regulating the

162. WHITMORE, *supra* note 109, at 2 (reprinting Act of May 24, 1851, ch. 324, §5, 1851 Mass. Acts 816).

163. *Van Matre v. Sankey*, 36 N.E. 628, 631 (Ill. 1893) (citing an adoption approved pursuant to 1855 statute); WITMER ET AL., *supra* note 49, at 31.

164. See PARKER, *supra* note 66, at 7–8 (noting that judicial discretion under the Massachusetts statute sometimes meant that a judge did not look beyond the actual adoption petition for additional facts). In 1923, Massachusetts enacted legislation permitting judges to appoint a guardian ad litem to investigate the situation. *Id.* at 8 (citing 1923 Mass. Acts 432).

165. EVELYN FOSTER PECK, ADOPTION LAWS IN THE UNITED STATES: A SUMMARY OF THE DEVELOPMENT OF ADOPTION LEGISLATION AND SIGNIFICANT FEATURES OF ADOPTION STATUTES 3 (U.S. Children’s Bureau, Pub. No. 148, 1925).

166. UNIF. ADOPTION ACT § 9 (1953).

167. BEREBITSKY, *supra* note 69, at 28; see *supra* note 58 and accompanying text.

treatment of apprenticed and indentured children.¹⁶⁸ In addition, the requirement contains overtones of class—of providing middle-class nurture and culture to a poor child. Finally, the statute specified that the adopted child would, for purposes of inheritance, custody, and “all other legal consequences and incidents of the natural relation of parents and children,” be deemed to be the legitimate child of her parents.¹⁶⁹

2. *The Conservative Nature of General Adoption Legislation.*

The 1851 statute was certainly a significant step in the development of United States law on adoption. But it cannot be examined in isolation from other legal and cultural developments occurring during the mid-nineteenth century, nor from later adoption reforms. Indeed, there are several explanations for the development of general adoption legislation. The adoption statutes legitimized an increasingly popular method of family formation, and it was part of the nineteenth-century trend away from individualized legislation.

Many scholars believe that more formal methods of adoption developed because of the inability of the public child welfare system to handle all of the children who needed help; as a private child welfare system developed the practice of placing-out children, it needed some method to regularize the children's situations.¹⁷⁰ Not only were they placing-out children in increasingly large numbers, they had also sought, and had been granted, legislative authority to do so.¹⁷¹ The need to specify the terms on which they could operate may have been responsible for the early legislation.

Some scholars believe that the adoption acts served merely to recognize the gradual evolution in the formation of families that was

168. See Presser, *supra* note 41, at 459 (discussing the development of laws regarding the care of apprentices and indentured servants and the subsequent advent of “adoption”). Writing in the early twentieth century, Arthur Calhoun mentioned a 1748 Virginia act that required that orphans who were not otherwise self-supporting be bound out as apprentices, but that, if they were “ill used or if training is neglected such orphans may be removed.” 1 ARTHUR CALHOUN, *A SOCIAL HISTORY OF THE AMERICAN FAMILY* 308 (1917).

169. Act of May 24, 1851, ch. 324, § 6, 1851 Mass. Acts 816.

170. Presser, *supra* note 41, at 472–73; Jan Ellen Rein, *Relatives by Blood, Adoption, and Association: Who Should Get What and Why*, 37 VAND. L. REV. 711, 716 (1984); see also Note, *Adoptees' Equal Protection Rights*, 28 UCLA L. REV. 1314, 1335 (1981) (“American adoption began in the 1850s as a variation of indentured servitude called ‘placing out.’”).

171. See *supra* Part III.A.2.

already occurring through other legal mechanisms.¹⁷² Parents could create a status equivalent to adoption through: (1) indenture contracts, which served as a means for transferring parental responsibilities; (2) through wills, which ensured appropriate inheritance rights; and (3) through private petitions to change a child's name. The existence of these legal means "made adoption a part of the legal process under the law of the Commonwealth," and "that made it possible for the General Court to enact the Adoption of Children Act of 1851."¹⁷³

Other scholars have suggested that the statutes provided stability to the adoptive family, ensuring that the biological parents would not seek the return of their children.¹⁷⁴ Adoptive parents may have wanted a procedure to ensure that an adoption was final, rather than a temporary expedient—that all of the effort invested in their adopted child (and all of the labor provided by the child) guaranteed a legally binding parent-child relationship that could not be undone. And adoption may have developed to protect the expectations of children that they could stay in their new families and inherit property from their new parents. Additionally, developing norms of motherhood, norms which became even more defined during the first half of the twentieth century, undoubtedly influenced the creation of legislation that provided legal recognition of new parent-child relationships.¹⁷⁵

Finally, the development of general adoption statutes typifies a more general movement toward judicial, rather than legislative, action in family law cases.¹⁷⁶ Prior to the 1851 statute, the Massachusetts legislature had been frequently presented with petitions for name changes, which it labeled as adoptions.¹⁷⁷ As the legislature was confronted with increasing numbers of these petitions, a more general adoption statute may have seemed an appropriate method for handling these cases. Indeed, the movement away from private petitions and toward more generally applicable legislation, thus shifting direct responsibility away from the legislature, as happened in adoption, was

172. See Ben-Or, *supra* note 101, at 269 (noting the importance of indenture and testamentary law in establishing a legal precedent for adoption law).

173. Ben-Or, *supra* note 101, at 269

174. Presser, *supra* note 41, at 464.

175. For a discussion of these changing norms, see, e.g., Dolgin, *supra* note 30, at 1149–50.

176. See, e.g., RICHARD CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW 109–121 (1994) (documenting the transformation in Maryland divorce law from legislative to judicial proceedings).

177. See *supra* Part III.A.1.

typical of nineteenth-century law. Legislatures transferred the authority to grant other family law relief, including divorce and child custody, to courts. They also transferred the authority to issue corporate charters to state agencies, rather than requiring each charter to be issued individually by the legislature.¹⁷⁸

In an 1873 article, Philip J. Joachimsen challenged the title of the first general New York adoption statute, which was designed to “legalize” adoption, stating: “no one can maintain that the matter intended to be legalized was ever an illegal transaction.”¹⁷⁹ Adoption as an individual legal action appeared well recognized, if not universally accepted.¹⁸⁰ The development of general adoption legislation acknowledged the already-existing practices of adoption; the legislative form paralleled the development of general incorporation statutes and the mid-nineteenth-century transfer of authority for ministerial acts out of the purview of the legislature.

IV. ANALOGIES: TENSIONS BETWEEN BLOOD AND ADOPTION IN NINETEENTH-CENTURY ADOPTION LAW

With the increasing numbers of adoptions, courts began to confront complex issues concerning the interpretation of adoption statutes and the corresponding legal status of adoptees. The process through which courts resolved these cases shows the tensions in creating a new family form and attempting to use existing principles based on blood ties to determine the rights of adoptive family members. This Part examines three contested areas of adoption law: issues of biological parent consent, the rights of adoptees to inherit, and laws concerning incest. It explores both historical and contemporary

178. CHUSED, *supra* note 176, at 151 (discussing the transfer of authority for divorce and custody petitions from the legislature to the judiciary); *see also* Gregory Mark, *The Vestigial Constitution: The History and Significance of the Right to Petition*, 66 *FORDHAM L. REV.* 2153, 2227–28 (1998) (discussing the end of legislative petitioning for corporate charters and divorces); Floyd D. Shimomura, *The History of Claims Against the United States: The Evolution from a Legislative Toward a Judicial Model of Payment*, 45 *LA. L. REV.* 625, 648–53 (1985) (documenting the mid-nineteenth-century Congressional concern with claims against the government which fueled proposals for a claims court). *See generally* Christine A. Desan, *The Constitutional Commitment of Legislative Adjudication in the Early American Tradition*, 111 *HARV. L. REV.* 1381, 1486–87 (1998) (discussing the right to petition the legislature).

179. Philip J. Joachimsen, *The Statute to Legalize the Adoption of Minor Children*, 8 *ALB. L. REV.* 353, 353 (1873).

180. *See* GROSSBERG, *supra* note 112, at 393 n.74 (noting the “lack of publicity that surrounded the enactment of adoption”). In addition to the variation in adoption practices, the extraterritorial effects of an adoption were uncertain. *See infra* note 259 and accompanying text.

approaches to the dilemmas posed by the adoptive family in these areas. This Part first uses the historical significance of biological-parent consent as an illustration of the deeply rooted respect for blood ties. It next demonstrates, using inheritance cases, how courts have struggled with the resolution of relationships between blood and land. Finally, this Part examines incest cases, which provide a new location for mapping the dilemmas inherent in classifying adopted children as family members.

A. Parental Consent

The necessity of parental consent to adoption was a critical component in the early adoption statutes. Cases construing these statutes generally reflected the broad deference accorded the authority of married biological parents in nineteenth-century America, but courts frequently struggled with claims raised by the legal recognition accorded functional families.

1. *Parents' Rights.* According to basic cultural norms, married¹⁸¹ parents were recognized as the appropriate and fit custodians for their children.¹⁸² The mid-nineteenth-century family-law treatises re-

181. Children born outside of marriage were deemed to have no father, and men often had difficulty establishing the same rights for these children as if they had been born within marriage. See, e.g., MASON, *supra* note 143, at 24, 70–71 (“[N]either the [biological] mother nor the father had a legal right to the custody of a child born out of wedlock in colonial America.”). By the mid-nineteenth century, mothers had strong claims to the custody of such a child, although fathers did not. The importance of marriage to parental rights, particularly for the father, has contemporary resonance. See, e.g., Janet L. Dolgin, *Just a Gene: Judicial Assumptions About Parenthood*, 40 UCLA L. REV. 637, 648 (discussing the view of fatherhood “that conditions paternal rights on a marriage (or other similar relationship) between a biological father and his children’s mother”). The state has consistently manipulated the parental rights of unmarried fathers and mothers, depending on cultural norms.

182. GROSSBERG, *supra* note 112, at 235; see also, e.g., *Johnson v. Terry*, 34 Conn. 259, 263 (1867) (“It is not in the power of a father to divest himself by contract, even with the mother, of the custody of his children.”); *Torrington v. Norwich*, 21 Conn. 543, 549 (1852) (“The contract whereby the father attempted to release his infant son from all parental charge and controul [*sic*], was absurd . . . The law determines the relation between a father and his infant children, which it is not in their power to change.” (quoting *Adams & Barnum v. Oaks*, 20 Johns. 282, 285 (N.Y. Sup. Ct. 1822))). The rights of unmarried fathers were far different and fewer, however. See, e.g., Carbone & Cahn, *supra* note 28 (examining the persistence of the marital presumption); Harry D. Krause, *Equal Protection for the Illegitimate*, 65 Mich. L. Rev. 477, 479 (1967) (“[I]n many states the father has no parental authority at all over his illegitimate child.”). In his dissent in *Troxel v. Granville*, 530 U.S. 57 (2000), Justice Scalia opined that parents’ rights were among the “unalienable Rights” recognized by the Declaration of Independence, as well as within the rights protected by the Ninth Amendment. *Id.* at 91 (Scalia, J. dissenting).

peatedly (and rhetorically) proclaimed this basic—indeed, natural—legal principle.¹⁸³ So strong was parental power within marriage that, in the absence of fathers, mothers were, by mid-century, legally allowed to exercise control over their children.¹⁸⁴ Given the many legal disabilities that attended women,¹⁸⁵ this was a stunning recognition of the significance of the parental relationship. Parental authority took the form of parents' obligations to support their children, with a corresponding return on property: parents owned the labor value of their children.¹⁸⁶ The law in action differed somewhat; nineteenth-century judges were struggling with how to reconcile the claims of biological parents with those of their children and with those of others living in a substantial relationship to the child.¹⁸⁷

183. *E.g.*, 1 ABBOTT, *supra* note 37, at 49 (“The wants and weaknesses of children render it necessary that some person maintain them, and the voice of nature has pointed out the parent as the most fit and proper person.” (quoting 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 189–90 (George F. Comstock ed., 11th ed. 1867))).

184. *See, e.g.*, *Osborn v. Allen*, 26 N.J.L. 388, 392–93 (1857) (holding that “a mother is not only authorized, but bound, the father being dead, to exercise authority over her children”).

185. It was during approximately this same time that the Married Women Property Acts began to accord some limited rights to women. *See generally* Richard Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983) (discussing the true impact of the married women's property acts); Nancy Cott, *Marriage and Women's Citizenship in the United States, 1830–1934*, 104 AM. HIST. REV. 1440, 1451–54, 1457 (1998) (“By 1850, virtually every state has passed a statute stipulating that a married woman owned her own property.”); Reva Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082–83 (1994) (“Some statutes exempted wives' real property from their husbands' debts; others codified the equitable separate estate, allowing wives to hold, though frequently not to control or dispose of, property acquired before or during marriage”). As an example of other legal disabilities, Professor Cott discusses an 1855 statute that allowed a male American citizen to confer citizenship on the woman that he married, but made no parallel allowance for a female American citizen. Cott, *supra*, at 1457.

186. Barbara Bennett Woodhouse, “*Who Owns the Child?*”: Meyer and Pierce and the Child as Property, 33 WM. & MARY L. REV. 995, 1042–44 (1992) (discussing the historical context in which “children were, and are, often conceptualized as closely akin to property”). Joel Prentice Bishop, a prominent nineteenth-century treatise writer, points out the father's “strong moral obligation” to support his children, as well as the father's entitlement to his children's earnings, so long as he is supporting them. 2 JOEL PRENTICE BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 528, at 423 (4th ed. 1864).

187. *See* GROSSBERG, *supra* note 112, at 254–63 (“Custody fights between natural parents and surrogate child rearers brought out clashing rights and obligation of fathers, mothers, and those who stood *in loco parentis*.”); 1 ABBOTT, *supra* note 37, at 49, 52 (stating that “courts of justice may, in their sound discretion . . . withdraw the infants from the custody of the father or mother, and place the care and custody of them elsewhere” (reprinting 2 KENT, *supra* note 183, at 205)). Professor Grossberg discusses courts' use of the doctrine of *parens patriae*, pursuant to which the crown had exercised custodial authority over children. GROSSBERG, *supra* note 112, at 236.

Moreover, the parent-child relationship was justified by “natural affection”¹⁸⁸ rather than entitlement to labor. During the first half of the nineteenth century, advice manuals began to instruct women on how best to raise their children,¹⁸⁹ a recognition of the changing nature of both childhood and motherhood. There was increasing attention to the special emotional bond between the mother and her child.¹⁹⁰ Even the free lovers framed their demands for sexual freedom in the context of a woman’s right “to choose ‘the father of her babe,’”¹⁹¹ rather than an independent right to untrammelled sexuality.

The concern with consent observed in the early adoption laws may have reflected this strong involvement and connection between biological parents and their children placed in foster families,¹⁹² as well as the strong cultural respect accorded the parents’ rights in their children, and the strong rhetoric against family intervention. In her study, Professor Carolyn Lawes found that the children’s aid societies could not, at least in the antebellum period, exert unlimited power over the parent-child relationship.¹⁹³ Although the doctrine of *parens patriae* allowed local authorities to protect children from drunk or neglectful parents, the government infrequently used this authority.¹⁹⁴ Moreover, “[a]n aggrieved parent, especially a mother, could appeal to the public’s belief in the sacredness of the parental bond to exert considerable extralegal leverage.”¹⁹⁵ Indeed, mothers frequently re-

188. 1 ABBOTT, *supra* note 37, at 49 (reprinting 2 KENT, *supra* note 183, at 189–90).

189. See NANCY COTT, *THE BONDS OF WOMANHOOD: “WOMAN’S SPHERE” IN NEW ENGLAND, 1780–1935*, at 63, 84–93 (1977) (describing the child-rearing literature of that time); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 399–401 (1996) (same).

190. E.g., COTT, *supra* note 189, at 93 (noting “a cultural preference for domestic retirement and conjugal-family intimacy” among the middle class).

191. Ellen DuBois, *Feminism and Free Love*, at <http://www2.h-net.msu.edu/~women/papers/freelove.html> (Mar. 17, 2003) (on file with the *Duke Law Journal*) (quoting T.L. NICHOLS & MARY S. GOVE NICHOLS, *MARRIAGE: ITS HISTORY, CHARACTER, AND RESULTS* 191 (Cincinnati, V. Nicholson & Co. 1854)).

192. Nonetheless, family reunification was the most common outcome of attempts to save children, not adoption. See O’CONNOR, *supra* note 44, at 98–99 (noting that almost 60 percent of children in nineteenth-century orphanages actually had one living parent, and they were frequently reclaimed by their families of origin). Even when family reunification did not occur, the experiences of the Children’s Aid Society children showed that children with the strongest family ties were placed closer to home, thereby reinforcing the biological family relationship. *Id.* at 223; Bellingham, *supra* note 47, at 329.

