Separated at Adoption: Addressing the Challenges of Maintaining Sibling-of-Origin Bonds in Post-adoption Families

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I. Introduction

Throughout the United States, for thousands of children languishing in foster care, adoption can seem like an unattainable fantasy; for the lucky few who are adopted, however, reality sets in when they first learn that their adoption has an unimaginable consequence. That is, once they are adopted, they will likely lose the ability—and certainly the right—to have contact with their biological siblings, often for the remainder of their childhoods.[1] Undoubtedly, from a legal standpoint, "once an unrelated adoption takes place, the child's previous ties are completely severed. For all practical and legal purposes, the child's biological relationships end."[2] Adopted children face this heart-wrenching scenario despite the fact that many states, as well as the federal government, now recognize the importance of maintaining sibling bonds when children are in the foster care system.[3] Similarly, for

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[1] Jill Elaine Hasday, *Siblings in Law*, 65 VAND. L. REV. 897, 906 (2012) ("The operative premise [of traditional adoption law] was that biological siblings were legally connected through their relationship with a shared parent or parents. Once a child's legal relationship with her birth parents ended, siblings no longer had any legally recognized tie to each other."); *see also In re* M.M., 619 N.E.2d 702, 713 (Ill. 1993) (positing that when a child is adopted, "[i]t then becomes the right of the adoptive parents to decide whether to permit or deny continued contact with the child's biological family"); *In re* Donte A., 631 N.E.2d 257, 258 (Ill. App. Ct. 1994) (denying the request of five brothers who asked the court "to consent to adoption only if the prospective adopting family agrees to reasonable post-adoption sibling visitation"); *In re* Jamison, 4 N.E.3d 889, 901 (Mass. 2014).

[2] Harold K. v. Ryan B., 730 N.E.2d 88, 95 (Ill. App. Ct. 2000).

[3] *See* Fostering Connections to Success and Increasing Adoptions Act of 2008, Pub. L. No. 110-351, 122 Stat. 3949 (codified at 42 U.S.C. § 671 (2012)) [hereinafter Fostering Connections Act] (creating an obligation for states to establish avenues for sibling contact while the children are in foster care). In fact, many social workers have spent countless months searching to find foster care placements that would allow these children to remain together.

children enmeshed in custody battles, judges often recognize the critical importance of keeping siblings together,[4] and, except in very limited circumstances,[5] are unwilling to involuntarily separate siblings when making legal custody determinations.[6] Yet none of those protections apply to children who are adopted.[7]

In many cases, foster care is transitory, uncertain, and impermanent, and does not result in the foster parent adopting the child,[8] leaving little doubt that a permanent adoptive home

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[4] *See, e.g.*, Ebert v. Ebert, 346 N.E.2d 240, 242-43 (N.Y. 1976) (finding that siblings, upon divorce, should remain together as long as the parent granting custody is fit); Wiskoski v. Wiskoski, 629 A.2d 996, 998-99 (Pa. Super. Ct. 1993) (stating that, when making policy determinations, the policy of Pennsylvania is that siblings be raised together); O. v. P., 560 S.W.2d 122, 127 (Tex. App. 1977) (determining that siblings should remain together when deciding a custody case, absent any compelling reasons against it).

[5] In disputed custody cases, courts consider the interests of the siblings when determining which parent is granted custody. However, when the custody arrangement is undisputed, and parents come to an agreement regarding a custody arrangement, siblings usually "have no access to the courts to vocalize their concerns or wishes regarding the custody decision." Ellen Marrus, "*Where Have You Been, Fran?" The Right of Siblings to Seek Court Access to Override Parental Denial of Visitation*, 66 TENN. L. REV. 977, 979 (1999) [hereinafter Marrus, *Where Have You Been, Fran?*].

[6] *See supra* note 4.

[7] In cases where siblings are separated by adoption or foster care, federal law does make some of its funding to states for foster care and adoption services conditional on the state's consenting to make reasonable efforts "to provide for frequent visitation or other ongoing interaction between the siblings, unless that State documents that frequent visitation or other ongoing interaction would be contrary to the safety or well-being of any of the siblings." Fostering Connections Act, *supra* note 3, § 671(a)(31)(B). That law, however, has had "little apparent effect to date." Hasday, *supra* note 1, at 908.

[8] In weighing in on the procedures governing the removal of foster children from foster homes, the U.S. Supreme Court has defined foster care as "(a) child welfare service which provides substitute family care for a planned period for a child when his own family cannot care for him for a temporary or extended period and when adoption is neither desirable nor

is better than foster care for most children.[9] On the other hand, especially for children who have long-established relationships with their brothers and sisters, sound public policy dictates that adoption not require children to sacrifice the only family they have ever known in order to secure a more certain future. The challenge, therefore, is to create a way for children in foster care to maintain a relationship with their biological siblings after they have been adopted, despite the legal—and practical—hurdles to doing so.[10] Using the psychological research on sibling attachment and loss as a springboard, this article explores the many ways children are harmed by the law's failure to ensure that the bonds they have developed with their biological siblings are not permanently

possible." Smith v. Org. of Foster Families for Equality & Reform, 431 U.S. 816, 823 (1977).

[9] This statement is not without its detractors. In his thought-provoking article, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* Sacha Coupet makes a case against the "reputed panacean effect attributed to adoption" with its "one-size-fits-all" solution. Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence,"* 34 CAP. U. L. REV. 405, 411 (2005) (arguing that "despite the positive benefits intended to flow from adoptive arrangements, not all children—even those whose biological parents are unable to care for them—would benefit equally from this permanent and radical configuration of the family"); *see also* Andre P. Derdeyn, Andrew R. Rogoff & Scott W. Williams, *Alternatives to Absolute Termination of Parental Rights After Long-Term Foster Care*, 31 VAND. L. REV. 1165, 1166 (1978) (questioning whether "absolute termination of the natural parents' rights and subsequent adoption constitute the optimal alternative for all children after long-term foster care").

[10] There are logistics issues to address, for example, if siblings live far away from each other. If some siblings still live with the original birth family and the parental rights terminated involved drug use, there may be some legitimate reasons for adoptive parents to be concerned with ongoing contact. For a discussion of the hurdles, see ASS'N FOR CHILDREN OF NJ, POST-ADOPTION SIBLING CONTACT: SOME ISSUES TO CONSIDER, 1, 3-4 (Sept. 2006), https://web.archive.org/web/20070706074933/http://www.acnj.org/admin.asp?uri=2081&action=15&di=863&ext=pdf&view=yes.

severed following adoption. It asserts that a child's "need for continuity in intimate relationships"[11] puts an onus on the state to provide children who are adopted with an avenue to maintain those important familial relationships and to shape their laws to better protect children from the psychological harms of having siblings with whom they have formed significant bonds removed from their lives forever. This article suggests a measure that allows for continued contact between biological siblings even after they are adopted without intruding on the fundamental constitutional liberty interest of parents, including adoptive parents, at issue in the United States Supreme Court case of *Troxel v. Granville.*[12] Although, under *Troxel* and earlier Supreme Court jurisprudence, parents have an interest "in the care, custody, and control of their children,"[13] that interest should not be paramount to the children's interest in maintaining relationships with sometimes the only family they have ever known.

Specifically, Part II of the article describes the current state of the law regarding siblings' legal rights to maintain a relationship with each other. The centerpiece of this Part is a discussion of *Troxel v. Granville*, the seminal United States Supreme Court decision that addresses third party visitation, and reaffirms, under the Due Process Clause, a parent's (including an adoptive parent) fundamental liberty interest in the "care, custody and control of their child" as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[14] Part II also provides an overview of existing state laws and how they may create potential openings for post-adoption sibling visitation.

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[11] Katherine T. Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family has Failed*, 70 VA. L. REV. 879, 882 (1984).

[12] Troxel v. Granville, 530 U.S. 57 (2000).

[13] *Id.* at 65.

[14] *Id.* (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)).

Next, Part III of this article discusses the historic transition from closed to open adoptions as a movement that has created the possibility for siblings to establish legally-sanctioned contact with each other post-adoption. This Part first analyzes the history of closed adoptions and the harm that has resulted from the secrecy connected with such "confidential" adoptions. It then recounts the significant progress that has been made toward a more open model of adoption vis-à-vis adopted children and their birth parents, but that has not yet been fully extended to relationships with birth siblings.

Part IV explains the psychology of sibling relationships, including (1) sibling attachment and how it is even more pronounced between siblings whose family lives have been so disrupted they have ended up in foster care; and (2) psychological loss that siblings experience when they are separated through adoption. Part V then discusses the possibilities and challenges of post-adoption contact between siblings. This involves (1) a discussion of post-adoption contact agreements, including post-adoption contact agreements between birth parents and adoptive parents permitted by state statutes, and post-adoption contact agreements recognized by a few state courts in the absence of state statutes; and (2) a general overview of mediation, including a discussion of the unrealized potential mediation could play in facilitating post-adoption contact agreements. Finally, the article concludes in Part VI with a description of steps states should take to create avenues for children adopted from foster care to have ongoing visitation with their siblings-of-origin.

II. Legal Background for Post-Adoption Sibling Visitation

A. Third Parties and the Courts

The United States Constitution provides little guidance to courts in family law matters, generally,[15] and even less when it comes to the area of children's rights. Indeed, the Constitution is devoid of evidence that the framers of the Constitution contemplated the rights of children.[16] In the wake of so little Constitutional guidance, it is no surprise that the Supreme Court has struggled to create a coherent construct for children's rights, let alone siblings' rights.[17] Although the United States Supreme Court has addressed some issues relating to family rights, it has "not specifically addressed the question of siblings' rights to maintain contact with each other."[18] That said, the right of a child to obtain visitation with her biological sibling once her sibling has been adopted is most significantly undermined by the adoptive parents' fundamental right under the Due Process Clause of the Fourteenth Amendment to raise their child "as they see fit."[19]

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[15] ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN 32 (1996); *see also* Janet L. Dolgin, *The Constitution as Family Arbiter, A Moral in the Mess?*, 102 COLUM. L. REV. 337, 337 (2002) ("[C]ases involving children and the parent-child relationship have resisted satisfactory resolution by constitutional principles because they involve precisely those aspects of the larger 'debate about family' that bewilder Americans.").

[16] MNOOKIN, *supra* note 15.

[17] William Wesley Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745, 769 (1994) ("The [United States Supreme] Court is peculiarly ill-equipped to define continually evolving social concepts like the 'family,' in part because these are highly individualistic, yet ironically normative, judgments requiring a delicate balance of individual predilections with empirical evidence which often belies gut-level reactions.").

[18] Barbara Jones, *Do Siblings Possess Constitutional Rights?*, 78 CORNELL L. REV. 1187, 1195 (1993).

[19] Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (striking down a state law that required attendance at a public school as violating the Due Process

Although the United States Supreme Court has indeed found this right to be fundamental, it also has made clear that the states have the authority at times to infringe on it.[20] Moreover, although no Supreme Court decision specifically refers to "adoptive" parents, they enjoy the same rights as biological parents under state law.[21]

At common law, third parties[22] had no legal right to visitation.[23] Although the courts' reception to third party claims has been mixed,[24] critics have claimed that court

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Clause because the parents had the "right" to decide whether or not their child would attend a public school); *Meyer*, 262 U.S. at 390 (finding that parents had a liberty interest under the Fourteenth Amendment in hiring the plaintiff to instruct their child in a foreign language). *See* Randi Mandelbaum, *Delicate Balances: Assessing the Needs and Rights of Siblings in Foster Care to Maintain Their Relationships Post-Adoption*, 41 N.M. L. REV. 1, 9-10 (2012).

