

William & Mary Journal of Race, Gender, and Social Justice

Volume 18 (2011-2012)
Issue 2 *William & Mary Journal of Women and
the Law*

Article 3

February 2012

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Barbara L. Atwell, *Nature and Nurture: Revisiting the Infant Adoption Process*, 18 Wm. & Mary J. Women & L. 201 (2012), <https://scholarship.law.wm.edu/wmjowl/vol18/iss2/3>

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NATURE AND NURTURE: REVISITING THE INFANT ADOPTION PROCESS

BARBARA L. ATWELL*

ABSTRACT

Adopted children constitute approximately two percent of the United States' childhood population, but are disproportionately represented in mental health settings, where they make up an estimated four to fifteen percent of the population. Science suggests that for those adopted at birth, this discrepancy may be due in part to their abrupt removal from the biological parents. We are now beginning to understand the importance of the bonding that takes place in utero and the infant's awareness at birth. This article suggests three changes to the infant adoption process to align it with scientific knowledge. First, all adults involved in the adoption need to be educated on the unique mental health needs that adopted children may have as a result of their transition from one family to another. Second, the infant adoption placement process should be changed from an event to a process to make the shift from one family to another more gradual. Finally, we need a sea change in the cultural beliefs surrounding adoption to make access to information and contact with biological parents the norm rather than the exception.

INTRODUCTION

I. FETAL DEVELOPMENT AND NEWBORN AWARENESS

- A. *Fetal Development*
- B. *Newborn Awareness*

II. MENTAL HEALTH CHALLENGES OF ADOPTEES

III. ADOPTION LAWS AND PROCEDURES

IV. IMPROVING THE ADOPTION PROCESS

- A. *Educating Adoptive Parents and Adoption Professionals*
- B. *Shifting from an Event to a Process*
- C. *Eliminating or Minimizing Secrecy*

CONCLUSION

Mara is seven years old and has lived in foster care with the same family all her life. Another family has now agreed to adopt Mara. When the adopting family arrives to pick up Mara, she gets

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very upset. Mara has no idea what is happening because she was not informed that she would be going to live with a new family. Her old family promptly disappears from her life, and Mara is perplexed as she attempts to adjust to her new reality.

Imagine the same scenario, but instead assume that Mara is a newborn who is being taken from her birth family and placed with her new adoptive family. As above, little if any attention is given to the transition from one set of individuals to another. This is common in the infant adoption process because conventional wisdom has promoted that the infant is completely unaware of the transition.¹ Modern science, however, suggests otherwise,² and the time has come for law and policy to catch up.

INTRODUCTION

Adoption³ has been used from the earliest of times as a means of creating permanent, stable families for children unable to live with their biological parents.⁴ It serves children who need homes, parents

1. See CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUM. SERVS., HELPING YOUR FOSTER CHILD TRANSITION TO YOUR ADOPTED CHILD 2-7 (2005), http://www.childwelfare.gov/pubs/f_transition.pdf; *Child Placement Services: Preparing the Family, the Child and the Foster Care Provider for Placement*, N.C. DEP'T HEALTH & HUM. SERVICES, <http://info.dhhs.state.nc.us/olm/manuals/dss/csm-10/man/CSs1201c5-03.htm> (last visited Feb. 13, 2012). Although there have been times in history when even the seven year old Mara would not be told that she was going to live with a new family, today, this is less likely to happen. Social workers and other mental health professionals are likely to advise that an adoptee receive advance notice and an explanation. With emerging information about newborn awareness and intelligence, appropriate changes are also in order for the infant adoption process.

2. See Michael F. McGinn, *Developmental Challenges for Adoptees Across the Life Cycle*, in HANDBOOK OF ADOPTION 61, 62-63 (2007), available at http://www.sagepub.com/upm-data/13654_Chapter5.pdf (describing the important bonding that takes place during the neonate's in utero experience).

3. According to *Black's Law Dictionary*, adoption is "[t]he creation of a parent-child relationship by judicial order between two parties who usu[ally] are unrelated." BLACK'S LAW DICTIONARY 52 (8th ed. 2004). By granting parental status to adoptive parents, adoption also serves to terminate the parental rights of the biological parents. *Id.* ("This relationship is brought about only after a determination that the child is an orphan or has been abandoned, or that the parents' parental rights have been terminated by court order."); see also *infra* notes 4 and 117 and accompanying text. In infant adoptions, this results from the biological parents' consent to have their parental rights terminated, for example, because the birth was the result of a teen pregnancy. See *infra* note 117 and accompanying text (discussing the consent required of the biological parents).

4. See, e.g., Naomi Cahn, *Perfect Substitutes or the Real Thing*, 52 DUKE L.J. 1077, 1088-90 (2003) (explaining the rationale behind nineteenth century child welfare organizations' adoptions); Barbara Bennett Woodhouse, *Waiting for Loving: The Child's Fundamental Right to Adoption*, 34 CAP. U. L. REV. 297, 309-16 (2005) (tracing adoption rules and practices through different eras and cultures); see also *Missions and Values*, DAVE THOMAS FOUND. FOR ADOPTION, <http://www.davethomasfoundation.org/who-we-are/mission-and-values/> (last visited Feb. 13, 2012) (describing its vision as providing children with "a permanent home and a loving family"). State statutes also make provisions

who cannot otherwise have children, and biological parents who are unable or unwilling to parent the children they have created. In fact, it has been suggested that children have a fundamental right to loving families, via adoption when necessary, just as adults have a fundamental right to choose whom to marry.⁵ In most respects, adoptive families mirror their biological counterparts.⁶ For children in need

for second parent adoption by a stepparent without requiring the biological parent to terminate his or her parental rights. *See, e.g.*, MONT. CODE ANN. § 42-4-302 (2011) (describing second-parent adoptions for stepparents); N.Y. DOM. REL. LAW § 117(1)(d) (McKinney 2011) (“When a birth or adoptive parent, having lawful custody of a child, marries or remarries and consents that the stepparent may adopt such child, such consent shall not relieve the parent so consenting of any parental duty . . .”). Second parent adoption has also been advocated for same-sex couples who face greater hurdles when they are not married, and the adoption by one partner would not terminate the parental rights of the other. *See, e.g.*, Elizabeth Rover Bailey, Note, *Three Men and a Baby: Second-Parent Adoptions and Their Implications*, 38 B.C. L. REV. 569, 575 (1997) (demonstrating that stability for the child is one consideration for allowing second parent adoptions in same-sex relationships); Jason C. Beekman, Note, *Same-Sex Second-Parent Adoption and Intestacy Law: Applying the Sharon S. Model of “Simultaneous” Adoption to Parent-Child Provisions of the Uniform Probate Code*, 96 CORNELL L. REV. 139, 165 (2010) (“Looking at legislative intent, the purpose behind adoption statutes . . . is to effectuate the best interest of the child.”); Christopher Colorado, Note, *Tying the Braid of Second-Parent Adoptions—Where Due Process Meets Equal Protection*, 74 FORDHAM L. REV. 1425, 1463 (2005) (noting that allowing second parent adoptions for same sex couples may be constitutionally required); Eleanor Michael, Note, *Approaching Same-Sex Marriage: How Second Parent Adoption Cases Can Help Courts Achieve the “Best Interests of the Same-Sex Family,”* 36 CONN. L. REV. 1439, 1446 (2004) (discussing the particularities of second parent adoption in adoptions where the parents are gay or lesbian couples).

5. *See* Woodhouse, *supra* note 4, at 308 (arguing that adoption and marriage both come from the same ancient tradition of creating recognizable families); *see also* Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115, 2115, 2122 (1997) (recognizing every child’s right to a safe home and creating an incentive to move children from foster care to permanent adoptive homes). The Adoption and Safe Family Act (ASFA) has been criticized, however, for privatizing child welfare. Woodhouse notes that:

ASFA “reduces the role of ‘public’ fostering of children while incentivizing formation of ‘private’ adoptive families to take on the parenting role.” While this policy shift reduces “foster care drift” and promotes permanency for children, it may do so at the expense of poor families. Formerly, poor parents encountering housing, marital, economic, or health crises had foster care as a ‘safety net’ to provide temporary substitute care at public expense while they got back on their feet. Now, even voluntary placements by good parents in difficult times can rapidly lead to disintegration of a family and permanent loss of family ties.

Woodhouse, *supra* note 4, at 303 (citations omitted). *But see* Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 357–58 (2008) (“Courts must protect biological parents’ fundamental rights to raise their children and may not remove a child from the care of his birth parents or terminate parental rights merely because another set of parents would do a better job of raising the child.”).

6. *Compare* James G. Dwyer, *First Parents: Reconceptualizing Newborn Adoption*, 37 CAP. U. L. REV. 293, 293 (2008) (“[A]doptive parents are the only caretaking parents the children ever have and for all intents and purposes raise the children just as do biological parents . . .”), *with* Annette Ruth Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 6 (2010) (claiming adopted children carry connections from their birth family to their adopted family).

of homes, adoption can provide the stability necessary for healthy childhood development.⁷ In general, adoption is a wonderful way to create a family and serves its intended purpose of furthering the best interest of the child.⁸

Infant adoption is a wonderful way to create a family; there is, however, room for improvement in adoption laws and policies. Adopted children constitute approximately two percent of the United States' childhood population, but are disproportionately represented in mental health settings.⁹ Studies suggest that as adoptees reach puberty and beyond, they have higher incidences of trust, attachment, depression and anxiety issues than the population at large.¹⁰ Although many adoptees live very successful lives—Apple, Inc.'s founder, the late Steve Jobs, perhaps being the most famous example¹¹—adoptees' private struggles can nonetheless be quite real.

Modern science and its understanding of fetal development and infant awareness show that both fetuses and newborns have greater levels of awareness than was once thought.¹² The abrupt removal of newborns from biological parents at or shortly after birth,

7. See Dwyer, *supra* note 6, at 299 (favoring fast placement for infants so they can form permanent attachments).

8. See Woodhouse, *supra* note 4, at 304 (“I continue to believe that adoption is clearly in the best interest of thousands of abandoned, abused, and neglected children who cannot safely return to their families and communities of origin.”); see also David M. Brodzinsky, *Long-Term Outcomes in Adoption*, FUTURE OF CHILDREN, Spring 2003, at 153, 153, available at http://www.princeton.edu/futureofchildren/publications/docs/03_01_12.PDF (“[R]esearch indicates that on a variety of outcome measures adopted children fare much better than those youngsters who are reared in institutional environments or in foster care. Furthermore, adoptees do significantly better than those children who are reared by biological parents who are ambivalent about caring for them or, in fact, do not want them.” (internal citations omitted)).

9. David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, in THE PSYCHOLOGY OF ADOPTION 3, 3 (David M. Brodzinsky & Marshall D. Schechter eds., 1990). Studies suggest that adoptees constitute between 10 and 15 percent of those in residential health facilities. *Id.* This estimate includes both infant and non-infant adoptions, but is noteworthy even though this article focuses on infant adoptions. *Id.* Children adopted later in life are more likely to be at the higher end of this estimate than those adopted in infancy. *Id.* at 4.

10. See, e.g., Brodzinsky, *supra* note 8, at 153 (remarking that over the past 30 to 40 years we have begun to understand that adoption is more nuanced than we may once have thought and that there are “possible psychological risk[s] associated with adoption”); see also *infra* Part II (discussing the mental health challenges of adopted children). Obviously non-adoptees also encounter mental health challenges during adolescence and beyond; with adoptees, however, the numbers are greater, and we are beginning to understand their genesis.

11. See *Steve Jobs: Adopted Child Who Never Met His Biological Father*, TELEGRAPH (London), Oct. 6, 2011, <http://www.telegraph.co.uk/technology/steve-jobs/8811345/Steve-Jobs-adopted-child-who-never-met-his-biological-father.html>.