193. LAWES, *supra* note 43, at 137.

194. See PLECK, *supra* note 32, at 75 (stating that “*parens patriae* was broadened to sanction removal of children from homes of drunken or neglectful parents”); see generally Monrad G. Paulsen, *The Legal Framework for Child Protection*, 66 COLUM. L. REV. 679 (1966).

195. LAWES, *supra* note 43, at 137.

claimed their children, notwithstanding a legal indenture contract.¹⁹⁶ Parents might seek to void the indenture contract, or simply to remove their children from the CFS home in violation of the contract.¹⁹⁷ Sometimes, the CFS itself voided a contract because of an improvement in the parent's situation.¹⁹⁸ Even during the early period of the Children's Aid Society, parents were in contact with their children and able to assert some power over their placements.¹⁹⁹

Notwithstanding the strong rhetoric supporting parental rights, it was common for children to live apart from their parents during some part of their childhood until the middle of the nineteenth century.²⁰⁰ In rural areas, approximately one-third of all farm families included an unrelated child during this time period.²⁰¹ In slave families, parents had no rights to their children, so their children were frequently raised by other people.²⁰² The situation of a child not living with her biological parents was not unusual in both white and black families; the termination of those parental rights in white families, however, remained less frequent.

The attention in the laws to issues of biological-parent consent had a very real basis that reflects some power that could be exercised by parents, and perhaps a recognition that their participation was crucial to ensuring a successful placement. Parents could exert power both legally, in withholding their consent, but also practically, in retrieving children placed away. In New York, Bruce Bellingham found that the integration of children into their substitute foster households depended not on "the willingness or reluctance of the foster caretaker, but of the child and his family of origin."²⁰³

196. *Id.* at 139; Ross, *supra* note 30, at 133 (describing a case in which a mother requested the return of her daughter from an apprenticeship).

197. LAWES, *supra* note 43, at 138–39.

198. *Id.* at 136–40.

199. Bellingham, *supra* note 47, at 129–30.

200. See Dolgin, *supra* note 30, at 1118–19 (discussing indenture). In Emma D.E.N. Southworth's 1876 novel, she casually mentions that a wealthy man lived with his own ten children, as well as the daughter of his dead sister whose father "confided [her] to the care of her uncle and aunt in preference to her being sent to a boarding school." *ISHMAEL; OR, IN THE DEPTHS* 97 (1876) (New York, Hurst & Co. 1904).

201. Bellingham, *supra* note 47, at 232–33, 313 n.20.

202. Roberts, *supra* note 139, at 269 (1995) ("Blacks' incorporation of extended kin and nonkin relationships into the notion of 'family' goes back at least to slavery.").

203. Bellingham, *supra* note 47, at 13. In her examination of the records of the Washington City Orphan Asylum, Julie Berebitsky also found that a fear that members of a child's biological family would return was sufficient to dissuade many potential adoptive parents. BEREBITSKY, *supra* note 69, at 37; see also Julie Berebitsky, "To Raise as Your Own": *The Growth of Legal*

In Massachusetts, the Children's Friend Society confronted a parallel set of problems with respect to parental consent. The consent of fathers was required before a child could be turned over to the Society, because married women could not make contracts.²⁰⁴ Only if the father was not living could the mother or a guardian surrender the child.²⁰⁵ In 1851, the same year that Massachusetts enacted its adoption statute, the power of mothers was increased. The Society was allowed to accept children upon the signature of their mother alone when the father had deserted the family or had left the family unprovided for, and when there was approval by an outside organization.²⁰⁶ Under all circumstances, the consent was required to be in writing.²⁰⁷

Of course, not all of the child-saving organizations respected the parents of their clients. By the end of the nineteenth century, poor parents who had abused and neglected their children were often not considered appropriate custodians, and the bonds between parent and child were not seen as terribly strong.²⁰⁸ Middle-class parents continued, however, to enjoy strong legal and cultural support for their rights.

2. *Legal Issues of Parental Consent.* The 1851 Massachusetts statute was subsequently amended in 1852, twice in 1853, in 1859, 1864, 1869, and 1870. Each time, the amendment focused on the consent of the biological parents to the adoption.²⁰⁹ The original statute provided:

Adoption in Washington, 6 WASH. HIST. 4, 20 (1994) (discussing the reluctance of child welfare organizations to place children for adoption based on both fear of interference by the biological parents and a desire to keep the original family together).

204. LAWES, *supra* note 43, at 125–26.

205. *Id.* at 125.

206. *Id.* at 127. She points out that fathers could sign articles of indenture without such intervention; nonetheless, there was an admission that women had rights with respect to their children, independent of their husbands. *Id.*

207. *Id.*

208. See Hasday, *supra* note 5, at 305 (noting that members of the New York Society for the Prevention of Cruelty to Children perceived parents' "connection to their children as little stronger than the ties of happenstance").

209. There was an additional amendment in 1854 that concerned name changes: "An act concerning the Adoption of Children, and the Change of Name of Person." Although the 1851 statute was merely captioned, "An Act to provide for the Adoption of Children," WHITMORE, *supra* note 109, at 1 (reprinting Act of May 24, 1851, ch. 324, 1851 Mass. Acts 816), the 1860 re-compilation of statutes titled it "Of the Adoption of Children and Change of Names," *id.* at 9 (reprinting MASS. GEN. LAWS, ch. 110 (1860)).

If both or either of the parents of such child shall be living, they or the survivor of them, as the case may be, shall consent in writing to such adoption; if neither parent be living, such consent may be given by the legal guardian of such child; if there be no legal guardian, no father nor mother, the next of kin of such child within the State may give such consent; and if there be no such next of kin, the judge of probate may appoint some discreet and suitable person to act in the proceedings, as the next friend of such child, and give or withhold such consent.²¹⁰

By 1871, the consent of a child over the age of fourteen was required, and the statute further provided that if either parent was imprisoned for a sentence of greater than three years, was insane, or had deserted the child for more than one year, then adoption could proceed without that parent's consent.²¹¹ In 1876, although there were further amendments that dealt with inheritance and age of the adoptee, yet again the amendments included a new provision relating to biological parents' consent. The 1876 revision strengthened the rights of biological parents by expanding the period of times during which their consent was required. The 1876 revision increased the time for desertion from one year to two years, and it changed the imprisonment time from a sentence of not less than three years to a sentence of which three years were unserved as of the date of the petition.²¹² Whitmore explains that these changes "are in deference to the claims of the natural parent, and are probably equitable."²¹³ Additional consent provisions were less well considered, Whitmore alleges, but he trusts the discretion of the judge not to terminate prematurely the rights of the biological parent.²¹⁴

Although most of the early adoption cases concerned an adoptee's right to inherit from the adoptive parents,²¹⁵ there are also cases in which biological parents sought to undo an alleged adoption. An 1889 Oregon case emphasized that the consent of both parents, unless

210. *Id.* at 1 (reprinting Act of May 24, 1851, ch. 324, § 2, 1851 Mass. Acts 816).

211. *Id.* at 18–19 (reprinting Act of May 18, 1871, ch. 310, §§ 2–3).

212. Act of Apr. 28, 1876, ch. 213, §§ 2–4, 8, 1876 Mass. Acts 210.

213. WHITMORE, *supra* note 109, at iv.

214. *Id.* at v. Whitmore questions the length of time covered by an adoption decree, clearly assuming that it was not a permanent status. This assumption echoes the status of putative fathers of illegitimate children who could adopt their own children, and then terminate the adoption. *Moncrief v. Ely*, 19 Wend. 405, 406 (N.Y. Sup. Ct. 1838).

215. *E.g.*, *In re Estate of Johnson*, 33 P. 460 (Cal. 1893); *Shearer v. Weaver*, 9 N.W. 907 (Iowa 1881); *Tyler v. Reynolds*, 4 N.W. 102 (Iowa 1880).

they were insane or drunkards or had abandoned their child, was an absolute requirement before a court could exercise jurisdiction over an adoption.²¹⁶ Similarly, an 1893 Wisconsin court overturned an adoption, holding that a father could not be found to have abandoned his child without receiving notice.²¹⁷ The court explained, “The contention that the county court could, without notice to the plaintiff . . . grant an order depriving the plaintiff of his most sacred natural rights in respect to his child . . . offends against all our ideas.”²¹⁸ In seeking to reclaim their children, parents typically challenged the formalities under which the adoption had been finalized. When the mother of Charles Henry Clark contested his adoption, she claimed that she had consented to Jacob Raelene adopting her son, but the written agreement and consent submitted to the judge was signed by “David Raelene.”²¹⁹ Although the adoptive parents attempted to amend the lower court record to show that “John D. Raelene” was the person identified as both “Jacob” and “David” Raelene, they were unsuccessful.²²⁰ The court construed the adoption law strictly, and also held “all doubts in controversies between the natural and the adopting parents should be resolved in favor of the former.”²²¹ Such decisions illustrate the strong legal and cultural preference for protecting the rights of the biological parents, and, perhaps of equal significance, the opposition to assimilating adoptive families into the existing familial model.²²² As a new familial form, adoption remained controversial and suspect, and the law sometimes returned to traditional guiding principles of the significance of blood-based relationships.²²³

216. *Furgeson v. Jones*, 20 P. 842, 847 (Or. 1889).

217. *Schiltz v. Roenitz*, 56 N.W. 194, 196 (Wis. 1893). The court’s reasoning was based on the father’s right to recover for loss of his child’s labor. *Id.* at 195.

218. *Id.* at 196.

219. *Ex parte Clark*, 25 P. 967, 967 (Cal. 1891).

220. *Id.*

221. *Id.* at 968.

222. The failure to comply with technicalities relating to consent was a frequent legal challenge to the inheritance rights of adopted children. *E.g.*, *Furgeson v. Jones*, 20 P. 842, 847 (Or. 1888). In *Luppie v. Winans*, 37 N.J. Eq. 245 (Prerog. Ct. 1883), the court held that a parent’s consent could not be dispensed with because this “would make the law liable to be the instrument of the forcible transfer of one man’s child to another person, in spite of the parents’ opposition, provided the court deems it advantageous for the child that the transfer be made.” *Id.* at 250.

223. See Presser, *supra* note 41, at 495–98 (“The most striking cases where the courts have denied adoptions are those in which a blood relative of the adopted child seeks to have the adoption nullified.”).

The early adoption statutes provided a mechanism for the transfer of full parental control from one person to another.²²⁴ The statutes carefully specified that the adoptive parents stood in the shoes of the biological parents with respect to custody, obedience, and care.²²⁵ They explicitly transferred “all” parental rights from the biological parents to the adopting parents, with a corresponding transfer of the child’s legal obligations of obedience, support, and maintenance.²²⁶ Thus, although the parent-child relationship was transformed with respect to the parent’s identity, the nature of parental rights and authority remained unchallenged. Adoption thus confirmed the indivisibility of parental rights by allowing new parents to replace legally the birth parents.²²⁷ This indivisibility remained, however, subject to the same constraints as that of any other parent.

This transfer of rights, which had previously occurred through other methods, served to recognize the equities in both the birth and adoptive parent-child relationships by protecting the rights of each set of parents. By allowing for the complete alienation of parental rights, the adoption statutes attempted to vest parental rights in new parents. This transfer was not, however, simple. The subsequent legal struggles concerned which rights were relinquished and which were

224. Professor Zainaldin has argued that the 1851 statute was revolutionary because it allowed for the transfer of parental power to unrelated third parties, which, for the first time, illustrated that parental power was neither indivisible nor inalienable. He argues that adoption indicated the developing respect for children’s rights and interests and for the family as companionate. Zainaldin, *supra* note 101, at 1086. This Section simultaneously reinforces his observations that adoption law served to disrupt traditional notions of the indivisibility of parental power, and questions its accuracy because adoption law served as a strong recognition of the power and control of biological parents. *See id.* at 1084–89 (discussing the changes in the relationship between the family and the state in the nineteenth and twentieth centuries). *See generally* GROSSBERG, *supra* note 112 (discussing the initial reluctance and eventual acceptance of adoption in Britain and the United States in the eighteenth and nineteenth centuries); MICHAEL GROSSBERG, *A JUDGMENT FOR SOLOMON: THE D’HAUTEVILLE CASE AND LEGAL EXPERIENCE IN ANTEBELLUM AMERICA* (1996) (recounting an American child custody battle from 1840).

225. *See, e.g.*, WHITMORE, *supra* note 109, at 55 (reprinting WIS. REV. STAT. ch. 49, § 6 (1871)). The 1857 Missouri statute provided that adopted children “shall have the same right against [the adoptive parents] for support and maintenance, and for proper and humane treatment, as a child has, by law, against lawful parents [*sic*].” *Id.* at 62 (reprinting MO. REV. STAT. ch. 28, § 3 (1870)).

226. *E.g., id.* at 55 (reprinting WIS. REV. STAT. ch. 49 (1871)); *id.* at 52 (reprinting Ill. Stat. 1873–74, § 8). The relinquishment of the child’s duty of obedience and maintenance appears in later statutes as well. *E.g.*, PECK, *supra* note 165, at 28, 30 (reprinting N.D. COMP. STAT. § 4449 (1913)); *id.* at 35, 36 (reprinting OR. LAWS § 9773 (1920)).

227. Of course, this transfer could never effect a complete substitution, but it was an effort to give the adoptive parents control over the care and custody of the children.

retained, as well as the procedures for effecting these changes.²²⁸ The varying protections in adoption statutes for the rights of biological parents show that this transfer of parental rights was neither an unproblematic nor unchanging concept. American adoption law has consistently accorded varying amounts of recognition to the rights of biological parents. Indeed, by the turn of the twentieth century, there was widespread acknowledgment of the importance of preserving the child in her family of origin.²²⁹ On the other hand, by the beginning of the twenty-first century, states were enacting legislation that authorized shortened time periods for biological parents to withdraw their consent.²³⁰

B. Sameness and Difference: Inheritance

The inheritance cases involve the settled expectations of adoptive family members in opposition to the blood-based expectations of other family members. The conservative approach—maintaining the status quo and respecting existing familial relations—involved upsetting blood ties. The inheritance cases raise fascinating questions concerning the relationship between blood and land.²³¹ Contrary to the claims of other scholars who have examined the inheritance cases and found that courts consistently construed adoption statutes narrowly, it appears instead that judges' decisions in this area were inconsistent. In some cases, judges interpreted the adoption statutes broadly, and in others, narrowly, using the same general legal principles and applying them to similar sets of facts. These differing interpretations illustrate how courts struggled with analogies. If adoptive families were the same as biological families, then it should not matter how the family was formed; if, on the other hand, adoptive families are purely creatures of statute, then precedents applicable to biological families were inapplicable, and the cases were “un-like.”

228. Indenture contracts were subject to many of these same controversies. *See Dolgin, supra* note 30, at 1126.

229. *See* Naomi Cahn, *Children's Interests in a Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189 (1999) (noting that the 1909 White House Conference on the Care of Dependent Children “proposed making payments to poor parents so that their children could stay at home, rather than be removed to an orphanage”).

230. *See infra* note 350 and accompanying text.

231. Or, as Professor Jane Larson phrases it, between sex and land. Telephone Interview with Jane Larson, Professor, University of Wisconsin Law School (Sept. 13, 2000).

Under the common-law approach to inheritance, only a legitimate, blood-related child served as his father's heir.²³² Indeed, this principle was so strongly embedded in the law that illegitimate children were deemed to have "no" blood, and thus incapable of inheriting.²³³ The early adoption statutes often provided that the adopted child was, with certain exceptions, the heir of his [sic] parents, but the adoptive parents could not inherit from the child.²³⁴ In addition, there was a series of differences between the other inheritance rights of adoptees and biological relatives. Moreover, regardless of what the statutes provided with respect to adoption, disappointed heirs mounted a series of challenges to adoption decrees, seeking to disinherit the adoptees. In applying the adoption statutes in the context of the common-law doctrine of blood-based inheritance, courts were chary of granting non-blood-related children significant intestacy interests, and thus scrutinized carefully the claims of adoptive children, lest they usurp "legitimate" children. These differences illustrate the tension between property interests and child welfare in adoption.²³⁵ This Section discusses the variations in statutory approaches to adoptees' inheritance rights, and then examines the different arguments through which disappointed heirs sought to overturn adoptees' inheritances. Throughout the statutes and cases, both legislatures and courts were meticulously aware of the "artificial" aspects of adoption,

232. 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 208 (4th ed. 1840); see also *Smith v. Derr's Adm'rs*, 34 Pa. 126, 127 (1859) ("By our law, none can inherit but such as are "born in lawful wedlock . . .").

233. 2 WILLIAM BLACKSTONE, COMMENTARIES *247. The inheritance rights of illegitimate children provide a fascinating counterpoint to those of adopted children. In both situations, even when the children could inherit from a parent (illegitimate children could often inherit only through their mothers), they remained unable to inherit through collateral relatives. See, e.g., Charles Nelson Le Ray, Note, *Implications of DNA Technology on Posthumous Paternity Determination: Deciding the Facts When Daddy Can't Give His Opinion*, 35 B.C. L. REV. 747, 750 (1994) (describing the use of blood in ancient Japanese paternity determinations).