[20] *E.g.*, Prince v. Massachusetts, 321 U.S. 158, 166-67 (1944) (stating that the court recognized the state's authority to limit parental freedom by creating child labor laws and requiring school attendance).

[21] *See* Michael J. Higdon, *When Informal Adoption Meets Intestate Succession: The Cultural Myopia of the Equitable Adoption Doctrine*, 43 WAKE FOREST L. REV. 223, 227 (2008). This is only true, however, once an adoption has been finalized under the law. Until the adoption is finalized, adoptive parents are simply "prospective adoptive parents" and their "liberty interests are arguably less than those of biological custodial parents because permanent legal custody is still contingent upon the adoption's finalization." Patton & Latz, *supra* note 17, at 772.

[22] "Third party" here refers to any person other than the legal parents and includes siblings and grandparents as well as others. *See, e.g.*, Webb v. Webb, 546 So. 2d 1062 (Fla. Dist. Ct. App. 1989); Brewer v. Brewer, 533 S.E.2d 541 (N.C. Ct. App. 2000).

[23] *See* Solangel Maldonado, *When Father (or Mother) Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865, 867 (2003) [hereinafter Maldonado, *When Father (or Mother) Doesn't Know Best*]; *see also In re* Adoption of C.A, 137 P.3d 318 (Colo. 2006); *In re* C.T.G., 179 P.3d 213, 216 (Colo. Ct. App. 2007); *In re* Hood, 847 P.2d 1300, 1303 (Kan. 1993); Kulla v. McNulty, 472 N.W.2d 175, 181-82 (Minn. Ct. App. 1991).

[24] *See, e.g.*, John DeWitt Gregory, *Blood Ties, A Rationale for Child Visitation by Legal Strangers*, 55 WASH. & LEE L. REV. 351, 372 (1998).

decisions are "increasingly relying more on function than form."[25] That is, "[p]arenthood itself is increasingly seen as a functional status, rather than one derived from biology or legal entitlement."[26] By the mid-1990's, all states had passed statutes allowing for grandparent visitation; yet less than half had granted third parties—most of whom were either stepparents or blood relatives such as siblings—standing to seek visitation even if it arguably was in the best interests of the child.[27] Overall, however, from the 1960s through the 1990s,[28] state courts increasingly recognize standing for, and awarded visitation to, attachment figures other than legal parents.[29] This trend came to an abrupt halt after the U.S. Supreme Court issued its opinion in *Troxel v. Granville*.[30]

The United States Supreme Court's granting certiorari in *Troxel v. Granville* in 1999[31] "raised expectations that the Court would provide clear guidance on how and when states could interfere with legal parents' decisions regarding visitation between their child and third parties, and how the 'best interests of the child' standard should be applied in the third party visitation context."[32] The Court failed to meet

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[25] Kristine L. Roberts, *State Supreme Court Applications of Troxel v. Granville and the Courts' Reluctance to Declare Grandparent Visitation Statutes Unconstitutional*, 41 FAM. CT. REV. 14, 16 (2003) (citing Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 893 (2000)).

[26] Garrison, *supra* note 25.

[27] *See, e.g.*, Maldonado, *When Father (or Mother) Doesn't Know Best*, *supra* note 23, at 867-68 & 868 n.6.

[28] New York State became the first state to enact a third party visitation statute in 1966. Roberts, *supra* note 25, at 15 n.16.

[29] *See* Andre P. Derdeyn & Mark Jennings, *Forensic Community Child and Adolescent Psychiatry*, *in* HANDBOOK OF CHILD AND ADOLESCENT DAY TREATMENT AND CMTY. PSYCHIATRY 115, 119 (Harinder S. Ghuman & Richard M. Sarles eds., 1998).

[30] Troxel v. Granville, 530 U.S. 57, 73 (2000).

[31] Troxel v. Granville, 527 U.S. 1069 (1999).

[32] Rebecca L. Scharf, *Psychological Parentage, Troxel, and the Best*

expectations, unabashedly declaring "[w]e do not, and need not, define today the precise scope of the parental due process right in the visitation context."[33]

In *Troxel*, the Supreme Court was specifically tasked with reviewing a petition for visitation rights filed by the grandparents of two children pursuant to a Washington state statute[34] that provided: "Any person may petition the court for visitation rights at any time . . . [t]he court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances."[35] The grandparents in *Troxel v. Granville* had requested that the lower court grant them overnight visitation[36] with their two granddaughters whose father, their son, had recently committed suicide.[37] Specifically, the grandparents had requested two weekends of visitation per month and two weeks during the summer. The children's mother opposed the request and refused to allow overnight visits or permit the daughters to visit their grandparents more than once a month.[38] Over the mother's objections, the trial court ultimately found that increased visitation was in the children's best interests,[39] and ordered visitation one weekend per month, one week during the summer, and four hours on each of the grandparents' birthdays.[40] On appeal, the Washington Supreme Court reversed, holding that the

Interests of the Child, 13 GEORGETOWN J. GENDER & L. 615, 624 n.76 (2012) (citing Ellen Marrus, *Over the Hills and Through the Woods to Grandparents' House We Go: Or Do We, Post-Troxel?*, 43 ARIZ. L. REV. 751, 793 (2001).

33 *Troxel*, 530 U.S. at 73.

34 WASH. REV. CODE § 26.10.160(3) (1994); *Troxel*, 530 U.S. at 61.

35 WASH. REV. CODE § 26.10.160(3).

36 *Troxe*l, 530 U.S. at 61.

37 WASH. REV. CODE § 26.10.160(3); *Troxel*, 530 U.S. at 61.

38 *Troxel*, 530 U.S. at 61.

39 *Id.*

40 *Id.*

grandparents could not attain any legal visitation with their grandchildren under the Washington statute because the statute unconstitutionally violated the right of the mother to raise her children "free from state interference."[41] The Washington Supreme Court found two distinct reasons to strike down the Washington statute. First, the statute did not require a showing of harm to the child.[42] Second, it swept too broadly by allowing "any person at any time" to petition for "forced visitation" as long as it was in the best interest of the child.[43]

The United States Supreme Court granted certiorari,[44] and subsequently issued a plurality opinion written by Justice O'Connor, along with two concurring and three dissenting opinions.[45] In her plurality opinion, Justice O'Connor held that the Washington state statute was invalid, but only as applied to the specific factual landscape of that case. Discussing the substantive component of the Due Process Clause, which protects against government interference with fundamental rights and liberty interests, the plurality opinion framed the liberty interest that all parents have in the "care, custody and control of their children" as "perhaps the oldest of the fundamental liberty interests recognized by this Court."[46]

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[41] Smith v. Stilwell, 969 P.2d 21, 27 (Wash. 1998) (en banc).

[42] *Troxel*, 530 U.S. at 63.

[43] *Id.*

[44] *Id.* at 57.

[45] There were six opinions in total: a plurality opinion by Justice O'Connor, joined by Chief Justice Rehnquist, along with Justices Breyer and Ginsburg; two concurring opinions by Justices Souter and Thomas; and three dissenting opinions, by Justices Kennedy, Scalia, and Stevens. *Id.*

[46] *Id.* at 65 (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923)) (fundamental liberty right to "establish a home and bring up children"); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) (fundamental liberty right to "direct the upbringing and education of children under their control"); Prince v. Massachusetts, 321 U.S. 158 (1944). In support of its position that there is a fundamental right of parents to make decisions

Acknowledging the long history of the Court's recognition, Justice O'Connor found that the Due Process Clause of the Fourteenth Amendment undoubtedly protected the fundamental right "of parents to make decisions concerning the care, custody, and control of their children."[47] In her opinion, Justice O'Connor began her reasoning by stating "demographic changes of the past century make it difficult to speak of an average American family."[48] A review of state non-parental visitation statutes revealed that states have recognized that children should have "the opportunity to benefit from relationships with statutorily specified persons"[49] and that this recognition was like the one at issue in the case. Those measures, she said, were largely a result of states' recognizing that it benefits children to continue relationships with grandparents and other family members in the household.[50]

Turning to the facts in *Troxel*, and the Washington statute specifically, Justice O'Connor criticized the language of the statute as "breathtakingly broad,"[51] by allowing a judge's opinion to overturn a fit parent's determination of whether it is in the "best interests" of her child to have visitation with a third party.[52] In Justice O'Connor's view, the denial of a fit custodial parent's right to determine her child's

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concerning the care, custody, and control of children, the Court relied on Washington v. Glucksberg, 521 U.S. 702, 720 (1997), Santosky v. Kramer, 455 U.S. 745, 753 (1982), Parham v. J.R., 442 U.S. 584, 602 (1979), Quilloin v. Walcott, 434 U.S. 246, 255 (1978), Stanley v. Illinois, 405 U.S. 645, 651 (1972), and Wisconsin v. Yoder, 406 U.S. 205, 232 (1972), but in fact, only *Glucksberg* and *Stanley* contain a discussion of fundamental rights; the other cases instead refer to the tradition and history of respecting parents and families. Scharf, *supra* note 32.

47 *Troxel*, 530 U.S. at 66.

48 *Id.* at 63-64.

49 *Id.* at 64.

50 *Id.*

51 *Id.* at 67.