12. See *infra* Part I (explaining recent developments in our understanding of fetal development and newborn awareness).

therefore, may not be the ideal procedure for implementing an adoption placement. In fact, there are suggestions that this abrupt removal may cause emotional problems for the child later in life.¹³

The typical infant adoption—whether done privately or through an agency—takes a newborn infant from his or her biological parents and places the baby with his new adoptive family. This transition from one family to another, though done with the consent of both the biological and adoptive parents, is generally done abruptly.¹⁴ The adoptive parents arrive with car seat, diapers, and baby formula in tow and simply bring the baby home after signing the necessary legal documents. Just as suddenly as the adoptive parents appear, the biological parents, having been replaced, disappear from the newborn's life. In addition, once the placement occurs, we engage in the fiction that the biological parents are not only irrelevant but virtually non-existent.¹⁵ Despite conventional reference to the “adoption triad,”¹⁶ we typically treat adoption as though only two parties rather than three are involved.¹⁷ Though consistent with traditional notions of the nuclear family, this ignores the reality that adopted children have both biological and adoptive parents. Expanded and more flexible notions of family can facilitate a shift in how we think about the adoption triad.

Adoption laws are largely silent with respect to the infant's transition from biological to adoptive parents. Instead, the traditional focus of adoption laws is whether the biological parents have consented to the adoption and whether the prospective adoptive parents are suitable to serve the best interest of the child.¹⁸ With the 2000 census reporting more than two million adopted children,¹⁹ it is important to get the process right, in addition to addressing issues like consent of biological parents and suitability of adoptive

13. See McGinn, *supra* note 2, at 63.

14. See *id.* (noting that the “abrupt[] sever[ing]” of a neonate adoptee from the birth mother does affect the child).

15. See Maldonado, *supra* note 5, at 324 (explaining that this tendency occurs because of “the belief that adoptive parents need[] to bond with their adopted children without the interference or reminder of the birth parent and that contact with the birth parents would confuse the child”).

16. See McGinn, *supra* note 2, at 61. The “adoption triad” is composed of the child being adopted, the birth parents and the adoptive parents. *Id.*

17. See *infra* notes 169–73 and accompanying text.

18. See, e.g., Cahn, *supra* note 4, at 1118 (recognizing that parental consent “was a critical component in the early adoption statutes”); Cynthia R. Mabry, *Joint and Shared Parenting: Valuing All Families and All Children in the Adoption Process with an Expanded Notion of Family*, 17 AM. U. J. GENDER SOC. POL'Y & L. 659, 660 (2009) (describing the best interest of the child as being “paramount” in the adoption process).

19. ROSE M. KREIDER, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2000, at 1 (2003), available at <http://www.census.gov/prod/2003pubs/censr-6.pdf>. The 2010 census data on adopted children has not yet been released.

parents. This article suggests a modification of adoption placement policies to align them with our knowledge of fetal development and infant awareness. It suggests 1) educational initiatives that inform the parties to adoption about the emotions their children may experience during infancy, and that may resurface in adolescence; 2) transitioning from a placement *event* to a placement *process*; and 3) minimizing the secrecy that surrounds adoption to give adoptees greater access to information about, and continued contact with, their biological parents. Adoptive families, though very similar to biological ones, are not identical and need to be recognized as such. Efforts to define all families in the nuclear family model disserve adopted children.²⁰

Part I of this article provides an overview of the latest understanding of fetal development and newborn awareness. Part II explores the mental health needs of adoptees. Part III reviews current infant adoption laws and procedures, and Part IV suggests adjustments to the infant placement process to make it more consistent with what would logically be in the best interests of the child given our current understanding of fetal and newborn development. In the long run, growing up with loving parents—adoptive, biological or other—is likely the key factor in a child’s emotional well-being.²¹ The adoption process can facilitate that well-being by implementing adjustments to the placement process.

I. FETAL DEVELOPMENT AND NEWBORN AWARENESS

The lack of appreciation of the gravity of loss for a neonate adoptee underestimates the significance of the in utero experience. As a fetus develops during pregnancy, it “hears its mother’s voice, experiences her biological rhythms, and indeed shares her very existence in a most literal way.”²²

A. Fetal Development

Scientific advancements suggest that the fetus has a greater level of awareness of his or her surroundings than we once thought.²³ For example, the fetal brain begins to develop by the third week after

20. See Bailey, *supra* note 4, at 590–91 (asserting that nuclear families may not be the only or best option for raising children).

21. See Woodhouse, *supra* note 4, at 322 (arguing that raising children in loving homes is central to their best interest).

22. McGinn, *supra* note 2, at 62.

23. See, e.g., *id.* (explaining that the fetus’s sensitivity to his surroundings begins in utero).

conception.²⁴ By the fourth week after conception, the fetal heart is pumping blood.²⁵ The fetus begins to develop the ability to hear during the second trimester of pregnancy, which can be first recognized at sixteen weeks after conception.²⁶ A week or two later, there is evidence that the fetus may pick up the birth mother's voice in conversation.²⁷ By the twenty-first week after conception, the fetus is developing taste buds,²⁸ and by the twenty-third week after conception, "[e]xploring the structures inside [the mother's] uterus may become the baby's" prime entertainment.²⁹ The fetus can open his or her eyes around the twenty-sixth week after conception.³⁰ From the seventh month, "each phoneme spoken by the mother switches on a precise muscular movement in the baby which paves the way for future language development."³¹

In addition to these largely biological developments, "[t]he prenatal bonding experience is[] . . . at least as complex, graded and subtle as the bonding that occurs after birth."³² The nine months of pregnancy profoundly impact the rest of our lives—biologically, socially and emotionally.³³ In the ongoing nature versus nurture debate, the suggestion is that both play an enormous role.³⁴ Nature—the

24. Mayo Clinic Staff, *Pregnancy Week by Week: Fetal Development: The First Trimester*, MAYO CLINIC (July 23, 2011), <http://www.mayoclinic.com/health/prenatal-care/PR00112>.

25. *Id.*

26. Mayo Clinic Staff, *Pregnancy Week by Week: Fetal Development: The Second Trimester*, MAYO CLINIC (July 23, 2011), <http://www.mayoclinic.com/health/prenatal-care/PR00113>. Sixteen weeks after conception, "the nerve endings from your baby's brain 'hook up' to the ears, [and] your baby may hear your heart beating, your stomach rumbling or blood moving through the umbilical cord. He or she may even be startled by loud noises." *Pregnancy: Second Trimester*, PREGNANCY & CHILD., http://www.pregnancyandchildren.com/pregnancy/pregnancy_trimester_2.htm (last visited Feb. 13, 2012).

27. *Second Trimester: Fetal Development*, WESTSIDE PREGNANCY CLINIC, <http://www.wpclinic.org/parenting/fetal-development/second-trimester> (last visited Feb. 13, 2012).

28. Mayo Clinic Staff, *supra* note 26.

29. *Pregnancy: Second Trimester*, *supra* note 26.

30. Mayo Clinic Staff, *Pregnancy Week by Week: Fetal Development: The Third Trimester*, MAYO CLINIC (July 23, 2011), <http://www.mayoclinic.com/health/prenatal-care/PR00114>.

31. Sharon Moloney, *The Legacy of Abandonment Through Adoption: Naomi's Story of Transformation*, 2 AUSTL. J. ADOPTION 2, 9 (2010). A phoneme is "any of a small set of units, usually about 20 to 60 in number, and different for each language, considered to be the basic distinctive units of speech sound by which morphemes, words, and sentences are represented." *Phoneme*, DICTIONARY.COM, <http://dictionary.reference.com/browse/phoneme> (last visited Feb. 13, 2012) (emphasis added).

32. McGinn, *supra* note 2, at 62 (quoting THOMAS VERNY & JOHN KELLY, *THE SECRET LIFE OF THE UNBORN CHILD* 75–76 (1981)).

33. See ANNIE MURPHY PAUL, *ORIGINS: HOW THE NINE MONTHS BEFORE BIRTH SHAPE THE REST OF OUR LIVES* 4–5 (2010) (describing the nine month gestational period as a "staging period" for the child's life).

34. T.M. McDevitt & J.E. Ormond, *Nature and Nurture*, EDUCATION.COM, <http://www.education.com/reference/article/nature-nurture> (last visited Feb. 13, 2012)

genetic makeup of the fetus—determines a great deal.³⁵ Likewise, however, the nurture or lack thereof during pregnancy is also critical.³⁶ Pregnancy “shape[s] . . . the fetus for the specific world into which it will be welcomed.”³⁷ Another scholar has remarked that “[f]or a baby born of a particular mother, that woman is the baby’s entire universe.”³⁸ When the newborn is adopted, the specific world that the fetus prepared itself for may be very different from the environment in which he will be raised.³⁹ As a result, after the adoption placement, the newborn may sense a real disconnect between his new life and his experience in utero.⁴⁰

B. Newborn Awareness

After birth, the newborn infant also has levels of awareness that we are only now beginning to appreciate. We may never know the full extent of newborn understanding and perception because they are not born with the ability to speak; as such, newborns cannot share with adults their full level of comprehension. Yet, we have begun to understand a great deal more than we once did. By observing newborn and infant movements, facial expressions, heart rate changes and the like, we now know that newborns are not “perfect idiot[s]” as they were once characterized.⁴¹ The fallacy of old ideas that infants were nothing more than blobs waiting for adults to make them into what we wish has largely been discredited.⁴²

In the first minutes of life, newborns can orient their full body, anticipating the movement of an object they have just seen.⁴³ They can also “detect patterns in the recurrence of particular things”⁴⁴ and have

(“[D]evelopmental theorists have come to realize that nature and nurture are both important and that they intermesh dynamically in the lives of children.”); *see also* PAUL, *supra* note 33, at 7 (explaining that advocates for both sides of the nature and nurture debate “gave short shrift to the prenatal period”).

35. *See* PAUL, *supra* note 33, at 7.

36. *See id.*

37. *Id.* at 4. The fetus is preparing for “the particular world it will soon enter.” *Id.* at 5.

38. Moloney, *supra* note 31, at 9.

39. *See, e.g.*, Maldonado, *supra* note 5, at 332 (explaining that adopted children can have a difficult time dealing with ethnically or racially diverse adoptive families).

40. Moloney, *supra* note 31, at 10.

41. Paul Bloom, *The Moral Life of Babies*, N.Y. TIMES, May 9, 2010 (Magazine), at 46 (quoting a statement made by Jean-Jacques Rousseau in 1762).

42. *See id.* (showing that babies have self-developed understandings of morality that can be seen in the first year of their lives).

43. Colwyn Trevarthen, *Mind in Infancy*, ANSWERS.COM (2004), <http://answers.com/topic/mind-in-infancy>.

44. *Id.*

a sense of time and location of events that are important to them.⁴⁵ They can coordinate their bodies to demonstrate their attention to sounds, objects, and movements.⁴⁶ Newborns also show their likes and dislikes; for example, they can show “[e]xpressions of concentrated puzzlement, surprise, pleasure, and displeasure.”⁴⁷ In other words, newborns “signal a subtle variety of feelings.”⁴⁸

[A] baby born without trauma or sedation may be strikingly alert within minutes of birth to the new world of sights and sounds. . . . Most remarkable of all are the infant’s reactions to persons. Newborns will turn in the direction of a voice from a loudspeaker behind a curtain, orienting not only the head and ears but the eyes as well, searching to see the person who calls. Simultaneously, hands and face move in ways that indicate a total involvement of a coordinated expressive brain. *At birth a baby prefers to hear its own mother’s voice—her particular vocal characteristics have been learned in utero. . . . The mother is known by her smell and ways of moving even when she takes the baby up silently in the dark.*⁴⁹

In addition to the newborn’s ability to perceive his surroundings is his ability to remember. It was once thought that there was no infant memory.⁵⁰ This idea has now been discredited.⁵¹ The fact that newborns demonstrate consistent preference for their biological mothers⁵² is an example of their ability to remember—both from in utero to birth and, after birth, from one day to the next.⁵³ It was thought until

45. *Id.*

46. *Id.* (“[A baby] may stop or change direction to fixate [on] bright places, or track stimuli in motion.”).

47. *Id.*

48. *Id.*

49. Trevarthen, *supra* note 43 (emphasis added); see also McGinn, *supra* note 2, at 62 (“His (the neonate’s) ability to respond to his mother’s hugs, stroking, looks and other cues is based on his long acquaintance with her prior to birth.”).

