
FROM CONTRACT RIGHTS TO CONTACT RIGHTS: RETHINKING THE PARADIGM FOR POST-ADOPTION CONTACT AGREEMENTS

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ABSTRACT

This Article considers the issue of post-adoption contact agreements (“PACAs”). PACAs are agreements between birth parents and adoptive parents, negotiated pre-adoption, that define the type and frequency of contact that the birth parents will have with the child after the adoption is final. Most private adoptions of infants in the United States are now open, and birth parents choose the adoptive parents in most of these open adoptions. About two-thirds of these adoptions include the negotiation and execution of a PACA.

PACAs are generally treated by the courts as simple contracts. However, treating a PACA as a straightforward contract ignores the fact that about half of the states hold PACAs to be unenforceable if the adoptive parents refuse to perform, negating the rights that should be enforced to promote the well-being of birth parents and adoptees.

Indeed, studies of the adoption triad (birth parents, adoptive parents, and adoptee) show that open adoption with ongoing contact benefits all three parties emotionally and psychologically. However, because many courts and legislatures view public policy in favor of the adoptive parents who acquire all parental rights when an adoption is complete, the interests of the birth parents—who almost always hold a lower socioeconomic status than the adoptive parents—are not given equal weight. The best interests of the child are similarly ignored.

This Article argues that viewing PACAs through a contractual lens fails to take into account the market conditions that govern adoption and the power differential separating birth parents and adoptive parents. Drawing on feminist theory and applying principles of legal realism, it further argues that, when a PACA is viewed as a contract, breach becomes an available and even tempting choice for adoptive parents, especially because there is no easy remedy for

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promise breach even in states that purport to honor PACAs. When adoptive parents fail to honor the PACA, birth parents and adoptees suffer.

Therefore, this Article argues for a shift in the PACA paradigm by looking to the law of child custody and visitation for a model of enforcement. This Article does not argue for a reinterpretation of the constitutional liberty interests of parents to raise and make decisions regarding their children; under the proposed scheme, all parental rights would remain vested in the adoptive parents. But it suggests the creation of a new kind of right for birth parents: contact rights. Because contact and communication with adoptees would become rights for birth parents, courts would have to treat adoptive parents' withholding of communication and contact as violative of the birth parents' rights, much as they do in the custody and visitation context. In the best interests of the child and in furtherance of the birth parents' contact rights, therefore, the court would start from a presumption of enforcing the contact agreement and would work to maintain relationships between birth parents and adoptees. In turn, this presumption would allow birth parents to make educated decisions when choosing adoptive parents, and adoptive parents would give serious consideration to just how much contact they are willing to provide. Adoptees would benefit from contact with both sets of parents.

This Article is timely and important because it recognizes and addresses a real inequity in a highly prevalent form of family formation: open adoption. Today's national conversation includes a sense of urgency about the role of courts and private actors in protecting children and their best interests, and today's intersectional feminism requires us to consider how poor women and women of color may be disadvantaged—even exploited—by wealthier White women who can use legal loopholes to become parents without honoring commitments to those who bear their children. Finally, courts and legislatures are in the process of developing legal strategies to deal with new types of family formation; as they do so, this Article offers original ideas and important guidance on how to honor the rights and needs of birth parents, adoptive parents, and adoptees.

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INTRODUCTION

Adoption Agency Representative:

"So, knowing the hospital time is coming here soon, do you have any things that you are worried about or concerned about? Why don't you share with me your thoughts and vent about that."

Birth Mother:

"I think, that just like the, if, like Brian and Courtney weren't fully open to doing, or like pulling through with an open adoption, they like, they could become so invested in their little family that they have now, and kind of decide, you know, maybe like, like the openness kind of trickles away. . . . That it's not anything like what we're thinking now."

Representative:

"It is important to know that in Michigan, openness agreements are not legally binding. And that's kind of a hard part for a lot of birth moms to hear. That you could have an openness agreement arrangement, but the law in Michigan is always going to default to the adoptive parents. They're the ones then for the next 18 years that have the legal say in who's going to get to see their child. But, your relationship with Brian and Courtney has been going well?"¹

Promises. Emotions. Power. Loss. Family. Joy. Bereavement. They are some of the most powerful forces in human experience.

In open adoption, they are all in play.

As legal realists have argued for at least a generation, a formal legal construct cannot adequately address and solve many societal issues, particularly when those issues have arisen in a context that ignores or dismisses emotional responses or justice-based consequences. Where emotions play a major role in promise making and promise keeping, and where one party holds greater power in promise formation and performance, logic and reason—even strict rules—may not adequately resolve a promise breach in a way that results in justice and emotional healing for both parties. And, of course, equitable remedies are appropriate when monetary damages for promise breach cannot suffice.

But in the adoption arena, where custody and parentage of and connection to a child are the stakes, a promise breach can bring about especially strong feelings of bereavement and injustice both for birth parents and, at least eventually, for the children they relinquish to adoption.

¹ *I'm Having Their Baby: Brittany/Alexa* (Oxygen television broadcast July 10, 2013), <https://www.youtube.com/watch?v=Qhec0Djr-NE> (transcript on file with the Boston University Law Review).

Drawing on this contextual framework, this Article considers the issue of post-adoption² contact agreements (“PACAs”).³ PACAs, which take the form of legal instruments, appear to be simple contracts. But the representation of a PACA as a straightforward contract ignores two issues: (1) about half of the states hold PACAs to be unenforceable if the adoptive parents refuse to perform and (2) PACAs create rights that should be enforced to promote the well-being of birth parents and adoptees.

In the past, legislatures and courts have refused to deem PACAs as enforceable, citing public policy reasons such as finality for the adoptive parents and the adoptive parents’ rights to make decisions for their children. But these public policy concerns fail to take into account that all parties to an adoption and all of those involved in its arrangement—the birth parents, the adoptive parents, the adoptee, the attorneys, and the adoption agency—designed or entered into the PACA for a reason. That reason? That before the adoption was complete, all of them recognized that ongoing contact was valuable, desirable, and often necessary for at least two of the three parties to the adoption triad.

This Article examines why, in failing to enforce PACAs, we privilege the adoptive parents’ emotional and psychological well-being over that of the birth parents and the adoptee. It then suggests that, while we should recognize that adoption terminates the birth parents’ *parental* rights, adoption does not necessarily terminate their *contact* rights. This Article proceeds to argue that courts and legislatures should view those contact rights as analogous to visitation rights in the divorce and separation context. Viewing contact rights through that lens, courts would not be able to cut off the birth parents’ interests completely but would have to work with the parties to continue a relationship between them and their birth children.

This Article discusses the shift in power over the course of the adoption experience from the birth parents to the adoptive parents. It argues that requiring adoptive parents to honor their commitments through the enforcement of contact rights will: (1) promote true feminist principles by empowering a birth mother to “shop” for the adoptive parents who are the true best match for her open adoption desires, rather than adoptive parents who are understandably trying to garner favor with her; (2) require adoptive parents to think through what types of contact they can support and encourage post adoption and (perhaps) for the next eighteen years; (3) promote the emotional and psychological well-being of both birth parents and adoptees, whom studies have shown to benefit enormously from post-adoption contact; and (4) move the needle from PACAs that are merely ceremonial in nature to PACAs that are enforceable, negotiated legal instruments that establish and maintain rights rather than offer legally

² Various scholars and adoption professionals spell “post adoption” in different ways. “Post-adoption” seems to be the most common spelling, but “post adoption” and “postadoption” are also used. Except in direct quotes from sources, where this Article preserves the spelling of the original authors, this Article will use “post-adoption.”

³ Some scholars and adoption professionals refer to PACAs as “post-adoption communication agreements.” These terms are interchangeable, except in the unusual cases in which the parties anticipate only communication and no in-person contact.

baseless reassurance to birth parents facing a difficult life experience: the relinquishment of their child.

I. THE CONTEXT FOR THE OPEN ADOPTION AND PACA DEBATE

In order to understand the power differential and social justice concerns inherent to PACAs, it is important to understand the adoption landscape and the open adoption context in which PACAs are executed.

A. *What Is Open Adoption?*

“Open adoption” is a term that encompasses a wide variety of relationships between birth parents⁴ and adoptive parents; in fact, research categorizes open adoptions into thirty-three types. Open adoptions range from situations in which minimal information is exchanged to direct contact between parties.⁵ Some birth or adoptive families want to share little information, while others agree to share identities, medical histories, information about the pregnancy and birth, and up-to-date information about the adoptee.⁶ In other words, the extent of contact and communication varies from adoption to adoption.⁷ Open adoption agreements may include provisions for information and contact before, during, and/or after the placement of the child.⁸

One adoption expert describes open adoption as

⁴ Although both birth mothers and birth fathers actively participate in pre-adoption decision-making and post-adoption contact, research shows that birth mothers are involved on an exponentially greater scale. This Article will therefore discuss birth mothers as the primary decision makers in placing children for adoption.

⁵ Ruth G. McRoy, *American Experience and Research on Openness*, ADOPTION & FOSTERING, Dec. 1991, at 99, 102-03 (identifying thirty-three subcategories of adoption types, ranging from adoptions where “the caseworker provide[s] nothing other than basic background information to each party” to adoptions where both adoptive and birth parents have ongoing direct communication through face-to-face meetings or phone calls).

⁶ DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., OPENNESS IN ADOPTION: FROM SECRECY AND STIGMA TO KNOWLEDGE AND CONNECTIONS 13-15 (2012); Ruth G. McRoy, Harold D. Grotevant, Susan Ayers-Lopez & Susan M. Henney, *Open Adoptions: Longitudinal Outcomes for the Adoption Triad*, in HANDBOOK OF ADOPTION 175, 175-78 (Rafael A. Javier, Amanda L. Baden, Frank A. Biafora & Alina Camacho-Gingerich eds., 2007); see also HAROLD D. GROTEVANT & RUTH G. MCROY, OPENNESS IN ADOPTION 6 (1998) [hereinafter GROTEVANT & MCROY, OPENNESS IN ADOPTION]; Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, FUTURE CHILD., Spring 1993, at 119, 119; Marianne Berry, *Adoptive Parents’ Perceptions of, and Comfort with, Open Adoption*, 72 CHILD WELFARE 231, 231-32 (1993); Marianne Berry, *Risks and Benefits of Open Adoption*, FUTURE CHILD., Spring 1993, at 125, 126.

⁷ JANICE GOLDWATER, ADOPTIONS TOGETHER, OPEN ADOPTION: TRENDS FROM THE FIELD 7 (2018) (PowerPoint), https://scholarworks.umass.edu/cgi/viewcontent.cgi?article=1091&context=rudd_conf [https://perma.cc/VMS4-H666] (“A range of openness exists across a continuum. Each family system [is] unique.”).

⁸ Baran & Pannor, *supra* note 6, at 121.

a major shift in thinking about the meaning of adoption. In the era of closed adoptions, children were thought to be “subtracted” from their family of birth and “added” to their family of adoption Open adoption implies . . . acknowledging that adoption creates an adoptive kinship network, in which the child connects his or her extended families of birth and rearing.⁹

For most of the twentieth century, birth parents did not participate in choosing the adoptive families for their children, even in private adoptions. Adoption professionals matched adoptive parents with babies, and most adoption records were sealed, primarily to prevent the infants from being stigmatized as illegitimate.¹⁰ Beginning in the 1970s, especially after *Roe v. Wade*¹¹ established the constitutional right to abortion access, fewer infants became available for adoption, and more birth parents began to demand open adoptions.¹²

Open adoption is now the mainstream adoption model.¹³ According to Harold Grotevant, “open adoption is increasingly common”; his two-decade research following thirty-five adoption agencies demonstrates a near-total shift from closed to open adoptions,¹⁴ in part because transparency in adoption is now universally acknowledged as healthier than secrecy.¹⁵ Today, up to 95% of agencies offer open adoption services for families.¹⁶

But that change took several decades. Between 1987 and 1989, only 35% of adoption agencies surveyed offered fully disclosed adoptions.¹⁷ By 1993, 76% of agencies surveyed offered some degree of openness;¹⁸ by 1999, the number

⁹ Harold D. Grotevant, Gretchen Miller Wrobel, Lisa Fiorenzo, Albert Y.H. Lo & Ruth G. McRoy, *Trajectories of Birth Family Contact in Domestic Adoptions*, 33 J. FAM. PSYCHOL. 54, 54 (2019) (citations omitted).

¹⁰ GROTEVANT & MCROY, OPENNESS IN ADOPTION, *supra* note 6, at 30.

¹¹ 410 U.S. 113 (1973).

¹² GROTEVANT & MCROY, OPENNESS IN ADOPTION, *supra* note 6, at 6-7.

¹³ Deborah H. Siegel, *Open Adoption: Adoptive Parents' Reactions Two Decades Later*, 58 SOC. WORK 43, 43 (2013) [hereinafter Siegel, *Open Adoption*].

¹⁴ Michael Winerip, *With Open Adoption, a New Kind of Family*, N.Y. TIMES, Feb. 24, 2008, at WE4.

¹⁵ ABBIE E. GOLDBERG, OPEN ADOPTION AND DIVERSE FAMILIES: COMPLEX RELATIONSHIPS IN THE DIGITAL AGE 3 (2019).

¹⁶ SIEGEL & SMITH, *supra* note 6, at 23 (“For the 100 agencies responding to the Institute’s survey, 95 percent offered open adoptions as an option for families.”).

¹⁷ GROTEVANT & MCROY, OPENNESS IN ADOPTION, *supra* note 6, at 32 (“Only 11 (35%) of the original 31 agencies offered fully disclosed options as part of their standard practice . . .”).

¹⁸ GROTEVANT & MCROY, OPENNESS IN ADOPTION, *supra* note 6, at 32.

had risen to almost 80%.¹⁹ Continuing that trend, by 2012, according to the Donaldson Institute,²⁰ 95% of all domestic adoptions were open in some form.²¹

Even as open adoption became prevalent, the idea was controversial.²² Researchers began following adoptive parents and adoptees, hoping to learn whether open adoption was psychologically and emotionally beneficial, particularly for adoptees.²³ The debate about the merits of open adoption continued until the early 1990s, but by the end of that decade, there was a near consensus that openness in the adoption process led to better outcomes for all members of the adoption triad.²⁴

Today, almost 100% of birth mothers relinquishing newborns choose open adoption.²⁵ Most birth and adoptive parents now meet in person,²⁶ and the birth parents pick the new family for their baby.²⁷ In addition, 67% of private adoptions today include PACAs.²⁸

B. *What Is a PACA?*

A PACA is a written agreement between birth and adoptive parents that provides for and outlines the types and frequency of post-adoption contact between the adoptee and his or her birth family.²⁹ PACAs are individualized; in

¹⁹ Susan M. Henney, Ruth G. McRoy, Susan Ayers-Lopez & Harold D. Grotevant, *The Impact of Openness on Adoption Agency Practices: A Longitudinal Perspective*, ADOPTION Q., no. 3, 2003, at 31, 38-39. See generally SHARON VANDIVERE, KARIN MALM & LAURA RADEL, U.S. DEP'T OF HEALTH & HUMAN SERVS., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 NATIONAL SURVEY OF ADOPTIVE PARENTS (2009), <http://aspe.hhs.gov/hsp/09/nsap/chartbook/index.cfm> [https://perma.cc/W5CC-XRT5] (documenting results from 2007 National Survey of Adoptive Parents, a telephone survey with parents of 2089 adopted children, generally viewed as first comprehensive study of its kind).

²⁰ The Donaldson Institute, which closed in 2018 due to financial issues, conducted numerous studies about open adoption. See John Kelly, *Donaldson Adoption Institute Has Closed Down*, IMPRINT (Jan. 4, 2018, 4:48 PM), <https://imprintnews.org/adoption/donaldson-adoption-institute-closed/29163> [https://perma.cc/B5HX-K92W].

²¹ SIEGEL & SMITH, *supra* note 6, at 23.

²² See *id.* at 11-12.

²³ *Id.* at 11.

²⁴ Siegel, *Open Adoption*, *supra* note 13, at 51; see also GOLDBERG, *supra* note 15, at 3.

²⁵ *10 Open Adoption Facts That Might Surprise You*, AM. ADOPTIONS, https://www.americanadoptions.com/pregnant/adoption_facts_then_and_now [https://perma.cc/J9NL-BYU5] (lasted visited Nov. 8, 2020). About 5% of adoption agencies offer only closed adoptions. SIEGEL & SMITH, *supra* note 6, at 22.

²⁶ SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST., SAFEGUARDING THE RIGHTS AND WELL-BEING OF BIRTHPARENTS IN THE ADOPTION PROCESS 4 (Adam Pertman ed., rev. ed. 2007); see also SIEGEL & SMITH, *supra* note 6, at 23.

²⁷ SIEGEL & SMITH, *supra* note 6, at 23.

²⁸ VANDIVERE ET AL., *supra* note 19, at 45.

²⁹ CHILD WELFARE INFO. GATEWAY, U.S. DEP'T HEALTH & HUMAN SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES 2 (2018), <https://www.childwelfare.gov/pubPDFs/cooperative.pdf> [https://perma.cc/Q7ZR-8YWY]

each adoption, birth and adoptive parents can carve out their own desired post-adoption contact parameters.³⁰ As one adoption attorney put it, “[PACAs] help us to give children more of the connections that help them feel known, loved and anchored in their lives.”³¹

However, as discussed in more depth in Part VI, PACAs are not legally enforceable in about half of the states; in the other half, enforcement is difficult, if not impossible.³²

C. *The Power Dynamic in PACAs*

Private domestic adoption highlights the power differential among social classes and particularly among the women in them. Christine Ward Gailey has commented that adoption “brings people from different social classes into coordination or conflict about one of the most intimate arenas in adult life: reproduction.”³³

As one scholar has put it, “Adoption is governed by forces of supply and demand.”³⁴ In the private domestic infant adoption arena, this is particularly true; in the past forty to fifty years, the rate of infant relinquishment, particularly among unmarried, pregnant teens, has taken a “quantum leap” down³⁵ from 8.7% before *Roe v. Wade* to 1% or lower today,³⁶ making “the domestic supply of infants relinquished at birth or within the first month of life and available to be adopted . . . virtually nonexistent.”³⁷ This precipitous change may be attributed to the recent, steady decline in teen pregnancies³⁸ and the availability of legal abortion.³⁹

[hereinafter CHILD WELFARE INFO. GATEWAY, POSTADOPTION CONTACT AGREEMENTS].