234. E.g., WHITMORE, *supra* note 109, at 49 n.* (reprinting Ill. Stat. 1867, ch. 47, § 38); *id.* at 61 (reprinting TENN. STAT. § 3645 (1871)). But see *id.* at 41 ("[I]n case of the death of such child, intestate, the adopting parent shall be entitled to his estate, in the same manner as a natural parent." (reprinting CONN. GEN. STAT. tit. xiv, § 2 (1875))).

235. See GROSSBERG, *supra* note 112, at 276. Professor Grossberg notes that "[a]doption law enabled children to join families, but judicial restrictiveness initially denied them a full legal membership . . . Guided by their commitments to property rights and child nurture, the courts viewed adoption primarily as a welfare device, not as a mechanism for rearranging established lines of descent." *Id.* at 276. It was not just judges who were sometimes reluctant to disrupt inheritance lines; the statutes themselves indicated ambivalence toward the adopted child's precise position in the inheritance structure. See *infra* Part IV.B.1.

and of the contrasts and comparisons between biological and adoptive children.

1. *Statutes.* Though some early statutes provided that adopted children would have the same inheritance rights as “natural children,” other statutes distinguished between the rights of adopted and biological children. First, some statutes explicitly specified differences between the rights of adopted and biological children to inherit from their parents. Second, historically, under the “stranger-to-the-adoption” rule, an adopted child generally could not inherit from relatives who were not a party to the adoption. Third, adoptive children could continue to inherit from their biological relatives in some states, and their biological relatives could inherit from them even after the adoption. Finally, even outside the general laws of intestacy and wills, the adoption statutes allowed the adoption agreement to determine the adoptee’s rights.²³⁶

The 1850 Texas statute illustrates this first statutory distinction between adopted and biological children. It provides that if the adoptive parent has a legitimate child, then the adopted child could not inherit more than one-fourth of the estate.²³⁷ The assumption underlying the disinheritance of adopted children was, obviously, that decedents wanted their estates to go to blood relatives. An extreme variation of this statute was the original 1855 Maine statute that treated the adoptee as the child of her parents for custody and related issues, but not for inheritance. Not until 1880 did Maine allow the adoptee to inherit through intestacy.²³⁸

Second, under the stranger-to-the-adoption rule, the adopted child could inherit from her adoptive parents, but not from their rela-

236. This situation remained true throughout most of the twentieth century. In 1943, Fred Kuhlmann documented the different intestacy schemes that applied to adoptees’ rights to inherit from their biological and adoptive parents and from collateral relatives, as well as the parents’ and relatives’ rights to inherit from the adoptee. Kuhlmann, *supra* note 156, at 227–32. For example, twelve states explicitly permitted the adoptee to inherit from her “natural” parent, five states explicitly denied the right, and thirty-two states had no statutes on point. *Id.* at 229.

237. WHITMORE, *supra* note 109, at 66 (reprinting GEORGE W. PASCHAL, PASCHAL’S DIGEST OF THE LAWS OF TEXAS, art. 3058 (1866)).

238. 1880 Me. Laws 183; 1855 Me. Laws 189; Richard J. Snyder, Note, *Adopted Children: Inheritance Through Intestate Succession, Wills and Similar Instruments*, 42 B.U. L. REV. 210, 213 (1962). Even under the 1880 amendments, adoptees could not inherit property explicitly limited to the “heirs of the body” of the adoptive parents. *Id.*

tives.²³⁹ Because they were “strangers” to the adoption process, these relatives were presumed not to have intended for their property to be inherited outside of the bloodline. The early treatises and articles on adoption do not question this precept. It is treated as a well-established exception to the general rule that adoption creates a substitute family relationship.²⁴⁰ As one court asked in 1881, in explaining why an adopted child could not inherit from a collateral relative, “[b]ut another person, who has never been a party to any adoption proceeding, who has never desired or requested to have such artificial relation established as to himself, why should his property be subjected to such an unnatural course of descent?”²⁴¹ The court labeled the adoptee “an alien in blood.”²⁴²

239. *E.g.*, WHITMORE, *supra* note 109, at 38 (reprinting 1872 R.I. Pub. Laws 150)); *id.* at 49, 51 (reprinting Ill. Stat. 1873–74, § 5); *id.* at 57 (reprinting OR. LAWS ch. xii, tit. iv, § 67 (1872)). For broader explanation of the nineteenth-century movement to protect private property against statutory enactments, see generally JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM (1990) (“[T]he Federalists’ focus on protecting property from redistribution and, more broadly, from democratic redefinition, led to a misunderstanding of both the problems and the potential of democracy”); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57 (1999) (tracing “the transition from [the] traditional understanding of just compensation provisions, as limitations on legislative competence, to the modern notion that just compensation provisions provide owners a cause of action for damages when their property is taken”).

240. *E.g.*, JAMES SCHOUER, A TREATISE ON THE LAW OF MARRIAGE, DIVORCE, SEPARATION AND DOMESTIC RELATIONS § 728 (Arthur W. Blakemore ed., 6th ed. 1921) (“A statute making the adopted child the heir of the adopter does not entitle the child to inherit through him from the ancestors of the adopting parent.”); Brosnan, *supra* note 65, at 341 (noting that the adoptee is unable to “inherit through the foster parent from a stranger to its blood”).

241. *Keegan v. Geraghty*, 101 Ill. 26, 35 (1881).

242. *Id.* Even biological children of the adopting parents were deemed a stranger to the adoption. *See, e.g.*, *Barnhizel v. Ferrell*, 47 Ind. 335 (1874); *Keegan*, 101 Ill. at 38–41. In *Barnhizel*, Jacob Reuber, an unmarried man, adopted Theodore, his biological grandson, with the consent of Theodore’s mother. 47 Ind. at 337. After Theodore’s death intestate, Reuber’s other child sought to inherit from her adopted brother. *Id.* The court held, however, that Theodore’s mother retained her rights, including the right to inherit when her son died intestate. *Id.* at 340. The court explained:

By the act of adoption, the child is entitled to inherit from his adopted parent as his heir, in the degree of a child. . . . The act does not provide that he shall be the child of the adopting parent . . . “one adopted has the rights of a child without being a child.”

. . . .

. . . Our statute contains no provision on the subject of the rights of the lawful and adopted children, as between themselves. . . . They are not only not brothers and sisters, but they have no rights as such.

Id. at 338–40 (citation omitted). The court clearly struggled with just how adopted children were the same as, or different from, biological children.

Even pursuant to the original Massachusetts statute, the adopted child could not inherit property otherwise gifted “to the heirs of the body or bodies of the parents by adoption, nor property from the lineal or collateral kindred of such parents by right of representation.”²⁴³ In its first case interpreting this provision, the Massachusetts Supreme Court liberally construed the law to allow an adopted child to inherit from her father’s estate.²⁴⁴ The court analyzed language in a trust that left property to the “child or children” of the primary beneficiary against the background of the Massachusetts statutory limitation preventing adoptees from inheriting property given to the “heirs of the body.”²⁴⁵ The court decided the statutory term “heirs of the body” should be given its narrow technical meaning, a meaning that differed from the terms “children” or “issue” used in the gifting instrument.²⁴⁶ The court opined that the statutory language was “broad and comprehensive,” expressing the legislative intent that an adopted child should have extensive rights to her parents’ estates.²⁴⁷ Two years later, in reaction to the breadth of the court’s decision, the legislature amended the statute to limit inheritance to “heirs at law,” thereby limiting the rights of adopted children.²⁴⁸ In this example, the court actually took an expansive view of the rights of adopted children, and was criticized by contemporary commentators;²⁴⁹ the legislature attempted to restore the rights of blood relatives. Ironically, adoption was frequently associated with inheritance; in popular culture, adoption served either to provide a “good” family for a poor child, or to provide an heir.²⁵⁰

243. 1851 MASS. GEN. STAT. ch. 110, § 8.

244. *Sewall v. Roberts*, 115 Mass. 262, 276–77 (1874).

245. *Id.* at 277.

246. *Id.*

247. *Id.* at 276.

248. *See Wyeth v. Stone*, 11 N.E. 729, 731 (Mass. 1887) (observing that “it was probable that the statute of 1876 was passed in consequence” of *Sewall*).

249. *See, e.g., The Law of Adoption*, *supra* note 98, at 80–81 (criticizing the Massachusetts court for construing the statute too strictly). As a 1962 comment explained, “the broad wording of the opinion [was] clearly inconsistent with the traditional common-law viewpoint.” Snyder, *supra* note 238, at 216–17.

250. For example, in the 1884 novel *Self-Raised*, a man, quite matter-of-factly, offers to adopt his illegitimate son as a method for making him his heir. E.D.E.N. SOUTHWORTH, *SELF-RAISED; OR, FROM THE DEPTHS* 14 (1904) (“I might *adopt* you as my son, and *appoint* you my heir.” (emphasis added)).

A third difference was that adoptees could often inherit from and through their biological parents,²⁵¹ signifying recognition of the importance of passing property through the bloodline. Although the biological parents had no other parental rights and were explicitly deprived of the parental rights of maintenance and support²⁵² from their children, the child could nonetheless inherit their property. The Maine statute explicitly provided that the decree of adoption would not affect the adoptee's inheritance rights.²⁵³ As late as 1925, Evelyn Foster Peck noted that adoptees could continue to inherit from their biological parents in many states, including New Jersey, New York, Ohio, and West Virginia.²⁵⁴

Finally, some statutes allowed the biological and adoptive parents themselves to determine the inheritance rights of the adoptee, regardless of the general intestacy or wills scheme in effect. The 1873 Nebraska statute provided that the "persons desiring to adopt such child shall also make a statement in writing to the effect that . . . they freely and voluntarily adopt such child (naming him or her), as their own, with such limitations and conditions as shall be agreed upon by the parties."²⁵⁵ This was interpreted to mean that, unless the statement of adoption specified otherwise, the adoptee did not have the same status as a "child born in lawful wedlock" between the parents.²⁵⁶ The adoption decree could simultaneously specify that the child would be treated like any other child, but, nonetheless, if the adoptive parents died while the adoptee was a minor, she could be returned to her biological parents.²⁵⁷ Similarly, the North Carolina 1873 statute

251. See *In re Estate of Darling*, 173 Cal. 221, 228 (Cal. 1916); *In re Landers' Estate*, 166 N.Y.S. 1036 (N.Y. Sur. Ct. 1917); Brosnan, *supra* note 65, at 341 (describing a New York law allowing adoptee to continue to inherit from biological parents); James Bugea, Comment, *Adoption*, 1 LA. L. REV. 196, 201 (1938) ("The adopted child, however, usually retains his inheritance rights in the successions of relatives of his blood parent.").

252. See *supra* notes 225–227.

253. WHITMORE, *supra* note 109, at 35 (reprinting ME. REV. STAT. tit. vi, ch. 67, § 31 (1871)); cf. *id.* at 80 (listing Massachusetts, Illinois, and Ohio as additional states where the adoptee could continue to inherit from the biological parents).

254. PECK, *supra* note 165, at 21. This remains true in some states today. For example, the Kansas adoption statute provides: "An adoption shall not terminate the right of the child to inherit from or through the birth parent." K.S.A. Sec. 59-2118(b) (2002).

255. *Ferguson v. Herr*, 90 N.W. 625, 626 (Neb. 1902) (quoting NEB. GEN. STAT. ch. 57, § 797 (1873)).

256. *Id.* at 627.

257. *Martin v. Long*, 53 Neb. 694 (1898). The adoption decree stated: "[i]f [the adoptive parents] should both die prior to her majority, her mother if living shall have control over her—and we bestow upon her equal rights and privileges of children born in lawful wedlock." *Id.* at 697.

allowed the adoption petition to establish the adoptee's inheritance rights.²⁵⁸

These statutory approaches to the rights of adoptees and their biological and adoptive relatives illustrate the continuing difficulties with integrating new families into the traditional model. No statute accorded adoptive children the same intestacy rights as biological children. Different treatment of biological and adoptive was written into the statutes and was a recognized aspect of the law.

2. *Court Challenges by Disappointed Heirs Seeking to Disinherit Adoptees.* The inheritance rights of adoptees were challenged on several different bases, including the extraterritorial nature of the adoption decree and the validity of the adoption itself. Although these attacks were not necessarily successful, their frequency and vehemence indicates hostility to adoptive relationships (as well as greed).

a. *Interstate Validity.* The interstate validity of an adoption decree remained uncertain until the early twentieth century.²⁵⁹ An 1893 court, grappling with the complexities of adoption, observed that adoption created a new status for a child that followed the adoptee and was effective outside of the decree jurisdiction with respect to all rights and duties not contrary to the laws and public policy of the deciding state.²⁶⁰ Thus, in *Van Matre v. Sankey*, the Illinois court held that allowing a child adopted pursuant to a Pennsylvania decree to

In *Ferguson*, the disappointed relative successfully attacked the adopted child's right to inherit, because there was no affirmative statement by the adoptive parents granting property ownership to the adoptee. 90 N.W. at 628.

258. WHITMORE, *supra* note 109, at 63 (reprinting N.C. BATTLE'S REVISAL ch. 1, § 3 (1873)). The North Carolina courts construed the inheritance rights of adoptees narrowly. *See, e.g., King v. Davis*, 91 N.C. 142, 146-47 (1884) (preventing child adopted after making of father's will from inheriting in the same manner as an "after-born," or pretermitted, biological child).

259. *See Van Matre v. Sankey*, 36 N.E. 628, 634 (Ill. 1893) (holding that once the status of a child is established by the law of the domicile, it is generally recognized and upheld in every other state). The extraterritorial effect of adoption was a deeply contested issue. *See, e.g., Foster v. Waterman*, 124 Mass. 592, 594-95 (1878) (construing the effect in Massachusetts of a New Hampshire adoption decree given to Massachusetts residents). An alternative attack was based on lack of jurisdiction. In *Stearns v. Allen*, 67 N.E. 349 (Mass. 1903), disappointed relatives argued that the biological parent who had consented to the adoption was not a United States resident. *Id.* at 350. The court rejected this challenge, explaining that, so long as the child lived in the state, she was subject to the court's jurisdiction. *Id.* at 351.

260. *Id.* at 634; *Ross v. Ross*, 129 Mass. 243, 246 (1880).

inherit property located in Illinois *from her father* was permissible.²⁶¹ On the other hand, as another Illinois court explained, allowing a child adopted in Wisconsin to inherit Illinois land *from collateral kindred* was not permissible.²⁶² By contrast to the situation of adoptees, “legitimate” children had no such difficulties in proving their entitlements.²⁶³

The early-twentieth-century case of *Hood v. McGehee*²⁶⁴ illustrates the continuing tensions between adoption, inheritance, and new family forms that pervaded early adoption law and that were subject to challenge based on conflicts of laws. In 1880, General McGehee adopted several children in Louisiana.²⁶⁵ The Louisiana instrument of adoption vested the children with “all the rights and benefits of legitimate children in [their parents’] estate.”²⁶⁶ Several years later, he bought land in Alabama, and he seemed to believe that his children would inherit all of his property.²⁶⁷ Following General McGehee’s death, his children sought transfer of the Alabama land to them. Alabama law, however, specifically precluded children adopted in other states from inheriting land in Alabama.²⁶⁸ The children appealed to the Supreme Court, urging that the federal Full Faith and Credit Clause required Alabama to respect a sister state’s adoption decree.²⁶⁹ Justice Holmes held, however, that Alabama was the “sole mistress of the devolution of Alabama land by descent.”²⁷⁰ Alabama was thus permitted to completely exclude children adopted in another state

261. *Van Matre*, 36 N.E. at 634.

262. *Keegan v. Geraghty*, 101 Ill. 26, 38–41 (1881).

263. The disabilities experienced by adoptees were experienced as well by illegitimate children. *See, e.g., Smith v. Derr’s Adm’rs*, 34 Pa. 126, 128 (1859) (refusing to allow a child legitimated in Tennessee to inherit land in Pennsylvania because “[i]t is the fact of birth in wedlock that gives inheritable capacity, and not any artificial legitimation” such as adoption).

264. 189 F. 205 (N.D. Ala. 1911), *aff’d*, 199 F. 989 (5th Cir. 1912), *aff’d*, 237 U.S. 611 (1915).

265. *Id.* at 207.

266. *Id.*

267. *Id.* at 211. Alabama law was quite restrictive in according rights to children born in alternative families. In *Lingen v. Lingen*, 45 Ala. 410 (1871), a son who was conceived in Alabama but born in France sought to inherit from his father, Dr. George Lingen, who had died intestate. *Id.* at 411. Although the father never married the mother of his child, Dr. Lingen did legitimate his son pursuant to French law. *Id.* This act of legitimization pursuant to foreign law was insufficient to grant the son any intestacy rights under Alabama law, which had stringent requirements for legitimating a child. *Id.* at 414–15.