52 *Id.*

best interests is precisely what occurred in *Troxel*.[53] She further stated that the statute "effectively permits any third party seeking visitation to subject any decision by a parent concerning visitation of the parents' children to state court review."[54] Further, Justice O'Connor noted that there were no facts in evidence to justify the state's infringing on the mother's right to bring up her children as she saw fit; moreover, the trial court failed to give the mother's wishes regarding the children's visitation any special weight at all, employing a pure best interests of the child standard.[55]

The plurality opinion set forth three primary reasons in support of its holding that the trial court's visitation order unconstitutionally infringed on Granville's fundamental Due Process right to raise her children as she saw fit.[56] First, the order cited no allegations or findings that Granville was unfit. Therefore, under Supreme Court jurisprudence,[57] the custodial mother was presumed to have acted in the best interests of her children.[58] Second, the trial court failed to give any "special weight at all" to the mother's opinion as to what was best for her children vis-à-vis visiting with their grandparents.[59] Third, the mother had never sought to discontinue all of her children's visitation and contact with their grandparents, but sought only to limit the amount of time her children visited with them.[60] Justice O'Connor concluded her opinion by

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[53] *Id.* at 68.
[54] *Id.* at 67.
[55] *Id.*
[56] *See* Scharf, *supra* note 32, at 624 n.81.
[57] *See* Parham v. J.R. 442 U.S. 584, 602 (1979) (finding that a fit parent is presumed to act in his or her child's best interests).
[58] *Id.*
[59] *Troxel*, 530 U.S. at 69. Justice O'Connor goes even further and finds that the trial court judge placed the burden of proving that visitation would *not* be in the best interests of her children on Granville. *Id.* ("In effect, the judge placed on Granville, the fit custodial parent, the burden of disproving that visitation would be in the best interest of her daughters.").
[60] *See id.* at 68–69.

stating that because they rested their decision on the "sweeping breadth" of the statute and its application, they need not address the primary constitutional question at issue, that is "whether the Due Process Clause requires all non-parental visitation statutes to include a showing of harm or potential harm to the children as a condition precedent to granting visitation."[61]

Dissenting, Justice Kennedy squarely addressed the question of whether all non-parental visitation statutes were required to include such a showing of harm.[62] He criticized the Washington Supreme Court for striking down the statute categorically because the statute lacked a requirement that "harm to the child would result if visitation were withheld,"[63] finding this reasoning "too broad to be correct."[64] Instead, a "best interests of the child standard"[65] should be applied in third party visitation cases.[66] Additionally, Justice Kennedy opined that the plurality opinion failed to adequately address recent changes in the nuclear family, finding that Justice O'Connor's opinion assumed that the custodial parent had been the primary caregiver, but that third parties did not have an established relationship with the child.[67] Furthermore,

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[61] *Id.* at 73.
[62] *Id.* at 94-95.
[63] *Id.* at 94 (Kennedy, J., dissenting).
[64] *Id.*
[65] *See* Janet L. Dolgin, *Why Has the Best-Interest Standard Survived?: The Historic and Social Context*, 16 CHILD. LEGAL RTS. J. 2, 2 n.1 (1996) (describing how all fifty states, either statutorily or judicially, require judges to apply a "best interest of the child" standard when making custody determinations between legal parents); *see also* Uniform Marriage and Divorce Act § 402, 9A U.L.A. (Part 2) 282 (1998). *But see* Jon Ester, *Solomonic Judgments: Against the Best Interest of the Child*, 54 U. CHI. L. REV. 1 (1987) (criticizing the "best interest of the child" standard as too elusive and subjective).
[66] *Troxel*, 530 U.S. at 98 (Kennedy, J., dissenting).
[67] *Id.* (Kennedy, J., dissenting).

Justice Kennedy recognized the importance of attachment and third party visitation:

> Some pre-existing relationships, then, serve to identify persons who have a strong attachment to the child with the concomitant motivation to act in a responsible way to ensure the child's welfare. As the State Supreme Court was correct to acknowledge, those relationships can be so enduring that 'in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship could cause severe psychological harm to the child. . .'[68]

Justice Stevens further argued in his dissenting opinion that a parent's interests must be balanced against "the child's own complementary interest in preserving relationships that serve her welfare and protection."[69] Moreover, he concluded that "the Due Process Clause of the Fourteenth Amendment leaves room for States to consider the impact on a child of possibly arbitrary parental decisions that neither serve nor are motivated by the best interest of the child."[70]

Troxel's reasoning applies with equal force to adoptive parents. Once an adoption is finalized, the adoptive parents acquire the same fundamental rights in the care of the adopted child that a biological parent has. In fact, the fundamental liberty interest in the "care, custody, and control of their children" to which *Troxel* refers would arguably go into effect only when an adoption is finalized and the adoptive parent

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[68] *Id.* at 99 (Kennedy, J., dissenting) (quoting *In re Custody of Smith*, 969 P.2d 21, 27 (Wash. 1998)).
[69] *Id.* at 87 (Stevens, J., dissenting).
[70] *Id.* at 91.

assumes the role of the legal parent.[71] In *Simmons v. Simmons*, the Tennessee Supreme Court considered the plaintiffs' claim that the adoptive parents' right to raise their child was subject to a lesser Constitutional standard than that of fit biological parents. The court rejected that argument and ruled that "[t]he relationship between an adoptive parent and child is no less sacred than the relationship between a natural parent and child, and that relationship is entitled to the same legal protection."[72]

While an adoptive parent may have such rights as a matter of state law, the United States Supreme Court has never recognized a fundamental right to adopt.[73] Moreover, the United States Circuit Courts of Appeal that have addressed the issue have explicitly found there is no fundamental right to adopt.[74] For example, in *Mullins v. Oregon*, the Ninth Circuit found that "whatever claim a prospective adoptive parent may have to a child, we are certain that it does not rise to the level of a fundamental liberty interest."[75] Similarly, in *Lindley v. Sullivan*, the Seventh Circuit held that "we are constrained to conclude that there is no fundamental right to adopt."[76]

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[71] *See In re* Jamison, 4 N.E.3d 889, 901 (Mass. 2014) (declaring that an adoptive parent obtains the same fundamental rights under the Fourteenth Amendment as biological parents, but legal guardians do not because "an adoption terminates the legal relationship between a biological parent and a child and establishes in its stead a new legal relationship between an adoptive parent and child").

[72] Simmons v. Simmons, 900 S.W.2d 682, 684 (Tenn. 1995).

[73] Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL'Y, 131, 154 (1995) ("[A]lthough the Supreme Court has rendered decisions defining various elements of family relationships as fundamental interests, none of those cases announced a fundamental interest in adopting children.").

[74] Mullins v. Oregon, 57 F.3d 789, 794 (9th Cir. 1995); Lindley v. Sullivan, 889 F.2d 124, 131 (7th Cir. 1989).

[75] *Mullins*, 57 F.3d at 794.

[76] *Lindley*, 889 F.2d at 131.

As preeminent family law scholar Solangel Maldonado suggests,

> [W]hile courts have recognized a fundamental right to procreate, they have not recognized a fundamental right to adopt. Courts must protect biological parents' fundamental rights to raise their children and may not remove a child from the care of his birth parents or terminate parental rights merely because another set of parents would do a better job of raising the child. Absent evidence of neglect or abuse or evidence that the child is in imminent risk of neglect or abuse, the state cannot terminate a parent's rights simply because it believes it would be in the child's best interests to be raised by another family. In contrast, when placing a child for adoption, courts must be guided exclusively by the child's best interests without regard for the interests of the adoptive parents.[77]

B. Statutory Authorization

States have struggled on the whole with how to approach third party visitation statutes in a post-*Troxel* universe. While many states repealed their third party visitation statutes entirely, some have moved in the direction of creating some mechanism for third party visitation. In doing so, they have faced a significant challenge in addressing the Supreme Court's concerns delineated in *Troxel v. Granville* without clear directives from the Court. Justice O'Connor made clear in the plurality opinion that a statutory standard

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[77] Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 357-58 (2008) [hereinafter Maldonado, *Permanency v. Biology*].

allowing a trial judge to apply a "best interest of the child" standard without giving "special weight" to a fit custodial parents' wishes would not meet Due Process requirements under the United States Constitution.[78] In the absence of guidance state legislatures have been reluctant to allow post-adoption visitation between biological and adoptive families without the adoptive parents' explicit consent.

For states that have addressed the issue of post-adoption contact through legislative enactment, there are generally two types of statutory schemes. The first way states have regulated post-adoption contact between biological and adoptive families is through statutes allowing for post-adoption contact agreements[79] entered into by the birth and adoptive families.[80] Such statutes "enable birth relatives and adoptive parents to enter into a post-adoption contact agreement prior to adoption that either party can enforce or modify in a court of law after adoption, but which can never provide grounds to set aside a voluntary relinquishment or an adoption."[81] Approximately twenty-five states and the District of Columbia now have statutes that specifically permit written contact agreements between birth parents and adoptive parents;[82] most, however, do not include or address birth

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[78] *See supra* Part II.A.

[79] For a more detailed discussion of post-adoption contact agreements, see *infra* Part V.A.

[80] *See* Annette R. Appell, *Controlling for Kin: Ghosts in the Postmodern Family*, 25 WIS. J. L. GENDER & SOC'Y 73, 92, 93 n.117-18 (2010) [hereinafter Appell, *Controlling for Kin*]; Annette R. Appell, *Enforceable Post Adoption Contact Statutes, Part II: Court-Imposed Post Adoption Contact*, 4:2 ADOPTION QUARTERLY 101, 101 (2000); *see also* Annette R. Appell, *Reflections on the Movement Toward a More Child-Centered Adoption*, 32 W. NEW ENG. L. REV. 1, 27-32 (2010).

[81] Annette R. Appell, *Survey of State Utilization of Adoption with Contact*, 6:4 ADOPTION QUARTERLY 75, 75 (2003) [hereinafter Appell, *State Utilization of Adoption with Contact*].

[82] *See* ARIZ. REV. STAT. ANN. § 8-116.01 (1999); CAL. FAM. CODE § 8616.5 (West 2004 & Supp. 2010); CONN. GEN. STAT. ANN. § 45a-715

siblings. This omission is particularly poignant for children in the foster care system, many of whom have had their birth parents' rights terminated, effectively prohibiting them from benefitting from a statute that is limited to contact with birth parents, rather than other members of the birth family.[83]

(West 2013); DEL. CODE ANN. tit. 13, § 929 (West 2013); D.C. CODE § 4-361 (2010); FLA. STAT. ANN. § 63.0427 (West 2012); IND. CODE ANN. § 31-19-16-2 (West 2012); LA. CHILD. CODE ANN. art. 1269.3 (2008); MD. CODE ANN., FAM. LAW § 5-308 (West 2006); MASS. GEN. LAWS. ANN. ch. 210, § 6C; MINN. STAT. ANN. § 259.58 (West 2007); MONT. CODE ANN. § 42-5-301 (2007); NEB. REV. STAT. ANN. §§ 43-162 to -165 (LexisNexis 2005); NEV. REV. STAT. ANN. §§ 127.187-127.1895 (West 2011); N.H. REV. STAT. ANN. § 170-B14 (2014); N.M. STAT. ANN. § 32A-5-35 (West 2009); N.Y. DOM. REL. LAW § 112-b (McKinney 2010); N.Y. SOC. SERV. LAW § 383-c(2)(b) (McKinney 2011); N.C. GEN. STAT. ANN. § 48-3-610 (West 1996); OKLA STAT. ANN. tit. 10, § 7505-1.5 (West 2000); OR. REV. STAT. § 109.305 (2009); PA. CONS. STAT. ANN. §§ 2733, 2738 (WEST 2011); R.I. GEN. LAWS ANN. § 15-7-14.1 (West 2001); S.C. CODE ANN. § 25-6-17 (2009) (2008); S.D. CODIFIED LAWS § 25-6-17 (2004); VT. STAT. ANN. tit. 15A, § 4-112 (2002); VA. CODE ANN. § 63.2-1220.2 (West 2010); WASH. REV. CODE ANN. § 26.33.295 (West 2009). Vermont, however, limits them to stepparent adoptions. VT. STAT. ANN. tit. 15A, § 4-112. Furthermore, many of the other state statutes are limited to situations where the *birth parent* is a party to the contract and not when the child is in foster care and the birth parents' rights have been terminated. CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SVC., ADMIN. FOR CHILDREN AND FAMS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMS., www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.pdf *2 (May 2011) [hereinafter CHILD WELFARE INFORMATION GATEWAY, POSTADOPTION CONTACT AGREEMENTS]. Connecticut and Nebraska, on the other hand, limit post-adoption contact agreements to children who are adopted through foster care. *Id.* at 3.