³⁰ Leigh Gaddie, Comment, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499, 502 (2009).

³¹ MARLA RUTH ALLISAN, FOUNDATION FOR LOVE: GENERAL PRINCIPLES FOR POST-ADOPTION COMMUNICATION AGREEMENTS 4 (2019), <https://www.umass.edu/ruddchair/sites/default/files/rudd.allisan.pdf> [<https://perma.cc/XBF4-AVRM>].

³² GOLDWATER, *supra* note 7, at 15.

³³ CHRISTINE WARD GAILEY, BLUE-RIBBON BABIES AND LABORS OF LOVE: RACE, CLASS, AND GENDER IN U.S. ADOPTION PRACTICE 3 (2010).

³⁴ Jo Jones, *Adoption Experiences of Women and Men and Demand for Children to Adopt by Women 18-44 Years of Age in the United States, 2002*, 23 VITAL & HEALTH STAT. 1, 17 (2008).

³⁵ Nelwyn B. Moore & J. Kenneth Davidson, Sr., *A Profile of Adoption Placers: Perceptions of Pregnant Teens During the Decision-Making Process*, 6 ADOPTION Q., no. 2, 2008, at 29, 30 (citing Anjani Chandra, Joyce Abma, Penelope Maza & Christine Bachrach, *Adoption, Adoption Seeking, and Relinquishment for Adoption in the United States*, 306 ADVANCE DATA 1, 9 (1999)).

³⁶ VANDIVERE ET AL., *supra* note 19, at 5 (citing Jones, *supra* note 34, at 17).

³⁷ Jones, *supra* note 34, at 16.

³⁸ See Nicholas Zill, *The Changing Face of Adoption in the United States*, INST. FOR FAM. STUD.: BLOG (Aug. 8, 2017), <https://ifstudies.org/blog/the-changing-face-of-adoption-in-the-united-states> [<https://perma.cc/QM8Q-EHS2>].

³⁹ See Marianne Bitler & Madeline Zavodny, *Did Abortion Legalization Reduce the*

Even so, “the demand for adoptable infants remains robust.”⁴⁰ In 2002, about one million women sought to adopt children, creating a significant disparity between infants available for adoption and families looking to adopt.⁴¹ This disparity results in couples “chasing” available infants.⁴²

Because prospective birth parents have, in commercial terms, a desirable “commodity”⁴³ and because the plentiful prospective adoptive parents are largely infertile and therefore unable to grow their families on their own, the adoption relationship begins with a large power differential: the birth parents hold the power to choose an adoptive family and relinquish their infant for adoption, whereas the adoptive parents have almost no choice or say in the transaction and must merely hope that they will be chosen and then, once chosen, that the adoption will proceed as anticipated. This dynamic motivates adoptive parents—and adoption professionals, who earn a living by locating birth parents and providing a smooth experience for the paying adoptive parents—to “sweeten the deal”⁴⁴ and promise almost anything in order to ensure that the adoption is finalized.

After the adoption is complete, the power differential shifts. After finalization, and from that point on, the adoptive parents are the legal parents of the infant.⁴⁵ As such, they have the power—indeed, the constitutional right⁴⁶—

Number of Unwanted Children? Evidence from Adoptions, 34 PERSP. ON SEXUAL & REPROD. HEALTH 25, 32 (2002) (“[O]ur results suggest that abortion legalization led to a decline in the adoption rate and a reduction in the number of ‘unwanted’ children relinquished and available for adoption.”).

⁴⁰ Zill, *supra* note 38 (citing *Key Statistics from the National Survey of Family Growth - A Listing*, NAT’L CTR. FOR HEALTH STAT., https://www.cdc.gov/nchs/nsfg/key_statistics/a.htm [<https://perma.cc/X3Z3-9PLS>] (last updated June 6, 2017)).

⁴¹ Jones, *supra* note 34, at 16.

⁴² Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 314 (2012).

⁴³ See, e.g., Jacqueline Bhabha, *Moving Babies: Globalization, Markets and Transnational Adoption*, FLETCHER F. WORLD AFF., Summer 2004, at 181, 182 (“Babies have become big business, commodities openly exchanged in many marketplaces. This growing market in babies is a relatively new form of commodification of human beings.”); Stacia L. Brown, *The Problem with Saying ‘Black Babies Cost Less to Adopt,’* ATLANTIC (July 1, 2013), <https://www.theatlantic.com/sexes/archive/2013/07/the-problem-with-saying-black-babies-cost-less-to-adopt/277452/> (arguing that discussions framing adoption in economic terms are problematic); David Crary, *As Number of Adoptions Drops, Many US Agencies Face Strains*, ASSOCIATED PRESS (Apr. 30, 2017) <https://apnews.com/b9f77e34d24c4303af5d601d960dd661/As-number-of-adoptions-drops,-many-US-agencies-face-strains#:~:text=In%20the%20absence%20of%20comprehensive,2007%20to%2011%20%2C373%20in%202014> [<https://perma.cc/9D3G-XLTP>].

⁴⁴ MARTHA M. ERTMAN, LOVE’S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES 73 (Michael Bronski ed., 2015).

⁴⁵ See Samuel E. Slater, Note, *Same-Sex Second-Parent Adoptions and the Stepparent Exception: The Difference Between Judicial Decisions and a Proposed Statutory Remedy*, 2 GEO. J. GENDER & L. 107, 107 (2000).

⁴⁶ Joan Heifetz Hollinger & Naomi Cahn, *Forming Families by Law: Adoption in America*

to raise the child as they see fit⁴⁷ and to make decisions about her care.⁴⁸ Inherent to these rights is the power to decide what is in the child's best interest, and those decisions about best interests include contact with, and visits from, others outside the immediate family.⁴⁹ At this point in the adoption journey, the birth parents are no longer legally family; in fact, they are legal strangers to the adoptee.⁵⁰ As one scholar has put it, "Relationships between adoptive parents and birth relatives are not based on an equality of power, but on recognition by birth relatives that adoptive parents have more power and willingness by adoptive parents to share some of this power."⁵¹

But adoption agencies and attorneys often fail to explain the power dynamics to the birth parents; at times, some who have been through the process say, they may act unethically.⁵² A quick look at several prominent agency websites reveals that agencies in the adoption "business" that pay more attention to their bottom line shade or even misstate the role that birth parents are entitled to play in their children's lives after an adoption is finalized.⁵³ American Adoptions, for example, facilitates about 300 private adoptions per year.⁵⁴ Yet, on its website, it falsely states that birth mothers have "rights":

At American Adoptions, 100 percent of prospective birth mothers have the right to choose the amount of openness in the adoptive relationship. Each birth mother will select the family that is open to her desires, and she will

Today, HUM. RTS., Summer 2009, at 16, 16.

⁴⁷ Kristina V. Foehrkolb, Comment, *When the Child's Best Interest Calls for It: Post-Adoption Contact by Court Order in Maryland*, 71 MD. L. REV. 490, 536 (2012).

⁴⁸ See D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 724 (1992).

⁴⁹ Gretchen Miller Wrobel, Harold D. Grotevant, Jerica Berge, Tai Mendenhall & Ruth McRoy, *Contact in Adoption: The Experience of Adoptive Families in the USA*, ADOPTION & FOSTERING, Apr. 2003, at 57, 61 (discussing dynamics involved in adoptive parents determining whether contact with others, including birth parents, is beneficial for adoptee).

⁵⁰ Cynthia E. Cordle, Note, *Open Adoption: The Need for Legislative Action*, 2 VA. J. SOC. POL'Y & L. 275, 289-90 (1995).

⁵¹ Elsbeth Neil, *The Corresponding Experiences of Adoptive Parents and Birth Relatives in Open Adoptions*, in INTERNATIONAL ADVANCES IN ADOPTION RESEARCH FOR PRACTICE 269, 287 (Gretchen Miller Wrobel & Elsbeth Neil eds., 2009) [hereinafter Neil, *Corresponding Experiences*].

⁵² See, e.g., Malinda L. Seymore, *Ethical Blind Spots in Adoption Lawyering*, 54 U. RICH. L. REV. 461, 463 (2020) (noting ethical issues arising from adoption when viewed through several legal lenses, including as gifts or business transactions).

⁵³ See AM. ADOPTIONS, <https://americanadoptions.com> [<https://perma.cc/B9NE-VBB6>] (last visited Nov. 15, 2020); ANGEL ADOPTION, <https://www.angeladoptioninc.com> [<https://perma.cc/H37S-M8JH>] (last visited Nov. 15, 2020) (showing children reuniting with birth parents post adoption).

⁵⁴ AM. ADOPTIONS, *supra* note 53.

always have the chance to get to know those adoptive parents prior to placing her child with them.⁵⁵

On the page titled “If You Give Your Child Up for Adoption, Can You Still Have Contact with Them?,” the website states: “You always get to choose the contact preferences you are most comfortable with. Just know one thing: After ‘giving your child up’ for adoption, you can have contact with them in the way that best suits your needs.”⁵⁶ Under a subheading titled “Can You Give Your Baby Up for Adoption but Still Have Visitation Rights?,” the agency answers: “Your adoption specialist will help you find a family that shares your contact preferences, and they will be responsible for upholding their end of the agreement.”⁵⁷ On a page dedicated to Michigan adoption law, the agency does not mention that PACAs are not enforceable in Michigan, but merely says,

In an open adoption in Michigan, you’ll never have to wonder how your child is doing or hope that everything in their life is going the way you wanted it to. You’ll get to see them and—if you choose—know them. You’ll get to witness firsthand that they are happy, healthy and at peace with their adoption story.⁵⁸

Gladney Center for Adoption, one of the largest agencies in the country with seventy-seven private infant placements in 2019,⁵⁹ states, “You will discuss with the adoptive parents your dreams for your future relationship with your child. Together, you will decide on a plan for periodic visits and communication, whether through letters, photos, calls, or e-mails.”⁶⁰ And Open Adoption and

⁵⁵ *Important Adoption Statistics to Know*, AM. ADOPTIONS, https://www.americanadoptions.com/adoption/adoption_stats [https://perma.cc/95SW-5P7C] (last visited Nov. 15, 2020) (emphasis omitted).

⁵⁶ *If You Give Your Child Up for Adoption, Can You Still Have Contact With Them?*, AM. ADOPTIONS, <https://www.americanadoptions.com/pregnant/will-i-see-my-baby-after-giving-them-up-for-adoption> [https://perma.cc/7SFS-DVQK] (last visited Nov. 15, 2020).

⁵⁷ *Id.* Nowhere does it say that the adoptive family is not only “responsible” but also in total control. While it acknowledges the legal unenforceability of contact agreements, it states that the problem is easily solved by finding the “perfect family”: “However, if you’re wondering, ‘When you give a baby up for adoption, do the mother and the father have the right to see them or have the same right to see them as the adoptive family?’ the answer is a bit more complicated. If you ‘give up’ a child, visitation rights are usually not legally enforceable – but finding the perfect family with an agency like American Adoptions helps ensure that your open adoption communication continues for years to come.” *Id.* (citing CHILD WELFARE INFO. GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 29).

⁵⁸ *Open Adoption in Michigan*, AM. ADOPTIONS, <https://www.americanadoptions.com/michigan-adoption/open-adoption-in-michigan> [https://perma.cc/JN89-VZ44] (last visited Nov. 15, 2020).

⁵⁹ See *Exploring Adoption: Some Common Questions*, GLADNEY CTR. FOR ADOPTION, <https://adoptionsbygladney.com/i-want-to-adopt/domestic-infant/exploring-adoption/common-questions> [https://perma.cc/CJU4-YEE6] (last visited Nov. 15, 2020).

⁶⁰ *Types of Adoptions*, GLADNEY CTR. FOR ADOPTION, <https://pregnancyhotline.org/the-adoption-process/types-of-adoptions> [https://perma.cc/Z2G8-LP67] (last visited Nov. 15, 2020).

Family Services, an agency that arranges forty-one adoptions per year, states on its “Open Adoption: Facts and Myths” page: “Today, most U.S. adoptions are open, with some form of ongoing contact. At OA&FS, you develop a relationship with the adoptive family and create a legally enforceable agreement for ongoing visits with their child. Your role is honored and respected.”⁶¹ In other words, agencies carefully parse language to make it sound like birth parents hold much more power than they do in dictating contact after the adoption is finalized.

Interestingly, it would seem that birth parents are often unaware of their own power before surrender. Marla Allisan notes that “often [birth parents] are so grateful that another family is willing to raise their child as their own that they feel apprehensive about asking for anything, much less [a PACA] . . . [I]t would be important for expectant parent counseling to acknowledge this power differential”⁶² Elsbeth Neil agrees: “Birth mothers were often anxious not to violate these boundaries set by adoptive parents, even when they wanted a greater level of openness.”⁶³ She suggests, “When planning post-adoption contact, and the support for such contact, there is a need to think about the . . . *understanding of power issues* of adoptive parents and birth relatives as individuals Support for contact should . . . focus on the . . . understanding of power issues between adoptive parents and birth relatives.”⁶⁴

That power differential may only evidence itself when adoptive parents flex their proverbial parental rights muscles after an adoption is complete. In a small, informal study⁶⁵ of birth mothers for whom promised contact had not occurred, researchers found that “[t]he universal theme among respondents was that each felt betrayed, having entered into an agreement with prospective adoptive parents to maintain some form of contact with them and/or their children, only to have that contact ultimately blocked.”⁶⁶

⁶¹ *Open Adoption Facts and Myths*, OPEN ADOPTION & FAM. SERVS., <https://www.openadopt.org/considering-adoption-for-your-child/#section-open-adoption-facts-and-myths> (click “MYTH. If I plan an adoption, I’ll never see my child again.”) [<https://perma.cc/T3S8-ETTJ>] (last visited Nov. 8, 2020).

⁶² ALLISAN, *supra* note 31, at 5.

⁶³ Neil, *Corresponding Experiences*, *supra* note 51, at 271.

⁶⁴ *Id.* at 291.

⁶⁵ As the study’s author explained,

the survey [with 67 responses] that we did prior to the [Concerned United Birthmothers] conference [in 2015] was very informal, created only to get a sense of the experiences of a self-selected group of birthparents. It did not lend itself to a formal analysis of any kind, and no effort was made to complete one.

E-mail from Gail Perry, to Lisa A. Tucker, Assoc. Professor of Law, Drexel Univ. Thomas R. Kline Sch. of Law (Jan. 23, 2020, 1:14 PM) (on file with the Boston University Law Review).

⁶⁶ *Id.*

D. *Shifting the PACA Paradigm: A Feminist Approach Rooted in Social Justice*

Certainly, some of the issues with the current PACA scheme derive from the contract paradigm that attorneys and adoption agencies purport to impose upon them. But viewing PACAs as contracts is also problematic when considered from a feminist, social justice-oriented viewpoint.

Surprisingly, few scholars have examined domestic adoption through a feminist lens.⁶⁷ Those who have raise several thematic concerns: first, that the power differential between the women who relinquish infants for adoption and the women who adopt them is exploitative;⁶⁸ second, that birth mothers are said to have a “choice” in relinquishing their babies when their personal and financial circumstances may actually preclude real “choice”;⁶⁹ and third, that the adoption industry has a vested, monetary interest in completed adoptions, resulting in what many call coercive and even fraudulent tactics.⁷⁰

These tactics may include misleading statements about PACA enforceability, but they may also be as simple as referring to a pregnant woman as a birth mother before relinquishment to place her in the mindset that she has already made that choice. In reaction to the Oxygen reality show, *I’m Having Their Baby*, birth mothers and feminists across the country wrote furious blog posts about the implications of the title’s wording. Said one, “When you title a TV show ‘I’m having their baby’ it’s coercive. As long as she is pregnant and until she signs the document surrendering her rights, she is the mother of that child. It’s HER baby, not theirs.”⁷¹ Others agreed.

That title implies that those women really have no choice in the matter. It implies that these women will relinquish their children and “move on” with

⁶⁷ See, e.g., Laura Briggs, *Feminism and Transnational Adoption: Poverty, Precarity, and the Politics of Raising (Other People’s?) Children*, 13 FEMINIST THEORY 81, 81 (2012) (describing conversation at international adoption conference in which male attendee asked “but why have the feminists had nothing to say about adoption?”); Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC’Y REV. 813, 815-16 (2002) (book review) (“While feminists have actively engaged in debates concerning the rights of women to choose abortion, much less attention has been paid to adoption.”); Nancy E. Dowd, *A Feminist Analysis of Adoption*, 107 HARV. L. REV. 913, 914 (1994) (book review).

⁶⁸ See *infra* Section II.C (discussing power differentials existing between adoptive and birth parents due to high demand for few children and adoption agencies stating birth parents have more rights than may be constitutionally granted).

⁶⁹ Dowd, *supra* note 67, at 927.

⁷⁰ See, e.g., Emily Matchar, *Meet the New Anti-Adoption Movement*, NEW REPUBLIC (Sept. 1, 2013), <https://newrepublic.com/article/114505/anti-adoption-movement-next-reproductive-justice-frontier> [<https://perma.cc/V2YF-3PUB>]; Amy Whipple, *The Dubious Ways Parents Are Pressured to Give Up Their Children for Adoption*, VICE (Aug. 13, 2019, 7:00 AM), https://www.vice.com/en_us/article/qvg45m/the-devious-ways-parents-are-pressured-to-give-up-their-children-for-adoption [<https://perma.cc/4GRZ-5972>].