268. *Id.* at 206; *see also Brown v. Finley*, 157 Ala. 424, 426 (1908) (observing that the adoption statute of another state has “no extraterritorial operation”); *Lingen*, 45 Ala. at 416 (“There is no law in [Alabama] that gives validity to an act of legitimation . . . in a sister State.”).

269. *Hood v. McGehee*, 237 U.S. 611, 611–12 (1915).

270. *Id.* at 615.

from the intestate inheritance of land located in Alabama. Although the Alabama law is a reflection of the state-based nature of real property ownership,²⁷¹ the rationale underlying the doctrine—as expressed in earlier cases—was that “artificial” families did not have the same rights as blood-based families.

b. Validity of Adoption. Second, disappointed relatives developed various theories to undermine an adoptee’s inheritance rights through challenges to the validity of the adoption itself. In *Albring v. Ward*,²⁷² the adopted child’s birth mother died shortly after she was born, and her father took the child to live with Henry and Martha Ward.²⁷³ Soon thereafter, the father consented to his daughter’s adoption. The adoption document provided that Lucy would become her adoptive parents’ “heir at law.”²⁷⁴ Lucy lived with her adopted family until the age of seventeen, when she moved with her husband to Toledo. After the death of Mr. Ward, his wife and a son denied that Lucy had been legally adopted, thereby precluding her from any in-

271. As the Supreme Court has repeatedly affirmed, states have complete control to determine title to real property located within their borders. See *Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998) (noting that “a sister State’s decree concerning land ownership in another State has been held ineffective to transfer title” (citing *Fall v. Eastin*, 215 U.S. 1 (1909))).

272. 100 N.W. 609 (Mich. 1904).

273. *Id.* at 609. Other cases frequently arose concerning the validity of adoption decrees, and courts sometimes rejected overly narrow, formalistic, and technical attacks on the decrees. In *In re Estate of Evans*, 39 P. 860 (Cal. 1895), heirs contested the validity of the adoption of Hattie Brown, arguing that the judge had made no order declaring the child to be the child of the adopting parent. *Id.* at 861. Samuel W. Evans, with his wife Ellen Evans, went before a judge of the superior court to execute an agreement for adoption. After examining Mr. Evans and his wife, and being satisfied that it would be in the child’s best interest to be adopted by them, the judge endorsed the agreement for adoption. *Id.* at 860. The agreement was filed with the county clerk, and Hattie Brown assumed the name of Hattie Evans. *Id.* She lived with them for ten years. *Id.* After Mr. Evan’s death, a dispute arose as to Hattie’s right to inherit as a child of the deceased. The trial court found the adoption decree valid, and granted Hattie inheritance rights. *Id.* On appeal, the court determined that, “it requires more than mere irregularities to brush aside and annul a relationship entered into with all honesty of purpose, lived up to for many years, and only severed by the hand of death.” *Id.* at 861. The court upheld the adoption decree. *Id.*

In *Abney v. DeLoach*, 4 So. 757 (Ala. 1887), disappointed heirs of John Sander urged that an order for adoption was invalid, because the declaration for adoption was not recorded on the minutes of the Probate Court. *Id.* at 761. The court held the decree valid, noting that

[w]hile these statutes authorizing adoption are in derogation of the common law, and for this reason are, in some respects, to be strictly construed, their construction cannot be narrowed so closely as to defeat the legislative intent which may be made obvious by their terms, and by the mischief to be remedied by their enactment.

Id. at 760.

274. *Albring*, 100 N.W. at 609.

testacy rights to her father's estate.²⁷⁵ The court denied Lucy any property rights. First, it found that the adoption statute was itself invalid.²⁷⁶ Second, the court found that Mr. Ward had made no contract—with Lucy's father or with her—that would give her any interest in his property.²⁷⁷ Finally, the court noted somewhat indignantly that just when Lucy was old enough to render useful service to her adoptive family, she married and left the household.²⁷⁸

In an 1880 case involving the alleged adoption of Ella Bancroft, the attorney for the blood heirs argued that adoption was “but another way to make a will,” because adoption allowed for a distribution of assets “contrary to common law.”²⁷⁹ He argued further that because adoption was like a will, its formalities must, just as those involved in a will execution, be complied with strictly. The judge, in ruling the adoption valid, explained that the adoption statute was simply a method for changing names, making heirs at law, and allowing for adoption²⁸⁰—somewhat different goals than those involved in will creation.

There remained considerable prejudice against adopted children, with a corresponding emphasis on the importance of blood. Adoption remained closely tied to its antecedent of indenturing, and many parents, in “adopting” a child, were seen as merely gaining another child worker. Inheritance rights typically followed blood lines, not adoptive lines. The doctrine of stranger-to-the-adoption (where the stranger

275. *Id.*

276. *Id.* at 610.

277. *Id.*

278. *Id.* This final reason nicely illustrates the concept that parents and children owed each other reciprocal duties; children were expected to provide services to their parents.

For another challenge to the validity of an adoption, see *Fosburg v. Rogers*, 21 S.W. 82 (Mo. 1893), involving an unsuccessful attack on the sufficiency of compliance with an adoption statute. *Id.* at 84–85. Also, in *Cunningham v. Lawson*, 36 So. 107 (Mo. 1904), disappointed heirs unsuccessfully attacked the validity of an adoption based on changes in circumstances after the adoption. *Id.* at 108–09. Jonathan and Nancy Sprowl had adopted Alice Leonora Sprowl. *Id.* at 108. After Jonathan Sprowl's death, his nephew and niece argued that the act of adoption was contrary to the law, and that, regardless of the validity of the adoption, it was no longer valid after Mr. Sprowl's death and Alice's marriage. *Id.*

279. *Bancroft v. Bancroft*, 53 Vt. 9, 12 (1880).

280. *Id.* at 12. Note that the judge did not focus on affectional relationships, but rather matter-of-factly focused on the mechanical nature of the act. Courts did, however, require strict compliance with the formalities. *E.g.*, *Shearer v. Weaver*, 9 N.W. 907, 910 (Iowa 1881) (“[T]he rights of inheritance must be acquired in [the] manner [provided by statute] and can be acquired in no other way.”); *Ferguson v. Jones*, 20 P. 842, 848 (Or. 1889) (“[T]he statute must receive a strict interpretation, and every requirement essential to authorize the court to exercise the special power conferred must be strictly complied with.”).

may have been the brother of the adoptive father) relies on the seeming abnormality of a non-blood relationship. Thus, notwithstanding the widespread acceptance of fostering, adoption, as a full substitution of familial relationships, remained a strange concept within the law governing families and inheritance. Though many of the child-saving organizations sought to overcome this prejudice,²⁸¹ it remained deeply entrenched throughout the first century of adoption law and practice.

In analyzing these cases, contemporary scholars have seen a “divergence” between court cases and the adoption laws. Scholars have suggested that courts favored biological relationships while the adoption statutes expressed a contrary intent.²⁸² They have provided several brilliantly insightful reasons for this seeming divergence. Professor Presser cites to the ambivalent views on adopted children: were they worthy, or simply cast-off waifs? He also suggests that using blood as a proxy for family allowed judges to return to a more traditional view of the family. Finally, he suggests that judges might have been hostile to a contractual, rather than a status-based, view of the family.²⁸³

While Professor Presser’s analysis is persuasive, I am not convinced that such a divergence between judicial and legislative decisionmaking existed. First, the statutes allowed for great judicial discretion in deciding on the rights of adopted children, and second, the laws themselves established a dichotomy between biological and adoptive children. The judicial discretion in this context was reflected in decisions that varied widely from state to state as to the appropriate balance between blood and adoptive relationships. Second, the preference for the rights of biological children was often explicit in the adoption laws, and the adoption laws generally clarified that the rights of adopted children were not the same as those of biological children, particularly concerning inheritance.²⁸⁴ Consequently, judges

281. See LAWES, *supra* note 43, at 143 (suggesting that the CFS was attempting to create families based on affinity rather than blood); Zainaldin, *supra* note 101, at 1075–78 (citing cases in which courts awarded custody on the same basis).

282. Presser, *supra* note 41, at 510–11.

283. *Id.* at 511–13 and n.276. He alleges that “courts occasionally allowed notions of vested property rights or strained interpretations to defeat the intent of adoption statutes.” *Id.* at 510. This was not universally true, as the history of the Massachusetts statute indicates; the court was more expansive than the apparent legislative intent. See *supra* notes 244–247 and accompanying text.

284. Professor Presser also suggests that family law itself was unclear. Presser, *supra* note 41, at 513–14.

may simply have been reacting to the ambivalence underlying the adoption laws themselves: though the laws were designed to provide homes for children, they were also strongly influenced by inheritance law, which, by statute, preferred blood to adoptive children.²⁸⁵ In a land-based society, succession to property—the primary form of wealth—was a critically important legal concept that was closely tied to blood; any derogations from blood were to be construed strictly.²⁸⁶ Writing in 1938 to explain the 1857 Mississippi adoption law, Catherine McFarlane urged the state legislature to modernize the statute to reflect that an adopted child might find “human aspects” of adoption more important than issues involving inheritance.²⁸⁷ Thus, property rights, as much as family law, affected the rights of an adoptee.

In some cases, courts were too liberal in their construction of adoption statutes by establishing new rights for adoptees, and the legislatures reacted by restricting the judicially created rights that seemed to favor adoptive children. The tension between legislative and judge-made law is part of the larger story of the development of the American common-law process during the nineteenth century.²⁸⁸ Throughout the late nineteenth and early twentieth century, adoption was legally and socially recognized as “alien in idea to the common law of the family group.”²⁸⁹

Issues concerning adoptees’ intestacy rights remained contentious throughout the twentieth century. When the National Commission on Uniform State Laws drafted the 1953 Uniform Adoption Act, questions concerning whether the adoptee could inherit from collateral relatives remained unresolved. So divisive was the issue that the Commissioners bracketed language in the official act that would have

285. For general information on the importance of private property in nineteenth-century legal thought, see generally MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780–1860* (1977); NEDELSKY, *supra* note 239.

286. The detriments of blood relationship were expressed through theories such as the corruption of blood doctrine. See Max Stier, Note, *Corruption of Blood and Equal Protection: Why the Sins of the Parents Should Not Matter*, 44 *STAN. L. REV.* 727, 729 (1992) (explaining the historical background for the notion that a finding of attainder lead not just to forfeiture of existing property, but also to inability to inherit or pass on property).

287. Catherine N. McFarlane, *The Mississippi Law on Adoptions*, 10 *MISS. L.J.* 239, 239 (1938).

288. See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 143–47 (William N. Eskridge & Philip P. Frickey eds., 1994) (describing the court’s choice between law and discretion, and the implications for uniformity of application of the laws).

289. Sophonisba P. Breckinridge, *Editor’s Preface* to *NIMS*, *supra* note 66, at vii.

allowed adoptees to inherit through their parents,²⁹⁰ thereby not providing a full endorsement.

Even today, the intestacy rights of an adopted child are extremely complicated. As the South Dakota Supreme Court stated in 1978, inheritance follows blood.²⁹¹ Today, in a few situations, an adopted child may have fewer rights to inherit from various relatives in the adoptive family than would a biological child. On the other hand, an adoptive child may have the same rights as a biological child of the adoptive family, and may also be able to inherit from her biological family.

Until 1996, in Vermont, an adoptee could not inherit from relatives of her adopted parents who had died intestate. In that year, the Vermont Supreme Court held that an adopted child could inherit from her uncle, her father's brother.²⁹² In Mississippi, the rights of adoptees to inherit from collateral relatives is still unclear.²⁹³ In some states, depending on the phrasing of the will, an adopted child may not be able to inherit through a "class gift," or a gift that is phrased as, for example, "to my descendants" or "to my grandchildren."²⁹⁴

In Colorado, an adoptee may inherit from her biological parents if there are no other heirs.²⁹⁵ In Pennsylvania, when the biological relatives—other than the parents—have maintained a relationship with the adoptee, then she may inherit from those relatives.²⁹⁶ In other states, an adoption decree can protect the child's rights to inherit from her biological family.²⁹⁷ Under the model statute that governs inheritance, a child adopted by the spouse of one of her biological parents can still inherit from her other biological parent, even though all legal ties have otherwise been severed between that parent and the

290. UNIF. ADOPTION ACT § 12 (1953).

291. *In re Estate of Edwards*, 273 N.W.2d 118, 120 (S.D. 1978).

292. *MacCallum v. Seymour*, 686 A.2d 935, 940 (Vt. 1996).

293. See generally Rick Pyper, Comment, *Why Mississippi Should Give Adopted Children the Same Intestate Succession Rights Which Natural-Born Children Enjoy*, 64 MISS. L.J. 201 (1994) (observing that Mississippi has yet to allow adoptees to inherit from all of their collateral relatives).

294. See Ralph C. Brashier, *Children and Inheritance in the Nontraditional Family*, 1996 UTAH L. REV. 93, 153–54 & n.199 (“[I]t is the testator’s or donor’s intent that governs the distribution of a class gift.”); Rein, *supra* note 170, at 731–32 (“[C]onstruction problems of [class gifts] have become the subject of a seemingly endless stream of litigation.”).

295. COLO. REV. STAT. ANN. § 15-11-103(6) (West 2002).

296. 20 PA. CONS. STAT. ANN. § 2108 (West 1999); see also Brashier, *supra* note 294, at 152 n.195 (listing other relevant statutes).

297. ME. REV. STAT. ANN. tit. 18-A, § 2-109(1) (West 1998).

child.²⁹⁸ Though some of these statutes protect a child's relationship with her biological kin, the assumption behind these provisions seems, nonetheless, to be based on the assumption that the decedent would prefer that her estate be left to a blood relative rather than to distant relatives.

C. Sameness/Difference: Incest

The notion of blood telling is also evident in other contexts. The incest prohibition that prevents relatives from marrying each other is deeply rooted in American law.²⁹⁹ Yet the history of adoption and incest indicates, once again, the difficulties of applying existing law to emerging families, and of assuming that analogical reasoning is appropriate. Because courts and legislatures have focused on the differences between biological and adoptive families, rather than on the similarities of the parent-child relationships, they have not treated incest within adoptive families as punitively as incest within biological families. Indeed, differential definitions of incestuous relationships continue today in both the civil and criminal law.³⁰⁰ The incest cases ultimately show that the legal recognition of adoption should not translate into identical regulation of adoptive families.

Although the relationship between incest and adoption has received relatively little scholarly attention,³⁰¹ the issue is at the core of the definition of an adoptive family. If incest is a crime between a parent and a child, and if adoption creates one parent-child relationship and disrupts another, then in which relationship are otherwise incestuous acts a crime? Depending on the policy supporting the incest prohibition, states could proscribe two kinds of relationships: (1) those be-

298. UNIF. PROBATE CODE § 2-114(b) (amended 1993); *see also* Estate of Dye, 112 Cal. Rptr. 2d 362, 367 (Ct. App. 2001) (children adopted by their step-father can still inherit from their biological father pursuant to a post-adoption amendment to the California intestacy statute).

299. Walter Wadlington, *The Adopted Child and Intra-Family Marriage Prohibitions*, 49 VA. L. REV. 478, 483 (1963); *see also* Leigh B. Bienen, *Defining Incest*, 92 NW. U. L. REV. 1501, 1521–22 (1998) (noting that colonial American legislatures had enacted incest statutes).

300. Cultural confusion about adoption and incest continues today. In the movie *The Royal Tenenbaums*, for example, a brother is in love with his sister, Margot. One review of the movie comments, “[t]his isn’t strictly incest, because Margot was adopted.” Anthony Lane, *Bloody Relations: “The Royal Tenenbaums” and “The Business of Strangers”*, NEW YORKER, Dec. 17, 2001, at 97.

301. Professor Walter Wadlington’s 1963 article is one of the few exceptions. *See* Wadlington, *supra* note 299. However, even his article is not a comprehensive examination of then-existing law; for example, it does not include the approach of the Model Penal Code.

tween adopted parents and children; or (2) those between biological parents and their subsequently adopted children. If adoptive and biological families are the same, and if adoptive families are analogized to biological families for this purpose, then incest is prohibited between people related by adoption. If adoptive and biological families are different, then incest is prohibited between people related by adoption as well as between people related by biology, notwithstanding the fact of adoption.³⁰² The early adoption statutes and cases rarely addressed either of these situations; indeed, throughout the many drafts of the Model Penal Code, it was only the 1962 proposed official draft that finally recognized the crime of incest in adoptive families.³⁰³ It appears, on the other hand, that incest between adoptive family members was subject to civil sanctions long before it became a crime.

1. *Civil Sanctions.* The early incest prohibitions were based simply on blood or affinity (defined narrowly as marriage). Given the underlying rationales of these prohibitions, they appear not to have included adoptive relationships. When they prohibited incestuous relationships, states were not necessarily concerned with protecting children against sexual offenses. Instead, they primarily sought to prevent inbreeding and to uphold familial structure.³⁰⁴ Indeed, the primary rationale was genetics, reflected by the laws in many states

302. The approach that incest is not a crime in the adoptive family, but only between members of the original biological family, was the approach of most cases until the late twentieth century. *See infra* notes 304–311 and accompanying text.