50. David B. Chamberlain, *Infantile “Amnesia” Is Dead!*, BIRTH PSYCHOL., <http://www.birthpsychology.com/free-article/infantile-amnesia-dead> (last visited Feb. 13, 2012) (“Psychologists and pediatricians alike have been enthralled by the theory of infantile amnesia since it was first stated by Sigmund Freud in 1916. His popular observation . . . turned . . . into a dogma of developmental psychology.”).

51. See *id.* (“[D]ogma and prejudice obscured the evidence for higher perception, telepathic communication, and subtle forms of knowing and awareness which could only be confirmed much later as the babies became children and adults. The false idea of ‘infantile amnesia’ . . . misled professionals in both medicine and psychology and delayed parents from realizing the true capacities of their babies in the womb, at birth and during infancy.”).

52. Anthony J. DeCasper & William P. Fifer, *Of Human Bonding: Newborns Prefer Their Mothers’ Voices*, 208 SCI. 1174, 1175–76 (1980).

53. See Chamberlain, *supra* note 50 (noting that babies recognize sounds, tastes and smells that they were exposed to during their time in utero).

relatively recently that infants could not feel physical pain.⁵⁴ We now know that this is not true.⁵⁵ There also appears to be a spiritual or energetic connection between the newborn and her biological mother.⁵⁶ We are evolving to have a greater awareness of the power of things not seen, of energy, and of the soul,⁵⁷ and these principles also apply to newborns:

[W]hen maternal and infant subtle spheres overlap for an adequate period of time, as they do with secure bonding and physical closeness, a major block of intuitive communication passes from mother to infant, enabling the baby's physical and emotional development. While this communication may occur below a mother's awareness, the subtle sphere is the only level of awareness fully active in the infant.⁵⁸

Based on our changing and expanding knowledge of fetal development and infant awareness, it is likely a very traumatic event for an infant to be removed from his or her birth parents. As we begin to understand an infant's ability to perceive and understand, it warrants revisiting the adoption process to be sure it is consistent with our latest understanding of fetal and newborn development and awareness.

54. Robert S. Van Howe & J. Steven Svoboda, *Neonatal Pain Relief and the Helsinki Declaration*, 36 J.L. MED. & ETHICS 803, 804 (2008).

55. *Id.* at 804; Susan J. Lee et al., *Fetal Pain: A Systematic Multidisciplinary Review of the Evidence*, 294 JAMA 947, 947, 950 (2005). There are also suggestions that the fetus has "the capacity for functional pain perception" by the twenty-ninth or thirtieth week of gestation. *Id.* at 947. As a result, anti-abortion advocates have pushed for fetal pain laws to limit access to abortions. Missouri now requires that women seeking an abortion be given information that suggests the fetus may feel pain as early as the twenty-second week of gestation. MO. ANN. STAT. § 188.027(1)(5)(c) (West 2010). This is not supported by the weight of scientific evidence. *See Lee, supra*, at 947, 952 (stating that pain is possible around 29 to 30 weeks). Accordingly, it arguably violates *Casey's* requirement that informed consent materials connected with abortion be "truthful, [and] nonmisleading." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 838 (1992) (O'Connor, J., Kennedy, J., Souter, J., concluding in parts V-B and V-D). This article is focused only on those women who choose to carry their pregnancy to term and place their newborns for adoption. The decision whether to abort, parent, or place the child for adoption properly remains the choice of the biological mother.

56. Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63, 63-64 (1995) ("[C]hildren adopted as infants do not have just one family, but are always physically and existentially related to their birth families.").

57. *See, e.g.*, WAYNE W. DYER, *THE POWER OF INTENTION* 6-10 (2004) (describing fields of intention); CAROLINE MYSS, *ANATOMY OF THE SPIRIT: THE SEVEN STAGES OF POWER AND HEALING* 33-37, 64 (1996) (discussing her work with energy fields).

58. Moloney, *supra* note 31, at 9 (quoting J.C. PEARCE, *EVOLUTION'S END: CLAIMING THE POTENTIAL OF OUR INTELLIGENCE* (1992)) (internal quotation marks omitted). The subtle sphere is "the infant's actual world-environment." *Id.* (internal quotation marks omitted).

II. MENTAL HEALTH CHALLENGES OF ADOPTEES

Although adoptees make up only two to three percent of the population, . . . they tend to be overrepresented in treatment and service settings.⁵⁹

It makes perfect sense that infant adoptees, undergoing the trauma of having everything familiar to them taken away at birth, might experience, in childhood and adolescence, a greater proportion of mental health challenges than the population at large.⁶⁰ “[P]sychoanalysts . . . have shown that what happens in one’s early life, between birth and age three, gets reworked during adolescence. If what happened in one’s early life was to be separated from one’s birth parents . . . then that is an extremely complex experience to rework.”⁶¹ As noted in Part I, the infant is aware, particularly of her birth mother’s voice, smell and sense of movement, which is an awareness that begins in utero. As newborns, the loss of the biological parents does not go unnoticed.⁶² A newborn cannot articulate the

59. Penny Callan Partridge, *The Particular Challenges of Being Adopted*, 61 SMITH C. STUD. SOC. WORK 197, 197 (1991).

[I]t is the case that all adoptees face particular challenges that must be mastered on the road to emotional maturity and identity consolidation. It is important that clinicians, whenever they encounter issues of adoption in their practice, be alert to these challenges and the impact they may be having on the client’s presenting problems.

Id. at 197–98; *see also* NANCY NEWTON VERRIER, *THE PRIMAL WOUND: UNDERSTANDING THE ADOPTED CHILD* xv (1993) (claiming that adoptees are over-represented in psychotherapy); Brodzinsky, *supra* note 9, at 3–4 (noting that adoptees make up about two percent of the childhood population in the United States, but that adoptees comprise “between 4 and 5% of the children referred to outpatient mental health facilities and between 10 and 15% of children in residential care facilities” (internal citations omitted)). On the other hand, there are studies that suggest that adoptees’ over-representation in therapeutic settings may, in part, be due to “differential patterns of referral and differential use of mental health facilities by adoptive parents, as opposed to increased rates of disturbance.” Brodzinsky, *supra* note 8, at 154; *see also infra* notes 99–104 and accompanying text (explaining other reasons for mental health issues).

60. McGinn, *supra* note 2, at 63 (noting both the infant’s trauma from being removed from everything familiar and the disadvantage of the adoptive parents who have not had 40 weeks of in utero bonding to help them become familiar with the baby).

61. JOYCE MAGUIRE PAVAO, *THE FAMILY OF ADOPTION* 60 (1998).

62. McGinn, *supra* note 2, at 63. McGinn states:

[E]ven for an adoptee relinquished straight into the arms of the adoptive parents, the bond that has developed in utero with the birth mother is abruptly severed. The sudden loss of that familiar voice, smell, pattern of movement, and so on does not go unnoticed. Rather, the adoptee is aware of the disruption in the continuum of care.

Id. *But see* Dwyer, *supra* note 6, at 294–95 (suggesting that the challenges facing children who were adopted in infancy are due to the social stigma society places on adopted children).

sense of loss or grief she feels, however, because language development takes time.⁶³ Nor does she understand why this loss has occurred. Moreover, the adoptive parents often have not been educated about these issues and are unlikely to be aware that the newborn is experiencing a sense of loss.⁶⁴ Accordingly, during early childhood, any sense of loss may go unnoticed.

In later childhood or adolescence, these feelings may resurface. At that point, a number of societal factors may exacerbate the challenges the adopted child may face.⁶⁵ First, the secrecy that traditionally surrounds adoption, though less extreme than it once was, can cause further harm. For example, secrecy may surround the child's questions about adoption.⁶⁶ The adoptive parents may be especially reluctant to discuss the biological parents.⁶⁷ Some may even avoid the topic of adoption entirely, believing that their child needs nothing more than the love and attention they are giving.⁶⁸ This secrecy can close off an outlet the child would otherwise have to express her feelings, resulting in a child who feels quite isolated.

If the loss of the first set of parents is seen as a loss at all, that loss may be seen as ameliorated by the provision of a new set of parents, who may be viewed as vastly superior. . . . Such a viewpoint leads some adoptive parents to repress the notion that there ever was another set of parents. . . . The adoptive parents are, thus, unlikely to encourage their child to mourn the loss of the original parents.⁶⁹

63. PAVAO, *supra* note 61, at 98.

64. See Partridge, *supra* note 59, at 199 (“[T]his loss, so apparent to the professional, is not so obvious to the adoptees[,] . . . [n]or do people around the adoptee necessarily see or want to acknowledge this loss.”).

65. See Dwyer, *supra* note 6, at 295 (describing the effect that the adoption stigma has on the adopted child: “[They] are seen as coming from a defective biological line; their birth parents either did not want them or were immoral and dysfunctional”); Karen March, *Perception of Adoption as Social Stigma: Motivation for Search and Reunion*, 57 J. MARRIAGE & FAM. 653 *passim* (1995) (describing social stigmas connected to adoption).

66. See, e.g., PAVAO, *supra* note 61, at ix–x (recounting the story of one girl constantly asking questions about her adoption and getting no answers); see also DAVID M. BRODZINSKY ET AL., BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 185–86 (1992) (stating that knowing maternal condition during pregnancy and birth can help adoptees later in life); Fernando Colón, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 301 (1978) (“There is no question about the value of adoption However, . . . all children should have not only adequate parenting but also access to information about, and perhaps eventual contact with, their biological families.”).

67. See, e.g., PAVAO, *supra* note 61, at ix–x (portraying one adoptive parent’s reluctance to discuss her child’s adoption).

68. See, e.g., *id.* at x, 60 (describing how when one child asked about her adoption, her mother “would get a sad and distant look and would change the subject”).

69. Partridge, *supra* note 59, at 199. Other losses include growing up without one’s biological family and the loss of information about that family. *Id.*

Second, there remains a social stigma associated with adoption.⁷⁰ Those who have never been part of an adoption triad may not fully understand it and may consider it a second best alternative. Insensitive or unkind remarks about adoption may be a regular part of an adoptee's interactions with her peers during childhood.⁷¹ Third, the media may portray adoption in an unflattering light.⁷² As they get older, therefore, adoptees may experience unique feelings and consequently undergo mental health challenges distinct from their non-adopted counterparts⁷³ because of removal from their biological parents at birth, secrecy or other factors.⁷⁴ At this point, they may finally begin to articulate their feelings, although any sense of sadness or loss may seem inexplicable even to the adoptee

70. See Dwyer, *supra* note 6, at 294–95.

71. See, e.g., PAVAO, *supra* note 61, at x (recounting personal negative adoption comments). In addition to issues that may be totally unrelated to adoption, adopted children often face challenges at school and in the media; in fact, there is a general social stigma that surrounds adoption. *Id.*; March, *supra* note 65, *passim* (discussing social stigmas). I can attest to the potentially harmful remarks that adopted children confront, having witnessed my daughter's friend ask her where her "real mother" was. No parent, adoptive or otherwise, can protect their child from all the challenges that may arise at school, but for those raising adopted children, it may be especially difficult when they are still trying to process the information themselves.

72. The media is another potential source of insensitivity for adopted children. See Susan Avery, *Adoption in the Movies: The Good, the Bad, and the Ugly*, ADOPTIVE FAMILIES, <http://www.adoptivefamilies.com/media/intro.php> (last visited Feb. 13, 2012) (giving examples of movies that portray adoption negatively).