⁷¹ Carlynnne Hershberger, *I Don’t Need Oxygen*, ONE OPTION MEANS NO CHOICE (July 22, 2012, 5:46 AM), <http://oneoptionnochoice.blogspot.com/2012/07/i-dont-need-oxygen.html#comment-form> [<https://perma.cc/F4MB-HMUJ>].

their lives because their babies are with their “real” families. It implies that these parents are just vessels to place these children where they’re really supposed to grow up. It perpetrates every evil adoption stereotype of birth parents in general out there. The title of the show causes shudders to course through my body because of the negative stereotypes associated with the terminology used.⁷²

As Twila Perry has put it,

[A] feminist analysis of adoption must view adoption as more than an individual transaction in which one or two adults legally become the parent or parents of a particular child. . . . Adoption . . . involves issues of hierarchy and power . . . among women. These issues must be retrieved from the background, where they have existed largely in silence, and must be confronted in the open.⁷³

These issues include recognizing as legitimate and appropriate the emotions that birth mothers experience when relinquishing their infants for adoption.⁷⁴ While adoptees’ feelings and adoptive parents’ emotions have been the subject of much research and are treated as important and psychologically vital, birth mothers’ sometimes lifelong feelings of grief and loss have not been given adequate attention.⁷⁵ As one scholar puts it,

It would indeed be comforting to be able to think about adoption as simply a transaction in which one woman transfers her child to another to

⁷² Claudia Corrigan D’Arcy, *The Adoption Lists: Oxygen’s I’m Having Their Baby*, ADOPTION & BIRTH MOTHERS (July 27, 2012), <http://www.adoptionbirthmothers.com/oxygens-having-their-baby/> [<https://perma.cc/6VRT-WJVH>]. The comments on this page were vociferous, with one adding,

I find the title of this show much more loathsome than any other that has gone before it. It reduces expectant mothers as though they are some sort of service for someone else. In reality, they are expectant mothers who are expecting a child that will be born to them. It is then that they must make the decision of whether or not to parent.

Another added,

Let’s start with terminology. No woman gives birth to someone else’s baby. She may choose to place her baby for adoption, but even after placement (or ‘transfer’, as Oxygen calls it), the baby is still her child. And she’s not a ‘would-be mom’. She’s a pregnant woman, and after she gives birth, she is a mother. She remains a mother no matter where her child grows up.

Id.

⁷³ Twila L. Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 106 (1998).

⁷⁴ See, e.g., *id.* at 158 (“[T]he parting of a mother from her child, when she knows that it is permanent, is an extremely painful thing for many women. It may be that we have undervalued this pain when the parting takes place in the context of adoption.”).

⁷⁵ See, e.g., Susan M. Henney, Susan Ayers-Lopez, Ruth G. McRoy & Harold D. Grotevant, *Evolution and Resolution: Birthmothers’ Experience of Grief and Loss at Different Levels of Adoption Openness*, 24 J. SOC. & PERS. RELATIONSHIPS 875, 882 (2007) (“Twelve to 20 years following the placement of the adopted child, most birthmothers in this [study] continued to experience at least some feelings of grief and loss related to the adoption.”).

raise. In adoption thus conceived, the surrendering mother experiences both the sadness of relinquishment and relief that she has probably given her child a better life than she, herself, would have been able to provide. The adopting mother experiences great personal joy at becoming a parent, as well as satisfaction in the knowledge that she has given a home to a child who needs one.⁷⁶

Feminists and legal realists should recognize how rosy and unrealistic this “ideal” adoption usually is. A feminist approach to adoption must decipher how to address the feelings of all members of the adoption triad when they seem to conflict and how to treat the birth mothers’ emotions as equally worthy of attention rather than trying to order the emotions of the triad in some sort of hierarchy—a hierarchy in which adoptive mothers almost always come out on top.

When adoptive parents break PACA promises, this hierarchy is starkly evidenced. Because emotions interfere with rational decision-making⁷⁷ and because childbearing and family formation are inherently emotional experiences, some justify adoptive parents’ decisions unilaterally to cut off contact with the birth parents by invoking their unpleasant feelings—particularly the birth mother’s.⁷⁸ As the argument goes, the adoptive parents need to feel secure in their parenting roles;⁷⁹ having the birth parents involved may take away their autonomy or feelings that they are “real parents.”⁸⁰ The adoptive parents may feel threatened by the birth parents or unable to cope with their emotions. They may feel that adopting an infant is a big enough change without getting even more new “family members” involved. One scholar posits that, in the first days and weeks of parenting a newborn, the adoptive parents may feel less elated and more stressed than they had anticipated; they may not want the birth parents to see them at less than their best.⁸¹

⁷⁶ Perry, *supra* note 73, at 109.

⁷⁷ See *infra* Part II.

⁷⁸ Elsbeth Neil, *Contact After Adoption: The Role of Agencies in Making and Supporting Plans*, ADOPTION & FOSTERING, Apr. 2002, at 25, 25-26; see also, e.g., S.M. v. M.P., 79 N.E.3d 1050, 1053 (Mass. App. Ct. 2017) (“[T]he adoptive mother sent the biological parents a letter purporting to terminate all future visits. As reasons therefor, she stated that . . . the visits were causing ‘undue stress, anxiety and confusion to the children’ . . .”).

⁷⁹ Deborah H. Siegel, *Open Adoption of Infants: Adoptive Parents’ Feelings Seven Years Later*, 48 SOC. WORK 409, 410 (2003) [hereinafter Siegel, *Open Adoption of Infants*].

⁸⁰ Charlene E. Miall & Karen March, *Open Adoption as a Family Form: Community Assessments and Social Support*, 26 J. FAM. ISSUES 380, 395-96 (2005).

⁸¹ Anne Marie McLaughlin, Richard Feehan, Heather Coleman & Karen Reynolds, *Negotiating Openness: A Qualitative Study of Adoptive Parents’ Experience of Contact in Open Adoption*, 30 CANADIAN SOC. WORK REV. 5, 14-16 (2013) (“The stress and tension was captured by one adoptive mother who confessed: ‘[I was] feeling exhausted, feeling frustrated and so this tension existed within me and in part within my husband. We want to do what’s good for us as a couple and as a family and we want to do what’s good for our birth mom and our birth dad and so this very tenuous balance, you know, was there for the first two to three years.’” (alteration in original)).

There is no question that the adoptive parents' feelings are valid. But the question must be asked: In refusing to enforce PACAs, why do we give preference to the adoptive parents' feelings over the feelings of the birth parents, particularly the birth mother, who has recently given birth and is experiencing the emotional, hormonal, and other physical aftermath of that experience? Is the answer, perhaps, that the adoptive parents are more powerful, not only in this adoption relationship but also in society?⁸² Is it that adoption attorneys and agencies are paid by adoptive parents and so the professionals' interests lie in making sure that the adoptive parents' desires are met?⁸³ Is it that the adoptive parents have the legal resources to pursue and defend their position while birth parents, who are typically less advantaged, do not?⁸⁴ And when adoptive parents do not keep the promises that induced the birth parents to relinquish their child, does that perpetuate the power imbalance?

These questions and others that logically flow from them have prompted the reflection that "[a]doption law as an ideological construct encourages underclass biological parents to think of themselves as failures."⁸⁵ The refrain society repeats to them, and to others in their position, sounds the rhythm of failure. If they unintentionally conceive a child, they have failed to consider the

⁸² David Ray Papke, *Family Law for the Underclass: Underscoring Law's Ideological Function*, 42 IND. L. REV. 583, 602 (2009) ("For the most part, 'have-nots' relinquish children to 'haves.' In a majority of adoptions, the 'have-nots' are members of the underclass, and children leave the homes of these biological parents to become children of their middle and upper-class adoptive parents."); Perry, *supra* note 73, at 109 ("[I]n the real world, adoption is not so simple. Not only are the emotional responses of the individuals involved likely to be . . . complex . . . , but adoption also takes place within the context of a wider world, in which factors such as race and class give rise to other troubling issues.").

⁸³ Papke, *supra* note 82, at 604 ("The law's approach to consent from the biological parents is especially revealing. Consents from underclass biological mothers are obtained early and easily, and they are difficult to challenge at a later point in time even if the poor and poorly educated biological mothers consented hastily.").

⁸⁴ *Id.* ("When attorneys file adoption petitions on behalf of their middle and upper-class clients with the appropriate court, the standard proceedings include obtaining consent from biological parents and a judicial consideration of whether the adoption is in the best interests of the child. With regard to both of these matters, those seeking to adopt have substantial advantages. The controlling approaches and standards help adoptions move forward to finalization. American law, in a sense, wants middle and upper-class Americans to be able to adopt the available children of the underclass.").

⁸⁵ *Id.* at 602. *But see* ERTMAN, *supra* note 44, at 73 ("[C]hanges [from closed to open adoption models] reframed the way both law and society viewed adoption. Instead of designating birth moms as sinful or mentally unstable and adoptive parents as rescuers, adoption moved toward moral neutrality.").

consequences of unprotected sex⁸⁶ and failed to act responsibly.⁸⁷ If they are not in a position to raise their infant, they have failed to give the child the life she deserves. If they have chosen adoptive parents for their infant but those parents break their promises for ongoing contact, they have failed to choose the right parents.⁸⁸ If they have understood their PACA rights as a condition precedent to their consent to the adoption, they have failed to be smart or informed enough to make an intelligent agreement. If they go to court to enforce the promise and lose, they have failed to create or continue a relationship with the child. And if they grieve their loss, they have failed to appreciate the likely privileged, likely White, likely better-educated couple who has given their child a better life.

Nothing about this perpetual beat of criticism considers the context in which birth mothers are making adoption decisions.⁸⁹ A feminist, social justice-oriented view of adoption would endeavor to ask why women relinquish children in the first place.⁹⁰

As Perry argues, “A feminist analysis must confront broader issues, such as the relationship between social and economic inequality and the decisions of birth mothers to surrender their children.”⁹¹ Laura Briggs agrees: “Adoption takes place almost exclusively in one direction, . . . from impoverished or otherwise vulnerable women and girls to wealthier, more secure ones.”⁹²

Indeed, as Dowd puts it, “The feminist concern with the role of power and class, especially in connection with the control of reproductive decisions, weighs

⁸⁶ If, indeed, it is even unprotected. Condoms, the only form of birth control commonly available without a prescription, are only 84% effective when used consistently and correctly. Given that many women’s public health clinics have lost or refused funding in the Trump era, it may be more difficult or prohibitively expensive for women to access other types of contraception. *See, e.g., Ariana Eunjung Cha & Sheila Regan, Higher Fees, Longer Waits for Patients at Planned Parenthood*, WASH. POST, Aug. 25, 2019, at A9.

⁸⁷ *See* Patton-Imani, *supra* note 67, at 820 (noting historical background of adoption as institution intended to “hide the ‘sexual deviance’ of young white women who became pregnant outside marriage”).

⁸⁸ SMITH, *supra* note 26, at 5 (“Women who have the highest grief levels are those who placed their children with the understanding that they would have ongoing information, but the arrangement was cut off. Such contact/information is the most important factor in facilitating birthparents’ adjustment, but only 13 states have laws to enforce post-adoption contact agreements in infant adoptions.”).

⁸⁹ *See, e.g.,* Patton-Imani, *supra* note 67, at 815 (“When we explore adoption as the state-regulated transfer of a child from one set of parents to another, the question of where children come from matters. What circumstances in the lives of pregnant women make it difficult or impossible to keep the children they give birth to? Asking such questions makes it clear that adoption is an issue of reproductive politics.” (footnote omitted)).

⁹⁰ *See* Perry, *supra* note 73, at 158.

⁹¹ *Id.* at 106.

⁹² Briggs, *supra* note 67, at 82; *accord* ERTMAN, *supra* note 44, at 71; Papke, *supra* note 82, at 603.

in favor of enhancing the control and range of options that birthparents exercise in the adoption process.”⁹³ She argues,

To ignore class issues is to ignore issues of both power and gender, because women are frequently the sole birthparent in adoption, and their disadvantaged economic status significantly affects their choices. Money pervades adoption, and it does so in all the wrong ways.

The limits within which birthparents operate sharply contrast with choice for adoptive parents.⁹⁴

Several studies have found that an increasing number of adoptive parents promise birth parents ongoing post-adoption contact with the children they relinquish for adoption.⁹⁵ Follow-ups in waves over several years demonstrate, however, that contact tends to decrease as time goes on.⁹⁶

Most adoption professionals state that they hear once or twice a year that adoptive parents have refused to honor a PACA;⁹⁷ given that, as of 2006, about 3000 adoption agencies operate in the United States,⁹⁸ PACA breaches likely happen in hundreds of adoptions.⁹⁹

E. *Research on Adoptees’ Emotional and Psychological Development in Open Adoption*

Even as we recognize as important the power differential between adoptive parents and birth parents, we must acknowledge that the third member of the triad—the adoptee—holds the least power, especially in the early years.

Birth parents want and benefit from contact with the children they have relinquished for adoption.¹⁰⁰ Adoptive parents benefit too, even if they do not think that they will.¹⁰¹ Still, if for the sake of argument we dismiss any potential value to the adults in the adoption triad, the enormous advantage of contact with birth parents for the adoptee cannot be ignored. In fact, open adoption

⁹³ Dowd, *supra* note 67, at 927.

⁹⁴ *Id.* at 928.

⁹⁵ Xiaojia Ge, Misaki N. Natsuaki, David M. Martin, Leslie D. Leve, Jenae M. Neiderhiser, Daniel S. Shaw, Georgette Villareal, Laura Scaramella, John B. Reid & David Reiss, *Bridging the Divide: Openness in Adoption and Postadoption Psychosocial Adjustment Among Birth and Adoptive Parents*, 22 J. FAM. PSYCHOL. 529, 529 (2008); Lynn Von Korff & Harold D. Grotevant, *Contact in Adoption and Adoptive Identity Formation: The Mediating Role of Family Conversation*, 25 J. FAM. PSYCHOL. 393, 394 (2011).

⁹⁶ Thomas M. Crea & Richard P. Barth, *Patterns and Predictors of Adoption Openness and Contact: 14 Years Postadoption*, 58 FAM. REL. 607, 613 (2009) (reporting findings of California Long Range Adoption Study, in which contact between adoptive and birth families decreased from 59% to 39% among study participants over fourteen-year period).

⁹⁷ SIEGEL & SMITH, *supra* note 6, at 33.

⁹⁸ DeLeith Duke Gossett, “[Take from Us Our] Wretched Refuse”: *The Deportation of America’s Adoptees*, 85 U. CIN. L. REV. 33, 59 (2017).

⁹⁹ See SIEGEL & SMITH, *supra* note 6, at 33.

¹⁰⁰ See *supra* text accompanying notes 23-24.

¹⁰¹ See *supra* text accompanying notes 23-24.

professionals and researchers emphasize that the “principal beneficiary” of open adoption “is meant to be the adoptee.”¹⁰²

Numerous studies have shown that adoptees need to know about their birth families.¹⁰³ Understanding why they were placed for adoption is psychologically beneficial,¹⁰⁴ and adoptees are better able to form an “identity” around adoption when their adoptive families talk to them regularly about adoption, especially in the context of contact with birth families.¹⁰⁵ Children in open adoptions may have a higher sense of self-worth, a heightened sense of belonging, and an increased connection to their birth ethnicities and family histories.¹⁰⁶

According to the Minnesota-Texas Adoption Research Project (“MTARP”), the largest longitudinal study of adoption in the United States, “adopted adolescents are more satisfied with the degree of contact in their adoptions when contact with birth parents is occurring.”¹⁰⁷ Most adopted teens in open adoptions report that they desire contact with their birth parents, with many stating that they would like even more than they already have.¹⁰⁸ Some adoptees say that they enjoy having another adult in their lives to support and care for them.¹⁰⁹ Certainly, their interest may vary over the years,¹¹⁰ but the foundation of openness helps adoptees feel supported and less alone.

Adoptees who do not know their birth parents experience many of the same emotions as birth parents who lack contact with their children: loss, grief, and

¹⁰² SIEGEL & SMITH, *supra* note 6, at 26.

¹⁰³ See, e.g., Gretchen Miller Wrobel, Harold D. Grotevant, Diana R. Samek & Lynn Von Korff, *Adoptees’ Curiosity and Information-Seeking About Birth Parents in Emerging Adulthood: Context, Motivation, and Behavior*, 37 INT’L J. BEHAV. DEV. 441, 441 (2013).

¹⁰⁴ Carole Smith & Janette Logan, *Adoptive Parenthood as a ‘Legal Fiction’ – Its Consequences for Direct Post-Adoption Contact*, 14 CHILD & FAM. L.Q. 281, 282 (2002).

¹⁰⁵ Von Korff & Grotevant, *supra* note 95, at 393.

¹⁰⁶ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T HEALTH & HUMAN SERVS., OPEN ADOPTION: COULD OPEN ADOPTION BE THE BEST CHOICE FOR YOU AND YOUR BABY? 5-6, <https://www.childwelfare.gov/pubPDFs/openadoption.pdf> [https://perma.cc/9JX8-ANX6] (last visited Nov. 15, 2020).

¹⁰⁷ Tai J. Mendenhall, Jerica M. Berge, Gretchen M. Wrobel, Harold D. Grotevant & Ruth G. McRoy, *Adolescents’ Satisfaction with Contact in Adoption*, 21 CHILD & ADOLESCENT SOC. WORK J. 175, 186 (2004).

¹⁰⁸ SIEGEL & SMITH, *supra* note 6, at 17 (“The 77 adolescents who had contact with their birthparents were more satisfied with the level of openness than were teens who did not have such contact, and almost all of those in open adoptions who were dissatisfied with their level of contact wanted it to be more frequent with their birthmothers or to meet with other members of their family of origin.”).