303. MODEL PENAL CODE § 230.2, at 188–89 (Proposed Official Draft 1962).

304. Martha Ertman, *Sexuality: Contractual Purgatory for Sexual Minorities: Not Heaven, But Not Hell Either*, 73 DENV. U. L. REV. 1107, 1132 (1996); *see* JOEL PRENTICE BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE AND EVIDENCE IN MATRIMONIAL SUITS 177 (Boston, Little, Brown, & Co. 2d ed. 1856) (“[T]he children which spring from [incestuous marriages] are feeble in body and mind, and subject to disease and insanity. [T]he toleration of [such marriages] would impair the quiet and concord of families”); Bienen, *supra* note 299, at 1531 (“Marrying your wife’s cousin by marriage is prohibited . . . because it would confuse an existing, rigidly structured, kinship relationship with your wife’s family.”); Jane Larson, “*Even a Worm Will Turn at Last*”: Rape Reform in Late Nineteenth-Century America, 9 YALE J.L. & HUMAN. 1, 18 n.77 (1997) (stating that “[early] criminal incest statutes in the United States were [not] directed . . . against intrafamilial child assault” (citing 3 ENCYCLOPEDIA OF CRIME AND JUSTICE 880, 881–882 (Sanford H. Kadish ed., 1983))).

Peter Bardaglio explains that affinity-based marriage bans were justified as protecting the unity of the family. PETER BARDAGLIO, RECONSTRUCTING THE HOUSEHOLD: FAMILIES, SEX, AND THE LAW IN THE NINETEENTH CENTURY SOUTH 42 (1995).

that, until the 1960s, prohibited only consanguineous relationships.³⁰⁵ Given the emphasis on blood relationships, allowing incestuous marriages would have rendered inheritance even more complex.³⁰⁶

Especially in light of the inheritance rationale, it is surprising that the early adoption statutes did not explicitly address this issue as either a civil or a criminal matter. To the extent that legislatures were concerned with inheritance and adoption, as well as with incest and inheritance, the ban on incestuous relationships should certainly have included adoptive relationships, just like step-family relationships, because they too threatened not only the “natural” order of families, but also the “natural” order of inheritance. In 1873, Philip Joachim- sen lamented that the New York adoption statute did not address incest.³⁰⁷ And, in 1876, Whitmore called for better definition of how adoption affected existing incest laws.³⁰⁸ That same year, Massachusetts amended its adoption statute to prohibit marriage between an adopted parent and child. Massachusetts also clarified that, although the adopted child was otherwise severed from her biological parents, this was inapplicable concerning “marriage, incest, or cohabitation.”³⁰⁹ Adoptees were thus subject to two sets of prohibited incestuous relationships: those involving their biological and adoptive parents. William Whitmore compared marriage to adopted children to the prohibition in other nations of marriage to step-children.³¹⁰ And, although

305. See Wadlington, *supra* note 299, at 483 (asserting that eugenics was the most significant basis for the incest prohibition, and that some jurisdictions applied their incest laws only to people related by blood).

306. Bienen, *supra* note 299, at 1531.

307. Joachimsen, *supra* note 179, at 357 (discussing the marriage prohibition).

308. See WHITMORE, *supra* note 109, at 83–84 (questioning whether “an adopted child [can] marry the offspring of his adopted parent” and suggesting that “the degree of affinity created by adoption ought to be defined by law”).

309. *Delano v. Bruerton*, 20 N.E. 308, 308 (Mass. 1889).

310. WHITMORE, *supra* note 109, at 83. (“In most English speaking nations the marriage of near relations is forbidden, and a person is debarred from marrying a step-parent or step-child.”). Incest, including step-parent incest, was frequently labeled a crime “Against Public Morals.” *E.g.*, IND. REV. STAT., art. 5, § 1990, at 373 (1881). Because statutes explicitly addressed the step-parent relationship, and otherwise generally confined themselves to blood-based or affinity-based (i.e., marriage-based) incest, adoptive relationships would not have been included under the general crime of incest.

Whitmore’s analogy is imperfect because many courts found that termination of the marital relationship also terminated the step-parent relationship, thus preventing an otherwise incestuous act from being prosecuted as such. *E.g.*, *Compton v. State*, 13 Tex. Ct. App. 271, 274 (1882) (citing *Noble v. Ohio*, 22 Ohio St. 541 (1872)); *Noble*, 22 Ohio St. at 544; *cf.*, *State v. Chambers*, 53 N.W. 1090, 1091 (Iowa 1893) (“It is the fact of the marital relation that makes the acts here charged constitute the aggravated crime of incest.”). Adoption, however, was a

Whitmore did not explain why, it may be that adoptive-child incest was not a crime against the marriage in the way that step-child incest was, because the latter involved the blood relative of the aggressor's spouse. Adoptive-child incest was certainly a problem. As one historical study found, in contrasting incest committed by biological and nonbiological caretakers, the nonbiological fathers were overrepresented.³¹¹

2. *Criminal Sanctions.* The crime of incest has received even less scholarly and legal attention than the civil aspects. The early criminal law treatises, while observing that incest is a statutory, not a common-law, crime, do not mention adoptive relationships.³¹² The definition of incest developed by Bishop in 1873, as “unlawful carnal intercourse, [between two parties who] are related to each other within the degrees of consanguinity or affinity wherein marriage is prohibited by law,”³¹³ remained intact through the early twentieth century and excluded adoptive relationships.³¹⁴ In the 1952 edition of their criminal law treatise—originally published in the early twentieth century—Clark and Marshall finally mention adoption in their comments to the incest discussion.³¹⁵ Court decisions from this period consistently clari-

permanent status, once conferred. *See also* BARDAGLIO, *supra* note 304, at 42 (noting the decrease in affinity-based bans on marriage in the pre-Civil-War north and south).

311. Linda Gordon & Paul O’Keefe, *Incest as a Form of Family Violence: Evidence from Historical Case Records*, 46 J. MARRIAGE & FAM. 27, 30 (1984) (reporting on case records from 1880 to 1960, with nonbiological fathers including step-, foster-, and adoptive-fathers).

312. *E.g.*, 1 JOEL PRENTICE BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW § 502, at 307–08 (8th ed. 1892); WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIME 704–06 (2d ed., 1912); *see also* 4 BLACKSTONE, *supra* note 233, at *64 (noting that in 1650 incest was made a capital crime). In Bishop’s treatise, the crime of incest is discussed in the same section as polygamy and selling and buying a wife. 1 BISHOP, *supra*, at 307–08.

313. JOEL PRENTICE BISHOP, COMMENTARIES ON THE LAW OF STATUTORY CRIMES 465 (1873).

314. *See* CLARK & MARSHALL, *supra* note 312, at 704–06 (defining incest as “marriage or cohabitation, or sexual intercourse without marriage, between a man and woman who are related to each other within the degrees within which marriage is prohibited by law” and failing to refer to incestuous adoptive relationships).

315. WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIME 688–89 (5th ed. 1952). The treatise cites *State v. Lee*, 17 So. 2d 277 (Miss. 1944), in support of the proposition that adoptive sexual relationships did not constitute criminal incest. Subsequent commentary questions whether there was any authority prior to *Lee* concerning criminal incest and adoption. Graham Hughes, *The Crime of Incest*, 55 J. CRIM. L. & CRIMINOLOGY 322, 323 (1964). Professor Wadlington does note an earlier Ohio decision that reached the same result as *Lee*. *See* Wadlington, *supra* note 299, at 486 n.48 (citing *State v. Youst*, 59 N.E.2d 167 (Ohio Ct. App. 1943)).

fied that the meaning of “daughter” did not include an adopted daughter,³¹⁶ thereby marking the adoptive relationship as different from the biological parent-child relationship. As an Ohio court starkly explained in 1943:

Lynn Youst was not the daughter of the accused as we understand that relationship. She was an adopted daughter only; she was not of the blood of Samuel Youst or of his wife. None of their blood coursed through the veins of the adopted daughter. The relationship was not actually one of father and daughter, or mother and daughter, but that of adopted daughter³¹⁷

The first three tentative drafts of the Model Penal Code (MPC) did not discuss sexual intercourse within the adoptive family. The fourth tentative draft—the first to address explicitly the crime of incest—prohibited cohabitation between “an ancestor or descendant, a brother or sister of the whole or half blood, or an uncle, aunt, nephew or niece of the whole blood.”³¹⁸ Like the laws of most states, the statutory language emphasized blood-based relationships.³¹⁹ The failure to include an explicit prohibition on adoptive relationships in the statute meant that they were not included—a startling example of how adoptive families were not included in the paradigm of “normal” families.

In their comments to the MPC, the drafters explained that they would leave the problem of “marriage between adoptive parent and child to the civil law, and the question of illicit relations between them to be dealt with in the context of other fornications and adulteries.”³²⁰ Although the comments acknowledged that the criminal

316. See, e.g., *People v. Kaiser*, 51 P. 703, 703 (Cal. 1897) (“The word ‘daughter’ means, and is generally understood to mean, ‘an immediate female descendant,’ and not an adopted daughter, a step-daughter, or a daughter in law.”); *State v. Rogers*, 133 S.E.2d 1, 3 (N.C. 1963) (recognizing that the statutory crime of incest is not applicable to a sexual relationship between a man and his adopted daughter); *Youst*, 59 N.E.2d at 168 (same).

317. *Youst*, 59 N.E.2d at 168.

318. MODEL PENAL CODE § 207.3, at 88 (Tentative Draft No. 4, 1955).

319. See *id.* § 207.3 cmt. § 207.3 app. A at 238–40 (citing sample incest statutes).

320. *Id.* § 207.3 cmt. 2(b) at 235. The commentary stated:

England and most American states limit incest to blood relations. However almost half the states include within the category of incest some categories of non-blood relatives, the most common being step-parent, step-child [and in-law relationships]

The case of adoption is somewhat different inasmuch as the law here is attempting to duplicate, so far as possible, the structure of the natural family. A decision in Mississippi that marriage to an adopted daughter was not incestuous was followed by the enactment of a statute specifically bringing this relationship within the incest law. *Id.* § 207.3 cmt. 2(b) at 234–35. In providing guidance, the commentary stated emphatically that the incest prohibition should not preclude

prohibition of incest should be based both on genetics and on a fear of intrafamilial abuse, the decision not to include adoption represented the drafters' decision to "adhere to a strictly genetic basis" for the crime.³²¹

By the time of the proposed official draft of 1962, however, the MPC explicitly defined incest to include sexual relationships between adoptive parent and child. Unlike the crime of incest in non-adoptive families, however, the incest prohibition for adoptive families did not include any other family members.³²² The addition of the adoptive parent-child relationship reflected a shift in the basis for the prohibition from genetics to "protection of the integrity of the family unit."³²³ As the drafters explained, adoption attempts "to insure that the 'artificial' family will mirror a natural family."³²⁴ Nonetheless, this jurisprudential shift was insufficient to extend to the adoptee the same protections that were enjoyed by biological family members.

Under contemporary law, states vary as to whether they prohibit people related by adoption, rather than blood, from marrying each other, and as to whether adoptive relationships, or biological relationships, constitute grounds for criminal incest. Though brothers and sisters—adopted or not—generally cannot marry each other, in some states, a man and his brother's adopted daughter can marry each other, even though the man would be prohibited from marrying his

an adoptive uncle and niece from marrying, and questioned its applicability to adopted siblings. *Id.* § 207.3 cmt. 2(b) at 235.

321. *Id.* § 207.3 cmt. 2(b) at 234–35. For critical commentary on the Model Penal Code, see Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 *YALE L.J.* 1331, 1385 (1997) (suggesting that by "[i]nternalizing the defense within the minds of reasonable defendants," the Model Penal Code "simply ignored [remaining] normative questions about relationships"). See generally Victoria Nourse, *The "Normal Successes and Failures of Feminism and the Criminal Law"* 75 *CHI.-KENT L. REV.* 951, 971–72 (2000) (critiquing criminal law as positive, rather than norm-based).

322. MODEL PENAL CODE § 230.2, at 188–89 (Proposed Official Draft 1962). That section provides:

A person is guilty of incest, a felony of the third degree, if he knowingly marries or cohabits or has sexual intercourse with an ancestor or descendant, a brother or sister of the whole or half blood [or an uncle, aunt, nephew or niece of the whole blood] The relationships referred to herein include blood relationships, without regard to legitimacy, and relationship of parent and child by adoption. The prohibition does not include the step-parent/step-child relationship.

Id. § 230.2 cmt. 3(b) at 414 (Official Draft and Revised Comments, 1980).

323. *Id.* art. 230 introductory note at 369.

324. *Id.* § 230.2 cmt. 3(c) at 416.

biological niece.³²⁵ The blood relationship is seemingly “stronger.” In New York, as recently as 1975, a father was allowed to marry his adopted daughter on the theory that they were not related by blood; the daughter was not “descended” from her father.³²⁶ Similarly, in Pennsylvania, two first cousins related by adoption were allowed to marry each other, even though a blood relationship, rather than an affinity relationship, would have precluded the marriage.³²⁷ Adoption has created similar problems in the international context. For example, in 2000, the New Zealand Law Commission explained: “Case law demonstrates considerable confusion about whether [current law] means that both adoptive parents and natural parents are considered parents for the purposes of any enactment relating to forbidden marriages or the crime of incest”³²⁸

With respect to criminal incest, states have taken similarly inconsistent positions on whether adoptive relationships have any effect. It is unclear whether a man who has intercourse with his adopted daughter, or with his biological daughter who has been adopted by someone else, would be subject to penalties. Several state courts have held that a man does not commit criminal incest when he has sexual intercourse with his adopted daughter.³²⁹ In South Dakota, incest can only be perpetrated against someone in a blood relationship.³³⁰ The South Dakota court rejected the state’s argument that adoption creates “legal consanguinity” and stated that the “adoption statute cannot erase lineal consanguinity and then create a new lineal consanguinity.”³³¹ By contrast, in *State v.*

325. See, e.g., *State ex rel. Meisner v. Geile*, 747 S.W.2d 757, 758 (Mo. Ct. App. 1988) (“[The state statute] makes it clear that an ancestor or descendant by adoption is a close enough relationship for the crime of incest, but provides that the relationship of uncle and niece must be ‘of the whole blood.’” (quoting MO. ANN. STAT. § 568.020 (West 1986))).

326. *Bagniard v. Hartnett*, 366 N.Y.S.2d 89, 90–91 (Sup. Ct. 1975).

327. *In re Enderle Marriage License*, 1 Pa. D. & C.2d 114, 121 (Phila. County 1954).

328. LAW COMMISSION, REPORT 65, ADOPTION AND ITS ALTERNATIVES: A DIFFERENT APPROACH AND A NEW FRAMEWORK 179, <http://www.lawcom.govt.nz/documents/publications/R65ado.pdf> (Sept. 2000) (on file with the *Duke Law Journal*).

329. E.g., *State v. Lee*, 196 Miss. 311, 315 (1944). The prosecutor unsuccessfully argued, “it naturally follows that if the artificial relationship or relationship by law would support the crime of incest between one and his step-daughter, certainly, a relationship of an adoptive parent and an adopted child would support the crime.” *Id.* at 312.

330. See *State v. Bale*, 512 N.W.2d 164, 166 (S.D. 1994) (“South Dakota . . . specifically limits the crime of incest to sexual penetration between those related by consanguinity.”).

331. *Id.*; see also Holmes, *supra* note 140, at 1678 n.131 (collecting recent cases to argue that when incest laws are applied to adoptive relationships, they should take a child-centered approach).

Fischer,³³² an Indiana court overturned the incest conviction of a man who had intercourse with his biological daughter who had been adopted by another family at the age of four.³³³ The court reasoned that the adoption completely severed the biological relationship; the child's parents were her adoptive parents.³³⁴ In overruling this decision three years later, however, the Indiana Supreme Court observed that "the link of consanguinity cannot be erased by enactment" of the adoption statute.³³⁵

When courts allow incest convictions of men whose victims are their biological daughters who have been adopted by another family, the courts take the position that adoption cannot completely sever the biological parent-child relationship. This is the appropriate approach in the context of incest (it would be absurd to allow a father to marry his biological daughter who had been adopted by another family), and may also be appropriate more generally in recognizing the complex nature of adoption. Similarly, when courts recognize that incest can occur between a man and his adopted child, their approach reflects a recognition that adoption creates a new parent-child relationship. The struggle over the appropriate approach to incest and adoption shows that the blood/function distinction is deeply embedded in the development of adoption law. Whether adoption brings about the existence of a new family has been a critical issue. Subjecting adoptees to double-incest prohibitions recognizes both blood-based family ties and adoptive-based ties. Legal severance of the relationship between biological parents and their children cannot sever all such connections under all circumstances.

332. 493 N.E.2d 1265 (Ind. Ct. App. 1986).