73. Although there is a great deal of scholarship about these challenges, not all of the research findings are uniform. Several studies find no statistically significant differences between adoptees and non-adoptees on a variety of mental health measures. See, e.g., PETER L. BENSON ET AL., GROWING UP ADOPTED: A PORTRAIT OF ADOLESCENTS & THEIR FAMILIES 18 (1994) ("[S]elf-esteem among adopted adolescents is at least as positive as it is for other adolescents."). Roughly 715 families participated in the study. *Id.* at 127; see also LOIS RUSKAI MELINA, RAISING ADOPTED CHILDREN: PRACTICAL REASSURING ADVICE FOR EVERY ADOPTIVE PARENT 62 (rev. ed. 1998) ("[I]n both the adoptive and biological family, the feeling of attachment between the parents and child develops after the child arrives."); Amy K. Nilson, The Effects of Adoption on Attachment Style and Internal Working Models of Self and Other in Young Adults ii, 108–09 (May 2000) (unpublished Psy. D. Dissertation, Wright Institute Graduate School of Psychology), available at <http://www.adoptioninstitute.org/cgi-bin/full.cgi?col5=Adulthood&snap=UL&1sp-license=hygirls&begin=%3CDT%3E&middle=%3CDT%3E&end=%3CHR%3E&top=%3CDL%3E&bottom=%3C/DL%3E> (abstract) ("Of 47 nonadopted and 39 adopted young adults, no differences were found between groups in attachment security classification or on measures of self and of other. Differences were found in attachment security among females."). Attachment, requiring interaction between parent and child, is distinct from bonding to a birth mother—described as protective instinct occurring during pregnancy. MELINA, *supra*, at 62. As noted above, other scholars suggest that any particular challenges that confront adopted children are likely due to the social stigma that surrounds adoption rather than the primal wound of being removed from the biological parents. See, e.g., Dwyer, *supra* note 6, at 294–95 (positing that it is stigmas that cause lifelong struggles for adoptees).

74. See *supra* notes 71–72 and accompanying text (noting childhood and media insensitivity).

herself.⁷⁵ Therefore, one of the biggest hurdles facing adoptees later in life is processing a sense of loss about which they no longer have any recollection.⁷⁶

One of the key mental health challenges for any infant is trust,⁷⁷ but “in adoptive families, this is complicated by several factors, such as . . . the separation from the birth mother.”⁷⁸ At a basic—and perhaps even subconscious—level, evidence suggests that adoptees fear being abandoned and rejected again.⁷⁹ They may not trust in the permanence of relationships⁸⁰—even if their adoptive parents have given them all the love and affection imaginable. Trust also forms the foundation for attachment.⁸¹ Accordingly, adoptees may have more difficulty with issues of attachment than non-adoptees.⁸² Attachment challenges may be expressed in the child’s failure to make eye contact, inability to properly regulate her emotions, and challenges with language development, among other things.⁸³

On the flip side of attachment, adopted children may also experience greater stress with separation than non-adoptees.⁸⁴ They may cling to relationships as they grow older and have difficulty separating because they suffered separation from their biological mother at birth.⁸⁵ “[S]eparation anxiety may be more intense and stressful”

75. McGinn, *supra* note 2, at 63 (quoting DAVID M. BRODZINSKY ET AL., CHILDREN’S ADJUSTMENT TO ADOPTION: DEVELOPMENTAL AND CLINICAL ISSUES 98 (1998)) (“[F]or children placed as infants, loss is of necessity more covert, emerging slowly as the youngster begins to understand the magnitude of what has happened.”).

76. See VERRIER, *supra* note 59, at 40.

77. McGinn, *supra* note 2, at 67 (“[T]he most salient psychosocial task confronting an infant is the development of a basic sense of trust . . .”).

78. *Id.*; see also VERRIER, *supra* note 59, at 88. Referring to the initial separation from the biological parents as a “primal wound,” Verrier explains that adoptees experience greater trust issues than non-adoptees due to a lack of understanding about why the “primal wound” took place: “The issues of trust and intimacy are closely related to those of abandonment and rejection. There is such a fluid movement among these issues that it is difficult to separate them. The adoptees’ lack of trust in the permanency of relationships brings about a distrust of closeness or intimacy and a need for distancing.” *Id.*

79. McGinn, *supra* note 2, at 67.

80. *Id.* at 63.

81. *Id.* (“Trust issues are both the cause and effect of . . . attachment challenges.”).

82. *Id.* (“Adoptees . . . face unique challenges in forming secure attachment relationships with their adoptive parents due to the resonance of this ‘primal wound’ experience.”). McGinn defines attachment as “close, enduring, emotionally based interpersonal relationships.” *Id.* Another scholar defines attachment as “a reciprocal process between a parent and child that develops during the first year they are together It is the development of a mutual feeling that the other is irreplaceable. . . . Attachment . . . develops as the child learns that he can count on his parents to meet his physical and emotional needs.” MELINA, *supra* note 73, at 62.

83. McGinn, *supra* note 2, at 65. Studies suggest attachment issues arise more with non-infant than infant adoptions. See *id.* at 65. (“A child who has experienced unreliable, chaotic, neglectful or inconsistent care cannot readily come to trust . . .”).

84. *Id.* at 68.

85. *Id.*

for these children, and “[s]eparateness may seem very dangerous.”⁸⁶ This may occur even in unhealthy relationships that the adoptee would benefit from leaving.⁸⁷

Similarly, transitions—changes of one sort or another—can bring back the same anxieties that the adoptees experienced as infants.⁸⁸ Given the loss they suffered as infants, a loss over which they had no control, the result may be a display of anger and an effort to control their environments in the future.⁸⁹ Adoptees may also have greater levels of depression and anxiety, which might be triggered by re-experiencing feelings that may have arisen at birth when they were separated from a familiar environment and placed in another that was completely unknown.⁹⁰ There is arguably a spiritual, energetic connection between the infant and biological parent that does not simply disappear with the adoption.⁹¹ The adopted child, therefore, may grow up to feel, at a gut or spiritual level, that something is amiss.⁹²

Adopted children tend to act in “one of two diametrically opposed” ways based on their experiences.⁹³ They may act out and engage in very difficult to control behaviors.⁹⁴ In a sense, this acting out is a way of testing to see whether they will be abandoned again.⁹⁵ Conversely, some adoptees are especially accommodating, in an attempt to avoid

86. *Id.*

87. See VERRIER, *supra* note 59, at 90.

88. See, e.g., PAVAO, *supra* note 61, at 52–53 (describing one adoptive child’s struggle to transition from home life to a two-week summer camp—despite loving camp).

89. *Id.*

90. See, e.g., Moloney, *supra* note 31, at 9 (discussing stories of depression and suicide attempts arguably triggered by adoption).

91. Although this theory has not been embraced by mainstream scholars, those who work in fields associated with energy are more likely to advocate for this position. See, e.g., *id.* (noting in particular the Maori cultural belief “that separating a baby from her biological kin inflicts a grave and irreplaceable loss on both”). But see Michele Kundalini, *Journey into the Shadows: No Time, No Space*, THE ENERGETIC CONNECTION (Mar. 7, 2010), <http://theenergeticconnection.com/blog/tag/kundalini> (reporting a similar energetic connection with an adoptive father).

92. See Kenneth W. Watson, *The Case for Open Adoption*, 46 PUB. WELFARE 24, 27–28 (1988) (detailing the special needs of adoptees relating to their unique situations as members of two families). “[A]dopted children are forever members of two families—the one that gave them life and the one that nurtured them through the process of adoption.” *Id.* at 24; see also Appell & Boyer, *supra* note 56, at 63–64 (“[E]ven children adopted as infants do not have just one family, but are always physically and existentially related to their birth families.”).

93. VERRIER, *supra* note 59, at xiii–xiv, 45.

94. See Brodzinsky, *supra* note 8, at 155 (relating that some studies show that adopted children have “higher than expected rate[s] of acting out, or ‘externalizing’ behaviors, including aggression, oppositional and defiant behaviors, hyperactivity, stealing, lying, running away, and other antisocial behavior”); see also VERRIER, *supra* note 59, at xiii, 45. Brodzinsky acknowledges that other studies do not find significant differences between adoptees and non-adoptees on these measures. Brodzinsky, *supra* note 8, at 155.

95. VERRIER, *supra* note 59, at xiii, 45.

making waves for fear of being abandoned again.⁹⁶ In describing her experience with her adopted daughter, Nancy Verrier explains:

For love to be freely accepted there must be trust, and despite the love and security our daughter has been given, she has suffered the anxiety of wondering if she would again be abandoned. For her this anxiety manifested itself in typical testing-out behavior. At the same time that she tried to provoke the very rejection that she feared, there was a reaction on her part to reject us before she could be rejected by us. It seemed that allowing herself to love and be loved was too dangerous; she couldn't trust that she would not again be abandoned. . . . [Other children have] a tendency toward acquiescence, compliance, and withdrawal.⁹⁷

The foregoing discussion is not meant to suggest that all adoptees have mental health problems or that raising them is fraught with peril. First, the data itself is inconclusive.⁹⁸ Although some studies find that adoptees struggle more than non-adopted children with trust, attachment, depression and anxiety, other studies find no difference.⁹⁹ Moreover, to the extent that there are discrepancies between the two groups, they are not necessarily related to the adoption process.¹⁰⁰ For example, a greater number of adopted children may have had inadequate prenatal care than non-adoptees.¹⁰¹ Alternatively, the birth mother, planning for adoption, may have been depressed, anxious or otherwise not attached to the developing fetus, adversely impacting the fetus in utero.¹⁰² In addition, the attunement between the adoptive parents and the child may have been more stressful than is typical in a traditional biological family.¹⁰³ The

96. *Id.* at xiii–xiv, 45.

97. *Id.* at xiii–xiv.

98. Compare Nilson, *supra* note 73, at ii, 108 (stating there are no noticeable differences in attachment issues), with VERRIER, *supra* note 59, at xv (stating extremely large numbers of adoptees have mental health issues, including attaching with parents).

99. See *supra* note 59 and accompanying text (discussing the prevalence of adoptees having mental or emotional health issues).

100. See *supra* notes 66–71 and accompanying text (discussing stressors that are not directly part of the adoption process—adoption secrecy, childhood social treatment and media portrayal).

101. Harold D. Grotevant & Ruth G. McRoy, *Adopted Adolescents in Residential Treatment: The Role of the Family*, in THE PSYCHOLOGY OF ADOPTION, *supra* note 9, at 167, 169.

102. See PAUL, *supra* note 33, at 154–55 (“[A] pregnant woman’s emotional state can influence the fetus’s developing brain . . . , potentially shaping the way the offspring will experience and manage its own emotions . . .”).

103. Attunement refers to the ability of the parent to tune in to the needs and emotions of the child, just as the newborn attunes herself to the parent. Whether this process is more complex for adoptive parents and their children is subject to question. See Alessandra Cavalli, *On Receiving What Has Gone Astray, On Finding What Has Got Lost*, 56 J. ANALYTIC PSYCHOL. 1, 2 (2011). Cavalli states:

adoptive parents may not have provided adequate love and nurturing to the adoptee.¹⁰⁴ Some adoptees also grew up in families that refused to discuss adoption, making it appear to be something negative.¹⁰⁵ Adoptive parents may also be more likely to seek out mental health resources for symptoms in their children than biological parents.¹⁰⁶

As noted above, the loss that many adopted children reportedly feel may also be attributable to a number of social factors like the loss they feel for their biological parents when they are old enough to fully understand the implications of being adopted, the “‘status loss’ associated with being different,” the loss associated with being unwanted or other factors.¹⁰⁷ Also, cultural biases that favor biological, nuclear families should not be minimized.¹⁰⁸ Though the focus of this article is on the impact of separating the infant from the biological mother at birth, there are many factors that may contribute to the disproportionate number of adopted children who seek counseling. Even if the numbers are not disproportionate for reasons noted above, the feelings that adoptees have are real and, as we begin to understand their origins, it would be remiss not to make legal and policy adjustments that would help them.

Applying the precautionary principle that is often applied in the environmental law context,¹⁰⁹ it would be better, from a legal

Different authors who conduct infant observation seminars describe how newborns and their mothers work hard at attuning with one another, so as to create a state of synchronous response, which creates the illusion of oneness that brings mother and baby together in an orchestrated attunement. This instinctual synchrony acts as a catalyst for the mother’s capacity to be fully aware of her infant’s existence outside the womb, and to be fully attentive to his external and internal movements, ‘matching’ them with an appropriate response.

Id. (internal citations omitted).

104. See, e.g., Moloney, *supra* note 31, at 9 (describing how pregnancy is not simply about nine months to grow a child, but is also nine months to grow a mother-child connection).