[83] Rhode Island is one of the few exceptions. In Rhode Island, the statute specifically states that adoption with contact can be available even when the termination of parental rights is involuntary, so that it is not as coercive. R.I. GEN. LAWS ANN. § 15-7-14.1. The change to the Rhode Island statute was made "so that birth parents would not forego the right to a termination of parental rights trial at the risk of losing and subsequently being statutorily precluded from participating in adoption with contact."

All but a handful of the post-adoption contact agreement statutes contain certain common features. First, these statutes give courts authority to grant an adoption with contact only when the adoptive parents agree to it.[84] Those statutes instead apply only when the agreements are voluntarily entered into, a situation that is not likely to occur when the adoptive parents have no motivation to do so. Even the most well-intentioned adoptive parents, sympathetic to an adopted foster child's desire to maintain a relationship with his or her birth family, are likely to choose an informal path to continuing those relationships, rather than to enter into a court-enforceable agreement. Second, although there are differences regarding who can be "parties to the adoption" in the post-adoption contact agreement,[85] the statutes require that

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Appell, *State Utilization of Adoption with Contact*, *supra* note 81, at 75. According to law professor Hillary Baldwin, who conducted a ten-year study of parental termination cases in Indiana, many mothers accused of abuse and neglect, who faced involuntary termination of their parental rights, voluntarily gave up their rights in exchange for an ability to enter into some type of post-adoption contact agreement. Hillary Baldwin, *Termination of Parental Rights: Statistical Study and Proposed Solutions*, 28 J. LEGIS. 239, 274 (2002) ("[V]oluntary termination gives the parent his only chance to work out a post-adoption visitation agreement. If the termination proceeds involuntarily, the parent risks never seeing the child again.").

[84] *See, e.g.*, MASS. GEN. LAWS ch. 210, § 6(c)(2008) ("[T]he court shall approve an agreement for post-adoption contact or communication if the court finds that such agreement is in the best interests of the child, contains terms that are fair and reasonable, and has been entered knowingly and voluntarily by all parties to the agreement.").

[85] CHILD WELFARE INFORMATION GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 82, at 3 ("The phrase 'parties to an adoption' generally refers to the birth parents (or other person placing the child for adoption) and the adoptive parents; it may include the adoptive child under the laws of some States."). In instances where the adoptive child is a party to the agreement, some states have provided for a guardian ad litem to represent the child's interests. *See, e.g.*, 23 PA. CONS. STAT. ANN. § 2733(b) (for siblings in foster care where "the prospective adoptive parent is not adopting all of the siblings, each such sibling who is under 18 years

all parties to the agreement must agree in writing to all terms prior to the finalization of the adoption.[86] Third, none of the statutes provide for vacating of the adoption or rescission of voluntary termination of parental rights as a remedy for breach of the agreement.[87]

The second way states have regulated post-adoption contact between biological and adoptive families is through statutes that permit courts themselves to order post-adoption contact; these statutes are typically silent as to post-adoption contact agreements, although they too require the consent of the adopting party. These statutes "empower the court to maintain pre-adoptive visitation rights after adoption or order post-adoption contact."[88] Colorado law, for example, provides that

> "[i]n cases involving the adoption of a child who is part of a sibling group, but who is not being adopted with his or her siblings, in addition to issuing a final decree of adoption, *if the adoptive parents are willing*, the court may encourage reasonable visitation among the siblings when visitation is in the best interests of the child."[89]

Indiana allows a court to issue an order for post-adoption sibling contact if the adopted child is at least two years old and "(1) the court determines that the postadoption

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of age shall be represented by a guardian ad litem in the development of an agreement").

[86] CHILD WELFARE INFORMATION GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 82, at 4.

[87] Appell, *State Utilization of Adoption with Contact*, *supra* note 81, at 77. The Rhode Island statute applies to children who demonstrate specific attachments to their birth parents and also allows it when termination is involuntary. R.I. GEN. ANN. LAWS § 15-7-14.1.

[88] Appell, *Controlling for Kin*, *supra* note 80, at 92.

[89] COLO. REV. STAT. § 19-5-210 (7) (2012) (emphasis added).

contact would serve the best interests of the adopted child; and (2) each adoptive parent consents to the court's order for postadoption contact privileges."[90]

While not dispensing with the consent of the adoptive parents, a few states have moved toward doing more to encourage adoptive parents to consent. In Pennsylvania, for example, the child welfare agency is required to notify the prospective adoptive parents, the birth parents, and the child that there is the option of voluntarily entering into a post-adoption visitation agreement with birth relatives, including siblings.[91] The Colorado statute specifies that the court "shall review the record and inquire as to whether the adoptive parents have received counseling regarding children in sibling groups maintaining or developing ties with each other."[92] So too, Massachusetts statutory and case law allows for courts to ensure that "sibling visitation rights be implemented through a schedule of visitation or supervised visitations" when it is in the best interests of the child, and the adoptive parents consent.[93]

Of the remaining states, most do not statutorily address the issue of post-adoption contact with birth families at all. A few, however, explicitly state that "open adoptions" are not legally recognized. Ohio law, for example, specifies that open adoptions are not binding or enforceable.[94] Moreover, finding

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[90] IND. CODE § 31-19-16.5 (1) (2012).

[91] 23 PA. CONS. STAT. ANN. § 2733(c).

[92] COLO. REV. STAT. § 19-5-210(7).

[93] Massachusetts is one of the few states that allows siblings to request visitation: "[a]ny child over 12 years of age may request visitation with siblings who have been separated and placed in care or have been adopted in a foster or adoptive home other than where the child resides." MASS. GEN. LAWS ch. 119, § 26B; *see also In re* Adoption of Zander, 983 N.E.2d 1222, 1226 (Mass. 2013).

[94] OHIO REV. CODE ANN. § 3107.65 (West 1996); *see also* S.C. CODE ANN. § 63-9-760 (D) (West 2008) (A post-adoption contact agreement "does not preserve any parental rights with the biological parents and does

that "[p]ost-adoption visitation is an extraordinary remedy,"[95] the South Dakota legislature specifically abrogated the South Dakota Supreme Court decision, *People in Interest of S.A.H.*,[96] "insofar as the case gave circuit courts the option to order an open adoption or post-termination visitation."[97] Such a wide divergence in the treatment of open adoptions and post-adoption contact by states mirrors the ambivalence of the public over the last century as the American adoption paradigm has undergone radical changes.

III. Movement from Closed to Open Adoptions

A. History of Closed Adoptions

Adoption was not recognized at common law and is purely a statutory creation.[98] In fact, in the post-Revolutionary War era, adoptions were legalized only through "individualized legislative enactments."[99] Such legislative enactments served to recognize the circumstances of a

not give them any rights enforceable in the courts of this State.").

[95] S.D. CODIFIED LAWS § 25-6-17 (1997).

[96] People in Interest of S.A.H., 537 N.W.2d 1 (S.D. 1995), *overturned by legislative enactment*, An Act to Prohibit Conditional Adoptions, 1997 S.D. Sess. Laws 153 (codified by S.D. CODIFIED LAWS § 25-6-17).

[97] S.D. CODIFIED LAWS § 25-6-17.

[98] English common law did not provide for adoptions, and adoption legislation was not passed in England until 1926. H. DAVID KIRK, ADOPTIVE KINSHIP xiv (1981); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, *in* 11 J. FAM. L. 443, 465 (1971). Massachusetts enacted the first adoption statute in the United States in 1851. Act of May 24, 1851, ch. 324, 1851 Mass. Acts 104; *see also* KIRK, *supra* at 71. The purpose behind the initial state adoption statutes was to create a mechanism for adoptive children to inherit from their adoptive parents. WILLIAM H. WHITMORE, THE LAW OF ADOPTION iii-iv (Albany, Joel Munsell 1876).

[99] Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1004 (1995) [hereinafter Appell, *Blending Families*]; Presser, *supra* note 98, at 461–70.

particular family, but no statutory construct governed adoption until Massachusetts passed the first statewide adoption statute in 1851.[100] Many other states soon followed the Massachusetts model.[101]

The concept of "open adoptions," that is, adoptions "which involve direct communication and full disclosure of identifying information between adoptive and birth families,"[102] may seem at first blush to be a modern convention. However, the enactment of the initial adoption statutes in the United States did nothing to "close adoptions"; for example, those statutes did not preserve confidentiality or seal adoption records.[103] It was not until the first decades of the twentieth century, during World War I, that the concept of legal "closed" adoption[104] was recognized.[105] Adoption

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[100] Whitmore, *supra* note 98, at iii; *see also* Presser, *supra* note 98, at 465.

[101] Presser, *supra* note 98, at 443; Naomi Cahn, *Perfect Substitutes or the Real Thing?* 52 DUKE L.J. 1077, 1102-54 (2003); *see also* KIRK, *supra* note 98, at 71.

[102] HAROLD D. GROTEVANT & RUTH G. MCROY, OPENNESS IN ADOPTION: EXPLORING FAMILY CONNECTIONS 3 (1998).

[103] Joan H. Hollinger, *Aftermath of Adoption: Legal and Social Consequences, in* 3 ADOPTION LAW AND PRACTICE 13-1, 13-5 n.6 (Joan Heifetz Hollinger ed., 2007) [hereinafter Hollinger, *Aftermath of Adoption*].

[104] "Closed adoptions," also referred to as "confidential adoptions," whereby "minimal information is shared between adoptive and birthfamily members and is never transmitted directly." GROTEVANT & MCROY, *supra* note 102, at 2-3 (explaining that with closed adoptions, after most adoptions were completed, the files were closed, and "no further contact was made between birth parents and adoptive family; all information about the adoption was kept confidential by the adoption agency or the state").

[105] Although the state of Minnesota passed the first law "closing" adoption in 1917, by the 1930's almost all states had statutes mandating that legal adoptions be "confidential." LOIS R. MELINA & SHARON K. ROSZIA, THE OPEN ADOPTION EXPERIENCE 4 (1993); *but see* Carol Amadio & Stuart L. Deutsch, *Open Adoption: Allowing Adopted Children to Stay in Touch with Blood Relatives*, 22 J. FAM. L. 59, 65 (1983-84) (discussing how couples cared for unwed pregnant women in the pre-World War II rural United States, adopted their children and kept an ongoing relationship with the

became confidential after World War I "in response to an increase in infant adoptions that was . . . spurred by many forces, including a growth in infertility, the availability of more reliable infant formula, and the changing psychological theories that began to view environment as more important in child development than genes."[106] Once the concept of "closed adoption" was introduced, it predominated the remainder of the twentieth century.[107]

While at the advent of the twentieth century most state adoption laws were silent as to confidentiality, by the mid-twentieth century, it was the norm for state adoption statutes to contain provisions mandating confidentiality.[108] The purpose behind those adoption statutes was "to effectuate a complete substitution of the adoptive family for the natural in every respect except the biological."[109] Moreover, the "adoption paradigm" that prevailed throughout the twentieth century was "one of exclusivity, secrecy, and transposition, through which the adoptee—usually an infant—is taken from one family and given to another, with all vestiges of the first family removed."[110] In the paradigm of closed adoption,

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biological mothers post-adoption).

[106] Appell, *Controlling for Kin*, *supra* note 80, at 88.