333. *Id.* at 1266; *see* *State v. Burney*, 455 A.2d 1335, 1338 (Conn. 1983) (overruling the defendant's conviction for sexual assault because the state failed to prove an essential element of the crime: "that the defendant was not responsible for the general supervision of the complainant's welfare" (construing CONN. GEN. STAT. ANN. § 53a-71(a)(4) (West 1983))).

334. *Fischer*, 493 N.E.2d at 1266. On the other hand, in *State v. Sharon H.*, 429 A.2d 1321 (Del. 1981), a Delaware court allowed an incest prosecution to proceed against a half-brother and half-sister, who had the same mother. *Id.* at 1323-24, 1330. The sister had been adopted when she was ten days old, and her brother had been raised as a ward of the state. Although the adoption statute eliminated any ties between the biological parents and the children, the blood relationship continued. *Id.* at 1323-34.

335. *State v. Bohall*, 546 N.E.2d 1214, 1215 (Ind. 1989). In *Bohall*, the Indiana Supreme Court upheld an incest conviction against a man who sexually molested his biological daughter, who had been adopted by another family, but who had returned to live with her biological father. *Id.* at 1215-16.

V. ANALOGIES: TRADITION AND NEW FAMILY FORMS

Family law continues to struggle with the treatment of families without marital and/or biological connections. The history of adoption shows that the meaning of family can change without undermining the family itself. Nonetheless, this history also shows that there remains a “first best” family to which other family forms are compared and contrasted.

This is, however, the wrong focus for contemporary family law. Instead, the deeper purposes of families must be examined, respecting both how they are like and how they are different. The underlying question is whether one paradigm is appropriate for all families or whether the existing paradigm itself should be challenged.

Adoption provides a prism through which to examine the creation of the parent-child relationship outside of the traditional blood-based family form.³³⁶ It provides insight into, and challenges for, contemporary debates on adoption,³³⁷ as well as on the utility of applying the biological family as a template to other family forms.

336. In a somewhat different context, Professor Ariela Dubler has persuasively suggested that the doctrine of common-law marriage provides a lens through which “to analyze a number of contested legal relationships that arise in cases about nonsolemnized domestic relationships.” Ariela R. Dubler, *Wifely Behavior*, 100 COLUM. L. REV. 957, 962 (2000). Unlike common-law marriage, however, when courts had strong incentives to legalize marital status when the parties acted married, *see id.* at 969 (“The doctrine of common law marriage provided judges with a way to privatize the financial dependency of economically unstable women plaintiffs.”), in adoption, courts showed a strong reluctance to impose a new legal status even on functioning families, *see supra* notes 271–281 and accompanying text. Others are engaged in reexamining the “first best family” in many different contexts, including the recognition of committed partnerships in inheritance law. *See, e.g.*, E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 258–59 (“[I]ncluding intestate inheritance rights for a surviving non-marital committed partner . . . might alter how society views these partnerships and, indeed, how the committed partners view their own relationship.”).

337. *See, e.g.*, *In re Adoption of Baby E.A.W.*, 658 So. 2d 961, 971 (Fla. 1995) (holding that a biological father had abandoned his child through his conduct toward the mother when she was pregnant); *DeBoer v. Schmidt*, 501 N.W.2d 193, 194, 198 (Mich. Ct. App. 1992) (transferring custody to the child’s biological father from her adoptive parents where the biological mother lied about the identity of the biological father at the time she signed a release of custody form), *aff’d*, 502 N.W.2d 649 (Mich. 1993). The Uniform Adoption Act provides a short time period during which biological parents can void their consent, a provision that has come under sharp attack. *See, e.g.*, *In re Baby Girl T*, 21 P.3d 581, 590–92 (Kan. Ct. App. 2001) (testing the constitutionality of statute that provides greater protection of parental rights to persons who relinquish their parental rights within twelve hours of the child’s birth).

The abuse and neglect system has historically shifted between an emphasis on preserving families and removing children. *See Cahn, supra* note 229, at 1191 (“The policy of child protective services exists on a continuum between child removal and family preservation.”); Marsha

At a more fundamental level, however, the history of adoption is a case study in the normative acceptance of alternative family forms. In deciding whether to integrate alternative families into the existing family model, it is critical to question the utility of that model. While there is increasingly widespread recognition of the existence of alternative family forms,³³⁸ there is little discussion of the need to reexamine the paradigmatic family.

A. *Adoptive Families and Assimilation*

Under contemporary law, the integration of adoptive families into existing family law has taken the form of treating the two types of families similarly. Adoptees are increasingly accorded the same inheritance rights as biological children, and incest laws applicable to biological relatives are beginning to extend to adoptive relationships. Yet adoptive families are, in some ways, significantly different from biological families.³³⁹

1. *Creation of Adoptive Families.* First, the process of creating a family through adoption is very different from the process of creating a biological family. By the middle of the twentieth century, social workers believed that the happiness of adoptive parents and of adopted children required matching children to their families. Matching became one of the principal strategies for lessening the stigma of adoption by attempting “to replicate the family that the

Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 441 (1983) (recognizing that “[a]round the turn of the century, child labor gradually fell into disrepute,” and “the idea of rehabilitating natural parents so that children could be returned home . . . gained currency”).

Not until the early twentieth century were adoption records sealed from a prying public. Elizabeth Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 369 (2001). And not until the latter half of the twentieth century were records closed to members of the adoption triad. *See id.* (“It was only in the 1960s, 1970s and 1980s that all but three . . . states changed their laws to close birth records to adoptees.”).

338. *See* Marsha Garrison, *The Technological Family: What’s New and What’s Not*, 33 FAM. L.Q. 691, 691 (1999) (discussing how technology can create additional family forms, but noting that changes to family forms in the past fifty years have been a result of social rather than technological changes); *cf.* Stark, *supra* note 1, at 1482 (maintaining that her proposals concerning marriage “are not simply an alternative to ‘regular’ marriage, but an acknowledgment that there is no regular marriage” (emphasis added)). Although there certainly are biologically formed heterosexual families, there are many other “regular” family forms as well.

339. *See* Cahn, *supra* note 7, at 329 (“Biological parents ‘retain the sense that they are normal rights-bearing citizens,’ while adoptive parents must undergo elaborate and intrusive regulatory processes before they are eligible to adopt.” (quoting BARTHOLET, *supra* note 7, at 33)).

adoptive couple and the child would have had, absent adoption.”³⁴⁰ This included attempts to match people of the same ethnic, religious, and racial origins, so that the family would look like a biologically formed family.³⁴¹

Many vestiges of this matching strategy still exist.³⁴² Older people are discouraged from adopting newborns, so as to preserve a “normal” familial age. White parents feel discouraged from adopting black children.³⁴³ Some state statutes explicitly direct that children will be matched with families of the same religion, or permit agencies to consider religious, ethnic, and racial heritages.³⁴⁴ Such strategies reinforce the primacy of the biological family, suggesting that families which look “different” are “different,” though they may serve to respect the need of the child for an identity.³⁴⁵

Other issues of family formation similarly illustrate that adoption creates families different from biological families, such as adoptive

340. *Id.* at 347; Samuels, *supra* note 337, at 404. Professor Barbara Melosh observes that there is a “paradox at the heart of adoption: the apparent naturalness of its kinship was an achievement of social engineering” through the use of matching. BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION 51 (2002).

341. Writing in 1919, in the early days of matching, Dr. Slingerland observed that it was “desirable in fitting children to applications, to select such as resemble one or both of the foster parents It is also worthwhile to avoid mixing too diverse types or nationalities” SLINGERLAND, *supra* note 85, at 125.

342. BARTHOLET, *supra* note 7, at 72.

343. See MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS’ RIGHTS 28 (2001) (recognizing Bartholet’s argument that “preference for same-race placement . . . harms prospective adoptive parents by depriving them of the chance to nurture and love a child” (citing BARTHOLET, *supra* note 7, at 1203)).

344. *E.g.*, CAL. FAM. CODE § 8709 (West Supp. 2003):

[An agency] may consider the cultural, ethnic, or racial background of the child and the capacity of the prospective adoptive parent to meet the needs of a child of his background as one of a number of factors used to determine the best interest of a child. The child’s religious background may also be considered in determining an appropriate placement

750 ILL. COMP. STAT. ANN. 50/15 (West 1999) (“The court in entering a judgment of adoption shall, whenever possible, give custody through adoption to a petitioner or petitioners of the same religious belief as that of the child.”); MD. CODE ANN., FAM. LAW §§ 5-316, 5-520 (1999) (permitting the court to consider religion).

345. See, *e.g.*, Joan Heifetz Hollinger, *Authenticity and Identity in Contemporary Adoptive Families*, J. GENDER-SPECIFIC MED., Nov. 2000, at 23–24 (“[T]he asserted-equivalence model of adoption attempted to reinscribe the biogenetic family”); *infra* note 356 and accompanying text.

family screening and biological parent consent.³⁴⁶ Biological parents—outside of the drug-abuse context³⁴⁷—are not screened in the same way as adoptive parents. Adoptive parents must undergo extensive state-sponsored screening in order to be approved, while biological parents may have parenthood thrust upon them with little “choice.”³⁴⁸ Professor Elizabeth Bartholet has, consequently, argued for a relaxation of the standards used to scrutinize adoptive parents.³⁴⁹

For birth parents, family formation results in different issues, such as the procedures for voluntary relinquishment of children: how long should each parent have to change his or her mind about the adoption? Existing state law varies as to how long the biological mother actually has to revoke an adoption, ranging from three months after birth to any time prior to the entry of the final adoption order.³⁵⁰ An emphasis on the rights of the biological mother suggests a longer time period for reconsideration of adoption, though a recognition of the rights of the adoptive parents suggests that a shorter time period may be appropriate. Adding in the child’s interests makes the issue even more complicated. While ensuring stability for the child and her family, the law must also reflect that adoptive families can only exist based upon the relinquishment of the birth parents’ rights, and that this relinquishment can only be fair after the birth parents have had an adequate opportunity for thought and counseling.

346. See BARTHOLET, *supra* note 7, at 85 (“[A]doptive screening . . . drives many of those who are fertile but would nonetheless be interested in adoption [such as straight singles and gay singles and couples] into the world of biologic parenting.”).

347. See *Ferguson v. Charleston*, 532 U.S. 67, 86 (2001) (holding that a state hospital’s performance of a drug test on pregnant women is an unreasonable search if the patient was not consulted); see generally DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* (1997).

348. Some men are surprised to discover that they are the biological fathers of children and consequently responsible for child support. See Carbone & Cahn, *supra* note 28 (“Paternity . . . is a matter often accompanied by uncertainty.”). Many women are unable to afford an abortion. See, e.g., *Harris v. McRae*, 448 U.S. 297, 303 (1980) (examining whether the Hyde Amendment violated the Constitution “insofar as it limited the funding of abortions to those necessary to save the life of the mother, while permitting the funding of costs associated with childbirth”).

349. See BARTHOLET, *supra* note 7, at 84 (suggesting that “[t]he government should have to demonstrate a powerful interest in screening” because “[p]arental screening has enormous costs from the perspective of those screened and categorized by the system”).

350. The Uniform Adoption Act, promulgated by the National Conference of Commissioners on Uniform State Laws in 1994, requires that consents be executed only after the child is born, but limits the time period of revocation to “192 hours after the birth of the minor.” UNIF. ADOPTION ACT § 2-404(a), 9 U.L.A. 53 (1999) (revocations are also permitted if the agency agrees to the revocation).

A related question concerns whether the rights of the biological mother should be the same as those of the biological father. Outside of the adoption context, the rights of unmarried mothers and fathers differ significantly.³⁵¹ When it comes to consenting to an adoption, it is unclear whether the biological mother and father should have the same rights.³⁵²

2. *Continuing Contact.* Second, there are issues concerning the continuing relationship between biological parents and the adoptee, and how much future contact will be allowed between the biological parent(s) and the child. Only recently have states begun to recognize the validity and enforceability of open-adoption agreements.

“Open adoption,” or adoption-with-contact, creates various problems for all members of the adoption triad.³⁵³ While open adoption solves some issues, such as the harshness of cutting all ties between the biological parent and her child, it creates other problems, as all family members search to define their new relationships. Facilitating continuing contact may, on the one hand, suggest the importance—even the primacy—of the biological family.³⁵⁴ On the other hand, it recognizes that adoptees have roots beyond those of their adoptive parents.

351. See, e.g., 8 U.S.C. § 1409(a)–(c) (2000) (stating that a child born out of wedlock, outside of the United States, automatically acquires American citizenship if the mother is an American citizen, but such a child only acquires citizenship when the father is a citizen if paternity is established before the child’s eighteenth birthday); *Nguyen v. INS*, 533 U.S. 53 (2001) (upholding 8 U.S.C. § 1409(a)–(c) (2001) against an equal protection challenge); see generally Mary L. Shanley, *Unwed Fathers’ Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy*, 95 COLUM. L. REV. 60 (1995).

352. See SHANLEY, *supra* note 343, at 46 (recognizing that “legal thinking is quite unsettled”). Some commentators argue that the “best interests” of the child must be considered, another group emphasizes “father’s rights,” while others support “maternal autonomy.”) *Id.*

353. See MELOSH, *supra* note 80, at 284 (“[C]hildren in open adoptions are vulnerable to the withdrawal of a birth mother who could see them but who chooses not to do so.”); SHANLEY, *supra* note 343, at 23 (“I think [nonsecrecy and open adoption] would undercut the blood-based understanding of family bonds by giving custodial authority to adoptive parents *even though* the identity of the birth parents was known.”). See generally Annette Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption With Contact Statute*, 18 CHILD. LEGAL RTS. J. 24 (1998);

354. See, e.g., Richard F. Storrow, *The Policy of Family Privacy: Uncovering the Bias in Favor of Nuclear Families in American Constitutional Law and Policy Reform*, 66 MO. L. REV. 527, 611 (2001) (“[T]he values said to promote openness in adoption emphasize the indelibility of blood bonds and the need to forge connections between adopted children and their biological parents . . .”).

3. *Transracial Adoption.* Third, transracial and international adoption challenge the biological family, but they also raise issues concerning cultural exploitation.³⁵⁵ Early adoption generally occurred across class lines, although not across religious, much less racial, lines.³⁵⁶ Recognizing the differences of adoptive families supports intercultural and transracial adoptions, but also argues for recognition of the child's identity as part of her family of origin.³⁵⁷ Adoption cannot always sever a child's identity from that of her birth parents.

4. *Stigma.* Adoption continues to rank as a second-class option.³⁵⁸ The notion that blood families trump adopted families remains deeply embedded in American culture. The cultural preference for blood ties explains some of the "stigma" that has accompanied adoption. During the mid-twentieth century, many parents did not tell their children that they were adopted, lest the family be seen as different, and thus worse, than other families.

355. See Perry, *supra* note 139, at 161 ("[I]t can be argued that international adoptions take, from the sending country, potentially productive adults who could assist in that country's development . . .").

356. See, e.g., LAWES, *supra* note 43, at 156 (opining that it was "unlikely" that the Worcester Children's Friend Society asked white families to adopt black children). Interracial adoption is of comparatively recent origin, a transgression of the policy of matching children with their parents. See Bartholet, *supra* note 7, at 1178 (noting that a variety of pressures, including the Civil Rights Movement, "made transracial adoption a sympathetic idea to many adoption workers and prospective parents"). Until the 1970s, some states' statutes explicitly prohibited interracial adoptions. Shari O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 486 (1986).

357. Professor Barbara Bennett Woodhouse arrives at a similar conclusion by examining children's voices and interests. Barbara Bennett Woodhouse, *Are You My Mother? Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 128 (1995). Professor Woodhouse has argued for a generist perspective on children's rights that views adults in a form of trusteeship for their children. See *id.*; see generally, Woodhouse, *supra* note 186.

358. See BARTHOLET, *supra* note 7, at 164–65 ("Adoption is set up as a choice of last resort both for birth parents and for the infertile. . ."). Professor Bartholet, a professor at Harvard Law School, explains that, during her years of infertility treatment, the specialists treating her never counseled her about the option of adoption. Instead, she was repeatedly encouraged to pursue ever more invasive medical technologies, with no discussion of alternatives. *Id.* at 27. Only after she had almost exhausted her resources (financially and emotionally) did she decide to adopt. *Id.* at 28. Part of her experience undoubtedly resulted from what Professor Bartholet identifies as the "stigma" of adoption—the view of adoption as a second-best alternative to having one's "own" babies.

Professor Bartholet devotes an entire chapter to the stigma of adoption, discussing the cultural conditioning that emphasizes the importance of blood within families. *Id.* at 168–86. As she points out, the law values the biological part of parenting. *Id.* at 164–65.