105. See, e.g., PAVAO, *supra* note 61, at x (“She knew she was adopted and she knew it must be a very bad thing, because no one would talk to her about it except to tease her.”). The secrecy that surrounds adoption and the biological family is another way that we potentially fail our adopted children. See *infra* Part IV.C.

106. Brodzinsky, *supra* note 8, at 154.

107. Brodzinsky, *supra* note 9, at 7 (internal citations omitted).

108. HARRIS INTERACTIVE, NATIONAL ADOPTION ATTITUDES SURVEY 4, 8, 20 (2002), available at http://www.adoptioninstitute.org/survey/Adoption_Attitudes_Survey.pdf (describing the misconception many people have about adopted children that they are more likely to have behavioral and social problems); see also *supra* note 71 (describing social stigmas and media-created perceptions about adoption).

109. See, e.g., Rachel Morello-Frosch et al., *Integrating Environmental Justice and the Precautionary Principle in Research and Policy Making: The Case of Ambient Air Toxics Exposures and Health Risks Among Schoolchildren in Los Angeles*, ANNALS AM. ACAD. POL. & SOC. SCI., Nov. 2002, at 47, 50 (“[I]n the face of uncertain but suggestive evidence of adverse . . . effects, regulatory action is needed to prevent future harm.”); Robert V.

perspective, to explore shifts in law and public policy that could minimize the risk of psychological harm to infant adoptees due to the process itself. Law and public policy can be used to facilitate change that will help adoptees minimize some of the challenges they currently face. We can honor their feelings, communicate openly and dedicate ourselves to an adoption process dedicated to truth. The next section explores the basics of current adoption law.

III. ADOPTION LAWS AND PROCEDURES

*It is our job to protect our children . . . from harm. Child professionals are mandated to protect them from danger and abuse. We are not, however, mandated to protect them from the truth. The greatest gift that one can give children is to tell them their truths and to help make sense of these truths, especially when they are complicated and harsh.*¹¹⁰

Now that experts understand the challenges that may go along with an abrupt change in custody from one set of parents to another,¹¹¹ law and public policy should reflect that understanding. Adoption laws have not focused on what placement procedures would best serve the child's long-term physical and mental health needs. Instead, they have focused primarily on the consent of the biological parents and the suitability of the adoptive parents.¹¹² As a result, there remains a gaping hole in the law concerning the *process* of adoption placement.¹¹³

Percival, *Who's Afraid of the Precautionary Principle?*, 23 PACE ENVTL. L. REV. 21, 21 (2005–2006) (explaining the precautionary principle: “a lack of scientific certainty should not preclude states from adopting cost-effective measures to control environmental risks”); Scott LaFranchi, Note, *Surveying the Precautionary Principle's Ongoing Global Development: The Evolution of an Emergent Environmental Management Tool*, 32 B.C. ENVTL. AFF. L. REV. 679, 679–80 (2005) (describing the failure of the United States to embrace the precautionary principle despite its use by much of the international community).

110. PAVAO, *supra* note 61, at 98.

111. See Brodzinsky, *supra* note 9, at 7 (describing the multiple ways an adoptee can feel loss).

112. See, e.g., *Consent to Adoption: Statute at a Glance*, ADOPTION.COM, <http://laws.adoption.com/statutes/consent-to-adoption.html> (last updated May 5, 2005) (showing all states require parental consent for adoption and most states require adoptee consent if the child is older).

113. This is arguably a public health issue that may require the desires of adoptive parents for privacy to give way to the public health needs of adoptees. Pursuant to principles of public health law, state police power to protect the health, safety and welfare of its citizens has been broadly construed. See, e.g., *Jacobson v. Massachusetts*, 197 U.S. 11, 39 (1905) (upholding a Massachusetts law that allowed municipalities to require small-pox vaccination or revaccination, while noting that sometimes individual rights must give way to the greater good); *Abate of Ga. v. Georgia*, 137 F. Supp. 2d 1349, 1351, 1356 (N.D.

Each state statutorily regulates adoption with the underlying goal of fostering the child's best interest,¹¹⁴ the standard that is also used in divorce and other child custody battles.¹¹⁵ In the adoption context, this has traditionally meant the formation of a permanent family for the child that, for legal purposes, is treated like any other.¹¹⁶

State adoption statutes require that biological parents voluntarily consent to terminate their parental rights before the adoption can move forward.¹¹⁷ Some states further require that the birth mother

Ga. 2001) (upholding Georgia's motorcycle helmet law). The state police power could encompass maximizing the potential for adoptees to grow up with the best possible mental health outcomes.

114. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-727a (West 2011) (describing what is in the best interest of a child); *In re Adoption of Carl*, 709 N.Y.S.2d 905, 907 (Fam. Ct. 2000) (allowing the child's adoption because it was in the best interest of child); Ashley L. Driver, Comment, *Confusing Plain Language: The Compelling but Counterintuitive Need for Adoption by a Biological Parent*, 63 ARK. L. REV. 139, 141 (2010) ("[T]he rationale for adoption—the creation of a legal relationship that promotes the well-being of the child—appears to be universal.").

115. *See, e.g.*, *Ex parte L.E.O.*, 61 So. 3d 1042, 1056 (Ala. 2010) (reasoning that giving custody to a biological parent over a nonparent is based on it being in the child's best interest); *Baber v. Baber*, No. 10-285, 2011 Ark. LEXIS 42, at *9 (Ark. Feb 9, 2011) ("The primary consideration regarding custody visitation is the best interest of the child."); *In re Baby M*, 537 A.2d 1227, 1246 (N.J. 1988) (stating that the best interests of the child will determine custody); *see also* JOSEPH GOLDSTEIN ET AL., *THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE* 19 (1996). Unlike divorce, adoption custody issues are consensual. *But see* *DeBoer v. DeBoer*, 509 U.S. 1301, 1302–03 (1993) (ordering the return of an adoptee to his biological parents because the birth parents' parental rights had not been properly terminated, regardless of the best interest of child). The concept of best interests, or "beneficence," is likewise one of the fundamental principles of bioethical decision-making; the first principle of bioethical decision-making—autonomy—allows a competent adult to determine whether to accept medical treatment even if refusing to do so will result in her death. *See, e.g.*, *Cruzan v. Dir.*, Mo. Dept. of Health, 497 U.S. 261, 278 (1990) (assuming that a competent adult could refuse life-saving medical treatment); *Bouvia v. Superior Court of L.A. Cnty.*, 179 Cal. App. 3d 1127, 1137 (1986) (same). If the patient once had capacity, but no longer does, the principle of substituted judgment seeks to further the goal of autonomy by trying to determine what the patient's wishes would be if she were still had decisional capacity. *See, e.g.*, *In re Guardianship of Schiavo*, 780 So. 2d 176, 178 (Fla. Dist. Ct. App. 2001) (noting that the proper question is what Schiavo, in a "persistent vegetative state," would want). The beneficence or best interest standard is more likely to be used in cases involving infants or adults who never had capacity and therefore have never expressed their wishes regarding medical treatment, or in cases where there is scant evidence of what the patient's wishes would be in a given situation. *In re Storar*, 420 N.E.2d 64, 79 (N.Y. 1981) (deferring to the mother's opinion of what would have been in the best interests of her child); *see, e.g.*, *In re Conroy*, 486 A.2d 1209, 1231 (N.J. 1985) (noting state can decide best interests of both children and the incompetent); *Storar*, 420 N.E.2d at 68, 79 (using the best interest standard where the patient was born retarded and had a mental age of approximately 18 months).

116. *See, e.g.*, DEL. CODE ANN. tit. 13, §§ 919(a), 920(b) (West 2011) (noting that the adoptive child is "entitled to the same rights . . . as if he or she had been born to the adopting parent or parents," including the right to inherit from his adoptive parents); *see also* GOLDSTEIN ET AL., *supra* note 115, at 19 (stating the best interests of the child include the child's need for continuity of relationships, among other things).

117. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-715(d) (West 2011) (requiring consent); ILL. ADMIN. CODE tit. 89, § 309.70(a) (2011) (decreeing that a child may be adopted when "both

receive counseling to help ensure that her decision is voluntary.¹¹⁸ Consent of the biological parents must take place after the infant's birth and may or may not be revocable during a set period of time that varies from state to state.¹¹⁹ Longer periods of time arguably benefit the birth parents, while shorter time periods serve the adoptive parents' need for certainty and finality.¹²⁰ One scholar describes this balancing of interests:

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.¹²¹

In addition to confirming the biological parents' consent to the adoption placement,¹²² assessing the adoptive parents' suitability is

parents of the child have signed adoptive surrenders or consents to adoption"); *see also* 750 ILL. COMP. STAT. ANN. 50/8(b)(1)(A)(B) (2009) (needing the mother's, and usually the father's, consent). There are instances in which a child is taken from the parents involuntarily, such as due to abuse or neglect. *See, e.g.*, ILL. ADMIN. CODE tit. 89, § 309.70(a)(2)–(3) (2011) (regulating that a child may be adopted when "one parent has signed an adoptive surrender or consent to adoption . . . and [the] parental rights of the remaining parent have been terminated through court action . . . [or] a court has terminated the parental rights of both parents"). An infant may be placed for adoption without the consent of the biological parents if they are deemed unfit. *See Cahn, supra* note 4, at 1089–91, 1093–94 (explaining that adoption was traditionally used to care for poor or neglected children). Adoption was sometimes used as a temporary measure to help a family get back on its feet, and biological parents were not precluded from seeing their children. *Id.* at 1093–94.

118. *See, e.g.*, CAL. FAM. CODE § 8801.5(c)(5) (West 2011) (requiring at least three counseling sessions); CONN. GEN. STAT. ANN. § 45a-728 (West 2011) (requiring the birth mother to undergo counseling within 72 hours of the child's birth); Ind. Vanderburgh Prob. Ct. LR82-PR Rule 13(2)(c) (2011) (requiring three hours of counseling within six months of the child's birth); IOWA CODE ANN. § 600A.4 (West 2011) (same).

119. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-715(d) (West 2011) (making the biological mother wait 48 hours after birth to give consent); DEL. CODE ANN. tit. 13, § 909 (2011) (allowing birth parent to file to revoke consent within 60 days of filing the adoption petition); 750 ILL. COMP. STAT. ANN. 50/9(A)–(D) (West 2009) (allowing irrevocable consent to be given 72 hours after the infant's birth); VT. STAT. ANN. tit. 15A, §§ 2-404(a), 2-408(a)(1) (2011) (requiring the birth mother to wait 36 hours after giving birth to consent and allowing her to revoke consent within 21 days). Some states permit consent to adoption prior to birth, but they then allow a period of time in which the biological parent can revoke the consent, which effectively makes the decision final only after the birth of the baby. *See, e.g.*, ALA. CODE § 26-10A-13(a) (2011) (giving five days after the birth or signing of consent to revoke consent); COLO. REV. STAT. § 19-5-103.5(1)(b)(i) (2011) (allowing revocation of consent until the petition is filed in court).

120. *See* LYNN DENNIS WARDLE & LAURENCE C. NOLAN, FAMILY LAW IN THE USA 162 (2011).

121. Cahn, *supra* note 4, at 1150. Unmarried biological fathers may be particularly at risk of losing their parental rights. *See, e.g.*, UTAH CODE ANN. § 78B-6-110 (LexisNexis 2011) (decreeing that a sexual act alone is enough to put a father on notice to act to protect his parental rights).