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 42. *But see* Attachment “Betrayed Open Adoption Session: Pages from the Flip Chart” to E-mail from Gail Perry, *supra* note 65 (on file with the Boston University Law Review) (stating that allowing child to choose whether to have contact with birth parents gives her too much power and arguing that same preference would be unacceptable if expressed in relation to grandparent or other relative).

anger.¹¹¹ Adoptees who meet or learn the identity of their birth parents later in life—usually as the result of a search—have difficulty with grief resolution.¹¹²

II. THE EFFECTS OF EMOTION ON RATIONAL DECISION-MAKING

[R]esearch in the behavioral sciences shows that people are not particularly rational in assessing their own interests across a variety of deliberative domains. For example, people tend to let their current feelings and needs influence their assessment of how they will feel about what they will want tomorrow, and to discount the value of future rewards.¹¹³

Indeed, psychological studies have shown that emotions influence decision-making and may interfere with logical reasoning.¹¹⁴ In fact “many psychological scientists now assume that emotions are . . . the dominant driver of most meaningful decisions in life.”¹¹⁵ In fact, “integral” emotions, or emotions caused by the decision itself, “can be remarkably influential even in the presence of cognitive information that would suggest alternative courses of action.”¹¹⁶ Once in place, integral emotions can be “difficult to detach . . . [and] can override otherwise rational courses of action.”¹¹⁷

What’s more, disappointment is a particularly motivating emotion; when a subject perceives another to be disappointed, she may be motivated to try to assuage the other person.¹¹⁸ “Although interpersonal emotions can influence others’ behavior . . . , they can also change decisions and behavior as a function of the corresponding or complementary emotional states they evoke in others.”¹¹⁹

In the surrogacy context, in which “a biological, physical, and emotional relationship . . . develops between the surrogate and fetus as well as with the intended parents,”¹²⁰ some scholars have expressed concerns that the intended

¹¹¹ Reagan Curtis & Frances Pearson, *Contact with Birth Parents: Differential Psychological Adjustment for Adults Adopted as Infants*, 10 J. SOC. WORK 347, 348 (2010).

¹¹² *Id.* at 361.

¹¹³ Katharine T. Bartlett, *Objectivity: A Feminist Revisit*, 66 ALA. L. REV. 375, 386-87 (2014).

¹¹⁴ See, e.g., Isabelle Blanchette & Anne Richards, *Reasoning About Emotional and Neutral Materials: Is Logic Affected by Emotion?*, 15 PSYCHOL. SCI. 745, 750 (2004); Nadine Jung, Christina Wranke, Kai Hamburger & Markus Knauff, *How Emotions Affect Logical Reasoning: Evidence from Experiments with Mood-Manipulated Participants, Spider Phobics, and People with Exam Anxiety*, FRONTIERS PSYCHOL., June 2014, at 1, 2.

¹¹⁵ Jennifer S. Lerner, Ye Li, Piercarlo Valdesolo & Karim S. Kassam, *Emotion and Decision Making*, 66 ANN. REV. PSYCHOL. 799, 801 (2015).

¹¹⁶ *Id.* at 803.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 810 (finding that expressing disappointment motivated greater cooperation between participants while expressing anger motivated retaliatory actions).

¹¹⁹ *Id.*

¹²⁰ Pamela Laufer-Ukeles, *Mothering for Money: Regulating Commercial Intimacy*, 88 IND. L.J. 1223, 1226 (2013).

parents' feelings may drive the surrogate's decisions. One scholar has described surrogacy as "an intimate relationship in which attachments and emotional relationships are formed, if not with the fetus directly than with the commissioning parents."¹²¹ She notes that "surrogates are vulnerable to the contractual control and relational desires of the more protected and powerful commissioning parents" and expresses concerns that the "relational, intimate aspects of surrogacy" can be harmful, especially when not acknowledged.¹²²

Others disagree that emotions are particularly influential in the child-bearing context, or at least that they contribute to irrational decision-making. Jody Madeira, a legal expert on infertility and reproductive technologies, argues that "[w]hile infertility is an emotional issue, what is 'emotional' is not inherently 'irrational,' nor do women's emotions—or emotional distress—rob them of the ability to make informed reproductive choices."¹²³ Still, studies of women facing decisions related to unplanned pregnancies show that, at the very least, they are strongly influenced by others' opinions and recommendations.¹²⁴ As one scholar reports,

[A]n unplanned pregnancy can cause considerable psycho-social stress, regardless of a woman's pregnancy-option decision. Participants cited high amounts of anxiety, confusion, and mixed emotions accompanying this phenomenon This finding suggests that others' opinions regarding pregnancy-options may be more influential as a result of these irregular psychological and emotional states. Supporting this assumption, a number of participants reported that they would not have chosen a specific pregnancy-option had it not been for the influence of another.¹²⁵

III. EMOTIONS, UNINTENDED PREGNANCY, AND ADOPTION

Anxiety and depression are highly prevalent in the United States, and women are more prone to anxiety and depression than men.¹²⁶ During pregnancy, most

¹²¹ *Id.* at 1226-27.

¹²² *Id.* at 1227.

¹²³ Jody Lyneé Madeira, *Woman Scorned?: Resurrecting Infertile Women's Decision-Making Autonomy*, 71 MD. L. REV. 339, 380 (2012).

¹²⁴ Jacquelyn A. Harvey-Knowles, *An Examination of Women's Decision-Making Processes During Unplanned Pregnancy*, 13 QUALITATIVE RES. REP. COMM. 80, 85-86 (2012).

¹²⁵ *Id.*

¹²⁶ Borwin Bandelow & Sophie Michaelis, *Epidemiology of Anxiety Disorders in the 21st Century*, 17 DIALOGUES CLINICAL NEUROSCIENCE 327, 334 (2015); Ronald C. Kessler, Maria Petukhova, Nancy A. Sampson, Alan M. Zaslavsky & Hans-Ulrich Wittchen, *Twelve-Month and Lifetime Prevalence and Lifetime Morbid Risk of Anxiety and Mood Disorders in the United States*, 21 INT'L J. METHODS PSYCHIATRIC RES. 169, 181 (2012); Christine Kuehner, *Why Is Depression More Common Among Women Than Among Men?*, 4 LANCET PSYCHIATRY 146, 146 (2017); see also BLUECROSS BLUESHIELD, MAJOR DEPRESSION: THE IMPACT ON OVERALL HEALTH 3 (2018), https://www.bcbs.com/sites/default/files/file-attachments/health-of-america-report/HoA_Major_Depression_Report.pdf [<https://perma.cc/A5XJ-EA43>].

women experience some mixed feelings about the pregnancy, and antenatal depression is quite common.¹²⁷ Still, the rates of anxiety and depression may be highest among women who did not plan their pregnancies, with 40-45% of these women experiencing anxiety and 20% experiencing depressive symptoms.¹²⁸ Women who plan their pregnancies enjoy greater levels of support from their friends, families, and partners than women who do not.¹²⁹

While it is impossible to generalize the emotions of birth mothers, research exposes certain themes. Post-adoption, many birth mothers feel a great sense of loss; for some, the feelings of loss are related to the baby and the parenting experience, but many also feel the loss of close family or friends who disagreed with the adoption decision.¹³⁰ Birth mothers often feel grief, shame, and guilt, sometimes for many years.¹³¹ Some have long-term difficulty with stability and emotional connection.¹³²

Pressure from adoption professionals and family members seems to increase grief and stress levels. In a study of 215 young birth mothers, those who felt pressured to relinquish their children suffered higher levels of grief over a longer period of time, with the grief level remaining constant or increasing over time.¹³³ Pressure to place a child for adoption also resulted in more regret about the decision.¹³⁴

¹²⁷ Fatemeh Ekrami, Sakineh Mohammad-Alizadeh Charandabi, Jalil Babapour Kheiroddin & Mojgan Mirghafourvand, *The Effect of Counselling on Depression and Anxiety of Women with Unplanned Pregnancy: A Randomized Controlled Trial*, 55 COMMUNITY MENTAL HEALTH J. 1047, 1048 (2019).

¹²⁸ *Id.* at 1047.

¹²⁹ Marjorie R. Sable, Carmen C. Washington, Lisa R. Schwartz & Melody Jorgenson, *Social Well-Being in Pregnant Women: Intended Versus Unintended Pregnancies*, J. PSYCHOSOCIAL NURSING, Dec. 2007, at 24, 30 (“The study findings suggest that psychosocial factors may be associated with unintended pregnancy, although we do not know the extent to which these problems existed prior to the unintended conception or whether they occurred as a consequence. A longitudinal, prospective study would be necessary to better understand the relationships among these variables in determining whether women who are lonely, lack social support, and have family relationship problems are more likely to become pregnant unintentionally than are other women.”).

¹³⁰ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T HEALTH & HUM. SERVS., IMPACT OF ADOPTION ON BIRTH PARENTS 2 (2013), <https://njarch.org/wpress/wp-content/uploads/2015/11/Impact-of-Adoption-on-Birth-Parents.pdf> [<https://perma.cc/U3DKMYMF>].

¹³¹ *Id.* at 3.

¹³² 1 Judith Muzzioli Bailey, *Making the Adoption Decision: A Study of Birthmothers* 107 (Jan. 13, 1997) (unpublished Ph.D. dissertation, Union Institute) (on file with the Boston University Law Review).

¹³³ Linda F. Cushman, Debra Kalmuss & Pearla B. Namerow, *Placing an Infant for Adoption: The Experiences of Young Birthmothers*, 38 SOC. WORK 264, 270 (1993) (“[T]he relationships are weak and only approach statistical significance.”).

¹³⁴ *Id.* (noting that pressure was associated “with regret regarding the adoption decision”); see also Michael De Simone, *Birth Mother Loss: Contributing Factors to Unresolved Grief*, 24 CLINICAL SOC. WORK J. 65, 69-70 (1996) (finding perception of coercion and feelings of

Secondary analysis of MTARP interviews with 163 birth mothers—nearly two-thirds of whom were teenagers—revealed that birth mothers continue to think about their children for years after the adoption takes place, and sometimes even for a lifetime.¹³⁵ Birth mothers think about their children not only on special occasions such as birthdays but also on days with no particular significance; Their children remain “psychologically present” for them.¹³⁶

Early in the implementation of open adoption practices, challenges arose mostly from misunderstandings or inconsistent expectations between birth parents and adoptive parents.¹³⁷ After these initial hiccups were ironed out, both birth parents and adoptive parents began to report high satisfaction levels with open adoptions across the contact spectrum.¹³⁸

While adoptive parents have expressed (and often do still express) concerns about birth parents intruding on family privacy and childrearing decisions, longitudinal studies demonstrate that those concerns are largely unfounded. When adoptive parents are dissatisfied with the level of contact with birth parents, it tends to be because they end up wanting more contact, not less.¹³⁹ Most concerns arise at the beginning of the adoption journey but are then alleviated as the open adoption proceeds.¹⁴⁰

Adoptive parents in open adoptions have also communicated worries that contact with the birth parents would lead to attempted adoption revocations.¹⁴¹ In fact, the opposite seems to be true: contact seems to strengthen feelings of permanence rather than diminish them and to help adoptive parents feel more secure in their parenting roles.¹⁴²

guilt correlated with unresolved grief in study with 264 women who had relinquished a child for adoption).

¹³⁵ Deborah Lewis Fravel, Ruth G. McRoy & Harold D. Grotevant, *Birthmother Perceptions of the Psychologically Present Adopted Child: Adoption Openness and Boundary Ambiguity*, 49 FAM. REL. 425, 431 (2000) (“This study demonstrates that birthmothers do *not* forget. When the entire sample is considered, the adopted child is psychologically present in every case, at a level that hovers in the moderate to moderately-high level.”).

¹³⁶ *Id.* at 429, 431.

¹³⁷ SIEGEL & SMITH, *supra* note 6, at 6.

¹³⁸ *Id.* at 16.

¹³⁹ Siegel, *Open Adoption of Infants*, *supra* note 79, at 417.

¹⁴⁰ See, e.g., ALLISAN, *supra* note 31, at 4 (explaining that “[w]hen discussing the idea of post-placement visits with prospective adoptive parents, I have noticed that it can be challenging for families to agree to visits when they have no idea what that experience might be like” and noting that photos of another birth parent or adoptive family gathering settled adoptive parents’ minds); Michael P. Sobol, Kerry J. Daly & E. Kevin Kelloway, *Paths to the Facilitation of Open Adoption*, 49 FAM. REL. 419, 419 (2000) (“Although potential adoptive parents tend to be fearful about open adoption and sceptical [sic] about its benefits, once they have experienced a fully disclosed adoption, they generally became positive about openness practices and less fearful that the birth mother would attempt to regain custody of the child.”) (citations omitted).

¹⁴¹ See LOIS GILMAN, *THE ADOPTION RESOURCE BOOK* 115 (4th ed. 1998).

¹⁴² *Id.* at 115-16; Sobol, *supra* note 140, at 423.

IV. WHY DO WE HAVE PACAS?

In theory, written agreements would not be necessary to maintain openness in an adoption; parties could orally agree to informal arrangements that would develop over time.¹⁴³ Experience has proven, however, that because of the power differential in adoption relationships, informal agreements are not always appropriate. Without an enforceable agreement, adoptive parents would have total discretion about whether and when contact could occur, because post adoption, the adoptive parents legally take the place of the birth parents and are legally entitled to make all decisions for their minor children.¹⁴⁴ A major issue for post-adoption contact is blind trust; without enforceable agreements, birth parents must operate on faith alone and believe adoptive parents' promises with no legal recourse in the event of a promise breach.¹⁴⁵

Many adoption professionals, therefore, recommend that birth parents and adoptive parents execute PACAs before the adoption is finalized.¹⁴⁶ Although adoption professionals acknowledge that PACAs are rarely functionally enforceable, they still recognize the value of explicit assurances that adoptive parents will allow birth parents continued post-adoption contact with their children.¹⁴⁷

¹⁴³ CHILD WELFARE INFO. GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 29, at 2; Barbara L. Atwell, *Nature and Nurture: Revisiting the Infant Adoption Process*, 18 WM. & MARY J. WOMEN & L. 201, 224 (2012).

¹⁴⁴ Atwell, *supra* note 143, at 219.

¹⁴⁵ Malinda L. Seymore, *Sixteen and Pregnant: Minors' Consent in Abortion and Adoption*, 25 YALE J.L. & FEMINISM 99, 151-52 (2013) (discussing unenforceability of PACAs despite widespread advertising and use); Kirsten Widner, Comment, *Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements*, 44 SAN DIEGO L. REV. 355, 371-72 (2007) ("[B]irth parents who select specific adoptive parents for placement of their child in reliance on a promise of visitation should have recourse if that visitation is revoked without good cause.").

¹⁴⁶ See Sophie Mashburn, Comment, *Mediating a Family: The Use of Mediation in the Formation and Enforcement of Post-Adoption Contact Agreements*, 2015 J. DISP. RESOL. 383, 383; see also Atwell, *supra* note 143, at 224 n.140; Martha M. Ertman, *Legal Tenderness: Feminist Perspectives on Contract Law*, 18 YALE J.L. & FEMINISM 545, 566 (2006) (book review) (describing contracts for visitation rights as an important example of "the unique role of contract in skirting majoritarian rules").

¹⁴⁷ See Atwell, *supra* note 143, at 224 ("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. Nonetheless, they provide a vehicle for ongoing communication and contact among all parties to the adoption triad." (footnote omitted)). Some speculate that part of the value of PACAs to adoption professionals is in ensuring that the birth parents will go through with the adoption; studies show that birth parents are more likely to relinquish if they have assurances of post-adoption contact. See, e.g., Mashburn, *supra* note 146, at 385 ("[S]tudies suggest that birthmothers are less hesitant to relinquish a child when they know they will be able to maintain contact."). All parties are advised that the PACA and the adoption agreement are separate and that breach of the PACA is never grounds for revocation of the adoption. In other words, even when birth parents rely

Often, when adoptive and birth parents enter into PACAs, they never experience problems or disagreements.¹⁴⁸

“Contact may continue for years after the adoption is finalized, or the parties may agree over time to go their separate ways. Problems arise when one party [usually the birth parent] wants to continue with the terms of the agreement, but the other party [usually the adoptive parent] no longer finds those terms suitable”

or no longer desires ongoing contact.¹⁴⁹ Issues most often arise when the adoptive parents decide that the arrangement is not in the best interests of the child and/or the adoptive family and unilaterally discontinue visitation.¹⁵⁰

V. EXPLORING THE POWER DIFFERENTIAL: WHO ARE THE PARTIES TO A PACA?

Both the birth parents and adoptive parents negotiate and sign the PACA, but others play an important role. The adoptee is, in contract lingo, an intended third-party beneficiary who is not a party to the PACA itself but is the underlying reason for its existence. Adoption professionals—including agency employees, social workers, and adoption attorneys—play an important role in helping the birth parents and adoptive parents reach an agreement. However, because each of these actors has different interests and, perhaps, different objectives related to the PACA, there is certainly a question about whether PACAs reflect a true meeting of the minds.

A. *Who Experiences Unintended Pregnancy and Unplanned Birth?*

While the rate of unintended¹⁵¹ pregnancy is still “significantly higher” in the United States as compared to other developed countries, the decreased rate of

on the PACA in deciding to surrender their parental rights, they may not rely on the PACA to set aside an adoption in the case of nonperformance. *Id.* at 384 (“Post-adoption contact agreements do not change the effect of adoption finalization, even if they are brought before a court for enforcement.” (footnote omitted)). *But see* Widner, *supra* note 145, at 372 (“Other courts have held that such a misleading promise amounts to coercion, and have invalidated adoptions on this basis.”).

¹⁴⁸ Gaddie, *supra* note 30, at 502.

¹⁴⁹ *Id.* at 502-03; accord Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 15 (1999) (noting that courts and statutes “fail[] to address the critical issue of enforceability of post-adoption contact agreements, that is, the use of the powers of public courts to order compliance with contractual terms when one party balks”).

¹⁵⁰ Gaddie, *supra* note 30, at 502-03; see also McGough & Peltier-Falahawazi, *supra* note 149, at 15.