The continuing cultural preference for biologically based families can be seen in the first general study of public attitudes toward adoption in the late 1990s. In the survey of more than 1,500 adults, 90 percent of the participants had a positive opinion of adoption, and 95 percent generally supported it. Nonetheless, when it came to an examination of the adoptive family, respondents were somewhat more cautious. Half of the respondents believed that, while having an adopted child was better than infertility, it was not quite as good as having a biological child.³⁵⁹ In a second survey conducted five years later, in 2002, attitudes toward adoption were more positive, but differences remained in beliefs about adoptive and biological children. Though 94 percent of those surveyed believed that adoptive parents are “lucky,” only 75 percent believed that adoptive parents love their children as much as they would have loved their biological children,³⁶⁰ and fewer (less than 60 percent) believed that adoptive parents receive the same amount of satisfaction from raising an adoptive child as from raising a biological child.³⁶¹ Extrapolating from the 2002 survey data to the general population, the researchers also found that 45 percent of Americans believed that adopted children are more likely than biological children to have behavioral problems.³⁶² There is, then, continuing ambivalence with respect to families formed through adoption, a belief that blood ties are stronger and more desirable than adoptive ties, and a belief that adoptees are less healthy than biological children.

Underlying the stigma of adoption are issues of sameness and difference. Part of the stigma may result from adoptive families’ seeming deviation from the normal family. Thinking about adoption

359. EVAN B. DONALDSON ADOPTION INST., BENCHMARK ADOPTION SURVEY: REPORT ON THE FINDINGS, at i, http://www.adoptioninstitute.org/survey/Benchmark_Survey_1997.pdf (Oct. 1997) (on file with the *Duke Law Journal*). Prejudice against adoptees is longstanding. In a 1952 survey, 46 percent of respondents believed that a mother should save her biological child from drowning first, before saving her adopted child; only 3 percent believed the mother should save the adopted child first. DAVID KIRK, SHARED FATE 26 (rev. ed. 1984). Respondents also differed dramatically in specifying the appropriate size for adoptive and biological families, generally believing that adoptive families should be smaller. *Id.* at 25–26; see also Susan Frelich Appleton, “Planned Parenthood”: *Adoption, Assisted Reproduction, and the New Ideal Family*, 1 WASH. U. J.L. & POL’Y 85, 85 (1999) (noting that the “conventional wisdom” is that adoptive families are “second best”).

360. HARRIS INTERACTIVE, NATIONAL ADOPTION ATTITUDES SURVEY: RESEARCH REPORT 6, http://www.davethomasfoundationforadoption.org/html/resource/Adoption_Attributes.pdf (June 2002) (on file with the *Duke Law Journal*).

361. *Id.* at 37.

362. *Id.* at 20.

in this manner could result in changing the norm—shifting the emphasis from how families are formed, to the families and children themselves. This would require a respect for alternative family constructions, including adoptive and gay families, that look different from the conventional middle-class nuclear family. It might help change norms that penalize families that do not conform—because of race or class—to this traditional image. Efforts to change attitudes toward adoption should be part of a more comprehensive agenda for reconceptualizing the family. The social and functional ties can be valued without denying the significance of biological ties.

B. Family Models: Lessons from History

The actions of individuals to form families that look different from other families—be they formed through adoption, through same-sex relationships,³⁶³ or through single parenting³⁶⁴—are certainly not novel. Today, these families have received increasing amounts of publicity as states struggle with issues of gay marriage, adoption by gay and lesbian couples, families formed through new reproductive technologies, and the status of children born to unmarried mothers.

Contemporary attempts to regulate “artificial” families, like adoption laws in the late nineteenth century, struggle with the utility of the existing template of the marital family. Despite the historical record that shows that the meaning of family can change without undermining the basic familial structure, attempts to adapt family law today have been met with inconsistent success. When alternative families look like the nuclear family—when there is only one mother and father for a particular child, even if that father is not the biological father³⁶⁵—then these families are more likely to gain the same rights and privileges as the traditional family form. When they look

363. See William N. Eskridge, Jr., *Multivocal Prejudices and Homo Equity*, 74 IND. L.J. 1085, 1095–96 (1999) (describing the unfair presumptions made against lesbian, gay, and bisexual parents).

364. See generally JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW (2000); NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1997); NATHANIEL HAWTHORNE, THE SCARLET LETTER (1850); SARA S. McLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS (1994); Naomi R. Cahn, *The Moral Complexities of Family Law*, 50 STAN. L. REV. 225 (1997) (reviewing DOWD, *supra*, and BARBARA DAFOE WHITEHEAD, THE DIVORCE CULTURE (1997)); Katharine B. Silbaugh, *Accounting for Family Change*, 89 GEO. L.J. 923 (2001) (reviewing CARBONE, *supra*).

365. This was the situation in *In re Nicholas H.*, 46 P.3d 932, 935 (Cal. 2002).

different—two parents of the same sex, one parent of either sex—then adapting family law is more difficult.

Of course, revising the history of adoption will not suddenly change the current scholarly, judicial, and legislative commitment to using the nuclear family as a template.³⁶⁶ The late-nineteenth-century efforts to interpret the meaning of adoption show the ambivalence about changing the family model. Yet these efforts also show that the underlying model can be modified to recognize the existence of new family forms. Although the biological marital family remains the preferred norm, family law accords adoptive families many of the same rights and privileges, and it is beginning to accord adoptive families additional rights, based on an acknowledgment of relevant differences. The normative need to enshrine a single family form is aligned with cultural concerns over the decline of the family and what is best for children. Nonetheless, a focus on how children are actually living may result in changing the template, just as nineteenth-century legislatures and courts struggled with the actual dilemmas presented by adoptive families.

Differences inherent in the new family structure, such as an adoptee having both a birth and an adoptive family, or a child having two parents of the same sex, need to be acknowledged as realities with legal consequences.³⁶⁷ Rather than a narrow application of analogical reasoning that relies on an empirically outdated model of the ideal family, family law can use a broader approach which requires an “eclectic, interdisciplinary inquiry” that welcomes the dilemmas presented by actual families.³⁶⁸ Forcing all families to conform to a single model harms all members of the unit.³⁶⁹

366. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1499 (2000) (noting that knowledge of history does not necessarily result in significant legal change); see also HARTOG, *supra* note 1, at 5 (commenting on the importance of understanding history).

367. See MILLER, *supra* note 22, at 129–30 (“History in casuistry is often used to suggest that ideas parading themselves as ‘natural’ are in fact cultural. . . .”). For critiques of essentialism, see generally Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990) (criticizing the works of Catharine MacKinnon and Robin West as reliant on gender essentialism); Leti Volpp, *Feminism versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1217–18 (2001) (“We need to acknowledge both that culture shapes gender domination in any community, and that specific histories and present-day practices necessarily will mediate the understandings of what constitutes culture.”).

368. See MILLER, *supra* note 22, at 245 (“Casuistry invites genre bending, for which there is no simple algorithmic formula or procedural menu.”).

369. For example, the U.S. House of Representatives recently passed legislation which included over a billion dollars to promote marriage. Such a broad approach completely overlooks

This Section applies the methodology of “interpretation by recognizing difference” to three contexts that show the basic dilemmas of identifying the like-ness of cases and the hegemony of background assumptions: the visitation rights of birth grandparents post-adoption, the rights of single parents who have conceived children without a partner, and the rights of second parents in gay and lesbian families. If families are seen as intimate arrangements for the protection of adult intimacy and/or nurturing of children, then the need for promoting such arrangements is obvious. Such a vision obviates the need for distinguishing one family form from another and becoming enmeshed in the differences or the similarities.³⁷⁰ An accurate application of the interpretive method requires an examination of both what is like, and what is un-like, between the cases before deciding how to approach them. Rather than checking the form of the family before according it rights and privileges, judges and legislatures should focus on the underlying purposes of the family unit; likeness should be treated similarly, while differences in form may require accommodation.

1. *Post-Adoption Visitation by Grandparents.* The Supreme Court’s recent opinion in *Troxel v. Granville*³⁷¹ considered the constitutionality of Oregon’s visitation statute as applied to the paternal biological grandparents of children.³⁷² The Supreme Court’s plurality opinion focused on the rights of parents to raise their children without interference.³⁷³ The Court held that the visitation statute at issue conflicted with the parents’ rights to care, custody, and control of

that domestic violence, drug and alcohol abuse, and other problems make marriage untenable for many men, women, and children. See JODIE LEVIN-EPSTEIN ET AL., CTR. FOR LAW & SOC. POLICY, SPENDING TOO MUCH, ACCOMPLISHING TOO LITTLE: AN ANALYSIS OF THE FAMILY FORMATION PROVISIONS OF H.R. 4737 AND RECOMMENDATIONS FOR CHANGE 3, http://www.clasp.org/DMS/Documents/1023821143.64/HR_4737_family_form_analysis_61102.pdf (June 11, 2002) (on file with the *Duke Law Journal*) (stating that H.R. 4737 does not “go far enough to require state TANF programs to assist two-parent families to the same extent as single-parent families”).

370. Martha Fineman, for example, argues that the basic constitutive elements of families should be the mother-child dyad. MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 101–25 (1995).

371. 530 U.S. 57 (2000).

372. *Id.* at 60.

373. *Id.* at 65; see also Emily Buss, “Parental” Rights, 88 VA. L. REV. 635, 638–39 (2002) (“Justice Sandra Day O’Connor’s plurality opinion noted that affording legal protection to a child’s relationship with nontraditional caregivers would come at a cost to the traditional parent-child relationship protected by the Constitution.”).

their children.³⁷⁴ Regardless of the decision's many other flaws, *Troxel* appropriately recognizes the constitutional significance of an ongoing parent-child relationship, and the consequent assumptions that children are best cared for by their parents.³⁷⁵

For purposes of this Article, the decision is remarkable because the fact that the mother's husband adopted the children during the course of the legal proceedings was virtually ignored throughout the judicial proceedings and in the briefs.³⁷⁶ The adoption terminated the legal relationship between the paternal grandparents and the children. Nonetheless, the Court repeatedly referred to the Troxels as the "grandparents." This description of the Troxels may have signified acceptance of the view that adoption did not terminate their status, or it may have been a manifestation of the breadth of the challenged statute, which granted "any person," regardless of legal relationship, standing to sue for visitation.³⁷⁷

Although the adoption was not significant to the *Troxel* outcome, many other courts and legislatures have considered the visitation rights of biological relatives after an adoption and have reached varying conclusions.³⁷⁸ In some cases, the adoption terminates

374. *Troxel*, 530 U.S. at 72. The Court did not hold, however, that these rights are never subject to interference. Moreover, the Court recognized the validity of some visitation statutes. *Id.* at 73 ("Because much state-court adjudication in this context occurs on a case-by-case basis, we would be hesitant to hold that specific nonparental visitation statutes violate the Due Process Clause as a *per se* matter.")

375. See Buss, *supra* note 373, at 640 ("Justices O'Connor, Kennedy, and Stevens's opinions all portrayed the claims of nontraditional caregivers as opposed to those of parents and suggested that protecting these relationships could only be accomplished at some cost to parental rights."). See generally FINEMAN, *supra* note 370 (arguing for privacy protection for the care-taking unit).

376. *Troxel*, 530 U.S. at 62. Kelly Wynn adopted the children in February 1996. *In re Custody of Smith*, 969 P.2d 21, 23 (Wash. 1998). The adoption is only briefly mentioned in the briefs of the parties. The American Civil Liberties Union, as amicus curiae, raised the issue of whether the adoption affected the grandparents' rights, but concluded it did not. Brief Amicus Curiae of the American Civil Liberties Union and the ACLU of Washington in Support of Respondent at 3 n.4, *Troxel v. Granville*, 530 U.S. 57 (2000) (No. 99-138) ("In light of the children's adoption by the mother's husband, there may be some question under Washington law as to whether the Troxels legally qualify as the children's grandparents. However . . . this Court has never dwelt on such legal technicalities.")

377. *Troxel*, 530 U.S. at 67.

378. *E.g.*, Bopp v. Lino, 885 P.2d 559, 563 (Nev. 1994) ("Once an adoption is entered, a grandparent lacks standing to petition for visitation rights."); *In re Grant*, 836 P.2d 167, 169 (Or. Ct. App. 1992) ("[A]fter an adoption, the relationship and rights of the natural parents and their kindred shall be the same as if the adopted person had been born to the adoptive parents and had not been born to the natural parents."). Some states, including California, have enacted statutes authorizing grandparent visitation when a step-parent adopts the child. CAL. FAM.

the legal rights of the grandparents to petition for visitation, because the child is part of a new family, while other cases have recognized their claims on a variety of bases. In the relatively few cases decided after *Troxel*, courts have consistently held that an adoption by non-relatives terminates the grandparents' rights. For example, the New Jersey Supreme Court concluded that, notwithstanding the existence of a general grandparent visitation statute, granting visitation rights to grandparents after their grandchild had been adopted would conflict with the goal of the adoption statute to prevent disruption of the adoptive parent-child relationship.³⁷⁹

Treating grandparents differently depending on whether there has been an adoption, however, allows the law to disrupt an ongoing relationship between the grandparent and the child. To the extent that grandparents are able to assert visitation rights, the change in legal definition between grandparents and former grandparents created by adoption should be legally irrelevant.³⁸⁰ Though the legal form of the child's family has changed after an adoption—she is no longer by law related to her birth grandparents—the functional relationship with the child remains the same.³⁸¹ It follows, then, that the birth

CODE § 3102 (2002); *see supra* note 297. Statutes do not necessarily apply when a non-relative adopts the child. *See Huffman v. Grob*, 218 Cal. Rptr. 659, 660 (Cal. Ct. App. 1985) (“[Visitation rights] shall not apply if the child has been adopted by a person other than a stepparent or grandparent.” (quoting CAL. CIV. CODE § 197.5) (alteration in original)); *West Virginia ex rel. Brandon L. v. Moats*, 551 S.E. 2d 674, 675–76 (W. Va. 2001) (“If a child who is subject to a visitation order under this article is later adopted, the order for grandparent visitation is automatically vacated when the order for adoption is entered, unless the adopting parent is a stepparent, grandparent or other relative of the child.” (quoting W. VA. CODE § 48-2B-9)).

379. *In re Adoption of a Child by W.P. and M.P.*, 748 A.2d 515, 522–23 (N.J. 2000); *In re J.D.G.*, 756 N.E.2d 509, 512 (Ind. Ct. App. 2001). In such cases, the substantive relationships between the grandparents and their grandchildren are legally irrelevant, even though, in the absence of the adoption, the applicable statutes might have permitted visitation.

380. For a careful review of the post-*Troxel* grandparent visitation cases in an effort to show the indeterminacy of constitutional law applied to the family, see Dolgin, *supra* note 1, at 396–401. My argument here does not concern the constitutionality of grandparent visitation per se; rather, I argue that an adoption that severs the legal relationship between grandparents and their biological grandchildren should be irrelevant to consideration of the grandparents' rights. Because the Supreme Court's opinion in *Troxel* does not mention the step-father's adoption, the opinion can be interpreted to support implicitly this position.

Grandparent visitation over the objection of the parents will be difficult in any situation, regardless of whether there has been an adoption. The focus in both instances should be on the child, not on the grandparents' legal status.

381. *See Annette R. Appell, Enforceable Post-Adoption Contact Statutes, Part I: Adoption with Contact*, 4 ADOPTION Q. 81, 81 (2000) (“[T]hese basic adoption statutes often fail to reflect adoption demographics and the rising recognition of birth connections that have made adoption a more open and fluid practice.”).

grandparents should have visitation rights in accord with their actual relationship to the child, rather than their legal status. The “deeper purposes”³⁸² of visitation are to nurture a relationship, rather than to reify statutory construction. Consequently, the changed legal structure of the family does not change the emotional connections. Although allowing visitation by a third set of grandparents means that this family is un-like the typical marital family, the interests of the children and the pre-adoptive grandparents are sufficiently “like” those in other grandparent visitation cases that they should be respected.

Whichever standard applies to visitation disputes between grandchildren and their legal grandparents should also apply to adopted grandchildren and their pre-adoption grandparents. This, as in the incest cases, is an example in which the legal status of adoption should not change the underlying relationship. It serves also as an example in which “like” treatment results in “un-like” results, given the potential for three sets of grandparents. Interpreting the grandparent statutes to recognize the differences between adoptive and biological families respects the underlying relationship.