122. As a practical matter, the biological father may be unknown or unavailable at the time of birth. Once due diligence has been used to secure his consent, the adoption may

the other primary focus area in state adoption laws.¹²³ Clearly, the adoptive parents must be deemed stable and loving in order to ensure that placement with them will be in the child's best interest. A social worker typically conducts a home study of the adoptive couple, interviewing them to assess both their stability as prospective parents and the suitability of their home for child rearing.¹²⁴ Recommendations may be required,¹²⁵ religious views explored¹²⁶ and a criminal background check conducted.¹²⁷ Factors to consider in determining the suitability of the adoptive parents may include the "prospective adoptive parent's ability to meet the physical, mental, and emotional needs of the child."¹²⁸ Such provisions could be construed to require

proceed without it. *See, e.g.*, FLA. STAT. ANN. § 63.062 (West 2011) (deeming consent waived where the "unmarried biological father [had] not complied" with other conditions); IND. CODE ANN. § 31-19-5-18 (West 2011) ("A putative father who fails to register within [a certain] period . . . waives notice of an adoption proceeding."); OHIO REV. CODE ANN. § 3107.07(A)–(B) (West 2011) (setting out conditions by which consent of the father to adoption is not needed); OKLA. STAT. ANN. tit. 10, § 7505-4.2(F) (West 2011) (precluding the need for a father's consent if he has been given notice and fails to come to the hearing).

123. Key debates in recent years have centered on the suitability, particularly the legality of including gay couples and singles as prospective parents and whether there should be transracial adoptions. *See, e.g.*, RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* 402 (2003) (advocating for placement with whatever family will provide the quickest opportunity for permanency, regardless of race); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1172 (1991) ("[R]acial matching policies represent a coming together of powerful and related ideologies—old-fashioned white racism, modern-day black nationalism, and . . . the idea that what is 'natural' in the context of the biological family is what is normal and desirable in the context of adoption."); Angela Mae Kupenda, *Seeking Different Treatment, or Seeking the Same Regard: Remarketing the Transracial Adoption Debate*, 26 B.C. THIRD WORLD L.J. 97, 98–99 (2006) (discussing transracial adoption debate); Mabry, *supra* note 18, at 660 (looking at who can adopt and advocating joint adoptions for non-intimate parenting partners); Devjani Mishra, *The Road to Concord: Resolving the Conflict of Law over Adoption by Gays and Lesbians*, 30 COLUM. J.L. & SOC. PROBS. 91, 92 (1996) (advocating that gay couples be allowed to adopt); Krista Stone-Manista, *Parents in Illinois Are Parents in Oklahoma Too: An Argument for Mandatory Interstate Recognition of Same-Sex Adoptions*, 19 L. & SEXUALITY 137, 141 (2010) (same); Driver, *supra* note 114, at 140–41 (exploring whether biological parents can adopt their own children under the Arkansas adoption statute).

124. *See, e.g.*, ARK. CODE ANN. § 9-9-212(b)(1)(A) (2011) (making a home study a requisite); OKLA. STAT. ANN. tit. 10, § 7505-5.3 (West 2011) (mandating home visits, interviews and background checks); VT. STAT. ANN. tit. 15A, § 2-201 (2011) (requiring a favorable evaluation).

125. *See, e.g.*, Ind. Vanderburgh Prob. Ct. LR82-PR Rule 13 (requiring at least three references).

126. *See, e.g.*, VT. STAT. ANN. tit. 15A, § 2-203 (2011) (noting the information that must be included in the pre-placement evaluation).

127. *See, e.g., id.* § 1-113 (2011) (setting out the requirements for the criminal record check). *But see* Cahn, *supra* note 4, at 1150 n.346 (suggesting that the screening process is too invasive and drives prospective adoptive couples away from the process).

128. ILL. ADMIN. CODE tit. 89, § 309.130(a)(5) (2011). Some statutes address the adoptive parents' ability to maintain and show compassion for the adoptee's pre-existing relationships and emotional ties. For example, the law may examine the ability of the

educating the adoptive parents about the potential emotional and mental health needs that tend to impact adopted children.¹²⁹

While adoption laws do not address the precise issue of the infant placement process itself,¹³⁰ there are two mechanisms present in some state adoption statutes that can assist adoptees who either seek information about their biological parents or want to maintain contact with them. First, whereas most adoptions are closed,¹³¹ some states allow adult adoptees to access their original birth certificates and provide for the release of whatever information they have about the biological parents.¹³² Although these provisions are useful, they only apply once adoptees have reached adulthood.¹³³ Therefore, their

adoptive parents “to support, maintain and continue to be sensitive to the child’s significant relationships with the child’s extended family, siblings, and any other significant persons who played an important part in the child’s life or to whom the child has established significant emotional ties.” *Id.*; see also *id.* § 309.130(b)(1) (2011) (separating siblings only if in the best interest of the children). Provisions like this are geared toward adoptions of older children who have well-recognized preexisting relationships. They are not a recognition of the bonding that takes place between the fetus/newborn and the biological mother.

129. See *infra* notes 150–54 and accompanying text (suggesting parents must be fully educated about all aspects of adoption).

130. See *infra* notes 131–42 and accompanying text (discussing later access to information about biological parents).

131. A closed adoption is one in which the parties to the adoption do not share identifying information. *Closed Adoptions*, ADOPTION.COM, <http://glossary.adoption.com/closed-adoptions.html> (last visited Feb. 13, 2012). To facilitate the privacy of the parties, the original birth certificates are sealed and a new one created with the names of the adoptive parents. See, e.g., FLA. STAT. ANN. § 63.162 (West 2011) (making all records confidential); GA. CODE ANN. § 19-8-23 (2011) (same); LA. CHILD. CODE ANN. art. 1185 (2011) (same); N.J. STAT. ANN. § 9:3-52 (West 2011) (same); OKLA. STAT. ANN. tit. 10, § 7505-1.1 (West 2011) (same); S.C. CODE ANN. § 63-9-780 (2010) (same); TENN. CODE ANN. § 36-1-126 (2011) (same). *But see infra* note 141 (describing how one state permits adoptive parents to be present at the birth of the child, under some circumstances).

132. See, e.g., ALASKA STAT. ANN. § 18.50.500 (West 2011) (providing adoptees with their original birth certificate per their requests after age 18); CONN. GEN. STAT. ANN. § 45a-744 (West 2011) (making additional information about their biological parents available to adult adoptees); MD. CODE ANN., FAM. LAW § 5-4B-04 (West 2011) (helping adoptees who wish to search for their biological parents by referring them to the child placement agency); MINN. STAT. ANN. § 259.89 (West 2011) (laying out procedures for adoptees 19 and older to gain access to information about their birth records).

133. In Delaware, original birth information is available to an adoptee 21 years or older. DEL. CODE ANN. tit. 13, § 923(b) (West 2011). No provision is made to release the information sooner. See also CONN. GEN. STAT. ANN. § 45a-746 (West 2011) (allowing access for adult adoptees); IND. CODE ANN. § 31-19-22-10 (LexisNexis 2011) (granting access to identifying information once reaching 21 years of age); LA. CHILD. CODE ANN. art. 1270 (2011) (providing voluntary registry for those 18 or older); MINN. STAT. ANN. § 259.89 (West 2011) (allowing access after adoptees turn 19); NEB. REV. STAT. § 43-130 (2011) (letting adoptees petition for information regarding biological parents at age 25); N.M. STAT. ANN. § 32A-5-40 (West 2011) (giving access at 18 years); N.Y. PUB. HEALTH LAW § 4138-c-6(b) (McKinney 2011) (allowing adoptees to access information at age 18); 23 PA. CONS. STAT. ANN. § 2924 (2011) (allowing those 18 years and older to request information); TENN. CODE ANN. § 36-1-127 (2011) (making records available to those 21 years of age);

struggles during childhood and adolescence are not addressed by these provisions. State laws are more flexible in releasing health information about the biological parents to adoptive parents, even during the adoptee's minority.¹³⁴

Second, a number of state adoption laws recognize and explicitly enforce post adoption agreements between the biological and adoptive parents.¹³⁵ Not all states, however, recognize these agreements.¹³⁶ Moreover, the states that recognize them generally take a position

TEX. FAM. CODE ANN. § 162.018 (West 2011) (denying access to information—identifying or non-identifying—until the age of 14); VT. STAT. ANN. tit. 15A, § 6-107 (West 2011) (releasing a copy of the original birth certificate upon request to those over 18 years). Moreover, in some cases, the birth mother may have veto power over the release of identifying information. *See, e.g.*, COLO. REV. STAT. ANN. § 19-5-305 (West 2011) (stating biological parents can indicate whether they want to be contacted by adoptee); DEL. CODE ANN. tit. 13, § 923(a) (West 2011) (allowing the birth parents to “deny[] the release of information”); IND. CODE ANN. § 31-19-25-3 (LexisNexis 2011) (letting the birth parents restrict access to information about themselves by submitting a non-release form); 23 PA. CONS. STAT. ANN. § 2925 (West 2011) (letting the birth parents authorize the search).

134. *See, e.g.*, ALA. CODE § 26-10A-31 (2011) (releasing “[h]ealth and medical histories of the adoptee’s natural parents” upon request); HAW. REV. STAT. § 578-14.5 (West 2011) (same); MO. ANN. STAT. § 453.121 (West 2011) (including the medical history of the biological parents in the non-identifying information that can be disclosed to the adoptive parents); 23 PA. CONS. STAT. ANN. § 2925 (West 2011) (allowing non-identifying information to the requester); S.C. CODE ANN. § 63-9-780 (2010) (same).

135. *See, e.g.*, CAL. FAM. CODE § 8616.5 (2011) (allowing voluntary agreements); CONN. GEN. STAT. ANN. § 45a-715(h) (West 2011) (“Either or both birth parents and an intended adoptive parent may enter into a cooperative postadoption agreement regarding communication or contact between either or both birth parents and the adopted child. . . . The postadoption agreement shall be applicable only to a birth parent who is a party to the agreement.”); D.C. CODE § 4-361 (2011) (noting that agreement shall be at the sole discretion of the adoptive parents); LA. CHILD. CODE ANN. art 1269.2 (2011) (recognizing post adoption contact if the child has an “established, significant relationship to the extent that its loss would cause substantial harm to the child”); *see also* MD. CODE ANN., FAM. LAW § 5-345 (West 2011) (recognizing the possibility of post-adoption contact agreements); MASS. GEN. LAWS ANN. ch. 210, § 3(d) (West 2011) (same); MONT. CODE ANN. § 42-1-102 (2011) (“Montana . . . support[s] relationships between adoptees and their birth families when desired”); N.H. REV. STAT. ANN. § 170-B:2(XVIII) (2011) (allowing for post-adoption contact); N.Y. DOM. REL. LAW § 112-b (McKinney 2011) (same); OKLA. STAT. ANN. tit. 10A, § 1-4-813 (West 2011) (same); OR. REV. STAT. ANN. § 109.305(2) (West 2011) (same); R.I. GEN. LAWS ANN. § 15-7-14.1 (West 2010) (same); S.D. CODIFIED LAWS § 25-6-17 (2011) (allowing contact when there is a pre-adoption agreement); VA. CODE ANN. § 63.2-1220.2 (2011) (allowing post-adoption agreements); *Humphrey v. Pannell*, 710 So. 2d 392, 400 (Miss. 1998) (“[T]he ‘unless otherwise provided’ language was intended . . . to provide . . . the option of entering into limited arrangements such as post-adoption visitation agreements as long as the best interests of the child would be served by such an arrangement.”). In case of disputes, visitation will be determined based on the child’s best interest. *Groves v. Clark*, 982 P.2d 446, 446, 449 (Mont. 1999). Any breach of the agreement will not defeat the finality of adoption. *See* CONN. GEN. STAT. ANN. § 45a-715(i),(n) (West 2011). *But see* OHIO REV. CODE ANN. § 3107.65 (West 2011) (stating that an open adoption does not give the birth parents any authority over the child).

136. *See State Survey of Post-Adoption Contract Agreements*, FLA.’S CHILD. FIRST, <http://www.dcf.state.fl.us/initiatives/dependency/docs/PostAdoptionStatutes.pdf> (last visited Feb. 13, 2012).

of neutrality on whether such an agreement should be executed,¹³⁷ with the default position generally being that information should remain confidential.¹³⁸ Post adoption agreements may also not be effective at the time of placement because adoptions are finalized only after a period of several months following the transfer of custody to the adoptive parents.¹³⁹ Nonetheless, they provide a vehicle for ongoing communication and contact among all parties to the adoption triad.¹⁴⁰ Moreover, the parties themselves can decide to maintain contact right after birth, regardless of the existence of a post adoption agreement.¹⁴¹ In addition, the internet may provide for ongoing contact in ways that were unimaginable even a decade ago.¹⁴²

Unless otherwise specified, adoption laws have traditionally excluded further contact between the biological parents and the child after adoption placement.¹⁴³ In fact, the adoptee's original birth certificate is normally sealed and a new one created with the names of the adoptive parents.¹⁴⁴ And, as noted above, the adoptee's right to

137. See, e.g., CONN. GEN. STAT. ANN. § 45a-715(h) (West 2011) ("There shall be no presumption of communication or contact between the birth parents and an intended adoptive parent in the absence of a cooperative postadoption agreement.").