¹⁵¹ The literature divides unintended pregnancies into “unwanted” and “mistimed.” Katherine A. Ahrens, Marie E. Thoma, Casey E. Copen, Brittini N. Frederiksen, Emily J. Decker & Susan Moskosky, *Unintended Pregnancy and Interpregnancy Interval by Maternal Age, National Survey of Family Growth*, 98 CONTRACEPTION 52, 53 (2018) (“Following conventional categorization for pregnancy intention, unwanted and mistimed pregnancies

unplanned pregnancy in the United States contributes to the shortage of babies available for private adoption here.¹⁵² In 2016, researchers published the results of a multiyear study, noting that, “[a]fter a long period of minimal change, the rate of unintended pregnancy in the United States declined substantially between 2008 and 2011 . . . [to] the lowest level seen in at least three decades.”¹⁵³ In just those three years, the rate dropped 18%.¹⁵⁴ This trend occurred across demographic groups, including age, income, and race.¹⁵⁵

Indeed, as of 2011 (the latest year for which the Guttmacher Institute has compiled statistics), unintended pregnancies occur more frequently in certain demographic groups, including poor women, women who were unmarried but cohabitated with a sexual partner, and women of color.¹⁵⁶ Age plays a factor, with women ages twenty to twenty-four experiencing the highest rates of unintended pregnancy; older women report fewer unintended pregnancies.¹⁵⁷

While women of all races, ethnicities, and socioeconomic statuses experience unintended pregnancy, the rates of births from unintended pregnancies are higher in certain demographics. For example, women below the poverty level are much more likely to give birth to a child they did not plan than women at or above 200% of the poverty level.¹⁵⁸ Latinx women in 2001 experienced rates of forty unintended births per 1000, versus thirty-five for Black women and

were considered unintended pregnancies, with the remaining pregnancies, including those with ‘didn’t care/indifferent’ and ‘don’t know/not sure’ responses (~1.2%), considered intended.” (citation omitted)). However, in addition to “unintended,” the terms “unwanted” and “unplanned” are also used to cover both types of unintended pregnancies. This Article uses the terms interchangeably.

¹⁵² GUTTMACHER INST., FACT SHEET: UNINTENDED PREGNANCY IN THE UNITED STATES 1 (2019), <https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf> [<https://perma.cc/Q7BH-LZ7D>].

¹⁵³ Lawrence B. Finer & Mia R. Zolna, *Declines in Unintended Pregnancy in the United States, 2008–2011*, 374 NEW ENG. J. MED. 843, 850 (2016).

¹⁵⁴ *Id.* at 843.

¹⁵⁵ *Id.*

¹⁵⁶ GUTTMACHER INST., *supra* note 152, at 1 (noting that rate of unintended pregnancy among women with incomes less than 100% of federal poverty level was more than five times the rate among women with incomes of at least 200% of federal poverty level and also noting low rate of unintended pregnancy among college graduates, married women, and White women); *see also* Sable et al., *supra* note 129, at 26 (“Although women with unintended pregnancies come from all social strata, marital status, and age groups, the incidence is highest among women who are young, unmarried, and have low incomes.”).

¹⁵⁷ GUTTMACHER INST., *supra* note 152, at 1.

¹⁵⁸ CASSANDRA LOGAN, EMILY HOLCOMBE, JENNIFER MANLOVE & SUZANNE RYAN, CHILD TRENDS, THE CONSEQUENCES OF UNINTENDED CHILDBEARING: A WHITE PAPER 2-3 (2007), <https://www.childtrends.org/publications/the-consequences-of-unintended-childbearing-a-white-paper> [<https://perma.cc/4VC8-BKXD>] (noting that in 2001, 5.8% of women below poverty level, as compared to about 1.1% of women at or above 200% of poverty level, had unwanted birth); *see also* GUTTMACHER INST., *supra* note 152, at 2 (“In 2011, women with incomes below 100% of poverty had an unplanned birth rate nearly seven times that of women at or above 200% of poverty.”).

seventeen for White women.¹⁵⁹ The Guttmacher Institute's study discovered that "there is evidence that the percentage of the population composed of women and girls with higher rates of unintended pregnancy, such as those who were poor or Hispanic, increased over time, and the decline in the rate of unintended pregnancy occurred despite this increase."¹⁶⁰ Further, "[a]lthough the differences in rates of unintended pregnancy across demographic groups narrowed over time, large disparities were still present in 2011. In particular, poor, black, and Hispanic women and girls continued to have much higher rates of unintended pregnancy than did whites and those with higher incomes."¹⁶¹ While this suggests a closing gap, significant disparities in the rate of unintended pregnancy across demographic groups still remain.

B. *Who Relinquishes Babies for Adoption?*

Carol Sanger, who has written extensively on birth families and birth mothers, puts it concisely: "As a social group, birth mothers have been a largely invisible category of mother."¹⁶² She quotes a birth mother as saying, "There are millions of birthmothers in this country, yet most people will tell you they've never met one."¹⁶³

Because until recently there existed a significant stigma around adoption and unplanned pregnancy, little research exists on birth mothers.¹⁶⁴ Although six out of ten Americans have a personal experience with adoption,¹⁶⁵ we know much more about adoptive parents¹⁶⁶ and adoptees¹⁶⁷ than we do about the birth mothers.¹⁶⁸ While there are an estimated six million birth mothers in the United

¹⁵⁹ LOGAN ET AL., *supra* note 158, at 2-3. *But see* Sable, *supra* note 129, at 26 ("[R]ace is most likely a proxy variable related to poverty and maternal and paternal education.").

¹⁶⁰ Finer & Zolna, *supra* note 153, at 850 (endnotes omitted).

¹⁶¹ *Id.* at 851.

¹⁶² Sanger, *supra* note 42, at 314.

¹⁶³ *Id.* (quoting JAN L. WALDRON, *GIVING AWAY SIMONE: A MEMOIR*, at xvii (1995)).

¹⁶⁴ SMITH, *supra* note 26, at 4.

¹⁶⁵ *US Adoption Statistics*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoption-statistics> [<https://perma.cc/NU5X-8V4Y>] (last visited Nov. 15, 2020) (defining "personal experience" as meaning "that they themselves, a family member, or a close friend was adopted, had adopted a child, or had placed a child for adoption").

¹⁶⁶ Elissa E. Madden, Scott Ryan, Donna M. Aguiniga, Michael Killian & Brenda Romanchik, *The Relationship Between Time and Birth Mother Satisfaction with Relinquishment*, 99 FAMS. SOC'Y 170, 170 (2018).

¹⁶⁷ *Id.* See generally, e.g., Andrew Brown, Cerith S. Waters & Katherine H. Shelton, *A Systematic Review of the School Performance and Behavioural and Emotional Adjustments of Children Adopted from Care*, 41 ADOPTION & FOSTERING 346 (2017); Barbara D. Ingersoll, *Psychiatric Disorders Among Adopted Children: A Review and Commentary*, 1 ADOPTION Q., no. 1, 1997, at 57; Jean Mercer, *Examining Dyadic Developmental Psychotherapy as a Treatment for Adopted and Foster Children: A Review of Research and Theory*, 24 RES. ON SOC. WORK PRAC. 715 (2014).

¹⁶⁸ See SMITH, *supra* note 26, at 4 (noting lack of research on birth parents and presenting the "most thorough, intensive and sophisticated effort to date" to study birth parents); see also

States, most studies and surveys have focused on the adoptive parents, rather than the biological parents.¹⁶⁹ Until recently, few researchers studied birth parent demographics; little research exists about their motivations for choosing adoption or the impact of relinquishment on their lives.¹⁷⁰

We do know that the number of relinquishing birth mothers has decreased sharply over the past fifty to sixty years. For example, between 1952 and 1972, more than 8% of unmarried birth mothers placed their newborns for adoption.¹⁷¹ Between 1982 and 1988, the number dropped significantly—to under 2%.¹⁷² According to the National Survey of Family Growth, “the only national source of data on voluntary relinquishment for adoption,”¹⁷³ it then dropped to less than 1% between 1989 and 1995.¹⁷⁴ In other words, by the early 1990s, 99% of unmarried birth mothers were choosing to parent their children.¹⁷⁵

Research has shown that birth parents today are no longer mostly White and unmarried. Still, White, never-married women experiencing unplanned pregnancies are more likely than Black, never-married women to choose adoption.¹⁷⁶ Birth parents today are racially diverse, and only a fraction are teenagers. The “typical” birth mother today is in her twenties; she is a high school graduate, and this is not her first child.¹⁷⁷

In one small study of women who decided to continue unplanned pregnancies, those who decided to place their children up for adoption did not believe they could parent at that point in time, in part because of financial concerns and life circumstances, including partners whom they considered unfit to parent.¹⁷⁸ However, the “women who selected adoption disclosed strong emotional

MERRY BLOCH JONES, BIRTHMOTHERS: WOMEN WHO HAVE RELINQUISHED BABIES FOR ADOPTION TELL THEIR STORIES (2016).

¹⁶⁹ Madden et al., *supra* note 166, at 170.

¹⁷⁰ SMITH, *supra* note 26, at 4.

¹⁷¹ Kathy S. Stolley, *Statistics on Adoption in the United States*, FUTURE CHILD., Spring 1993, at 26, 32-33 fig.4.

¹⁷² *Id.*

¹⁷³ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T HEALTH & HUMAN SERVS., VOLUNTARY RELINQUISHMENT FOR ADOPTION 1 (2005), https://www.childwelfare.gov/pubPDFs/s_place.pdf [<https://perma.cc/5E46-95NA>] [hereinafter CHILD WELFARE INFO. GATEWAY, VOLUNTARY RELINQUISHMENT]. *But see* Mary O’Leary Wiley, *Adoption Research, Practice, and Societal Trends: Ten Years of Progress*, 72 AM. PSYCHOLOGIST 985, 992 (2017).

¹⁷⁴ Chandra, *supra* note 35, at 9; Rachel Lowry, *A Heart Big Enough for Two: Navigating an Open Adoption*, DESERET NEWS (July 29, 2012, 10:32 PM), <https://www.deseret.com/2012/7/30/20426793/a-heart-big-enough-for-two-navigating-an-open-adoption> [<https://perma.cc/7NFA-DNB5>].

¹⁷⁵ Seymore, *supra* note 52, at 115.

¹⁷⁶ CHILD WELFARE INFO. GATEWAY, VOLUNTARY RELINQUISHMENT, *supra* note 173, at 2.

¹⁷⁷ SMITH, *supra* note 26, at 4.

¹⁷⁸ Tiffany Spierling & Karina M. Shreffler, *Tough Decisions: Exploring Women’s Decisions Following Unintended Pregnancies*, FRONTIERS SOC., May 2018, at 1, 5 (describing study of sixty-eight women and outcomes of their unintended pregnancies).

connections with their baby and/or described strong maternal identities.”¹⁷⁹ They all expressed their desire to keep their baby but noted that adoption served the baby’s best interests at the time.¹⁸⁰ All expressed emotional distress over the decision to relinquish their babies.¹⁸¹

Because teen pregnancy has been a social concern since at least the 1980s, more research is available on teen birth mothers than on other groups.¹⁸² We know that, compared to teens who parent, teens who relinquish have more education and higher incomes,¹⁸³ more educational aspirations,¹⁸⁴ and close family members or romantic partners who encourage adoption.¹⁸⁵ If a teen has some personal experience with adoption, she is more likely to choose that option.¹⁸⁶

Unplanned pregnancies are stressful, particularly because birth parents may not know or understand their rights vis-à-vis open adoption.¹⁸⁷ And, as Sanger explains,

The birth mother, often unmarried, recognizes that the demands of motherhood are too much for her at present; at the same time, she does not want to abort (or perhaps it is too late to do so legally). Adoption is at once sensible, maternal (doing what is best for the baby), and altruistic (making

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ *Id.*

¹⁸² Helina H. Hoyt & Betty L. Broom, *School-Based Teen Pregnancy Prevention Programs: A Review of the Literature*, 18 J. SCH. NURSING 11, 16 (2002); Caroline Moisan, Chloé Baril, Gina Muckle & Richard E. Belanger, *Teen Pregnancy in Inuit Communities – Gaps Still Needed to Be Filled*, 75 INT’L J. CIRCUMPOLAR HEALTH, no. 1, 2016, at 1, 1; see also JULIETA LUGO-GIL, AMANDA LEE, DIVYA VOHRA, KATIE ADAMEK, JOHANNA LACOE & BRIAN GOESLING, U.S. DEP’T OF HEALTH & HUMAN SERVS., UPDATED FINDINGS FROM THE HHS TEEN PREGNANCY PREVENTION EVIDENCE REVIEW: JULY 2014 THROUGH AUGUST 2015, at 1 (2016), https://tppevidencereview.youth.gov/pdfs/Summary_of_findings_2015.pdf [<https://perma.cc/8UHF-A42B>].

¹⁸³ Pearila Brickner Namerow, Debra S. Kalmuss & Linda F. Cushman, *The Determinants of Young Women’s Pregnancy-Resolution Choices*, 3 J. RES. ON ADOLESCENCE 193, 209 (1993) [hereinafter Namerow, Kalmuss & Cushman, *Pregnancy-Resolution Choices*] (finding consistently that “young women from socioeconomically disadvantaged backgrounds are less likely to choose adoption than are those from relatively more advantaged families”).

¹⁸⁴ See, e.g., Pearila Brickner Namerow, Debra Kalmuss & Linda F. Cushman, *The Consequences of Placing Versus Parenting Among Young Unmarried Women*, 25 MARRIAGE & FAM. REV. 175, 193 (1997); see also Steven D. McLaughlin, Diane L. Manninen & Linda D. Wings, *Do Adolescents Who Relinquish Their Children Fare Better or Worse Than Those Who Raise Them?*, 20 FAM. PLAN. PERSP. 25, 25-32 (1988).

¹⁸⁵ Brent C. Miller & Diana D. Coyl, *Adolescent Pregnancy and Childbearing in Relation to Infant Adoption in the United States*, 4 ADOPTION Q., no. 1, 2000, at 3, 16; see also Namerow, Kalmuss & Cushman, *Pregnancy-Resolution Choices*, *supra* note 183, at 198.

¹⁸⁶ Namerow, Kalmuss & Cushman, *Pregnancy-Resolution Choices*, *supra* note 183, at 203.

¹⁸⁷ SMITH, *supra* note 26, at 5.

the adoptive couple very happy). Even so, to reject motherhood and become a “legal stranger” to one’s child, knowing that the child is out there somewhere, is for some women, a hard bargain indeed.¹⁸⁸

The birth mothers Sanger describes may not know about or understand the open adoption options available to them.

Indeed, open adoption is not widely understood by the general public, particularly because much of the information available on the Internet is generated by the adoption industry, which is motivated to paint a rosy picture of the process. Therefore, women experiencing unplanned pregnancies may have inaccurate or incomplete information about open adoption.¹⁸⁹

C. *Who Are the Adoptive Parents?*

Studies show that adoptive parents are quite different from birth parents who relinquish infants in private adoptions.¹⁹⁰ Adoptive parents in domestic infant adoptions are overwhelmingly well educated,¹⁹¹ White,¹⁹² and relatively well

¹⁸⁸ Sanger, *supra* note 42, at 321-22; accord ERTMAN, *supra* note 44, at 81 (invoking term “gift rhetoric” and noting numerous contexts in which baby relinquished for adoption is referred to as “gift” to adoptive parents).

¹⁸⁹ SMITH, *supra* note 26, at 5.

¹⁹⁰ Because many adoption statistics lump all U.S. adoptions together, it is difficult to separate out private domestic *infant* adoptions. ROSE M. KREIDER & DAPHNE A. LOFQUIST, U.S. CENSUS BUREAU, ADOPTED CHILDREN AND STEPCHILDREN: 2010, at 14-19 (2014), <https://census.gov/content/dam/Census/library/publications/2014/demo/p20-572.pdf> [<https://perma.cc/P8FV-5E8C>]. Even when statistics purport to include only private domestic adoptions, many of these include stepparent adoptions and adoptions by other close family members such as grandparents. *Id.*

¹⁹¹ *Id.* at 17-18 (“Twenty-two percent of adopted children under 18 lived with a householder with a bachelor’s degree, compared with 19 percent of biological children and 14 percent of stepchildren. While 17 percent of adopted children under 18 lived with a householder with at least a graduate or professional school degree, just 12 percent of biological children and 6 percent of stepchildren did.”); see also VANDIVERE, MALM & RADEL, *supra* note 19, at 15; Zill, *supra* note 38 (“Fifty-three percent of the adopted kindergartners had mothers who were college graduates or had advanced degrees. This was significantly higher than the 42% of kindergartners living with both birth parents who had college-graduate mothers. And it was much higher than the 15% of kindergartners with college-graduate mothers among those living with single mothers or in stepfamilies, or the 10% of kindergartners with college-graduate mothers among those living with relatives or in foster families.”); Olga Khazan, *The Adoption Paradox*, ATLANTIC (Oct. 9, 2015), <https://www.theatlantic.com/health/archive/2015/10/the-adoption-paradox/409495/> (“Adoptive parents tend to be better-educated and put more effort into raising their kids, as measured by things like eating family meals together, providing the child with books, and getting involved in their schools.” (citation omitted)). But see Jones, *supra* note 34, at 9 (“[E]ducational attainment was not a factor in whether women had adopted children . . .”).

¹⁹² Zill, *supra* note 38; see also VANDIVERE, MALM & RADEL, *supra* note 19, at 9 (“A minority of adopted children are non-Hispanic white (37 percent), compared with a majority of children’s parents (73 percent). Overall, 40 percent of adopted children are of a different race, culture, or ethnicity than both of their adoptive parents (or their sole parent if there is

off.¹⁹³ Adoptive mothers, on average, are seven years older than nonadoptive mothers and often two decades older than birth mothers who relinquish.¹⁹⁴

Women who are unable to conceive because of infertility or surgical sterilization are more likely to adopt than women who can give birth to biological children.¹⁹⁵ As one researcher explains, “This may be explained in part because these women strongly desire a child (biological or unrelated) and, even though they have used infertility services, the difficulty conceiving and/or carrying a pregnancy to full term remains.”¹⁹⁶ The combination of advancing age and infertility seems to be an especially strong indicator of a woman’s desire to adopt.¹⁹⁷ This correlation makes sense, as many upper-middle-class women with careers delay childbearing until a later age, which makes conceiving and carrying a baby to term more difficult.¹⁹⁸

One study characterized adoptive mothers this way: “As would be expected, the group with the highest proportion who had adopted children was women 40–

only one parent in the household).”).