[107] *See* KIRK, *supra* note 98, at 99.

[108] *See* Hollinger, *Aftermath of Adoption*, *supra* note 103, at 13-6. Hollinger also posits that it was a desire to avoid the stigma of illegitimacy that was behind the movement toward confidential records in adoption. *Id.* at 13-5 (discussing how the New York adoption law mandated "that the 'fact of illegitimacy' not appear in the transcript of the [adoption] proceedings").

[109] Robert Borgman, *The Consequences of Open and Closed Adoption for Older Children*, 61 CHILD WELFARE 217, 218 (1982) (quoting ROBERT LEE, 3 N.C. FAM. LAW 214 (The Michie Co. 1963)) [hereinafter Borgman, *Open and Closed Adoption*].

[110] Appell, *Blending Families*, *supra* note 99, at 1005 (including references to history of development of adoption in the twentieth century); *see also* Carl Schoenberg, *On Adoption and Identity*, 53 CHILD WELFARE 549 (1974) ("The philosophy, legalities, and practice of adoption in the

> all actual contact, as well as legal relationships, between child and biological family are severed completely and permanently, with the expectation that the child will develop primary emotional attachments exclusively within the adoptive family. With the approval and support of the adoptive family, the child will begin anew to form relationships with others in the course of normal social growth. In the closed adoption, the adoptive family replaces the biological family.[111]

The closed adoption necessitated "a series of secrets designed to support this fictional rebirth."[112] Moreover, the adoption records were sealed with almost no possibility of access to names of all parties.[113] The child was given a new birth certificate with a new name and no reference to the adoption,[114] as if the original birth had never happened. But

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U.S. have historically been based on the availability of babies young enough and sufficiently like their adoptive parents to enable complete new families to come into existence.").

[111] Borgman, *Open and Closed Adoption*, *supra* note 109, at 218.

[112] Appell, *Blending Families*, *supra* note 99, at 1007; *see also* LEE, *supra* note 109 ("The adopted child is brought into the family of his adoptive parents as completely as by the process of birth.").

[113] Hollinger, *Aftermath of Adoption*, *supra* note 103, at 13-3 ("Once the adoption is granted, the records of the proceeding, along with the investigative reports on the parties, are sealed and are generally not available for inspection by anyone except upon court order for 'good cause.'"); *see also* Appell, *Blending Families*, *supra* note 99, at 1008 ("Whatever its claimed purpose, the sealing of records has become a cornerstone of modern adoption and serves to reinforce the notion that adoptive parents are the exclusive parents of the child."); Borgman, *Open and Closed Adoption*, *supra* note 109 (explaining how closed adoptions were "buttressed by the sealed adoption record that serves as a barrier to contact between children and their biological families").

[114] Appell, *Blending Families*, *supra* note 99, at 1007 n.40 ("[A]doption statutes generally mandate the issuance of a new birth certificate, identical

why blanket the adoption in secrecy? Traditionally, it was said to protect all members from the "shame" that shrouded the entire transaction: the adoptive parents' shame of infertility;[115] the birth mother's shame of having an "out-of wedlock" pregnancy;[116] and the child's shame of having been relinquished by the birth parent.[117] A further purported reason for the secrecy was that "it facilitated the formation of the adoptive family by excluding the birth parents while the adoptive parents and adoptee began to develop emotional and psychological bonds."[118] Toward the end of the twentieth

to the original, except for the substitution of the names of the adoptive parents for the names of the birth parents."); *see also* MIRIAM REITZ & KENNETH W. WATSON, ADOPTION AND THE FAMILY SYSTEM 5 (1992) (explaining that "in most jurisdictions, a new birth certificate is issued giving the adoptive parents as the child's parents"); Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 376-78 (2001) (describing how, beginning in 1930, states began the practice of replacing the names of the biological parents with those of the adoptive parents). In 1941, the U.S. Children's Bureau officially sanctioned the practice of issuing new birth certificates where the adoptive parents were listed as the actual birth parents, "on part so the children could avoid the embarrassment of explaining why their parents' names differed from those on their original birth certificates." Elizabeth J. Samuels, *The Strange History of Adult Adoptee Access to Original Birth Records*, 5-2 ADOPTION QUARTERLY 63, 74 (2001).

[115] ARTHUR D. SOROSKY, ANNETTE BARAN & REUBEN PANNOR, THE ADOPTION TRIANGLE 74 (1978).

[116] MELINA & ROSZIA, *supra* note 105, at 9.

[117] Burton Z. Sokoloff, *Antecedents of American Adoption*, *in* 3 ADOPTION 17, 22 (Spring 1993).

[118] Appell, *Blending Families*, *supra* note 99, at 1007; *see also* Hollinger, *Aftermath of Adoption*, *supra* note 103, at 13-8 ("[C]omplete severance of all ties between biological parents and the adoptee facilitates the development of strong emotional attachments between the adoptive parents and the adoptee, and insulates the adoptive families against interference in their lives by members of the child's family."). *But see* Appell, *Blending Families*, *supra* note 99, 1015 n.91 (suggesting that "[t]hose concerned that contact with the birth family will inhibit the adoption attachment or claiming process should consider the inevitability of the enduring presence

century, however, due to a confluence of normative changes, and groundbreaking psychological research, the adoption paradigm began to shift.

B. Movement Toward a More Open Model of Adoption

In the last three decades of the twentieth century, the nature of closed adoption slowly began to change largely as a result of demographics related to the decreased availability of infants for adoption,[119] and the "growing recognition of the negative impact of secrecy."[120] The legalization of abortion, the increased availability of birth control, and the lessening of the stigma of out-of-wedlock births all contributed to a culture in which fewer infants were available for adoption.[121] At the

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of the birth family in the adoptee's psyche").

[119] The demographics of who the adoptive parents were changed as well. Up until the second half of the twentieth century, most adoptions involved married, white, infertile couples adopting newborns born to single, white women. SHARON VANDIVERE, KARIN MALM, & LAURA RADEL, U.S. DEPT. OF HEALTH AND HUMAN SERVS., ADOPTION USA: A CHARTBOOK BASED ON THE 2007 SURVEY OF ADOPTIVE PARENTS (2009), *available at* http://aspe.hhs.gov/hsp/09/NSAP/chartbook/index.pdf. This group still comprises the majority of adoptive parents; by the end of the twentieth century, however, "a much wider range of adults [sought] to build families through adoption—for example, fertile couples, (with or without biological children of their own), minority couples, single adults, foster parents, and working class couples." DAVID M. BRODZINSKY & MARSHALL D. SCHECTER, *Preface* to THE PSYCHOLOGY OF ADOPTION xi (Brodzinsky and Schecter eds., 1990).

[120] DEBORAH H. SIEGEL & SUSAN LIVINGSTON SMITH, EVAN B. DONALDSON ADOPTION INST. 7 (March 2012), *available at* http://adoptioninstitute.org/old/publications/2012_03_OpennessInAdoption.pdf.

[121] Carol Sanger, *Bargaining for Motherhood: Postadoption Visitation Agreements*, 41 HOFSTRA L. REV. 309, 314 (2012); *see also* Appell, *Blending Families*, *supra* note 99, at 1008; *see also* Nicholas Zill, *Benefits and Challenges of Adopting Children from Foster Care: Insight from a National Survey of Children's Health*, *in* ADOPTION FACTBOOK V 213, 213 (Elisa S. Rosman et al. eds., 2011) (adding that "teen mothers, the age group historically most likely to place their infants for adoption, have

same time, an increase in infertility among many middle class couples who had delayed having children increased the demand for infants to adopt.[122] Consequently, birth mothers[123] who were giving up their children for adoption slowly gained the power to exert more control over the adoption process.[124] They became empowered to request ongoing contact with the child and adoptive parents and to choose among adoptive parents who were willing to agree to such continued contact.

Professor Annette Appell explains the increase in the openness of adoption as follows:

> [B]irth mothers have gained more autonomy through increased reproductive choice and changing legal and social mores that produce less shame in the tangible incarnations of women's sexuality. Armed with this moral authority, birth mothers began to seek adoptive

become less common since 1970"). There was also an increase in the number of step-parent adoptions that corresponded to the rise in divorce rates, which began in the early 1970s. SOROSKY ET AL., *supra* note 115, at 197.

[122] Sokoloff, *supra* note 117, at 23; Nicholas Zill, *Benefits and Challenges*, *supra* note 121. "According to the National Adoption Information Clearinghouse estimate, less than 14,000 children were voluntarily relinquished for adoption in the United States in 2003, and in 1995, the number of American women seeking to adopt was over 200,000." CHILD WELFARE INFO. GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SVCS., ADMIN. FOR CHILDREN AND FAMS., VOLUNTARY RELINQUISHMENT FOR ADOPTION 1 (2005), *available at* http://childwelfare.gov/pubs/s_place.pdf.

[123] I use the term "birth mother" throughout although there are, of course, instances when there are "birth parents" who make the determination to relinquish a child for adoption.

[124] Such "control" has manifested itself primarily by often allowing the birth mothers to choose the adoptive parents by reading statements or biographies, or by reviewing medical records. For a discussion of the "changes in the face of adoption" see Appell, *Blending Families*, *supra* note 99, at 1007, and Sokoloff, *supra* note 117, at 22-23.

> parents who would be willing to engage in open adoption in which birth parents meet each other and might even have open contact.[125]

As birth mothers sought more openness in adoptions, pressure mounted on adoptive parents to agree to open adoptions even beyond their comfort level, in order to adopt the child.[126] In open adoptions, the adoptive parents acquire legal rights and responsibilities as parents and are responsible for the day-to-day care of the child; however, contact between the adopted child and the biological family is permitted and, at times, even encouraged.[127] Open adoption pioneers Annette Baran, Reuben Pannor, and Arthur Sorosky define open adoption as "[an adoption] in which the birth parents meet the adoptive parents, participate in the separation and placement process, relinquish all legal, moral, and nurturing rights to the child, but retain the right to continuing contact and to knowledge of the child's whereabouts and welfare."[128] In fact, open adoption takes place on a spectrum with the mere exchange of information about the birth parents and adoptive parents at one end of the continuum and "full family

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[125] Appell, *Controlling for Kin*, *supra* note 80, at 91.

[126] Kirsten Widner, *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, 358 (2007) (citing Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 U.C.L.A. L. REV. 917, 917-22 (1991)) (arguing that because there are fewer adoptable infants, adoption is now a "provider's market" and birth mothers can "dictate whimsical requirements for the adoptive home").

[127] Borgman, *Open and Closed Adoption*, *supra* note 109 (describing how, with open adoptions, "the adoptive family expands the child's range of relationships").

[128] Annette Baran, Reuben Pannor, & Arthur Sorosky, *Open Adoption*, *in* SOC. WORK 97, 97 (Mar. 1976) ("There is no sound reason to continue in the belief that biological parents be banished, or that a child's emotional connections with biological parents preclude the creation of healthy and stable placements.").

interrelationships with shared space and shared parenting"[129] at the other, and a wide variety of levels of communications in between.[130]

The movement toward open adoption brought with it debate about the "detrimental or beneficial effects of openness in adoption."[131] Advocates of open adoption claim that adoptive parents are helped "by having permission to parent from their child's birth parents."[132] Open adoption can also arguably assist birth parents because "trust is built between birth and adoptive parents" and birth parents are reassured of their decision to place the child.[133] Moreover, many argue that "as adopted children grow up into adulthood, the secrecy surrounding their past can be more of a hindrance than a help to many of them."[134] Conversely, opponents of open adoption

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[129] Appell, *Controlling for Kin*, *supra* note 80.