138. See, e.g., DEL CODE ANN. tit. 13, §§ 906(9), 929 (West 2011) (providing for confidentiality unless the birth and adoptive parents agree otherwise, in which case identifying information can be shared, with restrictions); VT. STAT. ANN. tit. 15A, § 1-109 (West 2011) (noting that, after the adoption becomes final, there is no right to visitation or communication).

139. See *Family Law Resource Guide*, MO. B., 27 (May 2008), http://www.mobar.org/uploadedFiles/Home/Publications/Legal_Resources/Brochures_and_Booklets/Family_Law_Conference/family%20law%20resource%20guide.pdf (reporting it can take six months to finalize an adoption).

140. See Nancy S. Ashe, *Post-Adoption Contract Agreements—Why Make One?*, ADOPTING.ORG, <http://www.adopting.org/adoptions/post-adoption-contact-agreements-why-make-one.html> (last visited Feb. 13, 2012) ("Adoptive and birth families, adoption professionals, jurists, and policy makers are increasingly noting the positive effects of varying degrees of openness in adoption.").

141. Connecticut even allows for the adoptive parents to be present at the child's birth. CONN. GEN. STAT. ANN. § 45a-728a (West 2011) ("Prospective adoptive parents may participate in the labor and birth of the child identified for adoption and may visit with such newborn child, provided the birth mother, the child-placing agency and her physician agree and such participation and visitation are consistent with the medically necessary procedures of the hospital."). While this is another area in which most state statutes are silent, if, as recommended below, the prospective adoptive parents are identified prior to birth, nothing would preclude the parties from independently agreeing to having all of them present at birth.

142. Lisa Belkin, *I Found My Mom Through Facebook*, N.Y. TIMES, June 26, 2011, at 1 (describing several scenarios in which adoptees found their birth parents on Facebook or vice versa). "The Internet is changing nearly every chapter of adoption." *Id.*

143. See Rita Meiser & Marcie Velen, *The History of Adoption*, RES. ETC., INC., <http://www.researchetcinc.com/historyofadoption.html> (last visited Feb. 13, 2012) (describing the reasons adoption records started being closed).

144. See, e.g., ALA. CODE § 26-10A-32 (2011) (allowing the original to be inspected only if "good cause" is shown); D.C. CODE § 16-314 (2011) (noting that a new birth record is

access identifying information about her biological parents is generally precluded until she reaches the age of majority.¹⁴⁵ Regardless of the hardships, there is a movement in adoption laws towards greater openness,¹⁴⁶ allowance for the sharing of identifying information, and efforts to promote ongoing contact after birth through post-adoption agreements.¹⁴⁷ They do not, however, address the placement process itself or the question of the possible benefits of contact between the parties prior to birth. Guidelines are needed for the entire adoption placement process consistent with what we know is likely to serve the best interests of the child given our understanding of fetal development and infant awareness discussed above.¹⁴⁸ The next section offers suggestions on what those guidelines might include.

IV. IMPROVING THE ADOPTION PROCESS

*There is little that [cannot] be remedied later, and there is much that can be prevented from happening at all[.]*¹⁴⁹

As already noted, adoption laws exist to serve the best interests of the child. This includes both the child's mental and physical well-being. To serve these interests, this section recommends that best practices be implemented, including guidelines addressing adoption placement procedures. Such guidelines would require, first, that all adoption participants be educated about the unique emotional challenges that adopted children may face. This educational initiative must be targeted to adoption professionals, as well as the adoptive and biological parents. Second, placement should involve a transitional *process* rather than a transitional *event*. Third, guidelines must address both the short- and long-term secrecy that shrouds the entire adoption process.

created); HAW. REV. STAT. § 578-14 (West 2011) (same); LA. REV. STAT. ANN. § 40:73 (2011) (same); MICH. COMP. LAWS ANN. § 710.68(15) (West 2011) (same); VT. STAT. ANN. tit. 15A, § 3-802 (West 2011) (same).

145. See *supra* note 133 and accompanying text.

146. See *supra* note 135 and accompanying text.

147. *State Survey of Post-Adoption Contract Agreements*, *supra* note 136 (noting that "25 states have enacted statutes that allow for . . . Post-Adoption Contact Agreements").

148. See *supra* Parts I.A–B. The law is limited in its ability to govern long-term relationships, but a foundation can be laid at the beginning, making it more likely that placement will be in the child's best interest. See GOLDSTEIN ET AL., *supra* note 115, at 46–49.

149. Michael F. McGinn, *Attachment and Separation-Individualization in Adoptees*, EVAN B. DONALDSON ADOPTION INST., <http://www.adoptioninstitute.org/proed/mpresentation.html> (last visited Feb. 13, 2012) (statement of Erik Erikson).

*A. Educating Adoptive Parents and Adoption Professionals*¹⁵⁰

Adoption professionals often include social workers and others who already have some training about the unique challenges that adopted children may have.¹⁵¹ The law, though, should require that their education specifically include up-to-date knowledge about fetal development, infant awareness, and their implications for adopted children as they progress through childhood and adolescence. In addition, continuing education requirements should be imposed to help these professionals stay abreast of current developments as they relate to adopted children. This will enable them to pass that knowledge along to the biological and adoptive parents.

In addition, the adoption process should include comprehensive education of the adoptive parents. Adoptive parents are generally led to believe and expect that their families will be identical to traditional biological families.¹⁵² Though this is true in most respects, failing to alert the parents to unique issues that may confront their children does a disservice to the child and the adoptive parents. If children experience emotional challenges that their adoptive parents are ill-prepared to handle, the adoptive parents are less likely to meet their children's needs adequately. Therefore, "[e]very potential adoptive couple needs to be informed about the *primal wound* and the impact it [may] have on them, their child, and their child's biological mother. . . . [Adoption] is a difficult and complex process for everyone concerned. It deserves to be understood and honored as such."¹⁵³

150. Education is a common public health tool. See, e.g., Ronen Avraham & K. A. D. Camara, *The Tragedy of the Human Commons*, 29 CARDOZO L. REV. 479, 487 n.24 (2007) (discussing anti-obesity educational campaigns); Laura C. Leviton, *Children's Healthy Weight and the School Environment*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2008, at 38, 45–47 (same); Elaine Stoll, *The Family Smoking Prevention and Tobacco Control Act and the First Amendment: Why a Substantial Interest in Protecting Public Health Won't Save Some New Restrictions on Tobacco Advertising*, 65 FOOD & DRUG L.J. 873, 873 (2010) (discussing anti-tobacco educational campaigns); Christopher Valleau, *If You're Smoking You're Fired: How Tobacco Could Be Dangerous to More than Just Your Health*, 10 DEPAUL J. HEALTH CARE L. 457, 459–60 n.15, 489 (2007) (same). Education can be used in the adoption context not only to educate the parties to adoption, but in an effort to change cultural beliefs surrounding adoption.

151. See *Continuing Education-Professional Training*, ADOPTIONS TOGETHER, <http://www.adoptionstogether.org/EducationTraining/TrainingforProfessionals.aspx> (last visited Feb. 13, 2012) (providing training services to those who work with adoptees).

152. See Cahn, *supra* note 4, at 1087, 1148–50 (explaining how this traditional belief is misguided).

153. VERRIER, *supra* note 59, at 220; see also PAVAO, *supra* note 61, at 42 (“The adoptive parent role is especially challenging because they have to introduce very complex truths to a child and then be prepared to support him—even to try to stay a step ahead—as he makes sense of the truths of his life.”). This educational program should be implemented at the beginning of the adoption process when the prospective adoptive parents are trying to decide whether to move forward with the adoption—not at the joyous moment

Last, but certainly not least, the biological parents should be educated about the mental health issues that adopted children may face. One prerequisite to adoption is the requirement that the biological parents voluntarily consent to it.¹⁵⁴ Arguably, voluntariness only exists to the extent that the biological parents understand that to which they are consenting. Educating them about how adoption may impact the child needs to be part of that process. While adoption serves most adopted children very well, honesty about some of the mental health concerns should nonetheless be required.¹⁵⁵

B. Shifting from an Event to a Process

Given our current level of understanding regarding fetal and newborn awareness, the transition from birth to adoptive parents must become an area of focus in adoption laws and placement procedures. Birth itself is a traumatic event. To compound that trauma with a shift in everything familiar to the newborn appears to be unwise. Therefore, adoption laws and procedures, which currently focus either on the period of time before birth, when the fetus is still with the birth parents, or the period after, when the baby has been placed with the adoptive family,¹⁵⁶ should include a focus on the actual transition process from one family to another in the hours or days following birth.

The actual placement process of moving the infant from one home to another is generally not determined by law, allowing adoption agencies and private placement individuals to create their own procedures for actual placement.¹⁵⁷ Rather than leaving ad hoc transition processes in place, the law can provide guidelines that would shift adoption placement from a transition *event* to a transition *process*.

Whenever possible, this process should include contact between the birth and adoptive parents prior to the birth. Adoption best practices should shift so that a placement decision is normally made by

when the baby is born and like every parent, adoptive or not, they are simply thrilled to bring home their bundle of joy.

154. See *supra* notes 117–20 and accompanying text.

155. Any educational initiative should emphasize that non-adopted children also have their fair share of mental health concerns. Issues that tend to be unique to adoptees, however, deserve special attention. Widespread education about prenatal care and its importance to childhood development should also be included.

156. Prior to placement the key issues are: 1) whether the birth parents are prepared to provide voluntary consent to the adoption, and 2) whether the prospective adoptive parents are suitable parents. See *supra* notes 117–28 and accompanying text. After placement, the focus is on the procedures necessary to finalize the adoption. Often, this consists of a waiting period of six months or more.

157. CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH & HUM. SERVS., ADOPTION: WHERE DO I START? 4 (2010), available at http://www.childwelfare.gov/pubs/f_start.pdf.

the seventh month of the pregnancy.¹⁵⁸ At that point, visits between the birth and adoptive parents should be encouraged. This will allow the fetus to become familiar with the voices and rhythms of the adoptive parents so that when the transition to their home is made, it will feel less foreign. If properly educated as discussed above, the adoptive parents will likely be more open to this idea, although financial and logistical challenges may preclude their ability to have prenatal contact with the biological parents. If they cannot be physically present, the adoptive parents could provide recordings of their voices for the biological parents to play during the last trimester of pregnancy.¹⁵⁹

In addition to encouraging communication between the adoptive and biological parents prenatally, they should also be encouraged to have some overlap time after the baby's birth. For example, during the first forty-eight to seventy-two hours, the biological mother can visit the newborn for progressively shorter durations. This should permit the child to shift away from the biological mother more gradually, simultaneously spending most of her time with her adoptive parents and beginning the attachment process with them.

There are several concerns with continued contact between birth and adoptive parents subsequent to birth. One important reason is that this may be the most precarious time for the adoption itself, as continued contact between the biological mother and the newborn at this stage could result in the birth mother deciding to keep the baby herself.¹⁶⁰ Adoption, however, is to serve the best interest of the child—not the best interest of the adoptive parents. Therefore, in cases where the birth mother changes her mind, she is doing what adoption laws provide for—taking advantage of the period of time following birth in which she can decide whether to move forward with the adoption.¹⁶¹ Nonetheless, the adoptive parents, whose own emotions are on the line, may be wary of exposing themselves to this risk.¹⁶² Furthermore,

158. The parties must still understand that the birth mother's final decision whether to place the newborn will be made after birth. This is one critical difference between adoption and surrogacy arrangements, in which the surrogate agrees prior to conception to surrender the child at birth. See Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 2 (1988) (explaining the surrogate process). But see *In re Baby M*, 537 A.2d 1227, 1227 (N.J. 1988) (granting visitation rights to the surrogate if it is in the best interests of the child).