¹⁹³ KREIDER & LOFQUIST, *supra* note 190, at 17 (“[F]or children under 18, adopted children of the householder lived in households that had higher median incomes than those of either stepchildren or biological children. Almost 49 percent of adopted children under 18 lived in households with incomes of \$75,000 or more, compared with 41 percent of stepchildren and 40 percent of biological children. Fifteen percent of adopted children under 18 lived in households with incomes of \$150,000 or more, higher than either stepchildren (9 percent) or biological children (11 percent).” (citation omitted)); *see also id.* at 18–19 (“Among children whose householders were in the labor force, a lower percentage of adopted children (5 percent) lived with householders who were unemployed than stepchildren (8 percent) or biological children (7 percent). One commonly accepted indicator of socioeconomic well-being is whether a family owns its home. While 76 percent of adopted children under 18 years old lived with parents who owned their homes, the corresponding percentage for both biological [children] and stepchildren under 18 was 62 percent and 61 percent, respectively.”); Jones, *supra* note 34, at 9 (“[A] larger percentage of women with incomes between 150 and 299% of the poverty level had adopted compared with women with incomes less than 150% of poverty.”); Zill, *supra* note 38.

¹⁹⁴ KREIDER & LOFQUIST, *supra* note 190, at 17; Zill, *supra* note 38. It is hardly surprising that wealthier people are more likely to adopt privately, given that private adoption is expensive. *See, e.g.,* VANDIVERE, MALM & RADEL, *supra* note 19, at 43 (noting that private adoption costs often range from \$10,000 to \$20,000 and sometimes are even higher).

¹⁹⁵ Jones, *supra* note 34, at 9, 12 (“[W]omen who had not given birth to a child and had used infertility services were 3.5 times more likely to be currently seeking to adopt a child than women who had given birth and had used infertility services and nearly 10 times as likely as women who had never used infertility services.”).

¹⁹⁶ *Id.* at 11.

¹⁹⁷ Chinagozi Ugwu & Colleen Nugent, *Adoption-Related Behaviors Among Women Aged 18–44 in the United States: 2011–2015*, NCHS DATA BRIEF, July 2018, at 1, 5 (“This report shows that women aged 25–34 and 35–44 and women with current fertility problems were more likely than women aged 18–24 and women without fertility problems to be currently seeking to adopt a child.”).

¹⁹⁸ Steven P. Martin, *Diverging Fertility Among U.S. Women Who Delay Childbearing Past Age 30*, 37 DEMOGRAPHY 523, 530 (2000).

44 years of age, who had used infertility services, and who had never given birth. The smallest percentages were for women under 35 years of age who had not used infertility services.”¹⁹⁹

Adoptive fathers differ from adoptive mothers in one key way: they are more likely to adopt if they already have children.²⁰⁰ Some scholars have suggested that the difference may be attributable to stepparent adoptions, in which women with custody of their biological children marry and their new husbands adopt the children.²⁰¹

VI. PACAs, VISITATION, CONTRACTS, AND FAMILY LAW

Adoption always terminates the birth parents’ parental rights and vests them in the adoptive parents.²⁰² Divorce or separation, however, does not terminate the parental rights of either biological parent absent extraordinary circumstances, and both biological parents retain contact rights—known as “visitation” or “parenting time”—until the child reaches the age of majority.

A. *The Law of PACAs*

PACAs do not purport to change the traditional adoption construct, even now that open adoptions are the norm and closed adoptions are largely a “relic”²⁰³ of the past.²⁰⁴ Birth parents in domestic private adoptions still voluntarily surrender their parental rights, and courts grant these rights to the adoptive parents when an adoption is finalized.²⁰⁵

In the early days of open adoption, courts routinely declined to grant birth parents contact with the children they had relinquished for adoption, in part because statutes establishing an adoption regime did not provide for visitation and courts viewed it beyond their power to expand the rights of birth parents beyond what the legislature had already anticipated.²⁰⁶

In the 1980s, however, many courts revisited those decisions and began to reassess whether PACAs should be enforceable.²⁰⁷ Looking to the best interests

¹⁹⁹ Jones, *supra* note 34, at 9.

²⁰⁰ *Id.*

²⁰¹ CARL MAZZA & ARMON R. PERRY, *FATHERHOOD IN AMERICA: SOCIAL WORK PERSPECTIVES ON A CHANGING SOCIETY* 169 (2017).

²⁰² Catherine J. Ross, *Families Without Paradigms: Child Poverty and Out-of-Home Placement in Historical Perspective*, 60 OHIO ST. L.J. 1249, 1252 (1999).

²⁰³ Mashburn, *supra* note 146, at 383.

²⁰⁴ See Sanger, *supra* note 42, at 312.

²⁰⁵ 1 ADOPTION LAW AND PRACTICE § 2.01 (Joan Heifetz Hollinger ed., 2020).

²⁰⁶ Sanger, *supra* note 42, at 315.

²⁰⁷ *Weinschel v. Strople*, 466 A.2d 1301, 1306 (Md. Ct. Spec. App. 1983) (enforcing post-adoption agreement in favor of birth mother’s right to visitation in stepparent adoption); see also *Michaud v. Wawruck*, 551 A.2d 738, 742 (Conn. 1988) (enforcing visitation agreement of birth mother in best interests of four-year-old son); *Groves v. Clark*, 920 P.2d 981, 985 (Mont. 1996) (holding that such post-adoption agreements should be enforced when in best interests of adoptee).

of the child (particularly in noninfant adoptions, when children had an established relationship with their birth parents), some courts began to consider contact requests.²⁰⁸ Still, most courts declined to order contact, even when the parties had executed PACAs prior to the finalization of the adoption.²⁰⁹ As Martha Ertman explains, courts were in the position of deciding whether PACAs were “legally binding contracts, or merely . . . ‘deals.’ If a PACA [was] just a deal, then adoptive parents [could] restrict or forbid communication for good reason, bad reason, or no reason at all.”²¹⁰

And then the legislatures started to chime in by changing the laws on post-adoption contact. Over the past twenty-five years, state legislatures have significantly revised their statutory schemes regarding open adoption and PACAs.²¹¹ In 1999, sixteen states had explicitly authorized PACAs, with some holding simply that such contracts did not violate public policy and were performable;²¹² these states did not, however, provide for enforceability in the case of breach.²¹³ As of 1999, “only a handful of reported cases address[ed] the validity of a [PACA] in an infant adoption by a non-relative.”²¹⁴ Some states “forcefully rejected the attempted reservation of visitation rights,” citing statutory constraints and public policy.²¹⁵

²⁰⁸ Sanger, *supra* note 42, at 316; *see also, e.g.*, Wittig v. Atherton (*In re Custody of Atherton*), 438 N.E.2d 513, 513 (Ill. App. Ct. 1982); Kattermann v. DiPiazza, 376 A.2d 955, 957 (N.J. Super. Ct. App. Div. 1977) (reversing order denying mother visitation rights and instructing lower court to consider best interests of child); Hartman v. Smith, 674 P.2d 176, 177 (Wash. 1984) (en banc) (upholding lower court’s decision to grant visitation rights to father).

²⁰⁹ Sanger, *supra* note 42, at 318.

²¹⁰ ERTMAN, *supra* note 44, at 89.

²¹¹ “Under these statutes, sometimes referred to as cooperative adoption statutes, birth parents relinquish parental rights but maintain certain post-adoption contractual rights,” such as “exchange of letters and photos, phone calls at specified times . . . , and face-to-face contacts.” Madelyn Freundlich, *Open/Cooperative Adoption: The Impact of Current Laws on Negotiated Relinquishments*, in ABA NINTH NATIONAL CONFERENCE ON CHILDREN AND THE LAW 389, 396 (Howard Davidson & Robert Horowitz eds., 1999).

²¹² McGough & Peltier-Falahahwazi, *supra* note 149, at 15.

²¹³ *Id.* (observing that state statutes authorizing PACAs fail to address issues of enforceability where statute only states that PACAs do not violate public policy and are performable).

²¹⁴ *Id.* at 44.

²¹⁵ *Id.* at 44-51; *cf.* IND. CODE § 31-19-16-9 (2020) (“[P]ostadoption contact privileges under this section may not include visitation.”); S.D. CODIFIED LAWS § 25-6-17 (2020) (asserting that birth parents “retain no rights or privileges to have visitation or other post-adoption contact” with their child except for cases involving stepparent presently married to biological parent or “voluntary termination”); TENN. CODE ANN. § 36-1-121(f) (2020) (“A final order of adoption of a child cannot require the adoptive parent to permit visitation by any other person”); VT. STAT. ANN. tit. 15A, § 1-109 (2019) (declaring unenforceability of “any order or agreement for visitation” following final adoption decree, except for adoption of minor stepchild by stepparent or statutorily compliant PACA).

But the tide still continued to turn—somewhat. By 2006, thirteen states permitted birth parents and adoptive parents of infants to enter into PACAs.²¹⁶ By 2009, twenty-four states specified that written PACAs were enforceable; other state statutes allowed PACAs but left it to the adoptive parents to decide whether to honor the agreements.²¹⁷ By 2011, twenty-six states and the District of Columbia had passed legislation allowing PACAs and deeming them enforceable;²¹⁸ seven years later, the number had risen to twenty-nine.²¹⁹

Currently, thirty-two states have laws that govern PACAs,²²⁰ but only twenty-five state statutes specify that PACAs are enforceable.²²¹ Most state statutes authorizing PACAs make the agreement subject to judicial approval and modification.²²² States that recognize PACAs are generally neutral as to whether such an agreement *should* be executed.²²³

Some states' statutes are quite comprehensive, detailing what provisions a PACA may cover, who may contact the adoptee,²²⁴ what types of contact may be included in the agreement, and what remedies are available in the case of breach.²²⁵ Other states merely mention PACAs, leaving interpretation and

²¹⁶ SMITH, *supra* note 26, at 6.

²¹⁷ Erika Harrison, *Benefits of Post Adoption Contact Agreements*, CHILD. LEGAL RTS. J., Spring 2011, at 61, 62 (noting that Missouri statute “leaves contact to the discretion of the adoptive parents” and Ohio statute refers to PACAs as “non-binding agreements”).

²¹⁸ Sanger, *supra* note 42, at 319.

²¹⁹ Compare CHILD WELFARE INFO. GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 29, at 2 (reporting that as of August 2018, statutes in approximately twenty-nine states and District of Columbia permit enforceable written agreements for post-adoption contact that “specify the type and frequency of contact”), with CHILD WELFARE INFO. GATEWAY, U.S. DEP’T OF HEALTH & HUMAN SERVS., OPENNESS IN ADOPTION: BUILDING RELATIONSHIPS BETWEEN ADOPTIVE AND BIRTH FAMILIES 8, (2013), <http://centerforchildwelfare.org/kb/AdoptPub/openessinadopt2013.pdf> [<https://perma.cc/BFZ4-H76J>] (stating that as of January 2013, number of states with laws permitting enforceable PACAs had not risen above twenty-six).

²²⁰ GOLDWATER, *supra* note 7, at 15.

²²¹ *Id.*

²²² See, e.g., ARIZ. REV. STAT. ANN. § 8-116.01 (2020).

²²³ Atwell, *supra* note 143, at 223-24.

²²⁴ All statutes consider the birth parents among those who can seek visitation, but some incorporate additional birth relatives, such as siblings, grandparents, aunts, and uncles. Sanger, *supra* note 42, at 319. While beyond the scope of this Article, some statutes require that adoptees over the age of twelve consent to the PACA terms. See, e.g., CAL. FAM. CODE § 8616.5(d), (h)(1) (West 2020); CONN. GEN. STAT. § 45a-715(h)-(i) (2020); UTAH CODE ANN. § 78B-6-146(3)(c) (LexisNexis 2020).

²²⁵ See, e.g., CAL. FAM. CODE § 8616.5 (limiting terms of enforceable PACAs to provisions for visitation, future contact, and/or sharing of information regarding child); CAL. WELF. & INST. CODE § 366.29 (West 2020) (permitting provision for post-adoption sibling contact in final adoption order); IND. CODE § 31-19-16-9(2) (2019); 23 PA. CONS. STAT. § 2733(a) (2020) (permitting agreements for continued contact or communication between child and birth relative or adoptive parent and birth relative).

application almost entirely up to the courts.²²⁶ Most statutes authorizing PACAs require the agreements to be in writing and approved by the court, often—but not always²²⁷—by being incorporated into the final order of adoption.²²⁸

When adoptive parents refuse to allow contact even when a PACA is in place, birth parents may sue, asking the court to compel performance of the PACA or even to set aside the adoption on grounds of fraud.²²⁹ While no state statute provides for rescission of the adoption as a remedy for breach,²³⁰ some do authorize a court to enforce the PACA as long as certain requirements are met.²³¹

Most importantly, in states that allow for judicial discretion in PACA enforcement, some courts still determine whether visitation is in the child's best interest.²³² Such courts often base their decisions on the "emotional bonding and other circumstances of the actual personal relationship of the child and the biological parent, [and] not [o]n the rights of the biological parent nor the legal consequences of their natural relation."²³³ Still, courts across the country have debated just which factors they should consider when deciding whether visitation is in the best interests of the child; these factors are often defined by statute.²³⁴ For example, in *In re Adoption of Vito*,²³⁵ the Massachusetts Supreme

²²⁶ See, e.g., W. VA. CODE § 48-22-704 (2020) (conferring jurisdiction on court to hear petition for enforcement of agreement for post-adoption contact or communication).

²²⁷ Gaddie, *supra* note 30, at 503-04.

²²⁸ Sanger, *supra* note 42, at 319.

²²⁹ See *id.* at 323, 326-28 (discussing suit brought by birth mother alleging consent to posttermination agreement with child's foster parents was product of fraud, duress, and coercion); see also, e.g., *In re I.B.*, 142 So. 3d 919, 921-23 (Fla. Dist. Ct. App. 2014) (per curiam) (finding insufficient evidence for duress claim where birth mother testified that she only signed consent to adoption due to alleged promise to see child again); *Topel v. Miles (In re Adoption of Topel)*, 571 N.E.2d 1295, 1297 (Ind. Ct. App. 1991) (recounting birth father's request for withdrawal of consent to adoption where adoptive parents refused to honor visitation agreement); *Queen v. Goeddertz*, 48 S.W.3d 928, 932 (Tex. App. 2001) (reversing grant of adoption where birth father's execution of affidavit relinquishing parental rights was involuntary because it was completed in exchange for unenforceable promise of visitation rights).

²³⁰ See, e.g., IND. CODE § 31-19-16-8 (2019); TENN. CODE ANN. § 36-1-145(h) to (i) (2020).

²³¹ See, e.g., Mashburn, *supra* note 146, at 388; Kulsoom K. Ijaz, Note, *Shifting Paradigms: Promoting an American Adoption Campaign for Afghan Children*, 42 SYRACUSE J. INT'L L. & COM. 233, 263 (2014); see also, e.g., MASS. GEN. LAWS ch. 210, § 6D (2020) ("A party to a court-approved agreement for post-adoption contact or communication may seek to enforce the agreement by commencing a civil action for specific performance.").

²³² Laurie A. Ames, *Open Adoptions: Truth and Consequences*, 16 L. & PSYCHOL. REV. 137, 141 (1992); Harrison, *supra* note 217, at 62; Sanger, *supra* note 42, at 320.

²³³ See, e.g., *In re Adoption of Vito*, 728 N.E.2d 292, 302 (Mass. 2000).

²³⁴ See Danny R. Veilleux, Annotation, *Postadoption Visitation by Natural Parent*, 78 A.L.R.4th 218 (1990) (discussing cases where state courts considered varying factors related to child's interest to determine whether to enforce post-adoption visitation agreement).

²³⁵ 728 N.E.2d 292 (Mass. 2000).

Judicial Court applied several statutory factors relevant to determining whether enforcing a PACA was appropriate,²³⁶ including the child's age, whether contact would interfere with the potential adoption arrangements, whether there existed a strong bond between the biological parent and the child, and whether there was an established history of visitation.²³⁷ Other courts have considered a child's "psychological need[] . . . to know his ancestral, religious, ethnic and cultural background."²³⁸

B. *The Law of Visitation*

When one biological parent has primary physical custody²³⁹ of a minor child, the other biological parent is presumed to have visitation rights.²⁴⁰ Many states consider visitation to be a right of both the noncustodial parent and the child.²⁴¹

²³⁶ See *id.* at 301 (citing MASS. GEN. LAWS ch. 210, §§ 3(a)-(b), 5A, 5B).

²³⁷ See *id.* at 296-98, 301, 303, 306 (finding post-adoption contact unwarranted where evidence showed absence of strong bond between eight-year-old child and birth mother, minimal history of visitation, and potential for negative impact on child if separated from foster family).

²³⁸ See *In re S.A.H.*, 537 N.W.2d 1, 7 (S.D. 1995) (finding child's psychological needs and potential impact of open adoption on child's integration with adoptive family relevant to determination of child's best interests), *superseded by statute*, S.D. CODIFIED LAWS § 25-6-17 (2020); see also Veilleux, *supra* note 234, at 19 (discussing court's holding in *In re S.A.H.*). Scholars have also noted that attorneys provided "much of the original impetus for openness" in adoptions. Kathleen Silber, *Open Adoption History*, INDEP. ADOPTION CTR., <http://web.archive.org/web/20120504043219/http://www.adoptionhelp.org/open-adoption/history> (last visited Nov. 15, 2020).

²³⁹ "Family law. The right to have the child live with the person awarded custody by the court. — Also termed *residential custody*." *Physical Custody*, BLACK'S LAW DICTIONARY (11th ed. 2019).