[130] Chris Jones & Simon Hackett, *Communicative Openness Within Adoptive Families: Adoptive Parents' Narrative Accounts of the Challenges of Adoption Talk and the Approaches Used to Manage These Challenges*, ADOPTION Q. 157, 158-59 (2007) (describing a variety of medium whereby post-adoption contact between birth families and adoptive families is maintained, including handwritten, electronic, and telephonic).

[131] David M. Martin et al., *Toward a Greater Understanding of Openness: A Report from the Early Growth and Development Study*, ADOPTION FACTBOOK V 471, 471 (Elisa Rosman et al. eds., 2011); *see also* Charlene E. Miall & Karen March, *Open Adoption as a Family Form: Community Assessments and Social Support*, *in* 26 J. FAM. ISSUES 380-410 (2005).

[132] Martin, *supra* note 131.

[133] *Id*. at 471 n.7.

[134] KIRK, *supra* note 98, at 22. As a result of the secrecy, adopted children developed fears and fantasies about their origins. Miriam Reitz and Kenneth W. Watson conducted studies of adoptees and adoptive families and found the "origin" stories of adoptees focused on three reasons that their birth families did not raise them: (1) there was something wrong with the adoptee herself and therefore their birth family did not want to keep them; (2) there was something wrong with their birth parents; and (3) their adoptive parents kidnapped them from their birth parents. Reitz & Watson, *supra* note 114, at 8-9.

posit that in open adoptions, adoptive parents lack the necessary security in their role as parents, and birth parents are "unable to 'move on' with their lives."[135]

The demographics of adoption, however, continue to change. Many more children who are adopted do so from foster care and are adopted at a later age.[136] Given their older ages, there is little doubt that they have knowledge of their birth families, and for these children a truly "closed adoption" is merely a pretense. Thus, the question becomes what is sound public policy for addressing the needs of those children who are adopted but have palpable connections to their birth families.

IV. The Psychology of Sibling Relationships

A. Sibling Attachment Bonds

For many children, the bond they share with a sibling[137] will be one of the strongest they experience during their lifetime; often, sibling "relationships and identities are

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[135] Martin, *supra* note 131, at 471 n.5; *see also* Adrienne D. Kraft et al., *Some Theoretical Considerations on Confidential Adoptions* (pts. 1-3) 2 CHILD AND ADOLESCENT SOC. WORK J. 13, 69, 139-40 (1985) (discussing the effect of open adoptions on the adopted child, the adopted parent, and the birth mother). Even as the number of open adoptions increases and has become a common practice among domestic adoptions in this country, public attitudes toward open adoption have lagged behind. For example, one of the first national surveys regarding public attitudes toward adoption, conducted by the Adoption Institute in 2007, found "considerable ambivalence in the general public toward even a moderate level of openness." Siegel & Livingston Smith, *supra* note 120, at 5-6.

[136] *See* Hollinger, *Introduction to Adoption Law and Practice*, and accompanying text, *infra* note 179.

[137] Eighty percent of children in the United States have at least one sibling. Angela N. Hilton & Dawn M. Szymanski, *Family Dynamics and Changes in Sibling of Origin Relationships After Lesbian and Gay Sexual Orientation Disclosure*, 33 CONTEMP. FAM. THERAPY 291, 293 (2011).

intertwined, sometimes for life."[138] This bond is a result of a "closeness that comes from being the only people who know what it was like to grow up in their families. This sense of shared memories and shared experience often keeps siblings close long into adulthood."[139] As Stephen Bank and Michael Kahn explain in their seminal work, *Sibling Bond*, "[t]he sibling bond is often experienced like this—viscerally, forcefully, without conscious understanding, but with a sixth sense that this relationship is a vital key to one's own knowledge of oneself. One's core self, seen through the eyes of a sibling, or compared with that of a sibling, remains [an] essential reference point for personal identity."[140] Not surprisingly, the warmth resulting from a strong sibling bond is associated with individuals experiencing less loneliness, fewer behavior difficulties, and higher self-worth.[141]

When parents are consistently physically and emotionally unavailable, as is the case for many children who eventually find their way into foster care, siblings are even more likely to form a strong bond with each other.[142] That is,

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138 STEPHEN BANK & MICHAEL D. KAHN, THE SIBLING BOND 112 (1982).

139 MELINA & ROSZIA, *supra* note 105, at 288 ("Not surprisingly, siblings who see each other often will probably feel closer to each other than those who must build their relationship through an occasional long-distance phone call.").

140 BANK & KAHN, *supra* note 138, at 60. This is not to say that all sibling bonds are created equal. Siblings may also have "low access," such as when they are very far apart in age, and thus "lack the sense of a shared history." *Id.* at 10. "The strength of the sibling bond depends partially on 'access.' When siblings are the same gender, close in age, share a room, raised by the same parent(s), attend the same schools, they are 'high access' siblings and 'a strong and influential tie will develop between them.' " Marrus, *Where Have You Been Fran?*, *supra* note 5, at 984.

141 Clare M. Stocker, *Children's Perceptions of Relationships with Siblings, Friends, and Mothers: Compensatory Processes and Links with Adjustment*, *in* 35 J. CHILD PSYCHOL. & PSYCHIATRY 1447, 1454-55 (1994).

142 *See* BANK & KAHN, *supra* note 138, at 64, 123. Moreover, a number of psychological studies have concluded that parental under-involvement

sibling attachment bonds are strengthened when a parent is repeatedly "unresponsive or is ineffective in meeting the child's needs (as in the case of alcoholic, drug-addicted, or mentally unstable parents . . .)."[143] Thus, children whose family lives are deeply troubled and who lose daily contact with even one of their parents often form deeper attachments to their siblings;[144] those siblings then become "attachment figures" in their lives.[145]

An individual becomes an attachment figure[146] for a child when she has established a bond that is a "relatively

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results in strong loyalty between siblings. JAMES H.S. BOSSARD, & ELEANOR S. NOLL, THE LARGE FAMILY SYSTEM: AN ORIGINAL STUDY IN THE SOCIOLOGY OF FAMILY BEHAVIOR. (1956); Brian Sutton-Smith et al., *The Interaction of Father Absence and Sibling Presence on Cognitive Abilities, in* 39 CHILD DEV. 1213-21 (1968).

143 Marrus, *Where Have You Been, Fran?*, *supra* note 5, at 986 (citing Cicirelli, *supra* note 145, at 111).

144 *See* Katherine Bartlett, *Rethinking Parenthood as an Exclusive Status: The Need for Legal Alternatives When the Premise of the Nuclear Family Has Failed*, 70 VA. L. REV. 879, 881 (1984) (citing Looper v. McManus, 581 P.2d 487, 488-89 (Okla. Ct. App. 1978)); *see also* BANK & KAHN, *supra* note 138, at 31 ("[I]f a [parent] is available and competent, siblings are unlikely to become figures for symbiosis and attachment for each other.").

145 Although for most children, the first attachment bond they experience is with a parent, children also form attachment bonds with siblings and other close family members. *See* VICTOR G. CICIRELLI, SIBLING RELATIONSHIPS ACROSS THE LIFE SPAN 43 (1995); *see also* Tiffany Field, *Attachment and Separation in Young Children*, 47 ANN. REV. PSYCHOL. 541, 544 (1996). Furthermore, studies have shown that children can develop strong sibling attachments even as infants. CICIRELLI, *supra*; Field, *supra*.

146 According to John Bowlby, "[a]n attachment figure [is] any person perceived as stronger and better able to cope with the world and someone who provides consistent protection and care." Shelley A. Riggs, *RESPONSE TO TROXEL V. GRANVILLE: Implications of Attachment Theory for Judicial Decisions Regarding Custody and Third-Party Visitation*, 41 FAM. CT. REV. 39, 43 (2003) (citing JOHN BOWLBY, ATTACHMENT AND LOSS: VOL. 3. LOSS (1980)).

long-enduring tie in which the [family member] is important as a unique individual, interchangeable with none other,"[147] demonstrating "a need to maintain proximity, distress upon inexplicable separation, pleasure or joy upon reunion, and grief and loss."[148] In fact, researchers have found, that attachment bonds formed "between siblings can ease the separation from caregivers and can make separation from [the other sibling] very stressful."[149] Moreover, in many dysfunctional families, siblings provide the "only constancy and stability in their lives. Sometimes, siblings even help one another survive."[150]

As Bank and Kahn explain,

> Psychotherapists meet many [siblings] who have no loving or sustaining parent at home, and for whom, thus abandoned, the sibling

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147 Riggs, *supra* note 146, at 40-41.

148 *Id.* at 43. Moreover, empirical evidence demonstrates that alternative (meaning "other than natural parent") attachments can have a significant positive effect on a child's socioemotional development. These attachments, which include attachments to siblings, have increased importance during and after a divorce, for example, when natural parents are often distracted by the tumult in their own lives and are unable to adequately tend to the needs of their children, who may be experiencing tremendous loss at the changes taking place in their lives. *Id.* at 44; *see also* E. Mavis Hetherington, T.C. Law & Thomas G. O'Connor, *Divorce: Challenges, Changes and New Chances, in* NORMAL FAMILY PROCESSES 208-34 (F. Walsh ed., 1993).

149 Marrus, *Where Have You Been, Fran?*, *supra* note 5, at 979 n.16; *see also* BANK & KAHN, *supra* note 138, at 29 (recounting the story of a nineteen month-old infant who suffered no noticeable difficulties when separated from her mother and placed, along with her two older siblings, in the care of her aunt; when she later moved to another relative's home without her siblings, she stopped eating, stopped talking, became "withdrawn and agitated" and "resisted the affections of anyone, including the mother and father when she was reunited with them," until she was reunited with her siblings).

150 Adam Pertman, *Foreward* to SIBLINGS IN ADOPTION AND FOSTER CARE, xi (Deborah N. Silverstein & Susan Livingston Smith eds., 2009).

> relationship is the only caring force. These siblings' relationships and identities are intertwined . . . because they have jointly faced traumatic psychological losses at crucial stages of their development. Mutual loyalty and caregiving for these real-life Hansels and Gretels permit both physical and psychological survival.[151]

The attachment ties between biological siblings in foster care[152] are particularly strong.[153] Nationally, there are approximately 399,500 children in foster care, with only 28% of those children being cared by a foster parent who is a relative.[154] Often children "deprived of parents form a subfamily, with one child assuming the parental responsibility for another. Consequently, the ties between siblings are often

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[151] BANK & KAHN, *supra* note 138, at 112-13.