2. *Single Parents.* Though the revised Uniform Parentage Act simply does not address single parenthood by choice, Professor Garrison requires the identification of a second parent when a single parent has a child. She attempts to conform alternative families into the nuclear family model.³⁸³ She argues that contemporary family law fosters two parents for every child, regardless of the parents’ marital status; thus, for single women who choose artificial insemination by donor, Professor Garrison believes that the applicable paternity rules should be the same as for conception by sexual means, and the “donor” should be deemed the legal father.³⁸⁴ Her argument is that existing precedent establishes the two-parent family as the model, and there is no reason to depart from this model. She explains, “outside the AID [artificial insemination by donor] context, our legal system grants no parent, male or female, the right to be a sole

382. See *supra* notes 8–29 and accompanying text (discussing the interpretive method’s analysis of like cases).

383. See Garrison, *supra* note 1, at 903.

384. *Id.* at 903–10.

parent . . . There is simply no logical basis for a one-parent policy applicable only to single AID users.”³⁸⁵

The emphasis on the importance of two parents has eerie parallels with adoption in the early twentieth century. As Professor Julie Berebitsky has shown, single women were able to adopt children during the first third of the twentieth century.³⁸⁶ Single adoptive motherhood became less favored as cultural and social work norms emphasized the importance of fatherhood.³⁸⁷

The condemnation of single-parent families is based on a view of such families as “deviant” and “bad” for children. If, instead, the focus is on the commitment of these parents to their children, then these families can be viewed as moral and deserving of support. Changing the lens from external structure to internal caregiving provides a new perspective. In adoptions, changing the lens to examine the functioning of the family, rather than its legal formation, leads to conclusions about incest and inheritance with which nineteenth-century courts and legislatures were clearly uncomfortable. Efforts to extend the privileges accorded marital, blood-based families to other family forms need not focus simply on assimilation and integration, but must recognize the strengths and differences of these other forms.

Rigorous application of the interpretive method would recognize that single individuals who have children through adoption or through insemination are not like two-parent families, *and* that there is no longer (if there ever was) cultural consensus on the two-parent model. Children do not necessarily need two parents to thrive, and the imposition of a second parent not only infringes on the single parent’s rights as a parent, but, as a practical matter, may not benefit the child.³⁸⁸ Although the two-parent model generally is beneficial for

385. *Id.* at 906, 910.

386. BEREBITSKY, *supra* note 69, at 102–27. She notes, however, that acceptance of these women resulted from deeply gendered beliefs that all women, married or not, had strong maternal instincts. *Id.* at 103–04.

387. *Id.* at 116–17.

388. See ANDREW J. CHERLIN & PAULA FOMBY, POLICY BRIEF 02-3, WELFARE, CHILDREN, AND FAMILIES: A THREE-CITY STUDY 5, <http://www.jhu.edu/~welfare/19837BriefLivingArrang.pdf> (May 2002) (on file with the *Duke Law Journal*) (noting that children in mother/step-father families may fare no better than children in single-parent families); Stephanie Coontz & Nancy Folbre, Marriage, Poverty, and Public Policy: A Discussion Paper from the Council on Contemporary Families, <http://www.contemporaryfamilies.org/briefing.html> (Apr. 28, 2002) (on file with the *Duke Law Journal*) (“[B]ad fathering can be worse than no fathering.”).

children,³⁸⁹ forcing all families into that model does not benefit children. Indeed, when parents are forced to marry each other, or when a single parent marries someone else, children do not necessarily thrive.³⁹⁰

Recognizing that single parents form families, and providing them with the legal support to do so, is in accord with changing historical circumstances in which increasing numbers of women and men are creating these families with increasing amounts of social acceptance.³⁹¹ In the 1990s, one of every three births took place outside of marriage, one of every two marriages ended in divorce, and over half of American children born during the decade are expected to spend some part of their childhood in a single-parent family. Simply saying that single-parent families should be coerced into looking like two-parent families does not take into account the changing historical circumstances, nor does it account for the differing reasons underlying the formation of one- or two-parent families. Children benefit from increased resources, not from coerced parenthood.³⁹²

Though legal support for these families might appear to be a radical disruption of existing precedent, it is instead a (conservative) recognition of the settled expectations of single parents and their children. Rather than forcing change, the law can instead adapt by offering single parents the same protections as other families. Again, interpretation by recognition of differences allows respect for the family.

3. *Gay and Lesbian Second-Parent Families.* There are obvious parallels between the early adoption decisions and the legal rights of gay and lesbian families. Questions of whether recognition of two

389. See, e.g., Coontz & Folbre, *supra* note 388 (“Marriage offers important social and economic benefits.”).

390. See Carbone & Cahn, *supra* note 28 (“[D]o genetic parents provide care that is qualitatively or quantitatively greater than that provided by other adults? Our hunch is yes . . .”).

391. See, e.g., Dana Calvo, *Single-Mom Story Lines No Longer Draw Critics*, CHI. TRIB., Oct. 31, 2001, at 6C (noting that single mothers on television shows are becoming more common and less criticized); Barbara Kantrowitz & Pat Wingert, *Unmarried, With Children*, NEWSWEEK, May 28, 2001, at 46 (“The number of families headed by single mothers has increased 25 percent since 1990.”). There are approximately 7.6 million single mothers in the United States. Calvo, *supra*, at 6C. There is no separate numerical breakdown of whether these are families formed by divorce, widowhood, or other means, *id.*, although more than 40 percent of single mothers have never been married. Margaret Renkl, *The Single-Mom Boom; Their Numbers Are Growing Fast, and Their Future’s Looking Bright*, BABYTALK, Oct. 2001, at 68.

392. See DOWD, *supra* note 364, at 121–25 (arguing for a policy of “affirmative support” for single-parent families).

mothers or two fathers for a child will destabilize the traditional family resonate with historical questions of whether nonbiologically based family forms threatened the blood-based family. As with the early adoption cases, courts today generally use the two-parent,³⁹³ biological family as the template against which to measure, and to conform, other families. Repeatedly, sperm donors have received extensive visitation rights over the objections of the biological mother and her partner,³⁹⁴ based on analogizing the parent-child relationship to existing familial forms. In other cases, lesbian or gay partners who have planned families together, but separate after the child's birth without legalizing the second parent's relationship, may also face imposition of the biological-parent model when the second parent's rights are not recognized.³⁹⁵

The newly revised Uniform Parentage Act also uses the two-parent, heterosexual family as the model to which all other families should conform.³⁹⁶ For example, in its discussion of the validity of gestational agreements, the Act requires that the intending parents be married to each other,³⁹⁷ thereby precluding same-sex partners or single individuals from entering into binding surrogacy contracts. In cases involving both traditional and gestational surrogacy arrangements, courts have carefully tried to designate one mother and one father for each child.³⁹⁸

Attempting to fit new family forms into existing family structures, without adjusting those structures, straitjackets the new families

393. See, e.g., Garrison, *supra* note 1, at 892 (“Courts and legislatures have taken steps to ensure that children have two parents.”).

394. See Carbone & Cahn, *supra* note 28 (listing cases). In a recent case, a sperm donor for a lesbian couple successfully sought additional visitation rights beyond those to which he had previously agreed in writing because, in the court's judgment, it was in the best interests of the child. *In re Tripp v. Hinkley*, 736 N.Y.S.2d 506, 508 (App. Div.).

395. See Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 468–72 (1990) (“The law operates to require that a child have one parent of each sex When the [custody] dispute is between a parent and a nonparent, not only is the parent usually considered the preferred custodian, but the nonparent may even be found without standing to challenge parental custody.”); see generally Polikoff, *supra* note 3.

396. See UNIF. PARENTAGE ACT § 201, 9B U.L.A. 309 (2000).

397. *Id.* § 801(b), 9B U.L.A. 362 (2000).

398. E.g., *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 293–94 (Ct. App. 1998); *McDonald v. McDonald*, 608 N.Y.S.2d 477, 480–81 (App. Div. 1994). Courts may have nontraditional reasoning, such as focusing on intent, rather than biology. Garrison, *supra* note 338, at 699–700. Nonetheless, they achieve the traditional result of identifying only one parent of each sex to receive primary custody of the child.

and fails to recognize the rights of either parents or children.³⁹⁹ The history of adoption shows the uncertainty inherent in applying existing assumptions to new family forms. When nineteenth-century judges refused to recognize informal adoptions, or when they denied adoptees' various inheritance rights, they were using the blood/marital definition of families. When they did recognize extralegal adoptive relationships, and when they broadly construed the adoption statutes to give adoptees' inheritance rights equal to those of other children, they were looking at the parent-child relationship, and the function of the family form.

When contemporary courts refuse to acknowledge the rights of a lesbian co-parent, they are again using blood rather than functioning relationship as the defining characteristic. When they grant rights to a sperm donor over the objections of the mother, blood and tradition again become the definition of family form. These results are not necessarily "wrong" under a common-law approach, but they do show that analogical reasoning can be either somewhat traditional or somewhat progressive. That is, such reasoning can reinforce the primacy of the traditional form, or it can encourage the growth of alternatives. The use of blood as a measure of the "like-ness" of relationships results in a preference for the family based on a marital, biological model.⁴⁰⁰ The conflicts between these presumptions for biology or function are inevitable without a recognition that families are formed in multiple ways, and that children may have multiple caretakers who may have claims based on biology or affection.⁴⁰¹

399. Of course, the concept itself of "existing family structures" is not static. *See, e.g.*, Silbaugh, *supra* note 364, at 936 ("The 1950s family that many implicitly use as the baseline today was itself once radical and decried as dangerous to the society's moral fiber, with spouses choosing one another for love and with apparent disregard for parental approval and obligation toward the family of origin or larger community."). Nonetheless, at most points in recent history, it has been possible to identify a cluster of norms defining the "good" family. It is these norms which have been applied to (mis)judge all families.

400. The Supreme Court's opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), is somewhat ironic here; in that case, the Court upheld California's marital presumption of legitimacy which used marriage as a proxy for a blood relationship. *See id.* at 119-32 (rejecting the putative natural father's claims that the California statute violated his procedural and substantive due process rights and his biological child's equal protection rights). To be sure, biological paternity is sometimes given only limited respect, depending on other values. The newly revised Uniform Parentage Act appears somewhat punitive toward unmarried biological fathers by providing that, under certain circumstances, a biological (and unwed) father's rights can be terminated without notice where the child is less than one year old and the father has not filed with a paternity register. UNIF. PARENTAGE ACT § 404 (2002).

401. *See, e.g.*, 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,

Using blood-based, two-parent, marital families as the prototype to which all other families are analogized utterly fails to recognize this complexity of family forms, and it is contrary to the inherent adaptability of the common law. Accordingly, courts and legislatures should recognize the rights of lesbian and gay co-parents who have contributed to the creation of a child and participated in child rearing. Single parents should be allowed to raise children without the necessity of second-parent involvement through mandating responsibility for the sperm provider. For poor women, there should be no state coercion to marry. Although much research has recognized that children fare better when their parents are married to each other, strongly encouraging single parents to marry will not necessarily result in better outcomes for their children.⁴⁰² Instead, providing support to existing families, through measures such as improved access to education, job training, and child care, serve to recognize that families have differing needs based on their form. Finally, adoption should acknowledge the existence of two potential families.

CONCLUSION

How should the law recognize *difference* in developing the contemporary regulation of families? As Professor Reva Siegel observes, “[a]t the end of the day, we must forge answers to these questions in history.”⁴⁰³ There is a tendency to believe that the formation of non-biologically related families is of fairly recent origin, and thus, that the difficulties in regulating such families is a new challenge for the

961–62 (1984) (noting that the concept of nonexclusive parenthood is “an alternative for approaching certain child custody disputes in which, because the child has developed child-parent relationships with adults outside his nuclear family, one of the critical, underlying premises of child custody law—that parents raise their own children in nuclear families—is no longer a fair one”); Naomi Cahn, *Reframing Child Custody Decision Making*, 58 OHIO ST. L.J. 1, 27–28 (1997) (discussing the possibilities of multiple parents); Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1652–55 (1991) (critiquing the functionalist approach for examining nontraditional families to determine the extent to which they “mimic” traditional families).

402. See, e.g., Coontz & Folbre, *supra* note 388 (“The idea that marriage can solve the problems of children in impoverished families ignores the complex realities of these families.”); Theodora Ooms, *Marriage Plus*, AM. PROSPECT, Apr. 8, 2002, at 25, 26 (“Marrying a low-income, unmarried mother to her child’s father will not magically raise the family out of poverty”); Michael Selmi & Naomi Cahn, *Caretaking and the Contradictions of Contemporary Policy*, ME. L.REV. (forthcoming 2003) (discussing jurisprudence of encouraging marriage to help children).

403. Reva B. Siegel, *Discrimination in the Eyes of the Law: How “Color Blindness” Discourse Disrupts and Rationalizes Social Stratification*, 88 CAL. L. REV. 77, 78 (2000).

law. Adoption history shows the mistakes that underlie this assumption and illustrates the fallacies supporting the hegemonic blood and marital-based family.⁴⁰⁴

Even as adoption law has moved toward erasing differences between adopted and blood children, this belies the reality that adoptive families do face different challenges. Moreover, the attempt to erase differences may, paradoxically, contribute to the stigma of adoption: there is something less satisfactory, or even shameful, about adoption, such that adoptive families must conform to the norm established by blood families. Adoptive families confront very different issues from biologically based families,⁴⁰⁵ and erasing those different issues by assuming complete comparability prevents all members of the adoption triad from creatively confronting these differences.

History thus also provides the basis for challenging contemporary approaches to the status of all children. The difficulties encountered by alternative family forms as they seek to establish themselves as legally respected families shows that a policy of “sameness” cannot—and should not—erase difference.⁴⁰⁶

404. See Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 99 (2001) (advocating departure from the “naturalized” model of the family); see generally Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1989); Bartlett, *supra* note 401; Cahn, *supra* note 364; Jane C. Murphy, *Rules, Responsibility and Commitment to Children: The New Language of Morality in Family Law*, 60 U. PITT. L. REV. 1111 (1999).

A blood relationship itself was not always a determinate tie, as is clear in the context of children born out of wedlock who were unable to inherit from their fathers, and in the context of children of slaves and their white masters. See Roberts, *supra* note 202, at 214, 254–55, 260 (1995) (giving examples of situations in which biological parents were not allowed the usual presumption of paternity).

405. See *supra* Part V.A.i–iii. Adoptees often face different identity issues than other children. See generally BEING ADOPTED: THE LIFELONG SEARCH FOR SELF (David M. Brodzinsky et al. eds., 1992); BETTY JEAN LIFTON, JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS (1994). Adoptive mothers may feel that their motherhood is inferior to biological motherhood. See, e.g., KATARINA WEGAR, ADOPTION, IDENTITY, AND KINSHIP: THE DEBATE OVER SEALED BIRTH RECORDS 133–34 (1997) (“Charlene Miall . . . found that two-thirds of the adoptive mothers she interviewed were disturbed by the dominant societal belief that adoptive motherhood is inferior.”).

406. See Kathryn Abrams, *Critical Strategy and the Judicial Evasion of Difference*, 85 CORNELL L. REV. 1426, 1429–33 (2000) (discussing the tendency for courts to overlook differences); Louis Michael Seidman, *Brown and Miranda*, 80 CAL. L. REV. 673, 717 (1992) (noting that simply redefining separate as unequal does not solve the underlying problems of inequality). See also Neil Gotanda, *A Critique of “Our Constitution is Color-Blind”* 44 STAN. L. REV. 1 (1991) (discussing an “alternative to color-blind constitutionalism”); Girardeau A. Spann, *Proposition 209*, 47 DUKE L.J. 187 (1997) (discussing the implications of the California anti-discrimination proposition); Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (advocating a deinstitutionalization of gender instead of gender neutrality).

Finally, the history of adoption shows that a single, consensus-oriented model for all families is inadequate. Contemporary adoption law, in its attempts to dissolve tensions, has instead provided the basis to magnify these tensions. Although assimilation into existing legal institutions may be a questionable good,⁴⁰⁷ there is no doubt that, for example, granting parental status guarantees certain rights that are not available to an individual without that legal status, or that being married carries with it a specific set of entitlements.⁴⁰⁸ But simply legalizing through assimilation a functional parent-child relationship is inadequate. The law must also respect the particular characteristics of each such relationship. Accordingly, both parents of children in gay and lesbian families should be awarded legal rights, and single women should be able to parent by themselves, without state pressure to marry or to name a man as father. Applying the same principles to different family forms is contrary to the purpose of interpretive reasoning. Assimilation without recognition of relevant difference is a deficient process.

The difficulty today, as has been the case since the late nineteenth century, is determining how existing legal standards and institutions must adapt and expand to acknowledge changes in families, rather than how the alternative families themselves must adapt to comply with those standards. Changing the law to recognize differences does not preclude equality of treatment.

The history of adoption shows struggles that resulted in adoptive families being treated in almost the same way as biological families. Yet this assimilative treatment is highly problematic. Though members of adoptive families deserve the same rights as members of biological families, they also need different rights based on respect for their dissimilarities, such as the right to obtain original birth certificates, or the right to enforcement of contracts for continued visitation between biological relatives and adoptees. Gay and lesbian families and single parents by choice similarly deserve the same rights as members of biological families—as well as respect for their differences. Respecting the alternative forms of these families requires society to stop forcing them into a single model.

407. See, e.g., Gilbert A. Holmes, *The Conversations about the Intersecting Institutions of Marriage*, 4 TEX. WESLEYAN L. REV. 143, 147–48 (1998) (reporting on Professor Ann Shallick's questioning of marriage).

408. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000) (“[W]e have recognized the fundamental right of parents to make decisions concerning the care, custody, and control of their children.”).