²⁴⁰ See, e.g., *Moorman v. Andrews*, 114 N.E.3d 859, 864 (Ind. Ct. App. 2018) ("[T]he rights of parents to visit their children is a precious privilege that should be enjoyed by noncustodial parents.' '[N]ot only does a noncustodial parent have a presumed right of parenting time, but the child has the correlative right to receive parenting time from the noncustodial parent because it is presumed to be in the child's best interest.' Thus, a noncustodial parent is 'generally entitled to reasonable visitation rights.'" (first quoting *Duncan v. Duncan*, 843 N.E.2d 966, 969 (Ind. Ct. App. 2006), *trans. denied*, 855 N.E.2d 1012 (Ind. 2006) (unpublished table decision); then quoting *Perkinson v. Perkinson*, 989 N.E.2d 758, 764 (Ind. 2013); and then quoting *Perkinson*, 989 N.E.2d at 762)); *Hendrickson v. Hendrickson*, 603 N.W.2d 896, 902 (N.D. 2000) ("We have stated visitation between a non-custodial parent and a child is presumed to be in the child's best interests and that it is not merely a privilege of the non-custodial parent, but a right of the child. Thus, a court should only withhold visitation when it is 'likely to endanger the child's physical or emotional health.'" (citation omitted) (quoting *Blotske v. Leidholm*, 487 N.W.2d 607, 610 (N.D. 1992))); *Petry v. Pettry*, 486 N.E.2d 213, 215 (Ohio Ct. App. 1984) ("A noncustodial parent's right of visitation with his children is a natural right. As such, the right of visitation, albeit not absolute, should be denied only under extraordinary circumstances." (citations omitted)).

²⁴¹ See, e.g., *People v. Warren*, 671 N.E.2d 700, 708 (Ill. 1996); *Maxwell v. LeBlanc*, 434 So. 2d 375, 376 (La. 1983); *Ibrahim v. Ibrahim*, 825 S.W.2d 391, 396 (Mo. Ct. App. 1992);

Visitation is considered important because contact with both parents benefits parents and children.²⁴² Still, “the primary consideration in establishing the visitation rights accorded [to] a noncustodial parent is always the best interests and welfare of the child.”²⁴³ “Best interests” are often defined by statute but most often include: “[t]he emotional ties and relationships between the child and his or her parents, siblings, family and household members, or other caregivers”; “[t]he capacity of the parents to provide a safe home and adequate food, clothing, and medical care”; “[t]he mental and physical health needs of the child”; “[t]he mental and physical health of the parents”; and “[t]he presence of domestic violence in the home.”²⁴⁴

Visitation rights for biological, noncustodial parents are only restricted, or in rare cases denied, when “visitation is likely to endanger the child’s physical or emotional health,”²⁴⁵ such as when the noncustodial parent’s conduct “either previously harmed or currently endangers”²⁴⁶ the child. A parent’s conduct when the child is not present is almost always irrelevant to a visitation

Parris v. Wright (*In re Parris*), 96 N.Y.S.3d 60, 62 (App. Div. 2019).

²⁴² See, e.g., *Weiss v. Weiss*, 418 N.E.2d 377, 380 (N.Y. 1981) (“How valuable the mature guiding hand and love of a second parent may be to a child is taught by life itself. This is surely so when the parent-child relationship is carefully nurtured by a regular, frequent and welcomed visitation . . .”), *overruled on other grounds*, *Tropea v. Tropea*, 665 N.E.2d 145, 150 (N.Y. 1996).

²⁴³ *S.O. v. K.B.*, 137 So. 3d 348, 355 (Ala. Civ. App. 2013) (per curiam) (emphasis omitted) (quoting *Carr v. Broyles*, 652 So. 2d 299, 303 (Ala. Civ. App. 1994)); see also *Mashburn v. Mashburn*, 836 S.E.2d 131, 145 (Ga. Ct. App. 2019). But see *Adams v. Rice*, 196 So. 3d 1086, 1089 (Miss. Ct. App. 2016) (“The [court]’s paramount concern must be the best interest of the child, but the [court] also should always be attentive to the rights of the noncustodial parent, recognizing the need to maintain a healthy, loving relationship between the child and the noncustodial parent.”).

²⁴⁴ CHILD WELFARE INFO. GATEWAY, U.S. DEP’T HEALTH & HUM. SERVS., DETERMINING THE BEST INTERESTS OF THE CHILD 2-3 (2016), https://www.childwelfare.gov/pubPDFs/best_interest.pdf [<https://perma.cc/A39Y-9PTB>].

²⁴⁵ 59 AM. JUR. 2D *Parent and Child* § 36 (2020); accord, e.g., *Weiss*, 418 N.E.2d at 380 (“[I]n initially prescribing or approving custodial arrangements, absent exceptional circumstances, such as those in which it would be inimical to the welfare of the child or where a parent in some manner has forfeited his or her right to such access, appropriate provision for visitation or other access by the noncustodial parent follows almost as a matter of course.” (citations omitted)).

²⁴⁶ *Kraft v. Kraft*, 29 A.3d 246 (Del. 2011) (unpublished table decision) (upholding determination to continue visitation arrangement where evidence did not show that parent’s “patronage of prostitutes” currently endangered child).

consideration.²⁴⁷ The standard—usually established by statute²⁴⁸—is high.²⁴⁹ Because supervised visitation is an option, even incarceration;²⁵⁰ current alcohol

²⁴⁷ See, e.g., *Davis v. Lopez-Davis*, 162 So. 3d 19, 20-21 (Fla. Dist. Ct. App. 2014) (noting that “privilege of visiting the minor children of the parties to a divorce proceeding should never be denied either parent so long as he or she conducts himself or herself, while in the presence of such children, in a manner which will not adversely affect the morals or welfare of such progeny” (quoting *Yandell v. Yandell*, 39 So. 2d 554, 555 (Fla. 1949))). Even in the case of current danger to the child, however, courts may find that supervised visitation can adequately address safety concerns. See, e.g., MD. CODE ANN., FAM. LAW § 9-101(b) (LexisNexis 2020) (granting court discretion to approve “supervised visitation arrangement” even where likelihood of child abuse or neglect exists, so long as agreement “assures the safety and the physiological, psychological, and emotional well-being of the child”).

²⁴⁸ See, e.g., ARIZ. REV. STAT. ANN. § 25-403.03(F) (2020) (“If the court finds that a parent has committed an act of domestic violence, that parent has the burden of proving to the court’s satisfaction that parenting time will not endanger the child or significantly impair the child’s emotional development. If the parent meets this burden to the court’s satisfaction, the court shall place conditions on parenting time that best protect the child and the other parent from further harm.”); LA. CIV. CODE ANN. art. 137(A) (2019) (denying visitation and contact rights to parent who committed felony rape if child was conceived through commission of such rape); MINN. STAT. § 518.179 (2019) (“[I]f a person seeking child custody or parenting time has been convicted of a crime described in subdivision 2, the person seeking custody or parenting time has the burden to prove that custody or parenting time by that person is in the best interests of the child”); N.J. STAT. ANN. § 9:2-4.1 (West 2020) (stating that court shall not award visitation rights to any person “convicted of sexual assault” or endangering child’s welfare “except upon a showing by clear and convincing evidence that it is in the best interest of the child”); WIS. STAT. § 767.44(2) (2020) (permitting court to grant visitation to parent convicted of intentional homicide of child’s other parent if court determines visitation “would be in the best interests of the child”).

²⁴⁹ See, e.g., *Galbreath v. Braley*, 733 S.E.2d 412, 415 (Ga. Ct. App. 2012) (“Georgia courts ‘will not deny a parent all visitation rights absent exceptional circumstances in which there is reasonable probative evidence that the parent is morally unfit.’” (quoting *Mitchum v. Manning*, 698 S.E.2d 360, 361 (Ga. Ct. App. 2010))); *E.B. v. C. (In re Parentage of K.E.B.)*, 14 N.E.3d 1259, 1265 (Ill. App. Ct. 2014) (“Sound public policy encourages the maintenance of the parent-child relationship, and only in extreme circumstances may courts deprive a parent of visitation.” (quoting *In re Marriage of Campbell*, 633 N.E.2d 797, 804 (Ill. App. Ct. 1993))); *In re Mary Kathryn T.*, 629 A.2d 988, 995 (Pa. Super. Ct. 1993) (per curiam) (“It is clear that natural parents, even when they have lost custody of their children, should be awarded visitation”); *Brandon v. Rudisel*, 586 S.W.3d 94, 107 (Tex. App. 2019) (“Even when courts strip parents of important parental rights, the law permits courts to order a complete denial of possession of and access to a parent’s children only in extreme circumstances.”).

²⁵⁰ See, e.g., Benjamin Guthrie Stewart, Comment, *When Should a Court Order Visitation Between a Child and an Incarcerated Parent?*, 9 U. CHI. L. SCH. ROUNDTABLE 165, 168 (2002).

or drug use;²⁵¹ past alcohol,²⁵² drug,²⁵³ or sex²⁵⁴ addiction; current patronage of prostitutes;²⁵⁵ verbal abuse toward the other parent;²⁵⁶ and manipulation²⁵⁷ do not necessitate a court's denial of all visitation rights. Generally, only true neglect or abuse of the child is sufficient to deny all visitation.²⁵⁸

Biological parents may enter into a visitation agreement they negotiate themselves or through their attorneys,²⁵⁹ or they may choose to have a mediator

²⁵¹ See, e.g., *Lamb v. Lamb*, 707 N.W.2d 423, 437-38 (Neb. Ct. App. 2005) (holding that "district court did not abuse its discretion in determining that granting [the mother] custody of [the child] was in [the child]'s best interests" despite mother's husband being a "practicing alcoholic"); Nanette Reed, Comment, *Sacrificing the Child's Best Interests: Judicial Custody Awards & Parental Alcohol Abuse*, 35 SW. U. L. REV. 111, 116 (2005) (emphasizing that state legislatures have not specified "exact weight" courts should give to "parent's alcohol abuse problem"). But see *Bishop v. Baumgartner*, 738 S.E.2d 604, 606 (Ga. 2013) (affirming trial court's finding of father's excessive use of alcohol combined with lack of interest in child sufficient to deny visitation).

²⁵² See, e.g., *Wilson v. Ibarra*, 718 N.W.2d 568, 570, 573 (N.D. 2006) (holding that district court's findings failed to demonstrate how father's past problems, including past alcohol abuse, "would result in physical or emotional harm to the child at this time").

²⁵³ See, e.g., *Wagner v. Wagner (In re Wagner)*, 2 N.Y.S.3d 685, 687 (App. Div. 2015) (upholding visitation award to father with past drug abuse problems); *Schiff v. Schiff*, 611 N.W.2d 191, 196 (N.D. 2000).

²⁵⁴ See, e.g., *Kraft v. Kraft*, 29 A.3d 246 (Del. 2011) (unpublished table opinion) ("The Family Court's conclusion that Father's alleged sex addiction did not, standing alone, justify modifying the visitation order is logical, as it is based on the absence of a causal link between the alleged addiction and any danger to [the child].").

²⁵⁵ See, e.g., *id.* ("The court examined specifically whether the Father's admitted patronage of prostitutes . . . either previously harmed or currently endangers [the child], and found no evidence to so indicate.").

²⁵⁶ See, e.g., *Perkinson v. Perkinson*, 989 N.E.2d 758, 766 (Ind. 2013) (determining that mother's testimony that father was verbally abusive to her eight years prior was "an insufficient basis" upon which "to deny parenting time to [f]ather"); *Qi v. Yang*, No. 2012-CA-24, 2012 WL 5989711, at *2-3 (Ohio Ct. App. Nov. 30, 2012) (upholding award of parenting time to father despite evidence of "[f]ather's use of derogatory language about [m]other").

²⁵⁷ See, e.g., *Qi*, 2012 WL 5989711, at *2-3 (finding evidence of father's manipulation insufficient for reversal of grant of parental time to father).

²⁵⁸ 4 KATHERYN D. KATZ, *CHILD CUSTODY AND VISITATION* § 31.02 (rev. ed. 2020); see also, e.g., MD. CODE ANN., FAM. LAW § 9-101(b) (LexisNexis 2020) ("Unless the court specifically finds that there is no likelihood of further child abuse or neglect by the party, the court shall deny custody or visitation rights to that party . . ."); TEX. FAM. CODE ANN. § 153.004(b) (West 2019) ("The court may not appoint joint managing conservators if credible evidence is presented of a history or pattern of past or present child neglect, or physical or sexual abuse by one parent directed against the other parent, a spouse, or a child . . .").

²⁵⁹ 2 JOAN H. HOLLINGER, *ADOPTION LAW AND PRACTICE* § 13.02 (2020); Amy L. Doherty, *A Look at Open Adoption*, 11 J. CONTEMP. LEGAL ISSUES 591, 592 (2000).

or court devise a visitation plan.²⁶⁰ Even when the agreement or court order is in writing, however, it is always subject to modification, whether because the parties' desires or circumstances have changed or because concerns have arisen that might warrant supervised or discontinued visitation.²⁶¹

C. *The Role of Contracts in Family Law*

Numerous scholars have considered the interrelationship between contract and family law. Brian Bix notes that, "One can speak of premarital agreements, marital agreements, separation agreements, open adoption agreements, co-parenting agreements, [and] agreements on the disposition of frozen embryos."²⁶²

Bix posits that "domestic relations remains an area in which private ordering is viewed with significant suspicion,"²⁶³ and, in commenting on open adoption contracts, that market conditions give rise to the execution (if not always the enforcement) of these contracts.²⁶⁴ As Bix explains,

[F]ar more [prospective] parents are seeking to adopt than there are healthy babies and infants available for adoption: creating a situation where (1) a [birth] parent considering putting his or her child up for adoption is in a position to set terms (e.g., of ongoing contact) that the adopting parents might not otherwise prefer; and (2) there is an interest in creating options (like enforceable open adoption) that "free up" more children for adoption.²⁶⁵

The Children's Bureau, an agency within the Department for Health and Human Services, agrees.²⁶⁶

Certainly, one issue with viewing a family law agreement as a contract is context. Whereas commercial contracts for the sale of goods or provision of services are generally "arm's length,"²⁶⁷ with monetary damages available for

²⁶⁰ HOLLINGER, *supra* note 259.

²⁶¹ *Id.*

²⁶² Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249, 249 (2010).

²⁶³ *Id.* at 285; *see also* ERTMAN, *supra* note 44, at 67 ("Contractual adoption sounds like an oxymoron . . .").

²⁶⁴ Bix, *supra* note 262, at 275.

²⁶⁵ *Id.*

²⁶⁶ CHILD WELFARE INFO. GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 29, at 2 ("Birth parents who participate in selecting the adoptive family may have a wide range of adoptive parent choices and may base their selection on the willingness of the adoptive parent(s) to allow postadoption contact."). Claudia D'Arcy, a birth mother, also agrees: "I think if open agreements were known to hold more weight than the paper they are written on, then we would see less lies and people would be apt to be more honest about what they would be willing to do." Claudia Corrigan D'Arcy, *15 Solutions to Fix Adoption in America*, ADOPTION & BIRTH MOTHERS (Jan. 31, 2013), <http://www.adoptionbirthmothers.com/the-solutions-2/> [https://perma.cc/PHE7-YYDG].

²⁶⁷ Alexander M. Weaver, Note, *Convergence Through the Crisis: State Aid*

breach,²⁶⁸ family law contracts are anything but. In fact, they involve intimate, familiar associations between people with established or emerging relationships. This key difference between traditional and family law contracts raises the question of whether “contract” is in fact the correct word for agreements among family members.²⁶⁹

Sanger addresses that question in noting that, when open adoption and other paths to parenthood became widespread, “new contractual arrangements reflect[ed] new family structures.”²⁷⁰ She compares PACAs to prenuptial agreements.

One might say that [PACAs] are to adoption what prenuptial agreements are to marriage: a species of contract that facilitate the primary relationship—whether wedlock or parenthood—and that make the acquisition of relatives—whether spouses or children—possible. If the adoptive parents renege, the birth mother can seek specific performance, unless, of course, the court finds visitation is not in the child’s best interest.²⁷¹

Sanger notes that PACAs “may not be skimmed milk but neither, on closer inspection, are they always cream.”²⁷²

In fact, however, PACAs and other contracts designed for family formation are perhaps the “most relational of agreements—the creation of a new family and the dismantling of an existing one.”²⁷³ But some scholars see this very construct as problematic because it may exploit poor women and women of color;²⁷⁴ they ask, for example: “Given the deep structural inequities that remain entrenched in United States law and society, why should we allow and spend resources regulating arrangements that increase the reproductive capacity of affluent, most often white, people when the reproductive health, equality, and self-determination of people of color remains at risk?”²⁷⁵ Others agree, querying:

Modernization & West European Varieties of Capitalism, 21 COLUM. J. EUR. L. 587, 605 (2015).

²⁶⁸ 17B C.J.S. *Contracts* § 758 (2020).

²⁶⁹ Martha Minow & Mary Lyndon Shanley, *Relational Rights and Responsibilities: Revisioning the Family in Liberal Political Theory and Law*, HYPATIA, Winter 1996, at 4, 13.

²⁷⁰ Sanger, *supra* note 42, at 320.

²⁷¹ *Id.* at 323.

²⁷² *Id.*

²⁷³ *Id.* at 329.

²⁷⁴ LAURA BRIGGS, *SOMEBODY’S CHILDREN: THE POLITICS OF TRANSRACIAL AND TRANSNATIONAL ADOPTION* 4 (2012); Perry, *supra* note 73, at 158 (arguing that “even ‘voluntary’ surrenders of children for adoption can have coercive undertones” for Black parents). *But see* Laufer-Ukeles, *supra* note 120, at 1235 (“[F]eminist predictions that gestational surrogacy would lead to a situation in which poor, uneducated women would be used and controlled in an undignified manner have not materialized . . . at least in domestic surrogacy arrangements in the United States, Europe, and Israel . . .”).