[152] One of the major sea changes of the last decades of the twentieth century has been the tremendous increase in the number of children in the foster care system. In 2006, approximately fifty thousand children in foster care were adopted. ADMIN. FOR CHILDREN, YOUTH & FAMS., U.S. DEP'T OF HEALTH & HUMAN SERVS., AFCARS REPORT: PRELIMINARY FY 2006 ESTIMATES AS OF JAN. 2008 (14), at 4, *available at* http://www.acf.hhs.gov/sites/default/files/cb/afcarsreport14.pdf. Less than three percent of these children were under the age of one. *Id.* at 7. For additional data on children in foster care and adoption, see CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SVCS., ADMIN. FOR CHILDREN AND FAMS., FOSTER CARE STATISTICS 2012, 1-6 (Nov. 2013), https://www.childwelfare.gov/pubs/factsheets/foster.pdf [hereinafter, CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS]; *see also* Nicholas Zill, *Benefits and Challenges*, *supra* note 121.

[153] Pertman, *supra* note 150.

[154] CHILD WELFARE INFORMATION GATEWAY, FOSTER CARE STATISTICS, *supra* note 152, at 1, 3-4. As of September 2012, nationally there were 399, 546 children in foster care. 47% were in nonrelative foster family homes, 28% in relative foster family homes, 9% in institutions, 6% in group homes, 6% on "trial home visits," and 6% in a variety of other arrangements. *Id.*

even stronger than the ties of the children to their biological parents."[155] Those ties between those children grow even stronger once they are in foster care.[156]

B. The Psychology of Sibling Loss Through Adoption

It is generally undisputed among psychologists that all adopted children experience some degree of loss when adopted.[157] Although a child's experience of loss is certainly not limited to adoption,[158] adoption loss is unique in several critical ways. The loss an adopted child experiences is 'more pervasive, less socially recognized, and more profound' than other family losses, such as those associated with divorce.[159] Adoption expert and scholar David M. Brozinsky has observed that,

> [a]lthough adoption, divorce, and death all involve loss, the *extent of the loss* is greater in

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[155] CLAUDIA L. JEWETT, ADOPTING THE OLDER CHILD 161 (1978).

[156] *Id.*

[157] *See* David M. Brodzinsky, *Adjustment to Adoption: A Psychosocial Perspective*, *in* 7 CLINICAL PSYCHOL. REV. 25, 36 (1987) [hereinafter Brodzinsky, *Adoption: A Psychosocial Perspective*]; Steven L. Nickman, *Losses in Adoption: The Need for Dialogue*, 40 THE PSYCHOANALYTIC STUDY OF THE CHILD 365-98 (1985); Paul M. Brinish, *Some Potential Effects of Adoption on Self and Object Representations*, 35 THE PSYCHOANALYTIC STUDY OF THE CHILD 107-33 (1980).

[158] David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, *in* THE PSYCHOLOGY OF ADOPTION 3, 7 (David M. Brodzinsky and Marshall D. Schecter eds., 1990) [hereinafter Brodzinsky, *Model of Adoption Adjustment*] (explaining that "loss has been conceptualized as a fundamental explanatory construct in children's adjustment to many forms of family disruption and life transitions."). Moreover, "loss associated with family disruption and life transitions varies along a number of dimensions, including degree of acuteness, pervasiveness, permanence, universality, [and] public recognition of loss." *Id.* at 8.

[159] DAVID M. BRODZINSKY, MARSHALL D. SCHECTER & ROBIN MARANTZ HENIG, BEING ADOPTED: THE LIFELONG SEARCH FOR SELF 9 (1992); *see also* Brodzinsky, *Adoption: A Psychosocial Perspective*, *supra* note 157, at 36-37.

> adoption . . . . In adoption, the loss is more pervasive, although perhaps less obvious. Not only do adopted children experience the loss of birth parents and the extended birth family as well as the loss of cultural and genealogical heritage, but for many adoptees there is a loss of a sense of permanence in, and connectedness to, their adoptive family, as well as a loss of self and social status.[160]

Children who are adopted can even experience loss for biological family members they have never known.[161] In fact, "[t]he only certain commonality among . . . families [connected through adoption] is that they have undergone fundamental loss experiences beyond those that any family can normally expect."[162] The scholarship on attachment and children demonstrates that "[c]hildren separated from brothers and sisters may never resolve their feelings of loss, even if there are new brothers and sisters whom they grow to love."[163] The loss of—or sudden, long-term separation from—an attachment figure creates significant psychological harm in children[164] and can "seriously injure and fragment an individual's sense of self."[165] When siblings are separated at a

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160 Brodzinsky, *Model of Adoption Adjustment*, *supra* note 158, at 9.

161 *Id.* at 7.

162 REITZ & WATSON, *supra* note 114, at 13; *see also* Anne B. Brodzinsky, *Surrendering an Infant for Adoption: The Birthmother Experience*, *in* THE PSYCHOLOGY OF ADOPTION 295, 304 (David M. Brodzinsky & Marshall D. Schecter eds. 1990). Moreover, there is evidence that demonstrates that birth fathers experience a sense of loss as well, which can result in feelings of anger and grief. VIVIAN B. SHAPIRO ET AL., COMPLEX ADOPTION AND ASSISTED REPRODUCTIVE TECHNOLOGY 155 (2001); Brodzinsky, *Model of Adoption Adjustment*, *supra* note 158, at 8 ("Adopted children also fantasize about 'undoing' their loss.").

163 JEWETT, *supra* note 155, at 162.

164 BOWLBY, *supra* note 146.

165 *Riggs*, *supra* note 146, at 41. "People with insecure attachment

young age, the bond is often "disrupted before it begins to form."[166] Moreover, multiple studies have demonstrated that separating siblings can have "detrimental effects on them, while maintaining their bonds can yield developmental, psychic, and social benefits."[167] Nevertheless, some have argued that adopted children will not be able to fully attach to their adoptive parents "until they have relinquished attachments to others important to them in the past through a process of mourning, protest, and acceptance of the loss."[168]

Because of the bonds children from disrupted families have established with their biological siblings,[169] a child's loss of her biological siblings when adopted is particularly acute. Children who are old enough to understand "may grieve for the loss of the brother or sister they will not be living with."[170] This grief is experienced "by first feeling numb and denying

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strategies may be at greater risk for emotional problems due to distortions in their thinking and difficulties regulating emotion." *Id.* (citing Elizabeth A. Carlson & L. Alan Sroufe, *Contribution of Attachment Theory to Developmental Psychopathology*, *in* DEVELOPMENTAL PSYCHOPATHOLOGY, VOL. 1: THEORY AND METHODS 581 (Dante Cicchetti & Donald J. Cohen eds., 1995)).

166 Marrus, *Where Have You Been, Fran?*, *supra* note 5, 978 n.4 (citing SIBLING RELATIONSHIPS: THEIR NATURE AND SIGNIFICANCE ACROSS THE LIFESPAN 228 (Michael E. Lamb & Brian Sutton-Smith eds., 1982)); Melina & Roszia, *supra* note 105, at 288 ("Close relationships between birth siblings raised apart are also more common when a child the birth parent is raising is old enough to remember the placement of the younger sibling.").

167 Since the advent of open adoption, there has been an increase in studies looking at the effect of terminating family bonds. Pertman, *supra* note 150, at ix.

168 Borgman, *Open and Closed Adoption*, *supra* note 109, at 219 (citing LAURIE WISHARD & WILLIAM WISHARD, ADOPTION: THE GRAFTED TREE 52 (1979)); *see also* ANN CARNEY, NO MORE HERE AND THERE, 72-73 (1976) ("The genuine adoption will more easily be effected once the child cuts all cords with the past, painful as this may be.").

169 *See supra* Part IV.A.

170 MELINA & ROSZIA, *supra* note 105, at 283.

the loss, by believing they caused the loss and trying to recover it through some 'bargain,' by feeling angry and sad."[171] The grieving process for children who have lost a sibling to adoption is similar to that of an adult, but also can involve both tremendous grief and a type of guilt.[172] This is particularly true for older siblings whose younger siblings were adopted. They may feel guilty, believing they should have "dropped out of school to get a job to help support"[173] the sibling so that they would not need to be permanently separated.

Creating an avenue for contact with children whose siblings are adopted is critical to addressing the significant losses suffered by siblings. Open adoption is particularly important for older adoptees who have a need for "continuity as well as permanency."[174] Older children, in particular, find it

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171 *Id.*

172 *Id.*

173 *Id.* According to adoption expert David M. Brodzinsky, "[f]antasies about reunions with birthparents (and birthsiblings) are extremely common among adopted children as they are growing up . . . and may well serve to impede the resolution of loss among many adopted individuals." Brodzinsky, *Model of Adoption Adjustment*, *supra* note 158, at 7, 8; *see also* BANK & KAHN, *supra* note 138, at 60 ("To meet one's brother or sister, even after many years, is to recapture the bittersweet memory of one's own essential childhood self, unmoved by the passage of time."). Moreover, "loss associated with family disruption and life transitions varies along a number of dimensions, including degree of acuteness, pervasiveness, permanence, universality, [and] public recognition of loss." Brodzinsky, *Model of Adoption Adjustment*, *supra* note 158, at 7 (explaining that "loss has been conceptualized as a fundamental explanatory construct in children's adjustment to many forms of family disruption and life transitions.").

174 *See* Borgman, *Open and Closed Adoption*, *supra* note 109, at 217 (explaining that "traditional closed adoption creates an artificial emotional circumstance for older children who are asked to sever ties with meaningful persons"). Furthermore, "[s]ince the child may remain involved with the biological family, he or she is spared the pain and guilt of being forced to choose between the adoptive family and the biological

"extremely difficult, if not impossible, to suddenly erase ten or more years of relationships, experience and family history without endangering their basic security and self-identity."[175] Moreover, access to birth families, including siblings, can provide the adopted child with "a more realistic view of his or her birth parents and relieve the child's guilt, self-blame, and anger about placement and adoption."[176]

In 1998, researchers Harold D. Grotevant and Ruth G. McRoy conducted the Minnesota-Texas Research Project (MTARP), one of the most comprehensive longitudinal studies involving adolescent adoptees and their opinions on the openness of their adoptions.[177] The MTARP studied the domestic adoptions of 190 adoptive families and 169 birth mothers with "varying levels of openness" over a twenty-year period. As part of the MTARP, over 150 adolescents who were adopted were interviewed specifically regarding their feelings and satisfaction levels surrounding the level of openness in their adoption. Those adolescents who had contact with their birth families consistently were more satisfied with the level of openness than those who did not, with almost all of the teens interviewed wishing for even more extensive

parents and relatives." *Id.* at 219.

[175] *Id.*; *see also* Andre P. Derdeyn, Andrew R. Rogoff & Scott W. Williams, *Alternatives to Absolute Termination of Parental Rights After Long Term Foster Care*, 31 VAND. L. REV. 1165, 1189 (1978) ("There is no sound reason to continue in the belief that [biological families] be banished, or that a child's emotional connections with [biological families] preclude the creation of healthy and stable placements.").

[176] Appell, *Blending Families*, *supra* note 99, at 1017 (citing Borgman, *Open and Closed Adoption*, *supra* note 109, at 222-23).