159. Some parents play Mozart or Beethoven, among other things for their unborn child. See Maryann Harman, *Music and Movement—Instrumental in Language Development*, EARLYCHILDHOODNEWS, http://www.earlychildhoodnews.com/earlychildhood/article_view.aspx?ArticleID=601 (last visited Feb. 13, 2012). The concept here is similar.

160. See *Open Adoption Process*, CATHOLIC SOC. SERVICE, <http://catholicsocialservice.org/open-adoption-process> (last visited Feb. 13, 2012).

161. Atwell, *supra* note 158, at 23.

162. See, e.g., Danielle Pennel, *Scared of Adoption Failure Statistics? Don't Be: Adoption Can Have a 100-Percent Success Rate*, ADOPTIVE FAMILIES CIRCLE (Apr. 2010), <http://www>

the child's birthplace and the place where the adoptive parents live may be far away from one another. The adoptive parents may simply be unable to spend several extra days waiting to return home to jobs and other obligations.

This is a situation in which technology may help. For example, the adoptive parents and biological parents can agree to use Skype or a similar technology for daily conversations during the end of the pregnancy and immediately after birth. While a far cry from personal contact, this use of technology may allow the fetus to hear and become familiar with the adoptive parents' voices, so that when the adoption placement is made, the environment seems more familiar to the newborn.¹⁶³ After the transition from birth to adoptive parents, Skype-like communications likewise will give the baby and the birth mother a chance to separate more gradually. While Skype may be the ideal technology since it provides both visual and audio contact, some adoptive parents may prefer to limit any contact to traditional phone calls. If our cultural attitudes toward adoption¹⁶⁴ shift sufficiently, though, the adoptive parents may begin to welcome ongoing communication.

C. Eliminating or Minimizing Secrecy

We need a sea change in how we think about adoption. For too long, secrecy has been a key component of adoptions and both adoptive parents and adoption professionals should be educated regarding its corrosive effect. Secrecy works on many levels. First, the process itself has traditionally been shrouded in secrecy. Several decades ago, an adopted child might not even be told she was adopted.¹⁶⁵ Today, there is still a great deal of secrecy.¹⁶⁶ The process itself should become more open.¹⁶⁷ Information about all parties to the adoption triad should be kept in a place where the parties can access it as

.adoptivefamiliescircle.com/blogs/post/adoption_failure_statistics_recovery/ (discussing personal fears about not receiving a child through adoption and comparing the loss to a miscarriage).

163. See *supra* notes 26–27 (stating babies can sense the outside world while still in utero).

164. There are many stigmas connected to adoption. See *supra* notes 66–73 and accompanying text.

165. See Cahn, *supra* note 4, at 1152.

166. See, e.g., VT. STAT. ANN. tit. 15A, § 6-102 (West 2011) (sealing adoption records for 99 years).

167. See PAVAO, *supra* note 61, at 19.

[S]ecrecy is not usually the fault of the birth or adoptive families, but of the system and the professionals in it Too often it is the system of adoption, with its sealed birth records and its legal fictions—falsified birth certificates—that creates an aura of secrecy, that attempts to erase the truth that, for the child, needs to be acknowledged, not denied.

Id.

appropriate.¹⁶⁸ For example, health information is generally available to the adoptive parents.¹⁶⁹ Information about the pregnancy itself should also be included given its importance in childhood development.¹⁷⁰ The parties should be encouraged to share as much relevant information, including identifying information, as possible.

Adoptive parents may not want the birth parents to know who they are, preferring instead to maintain their privacy and anonymity. If, as suggested in Parts I and II, however, openness is in the best interest of the child, the time for closed adoptions and the secrecy that goes along with them has passed. Adoption professionals often speak of an “adoption triad,”¹⁷¹ recognizing 1) the birth parents, 2) the adoptive parents, and 3) the adoptee. Yet as a society, we treat adoption as if there were only two parties involved at any given time.¹⁷² Either the baby is with the birth parents or the adoptive parents, each behaving as if the other does not exist.¹⁷³

Second, in addition to the initial secrecy, parents are often reluctant to discuss adoption as their children get older and more inquisitive. While the law cannot force openness in these discussions, educating the parents about the adverse consequences of secrecy may help encourage them to address their children’s questions openly, forthrightly, honestly and with compassion. Children in families that suppress adoption conversation may suffer from feelings of

168. States generally keep sealed adoption records in an office of vital statistics. *See, e.g.*, DEL. CODE ANN. tit. 13, § 921 (West 2011) (keeping original information with the Department of Health and Social Services, Office of Vital Statistics); VT. STAT. ANN. tit. 15A, § 3-802 (West 2011) (same); *see also* Colton Wooten, *A Father’s Day Plea to Sperm Donors*, N.Y. TIMES, Jun. 19, 2011, at 9. Wooten, an 18-year-old son of a single mother and an anonymous sperm donor, pled for greater openness and access to information; he was informed that the fertility clinic his mother used did not keep files on anonymous sperm donors, limiting his ability to locate his biological father. *Id.*

169. *See supra* note 134 and accompanying text (giving examples of states requiring access to medical information). The adopted child is usually precluded from accessing information—whether identifying or non-identifying—about her birth parents prior to the age of 18. *See supra* note 133 and accompanying text. Although the adoptive parents generally have access to more information during the child’s minority, they may not have the incentive to examine it.

170. CTR. ON THE DEVELOPING CHILD, THE FOUNDATIONS OF LIFELONG HEALTH ARE BUILT IN EARLY CHILDHOOD 10–11 (2010), *available at* http://developingchild.harvard.edu/index.php/resources/reports_and_working_papers/foundations-of-lifelong-health/.

171. McGinn, *supra* note 2, at 61.

172. The media reflects many of the cultural biases that surround adoption. For example, many of us have seen adoptees reunited with their birth mothers on television. While such reunions may be beneficial for the adoptee and the biological mother, there is generally no mention of the adoptive parents. It is another example of failure to recognize the entire triad. In addition, movies and television may depict adoption in a negative light. *See Avery, supra* note 72.

173. Ellen Waldman, *What Do We Tell the Children?*, 35 CAP. U. L. REV. 517, 522 (2006) (discussing the traditional notion of “one family entirely displacing and eradicating the other”).

guilt if they later decide to search for their birth parents.¹⁷⁴ They are also likely to exclude rather than share with their adoptive parents that they are searching in the first place.¹⁷⁵ This further disserves the child. Education and culturally shifting the way we think about adoption can facilitate this. Every adoption, like every family, is unique. Undoubtedly, the degree of openness or secrecy that the parties are comfortable with will also vary. With greater awareness, however, all parties to the adoption triad may consider moving toward more openness for the best interest of the child.

The third level of secrecy involves the question of continued contact with the biological parents after placement. This remains a sensitive issue. Post adoption agreements should be a routine best practice in adoptions, which would create an expectation that some degree of ongoing contact is the norm. Adoptive parents willing to enter into a post adoption agreement can be given preference over those who are not. Although they do not often get much attention, there are parents who have chosen to allow such contact.¹⁷⁶ New York Times reporter Melanie Thernstrom shared her experience of using egg donors and gestational surrogates to create a family.¹⁷⁷ She chose to meet the egg donors and developed relationships with the surrogates that lasted beyond the birth of the babies.¹⁷⁸ In fact, one of them would occasionally nurse the baby, and both surrogates pumped milk for the infants.¹⁷⁹ As Thernstrom noted, “[w]e feel good about the truth.”¹⁸⁰ She rejected the idea that there was something somehow amiss about having a relationship with the other women involved in the creation of her family.¹⁸¹

This kind of openness can also be ideal in the adoption context. Adoptive families represent just one of many different types of families. In addition to traditional nuclear families, there are single parent families, stepparent and blended families, extended inter-generational families and others.¹⁸² In many of these families,

174. See Maldonado, *supra* note 5, at 329 & n.57 (suggesting that ongoing contact with the birth parents might alleviate a child’s guilt over seeking out his birth parents).

175. *Fears About Your Adopted Child’s Search*, FAM. EDUC., <http://life.familyeducation.com/adoption/adoptive-parents/45810.html> (last visited Feb. 13, 2012).

176. CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 1 (2011), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm.

177. Melanie Thernstrom, *My Futuristic Insta-Family*, N.Y. TIMES, Jan. 2, 2011, at 28.

178. See *id.* at 35.

179. *Id.* at 31, 35, 42.

180. *Id.* at 35.

181. *Id.* at 42.

182. *Types of Families*, HEALTHY CHILD., <http://www.healthychildren.org/English/family-life/family-dynamics/types-of-families/Pages/default.aspx> (last visited Feb. 13, 2012).

children have access to both biological and other parental figures.¹⁸³ All too often, though, we have idealized the traditional nuclear family as the model for adoptions.¹⁸⁴ Adoptive parents often fear the biological parents.¹⁸⁵ The culture surrounding adoption has created a myth that the biological parent will return, and the adoptive parents, who have loved and nurtured the child, will be forgotten or ignored.¹⁸⁶ The truth is that the more people who genuinely love our children, the better.¹⁸⁷ The ultimate determination of how much contact with the birth parents is in the child's best interest rests with the adoptive parents, as the custodial parents who are raising the child and making educational, medical, financial, and all the other day-to-day child-rearing decisions. In the end, contact should not be precluded based on a cultural principle of secrecy. Contact or the lack thereof should be based on the child's needs. Serving the child's needs will be beneficial for everyone.

CONCLUSION

Now that we are beginning to understand the importance of the bonding that takes place in utero and the infant's awareness at birth, infant adoption procedures must shift to align with that scientific knowledge. First, all adults involved in the adoption need to be educated on the unique mental health needs that adopted children may have as a result of their transition from one family to another. Second, the infant adoption placement process should be changed from an event to a process to make the change more gradual. Finally,

183. This village need not exclude the two people who conceived the child. *See* HILLARY RODHAM CLINTON, *IT TAKES A VILLAGE* 10–12, 19 (1996) (“It takes a village to raise a child.”); *see also* *Troxel v. Granville*, 530 U.S. 57, 64–65 (2000) (noting that relationships with the grandparents are often in the best interest of the child); *Ex parte D.W.*, 835 So. 2d 186, 190 (Ala. 2002) (noting that in many households grandparents play the role of parents and granting visitation rights after adoption).

184. *See Mabry*, *supra* note 18, at 663 (noting single parent adoptions are looked down upon by society).

185. *Fears About Your Adopted Child's Search*, *supra* note 175; Pennel, *supra* note 162.

186. *Fears About Your Adopted Child's Search*, *supra* note 175 (“Some adoptive parents worry that if the adopted person likes the birthparents better, then he may devote all his spare time to them and forget he was ever adopted.”). The media sometimes perpetuates this notion when there are reunions between adopted children and their biological mothers. Usually, the adoptive parents are not mentioned and not seen in these instances. Again, the adoption triad is treated as if only two parties exist.

187. Children may be fortunate to have loving aunts, uncles, cousins, grandparents, and friends of the family, and these people can be analogous to having a biological parent present at various stages of life. It does not mean the adopted child loves her adoptive parents any less because she loves her biological parents. *Cf.* *THE SOUND OF MUSIC* (Twentieth Century Fox 1965) (“If you love this man, it doesn't mean you love God less.” (quoting the Reverend Mother)).

we need a sea change in the cultural beliefs surrounding adoption to make access to information and contact with biological parents the norm rather than the exception. While the law is limited in its ability to regulate long-term family dynamics,¹⁸⁸ it can identify and encourage adoption best practices, like open sharing of information and standardizing post-adoption agreements.

188. GOLDSTEIN ET AL., *supra* note 115, at 46 (“[T]he limitations of law go unacknowledged in discussions about child placement. Too frequently there is attributed to the law and its agents a magical power—a power to do what is far beyond its means. While the law may claim to regulate parent-child relationships, it can at best do little more than give them recognition and provide an opportunity for them to develop.”).