²⁷⁵ Sara L. Ainsworth, *Bearing Children, Bearing Risks: Feminist Leadership for Progressive Regulation of Compensated Surrogacy in the United States*, 89 WASH. L. REV.

“We know that the state of mind which the law of contracts generally requires focuses on arms-length bargaining, and an economic exchange relationship. How could we even imagine that this would work within family relationships?”²⁷⁶

In this sense, PACAs, which operate in the adoption context, are similar to surrogacy contracts, which operate in another family-creation context. Some feminist scholars have expressed concern that paid surrogacy exploits poor women and advantages the wealthy who can pay for the privilege of forming their families.²⁷⁷ Others have noted that, throughout history, Black women have been disproportionately coerced into forms of surrogacy.²⁷⁸ And, just as with PACAs, concerns arise about the propensity—even probability—of emotions clouding rational decision-making.²⁷⁹

VII. RECOMMENDATIONS FOR REFORM

For the last thirty years, construing PACAs as contracts has not resulted in successful enforcement by birth parents when adoptive parents have unilaterally cut off contact. This Part will review the problems with PACAs as they are currently understood and then offer substantive and logistical recommendations for shifting the PACA paradigm from contract rights to contact rights.

A. *Review: An Overview of the PACA Problem*

In the preceding Parts, this Article has identified several issues with the current PACA scheme.

First, virtually all research confirms that open adoption is best for adoptees’ emotional and psychological development. When adoptive parents unilaterally cut off contact with birth parents, the resulting separation is not in the best interests of the child.

Second, birth mothers cannot reliably “shop” for adoptive parents who match their desires for openness and/or level of openness because the low supply of babies available for adoption and high market demand causes adoptive parents to present the “best case” scenario to birth parents rather than the likely contact scenario.

Third, birth mothers, who are vulnerable and in crisis (as evidenced by the very fact that they are experiencing an unintended pregnancy and seeking adoption as a solution), may have difficulty making rational rather than

1077, 1086 (2014) (footnote omitted).

²⁷⁶ Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 779. *But see* ERTMAN, *supra* note 44, at 67 (“By uncovering the contracts already lying at the very foundation of every adoption, we can consider how law and society can and should shape the terms of those agreements in ways that protect everyone involved.”).

²⁷⁷ Ainsworth, *supra* note 275, at 1088.

²⁷⁸ *Id.* at 1084-85 (citing, *inter alia*, DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 22-55, 150-245, 282-83 (1st ed. 1999)).

²⁷⁹ Laufer-Ukeles, *supra* note 120, at 1226-27.

emotional decisions when choosing adoptive parents who are promising her baby—and likely her—comfort, security, love, and family.

Fourth, adoptive parents are forced into a beauty pageant of sorts in order to persuade a birth parent to allow them to adopt her child. In these situations, an adoptive parent may feel pressured to make promises that she is not sure she can keep. Her emotional drive to secure a baby to adopt may override her rational decision-making skills.

Fifth, unlike in most contracts, the power in the PACA scenario shifts over the course of the adoption relationship. Before the birth parents surrender a child for adoption, they have much more power in that they hold the sole right to parent or place their baby for adoption. After the adoption is complete, the adoptive parents have much more power, as they can often choose whether to comply with the PACA agreement.

Sixth, treating PACAs like contracts leads to situations in which adoptive parent breach is possible, tempting, and perhaps efficient.

Seventh, while adoptive parents enjoy the constitutional right to raise and make decisions about their (adopted) children, birth parents retain no rights whatsoever after an adoption is finalized, even when a PACA is in place. Contact with their birth child is considered a privilege, and adoptive parents hold all of the rights.

Eighth, at least some adoptive parents will promise birth parents contact with the adoptee and then back out of that promise, either immediately after parental rights are terminated or at some point in the ensuing years.

Ninth, PACAs are not legally enforceable in about half of the states and are difficult to enforce in the other half.

Tenth, because all social science research shows that open adoption with some degree of contact is better for all members of the adoption triad, failure to comply with the PACA results in poorer psychological outcomes for birth parents, adoptive parents, and adoptees.

B. *Solving the PACA Problem*

In seeking to solve the problems with PACAs, the first step must be to even out the power differential post adoption. Pre adoption, this concern is lesser, as it is only fair that birth parents have the opportunity to meet and select adoptive parents whose vision of open adoption matches their own. However, post adoption, when all of the power vis-à-vis contact lies with the adoptive parents, birth parents must have a means to prompt compliance with a contact agreement.

The best way forward would be to reexamine the PACA-as-contract paradigm. If a PACA is a contract, there is very little the birth parents can do under current law to enforce it, and their remedies are almost nonexistent even if they can. The adoptive parents will know—and, in fact, their attorney will ethically have to advise them—that a breach is unlikely to result in any sanctions and that they can probably prevent the birth parents from contacting the adoptee, even if a PACA specifically says otherwise.

In short, under the current PACA scheme, adoptive parents have “rights,” and birth parents have “privileges.” That dichotomy alone demonstrates the importance of evening the playing field, so to speak.

To do so, we need to shift the paradigm from viewing PACAs as contracts and viewing all “rights” as parental. Instead, we should use the PACA to establish a new kind of right—contact rights—akin to the visitation rights that noncustodial parents maintain when two biological parents are in conflict over contact with their child. By creating contact rights, we accomplish several goals: (1) we eliminate the possibility of efficient breach; (2) we promote psychological and emotional health for all members of the adoption triad; (3) we allow birth parents and adoptive parents to choose each other honestly and openly rather than through subterfuge, uncertainty, and even deceit; and (4) we diminish the potentially deleterious role emotions can play in negotiating agreements because the agreement—which itself is essentially one governing emotional bonds—will be honored.

C. *The Logistics*

In order to shift PACAs from creating contracts to instilling rights on birth parents, several functional changes must first occur.

1. Shifting the Paradigm for Birth Parents

Under the current PACA scheme, birth parents cannot adequately enforce their rights to contact with their biological children. In many jurisdictions, they have no standing to enforce the agreement; in many others, they may have to jump over an unrealistic number of legal hurdles to attempt to enforce it.

In order to make the PACA meaningful, birth parents should receive adequate counseling in the pre-adoption, family-selection phase. This counseling should come from the adoption agency (if one is involved), as well as from an independent attorney whose sole job it is to advise the birth parents about the adoption process and their post-adoption contact rights. They should also receive extensive counseling from therapists and social workers who have experience with open adoption and the kinds of emotions birth parents may experience.²⁸⁰

The therapists, social workers, adoption agencies, and attorneys should all ensure that they assist the birth parents in recognizing how emotions may cloud reason. They should also encourage the birth parents to feel free to change their minds regarding decisions they make before the adoption becomes final or the period of irrevocability for consent to the adoption has closed. They should emphasize that relinquishment is indeed the birth parents’ choice, no matter how far into the adoption process they have proceeded prerelinquishment.

Birth parents should also have the opportunity to meet with birth parents who have relinquished their babies in the past. They should discuss their feelings about the adoption, perhaps in group meetings with therapists and social workers, and hear from experienced birth parents about how open adoption has worked for them.

Only after meeting with attorneys, therapists, social workers, and other birth parents should birth parents who are considering open adoption begin to look

²⁸⁰ Dowd, *supra* note 67, at 928 (“A feminist approach would require empowerment, support, and counseling.”).

for adoptive families who match their desires for degree of contact. Because the birth parents will have had time to explore and consider their own needs and consult with others about them, they will have a clearer sense of their own negotiating power in family selection. During this process, they should continue to consult with and be advised by professionals experienced with the process who are ethically required to represent the birth parents' interests only. They should be supported in asserting their rights to choose the kind of open adoption they seek, including sticking to their true desires whatever type of post-adoption contact they seek.

2. Shifting the Paradigm for Adoptive Parents

Just as for birth parents, the adoption experience is emotional for adoptive parents, but perhaps for different reasons. Whereas birth parents may feel alone, frightened, and insecure in the midst of what is for them a crisis, adoptive parents may feel desperate and hopeless in their pursuit of parenthood. Just as for birth parents, however, it is critical for adoptive parents to make good decisions based on reason rather than emotion to the extent possible.

First, they should receive counseling from the outset that explains two key components of the open adoption scheme: (1) that birth parents have the right to change their minds at any point in the process before the decision is irrevocable and finalized and that the birth parents have advocates working solely in their best interests to guarantee that they will not experience guilt or duress in making their final adoption decisions; and, (2) that in agreeing to a PACA and its terms, they are vesting contact rights akin to visitation rights in their child's birth parents.

Because the enforceability of new PACAs will vary substantially from those in past adoptions, the adoptive parents should receive explicit legal advice explaining that, while their friends and family who adopted children may have had different experiences with PACAs, going forward, PACAs will be enforceable and the birth parents of their child will have rights.

After they have completed extensive counseling from their attorney, their adoption agency, and their social worker, but before communicating with potential birth parents, they should draw up a draft PACA, one with which they would feel comfortable complying. This draft PACA would guide the agency and attorney in matching the adoptive parents with birth parents who want the same amount and kind of contact, much as dating sites match potential mates by filtering out partners who do not meet a person's dating criteria. Only after the draft PACA is complete should the agency and attorney make the adoptive parents' profile available to birth parents. The adoptive parents should understand that they are free to modify their draft PACA at any time but that they should only do so after more counseling with, and advice from, adoption professionals about what kinds of contact are realistic for their family.

Finally, the adoptive parents should set up a PACA escrow fund into which they will pay every month until their child reaches the age of majority. The fund should be accessed only in the event that the adoptive parents do not carry out their obligations under the PACA, and it should be used for enforcement costs

such as mediation²⁸¹ and litigation. Should the adoptive parents honor the PACA as anticipated, the fund could be returned to them when the adoptee reaches majority or converted into a 529 account for the adoptee's future education.²⁸²

3. Shifting the Paradigm for Adoption Agencies and Attorneys

While shifting from contract rights to contact rights will substantially affect the adoption experience for birth and adoptive parents, it will also significantly impact the approach that agencies and attorneys use in matching families for open adoption and alter the types of advice adoption professionals will be ethically obligated to give.

Under the current PACA scheme, attorneys face an ethical dilemma. In order to give adoptive couples complete legal information and advice, they must acknowledge that, even if it is in writing, the PACA is unlikely to be enforceable (or at least to be enforced). In other words, they ethically must explain to their clients that, given how difficult it is to find a baby for adoption, the adoptive parents can safely enter into an open adoption agreement because they will likely have no legal obligation to honor it. Treating PACA rights as "contact rights" would eliminate the ethical dilemma because they wouldn't have to advise clients about unenforceability; in fact, they could advise that these agreements hold legal weight.

One other complicating legal fact is that in some states, attorneys paid by and representing the prospective adoptive parents may also represent the woman considering placing her child. This practice of dual representation results in ethical conflicts and practical difficulties.²⁸³ Under a new PACA scheme, separate professionals will work with and represent birth parents and adoptive parents, and each professional "team" will be ethically obligated to represent and advocate for their clients' interests and advise them of their rights. Adoption agencies will be ethically prohibited from pressuring birth parents to relinquish (whether to a specific adoptive family or to anyone), and they will be required to advise birth parents of their rights to change their minds about the adoption before finalization and enforce their rights to post-adoption contact.

The timing of the birth parent/adoptive parent matching process will also change. Agencies will only introduce adoptive parents to birth parents after the adoptive parents have gone through the counseling process and written a draft PACA. Birth parents will only meet adoptive parents after they have considered what types of post-adoption contact they desire and have received extensive counseling about their rights to choose adoptive parents and enforce post-adoption contact rights.

²⁸¹ See, e.g., Mashburn, *supra* note 146, at 391 ("Under the governance of the best interests of the child standard, these separate interests [of the birth and adoptive parents] are addressed in a less adversarial and more collaborative environment.").

²⁸² This idea derives in part from a session at the 2015 Conference of Concerned United Birthparents, in which participants generated ideas for better PACA compliance. Attachment "Betrayed Open Adoption Session: Pages from Flip Chart" to E-mail from Gail Perry, *supra* note 110.

²⁸³ See SIEGEL & SMITH, *supra* note 6, at 15.

4. Shifting the Paradigm for Judges

The way that judges view PACAs must change radically. Shifting the PACA paradigm from contract rights to contact rights will force judges and mediators to resolve conflicts between adoptive parents and birth parents over contact rather than just cutting out the birth family.

As it stands, a judge's first consideration when judging a PACA breach is whether state law authorizes enforcement; if it does not, then the inquiry is complete. If it does, then the judge must usually apply a balancing or factor-based test that considers the best interests of the child in a context in which that term has a very loose definition (if any at all).²⁸⁴ The result is that enforcement is extremely rare, and the law is at a point where there is almost a presumption against enforcement due to the adoptive parents' constitutional liberty interest.

Vesting contact rights in birth parents—and, indeed, in adoptees, should courts construe the rights that way—would not eliminate, limit, or alter in any way adoptive parents' liberty rights to raise their children and make decisions regarding their care. It would only create new common-law contact rights that the legislature could choose whether to codify for the birth parents and adoptees, rights to which the adoptive parents would agree at the outset. The contact rights would only vest in birth parents if and when they and the adoptive parents (and the adoptee, if the child is old enough to be involved) agreed on the extent of these rights and memorialized them in writing.

Once memorialized, these contact rights would create a judicial presumption in favor of enforcement. For enforcement guidelines, judges would look to the law of visitation for noncustodial biological parents.²⁸⁵ Just as they do in visitation conflicts, judges would balance the child's right to contact with his birth parents and the birth parents' right to contact against any presumptively disqualifying conditions.²⁸⁶ Just as it does in visitation, supervised contact might

²⁸⁴ See, e.g., Papke, *supra* note 82, at 605 (“‘Best interests’ in the context of adoption is not the same as ‘best interests’ when two parents are battling for child custody at the time of divorce. In the latter, the judge might weigh the strengths and weaknesses of one parent against those of the other in hopes of placing the child in the most nurturing home. In the adoption context, by contrast, the judge is not really choosing between options. The biological parent or parents have placed the child for adoption, a caseworker has studied the files and the home of the adoptive parents, and a government department or non-profit agency has lent its support. The determination at this point in the process that the adoption is in ‘the best interests of the child’ is, for all intents and purposes, a foregone conclusion. Underclass parents or, in most cases, unmarried underclass mothers could not hope to successfully argue that they should keep their children or that parents other than those who filed the adoption petition would be better picks.”); see also Mashburn, *supra* note 146, at 383.

²⁸⁵ Of course, this would also apply to adoptive parents who were divorced from the coparent of their adopted child.

²⁸⁶ Just as they do in visitation, such conditions might include active addiction, evidence that the parent seeking contact has abused the child, sex offender registration, and so on. See, e.g., D.C. CODE § 4-361(b)(2), (c) (2020) (“In enforcing a PAC agreement, the court shall take into consideration the written consent to the agreement of an adoptee who is 14 years of age or older . . . If a party moves to modify a PAC agreement and satisfies the court that the

suffice if the birth parents posed any perceived danger to the child. PACAs could provide for this possibility by offering videos, photos, phone calls, and other types of communication in lieu of in-person contact while the danger persisted.²⁸⁷

5. Shifting the Paradigm for Legislatures

Under a new PACA paradigm, contact rights will be created under common law. Because these should apply consistently and universally to all PACAs, statutes currently on the books stating that PACAs are unenforceable or enforceable only under certain conditions will be repealed or recognized as overruled by the common law.

To the extent that legislatures sought to do so, they could codify common-law contact rights for birth parents and include exceptions to these rights. Logically, these statutes would mirror laws governing visitation in the jurisdiction, explain the presumption in favor of the birth parents as paralleling that in favor of the noncustodial parent, and outline situations in which the presumption would be rebutted, including circumstances in which the child would be at risk of serious harm from the birth parents.

CONCLUSION

Birth parents and adoptees desire and deserve contact with each other. By construing PACAs as contracts, adoptive parents can and do unilaterally interfere with the needs of the two other members of the adoption triad. However, establishing contact rights for birth parents will disrupt that power dynamic, allowing adoptees and birth parents to enjoy and benefit from a lifelong relationship they design.

Moreover, establishing contact rights for birth parents will do more than just enhance their individual connections with their birth children. It will change adoption practice for adoption professionals and attorneys, who will now be required to counsel adoptive parents to consider what types of contact they can facilitate for their children, for at least eighteen years, without the option to cut that contact off completely. Creating new contact rights for birth parents will therefore engender more honest and dependable relationships between birth and adoptive families.

Finally, the real winners under the “contact rights” concept are adoptees. Social science is unequivocal that adoptees benefit from knowing their birth parents and having contact with them. Contact rights for birth parents, therefore,

modification is in the best interest of the adoptee, the court shall order that the PAC agreement be modified accordingly.”); N.H. REV. STAT. ANN. § 170-B:14(II)(d)(1)(G) (2020) (listing “[a]ny evidence of abuse or neglect of the child” as factor court can consider to determine best interests of child); 23 PA. CONS. STAT. § 2735(b)(2)(iv) (2020) (listing “[t]he willingness and ability of the birth relative to respect and appreciate the bond between the child and prospective adoptive parent” as factor court can consider to determine whether agreement is in best interests of child).

²⁸⁷ See Von Korff & Grotevant, *supra* note 95, at 394.

further the best interests of the child—and, in the end, the best interests of the child are the very foundation of good adoption and childrearing practice.

It is critical for researchers to study PACAs, especially if the agreements are eventually understood as establishing contact rights for birth parents. Several questions still need to be answered. As Allisan points out, there exists a real lack of research on what benefits adoptees derive from performance of the PACA, why adoptive parents sometimes do not perform, and what modifications to PACAs might encourage performance.²⁸⁸ However, it is striking that, given the issues with PACA performance over the past twenty years, the calls for reform to date have focused on legislation around contract enforcement rather than a shift in PACA schemata. This Article sought to refocus legal attention in a way that will move the conversation—and the families—forward.

²⁸⁸ ALLISAN, *supra* note 31, at 5.