[177] *See generally* GROTEVANT & MCROY, *supra* note 102. Grotevant and McRoy's study was commenced in 1987 with 190 adoptive families. All families had adopted newborns through domestic adoption agencies in the United States. It is one of the only studies that has conducted in-depth interviews of both birth and adoptive families across a period of many years. SIEGEL & LIVINGSTON SMITH, *supra* note 120, at 16.

contact, including contact with more family members of their family of origin.[178]

The MTARP findings take on particular significance when viewed in light of present day adoptions. Today, most domestic adoptees are older children, not the infants historically associated with adoption.[179] In fact, of the 133,737 domestic adoptions in 2007, only 18,078, or 13.5 percent were unrelated domestic adoptions of infants.[180] Therefore, the vast majority of domestic adoptions are likely to involve children of an age when they have developed a bond with a sibling.

When siblings are placed together, the adoption itself is less likely to result in a disrupted placement.[181] Placing

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[178] Jerica M. Berge et al., *Adolescents' feelings about Openness in Adoption: Implications for Adoption Agencies*, 85 CHILD WELFARE 1011, 1039 (2006); Sacha Coupet, *Swimming Upstream Against the Great Adoption Tide: Making the Case for "Impermanence"*, 34 CAP. U. L. REV. 405, 423 (2005) (quoting Robert Green, *The Evolution of Kinship Care Policy and Practice*, *in* 14 THE FUTURE OF CHILDREN 131, 143 (Winter 2004) ("Research suggests that children in kinship foster care are more likely than children in non-kin placements to be placed with siblings and 'more frequently placed in close physical proximity to the homes from which they were removed.'")).

[179] Joan H. Hollinger, *Introduction to Adoption Law and Practice*, *in* 1 ADOPTION LAW AND PRACTICE 1-56 (Joan Heifetz Hollinger ed., 2013). A little over twenty percent of children adopted are infants who are adopted by non-relatives. Over half of adoptions are by step-parents or other relatives, while another twenty percent are children who are in foster care, who are rarely adopted as infants. UNIF. ADOPTION ACT, *Prefatory Note* at 1 (1994).

[180] Paul J. Placek, *National Adoption Data Assembled by the National Council for Adoption*, *in* ADOPTION FACTBOOK V 3, 11 (Elisa S. Rosman et al. eds., 2011).

[181] CHILD WELFARE INFORMATION GATEWAY, U.S. DEP'T OF HEALTH AND HUMAN SVCS., ADMIN. FOR CHILDREN AND FAMS., SIBLING ISSUES IN FOSTER CARE AND ADOPTION 7 (Jan. 2013), https://www.childwelfare.gov/pubs/siblingissues/siblingissues.pdf. For a discussion of disruption in adoptions, see Robert Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and*

siblings together can help increase the likelihood the adoption will be successful.[182] In a review of studies on "adoption disruption," that is, "the removal of a child from an adoptive placement before the adoption has been legalized,"[183] Trudy Festinger determined that "siblings who were living together were less apt to have problems of various sorts, which very likely was a factor in their lower rate of disruption."[184] Moreover, the children who had siblings in other adoptive homes, but were separated from them, were "overrepresented among disruptions."[185] Children adopted when they are older have the most "impaired ability to attach" and are most likely to have their adoptions disrupted.[186] Given that adoptions in this country are more likely to involve older children, it is even more important to look to factors that will increase the likelihood of the success of the adoption. Studies have shown that the older a child is when adopted, the more likely the adoption is to be disrupted.[187]

Neglected Children, 60 CHILD WELFARE 391, 391 (1981) [hereinafter Borgman, *Parental Rights Termination*].

182 *See* JEWETT, *supra* note 155, at 161-63.

183 Trudy Festinger, *Adoption Disruption: Rates and Correlates*, *in* THE PSYCHOLOGY OF ADOPTION 201, 209 (David Brodzinsky & Marshall Schecter eds., 1990).

184 *Id.*

185 *Id.* According to Festinger, these studies, however, did not explore the specific reasons that separated siblings experienced more disruptions (opining that "[p]erhaps the separation was problematic for these children and influenced their adaptation in the adoptive home; or perhaps they had more serious problems to begin with, which may have influenced their having been separately placed"). *Id.* at 209-10. In addition, there is at least some evidence that an inability or difficulty with maintaining such relationships can lead to a disruption in adoption.

186 REITZ & WATSON, *supra* note 114, at 175.

187 Festinger, *supra* note 183, at 208; Delores M. Schmidt, James A. Rosenthal & Beth Bombeck, *Parents' Views of Adoption Disruption*, 10 CHILD. & YOUTH SERV. REV. 119, 120 (1988) (citing to multiple studies that show a relationship between the age of the child and the "risk of disruption"); *see also* Susan Livingston Smith & Jeanne A. Howard, *A*

Keeping siblings together or providing visitation can help both younger and older children. It can relieve the sense of responsibility that younger children often have for the breakup of the family.[188] And, "[e]specially in the case of an older caretaker child who believes it was his or her responsibility to hold the family together,"[189] keeping siblings together can alleviate other "deep feelings of guilt, failure, and unworthiness."[190] Without post-adoptive contact, children who have been in foster care can demonstrate reluctance to be adopted.[191] As Robert Borgman's detailed study of children in foster care illustrates, once a biological parent's rights have been terminated[192] and adoption becomes a possibility, children grow anxious at the prospect of losing contact with their siblings.[193] Indeed,

> [C]hildren showed understandable anxiety and suspicion about the unknown and a reluctance to move again. Some voiced concern about losing activities and relationships in the community that were important to them. Some were unwilling to relinquish contact with siblings and other relatives to whom they were

Comparative Study of Successful and Disrupted Adoptions, 65 SOC. SERVICE REV. 250 (1991).

188 Emily Jean McFadden, *Placement of Sibling Groups, Single-Parent Adoption, and Transracial Adoption: An Analysis*, *in* FOSTER CHILDREN IN THE COURTS 399, 401 (Mark Hardin ed., 1983).

189 *Id.*

190 *Id.*

191 *See generally* Borgman, *Parental Rights Termination*, *supra* note 181.

192 "Children are placed in a special emotional and legal limbo after the termination of parental rights and prior to adoption; legal ties and contacts with biological parents are cut off and no substitute permanent ties yet exist." Patton & Latz, *supra* note 17, at 787. Without question, "[t]hey are officially parentless." Borgman, *Parental Rights Termination*, *supra* note 181, at 399.

193 Patton & Latz, *supra* note 17, at 780 ("One of the most frequent reasons children run away from foster homes is to visit siblings.").

> attached when they were told, honestly, that continuation of such relationships could not be guaranteed in an adoptive home. Many felt that acceptance of adoption would be an expression of disloyalty toward the biological family.[194]

This is not to downplay the difficulties in placing siblings together, especially when it is a large sibling group, when there are a limited number of potential foster parents, or when one of the siblings has special needs.[195] In addition, it is not uncommon for siblings to come into the foster care system at different times.[196] This creates the difficulty of either persuading the adoptive parent to agree to parent the additional sibling who has now come into care, which she may be unwilling to do,[197] or forcing the original sibling into a new foster care placement with a foster parent who is willing to take on the new sibling.[198] The latter may not be the optimal choice given that the psychological "bond with the [foster] parent may be paramount if siblings have been in different foster homes over an extended period of time and have little attachment to each other."[199] In such cases, the transition to a post-adoption life with all siblings together in one household becomes even more complicated because of the weaker sibling bonds.

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194 Borgman, *Parental Rights Termination*, *supra* note 181, at 397-98.

195 *See* McFadden, *supra* note 188, at 401-02 (delineating the practical limitations of foster parents caring for large sibling groups).

196 *See, e.g.*, *In re* Donte A., 631 N.E.2d 257, 263 (Ill. App. Ct. 1994) (describing how five siblings came into foster care at different times); *In re* Adoption of Anthony, 448 N.Y.2d 377 (Fam. Ct. 1982).

197 McFadden, *supra* note 188, at 402 ("The other relatives may have difficulty or be unwilling or unable to accept a new group of children into the extended family.").

198 *See id.* (explaining how sometimes "the bond with the [foster] parent may be paramount").

199 *Id.*

V. Possibilities and Challenges of Post-Adoption Contact Between Siblings

A. Post-Adoption Contact Agreements

Many, if not most, children in foster care know their birth families and will never experience a "closed adoption" in a traditional sense. In fact, some children who are adopted out of foster care continue to maintain relationships with relatives post-adoption.[200] The question then is whether a legal mechanism should exist to enable these children to maintain these relationships rather than having to rely purely on informal mechanisms or on the whim of the adoptive families.[201]

Post-adoption contact agreements constitute mutually agreed upon arrangements between members of birth families and adoptive families to maintain contact after an adoption has been finalized.[202] The types of "arrangements" run the gamut between "informal, mutual understandings" between the birth family and adoptive family to "written, formal" agreements.[203] In fact, some scholars have argued that no termination of

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[200] KATHERINE A. NELSON, ON THE FRONTIER OF ADOPTION: A STUDY OF SPECIAL-NEEDS ADOPTIVE FAMILIES 103 (1985) (children in twenty percent of families in the study maintained contact with a biological relative after they were placed in an adoptive family); *see also* Amadio & Deutsch, *supra* note 105, at 83-85.

[201] Post-adoption contact with siblings can be especially important in transracial adoptions, where the adopted child is of a different race than her adoptive parents. Maldonado, *Permanency v. Biology*, *supra* note 77, at 323. Transracial adoptions are particularly prevalent when children are adopted from foster care, a fact that is particularly important given that nationally, twenty-six percent of African-American children who were adopted from foster care were adopted by parents of a different race. *Id.* (citing Lynette Clemetson & Ron Nixon, *Breaking Through Adoption's Racial Barriers*, N.Y.TIMES, Aug. 17, 2006, at A1).

[202] *See* Sanger, *supra* note 121.

[203] CHILD WELFARE INFORMATION GATEWAY, POSTADOPTION CONTACT AGREEMENTS, *supra* note 82, at 1.

parental rights should occur without a corresponding adoptive family.[204] Such a requirement would relieve the child of having to spend his or her life in foster care limbo. Moreover, there can be long-term benefits to having a birth parent voluntarily agree to the termination of his or her parental rights rather than the state terminating them involuntarily.[205] For example, one study by Robert Borgman demonstrated that children in foster care viewed voluntary and involuntary termination of parental rights very differently. In instances where the parents contested the termination of their parental rights, the children felt it was disloyal to their birth families for them to acquiesce in long-term foster care or adoption planning. Conversely, when the birth parents voluntarily consented to the termination of their parental rights, the children felt more able to embrace the transition into adoption. In this way, some birth parents may have viewed voluntary consent to adoption as a valuable gift to the child.[206] When entered into without duress, post-adoption contact agreements may look very much like any other contract with the requisite elements of offer, acceptance, and consideration.[207] Given that the consideration, however, is "the placement of the baby with a particular family in exchange for a promise of continuing

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[204] *See* Appell, *Blending Families*, *supra* note 99, at 1005.

[205] *See* Borgman, *Parental Rights Termination*, *supra* note 181, at 396-97. Borgman conducted a study where adoption stability correlated to whether parents had signed voluntary consents for adoption. "In contrast, parents of 18 of 19 children whose adoptions had been disrupted or who had remained without adoptive placement had had their rights terminated involuntarily or by court order. Children usually consider involuntary PRT a hostile act of disapproval by the agency and the court, and they may retaliate by undermining adoptive planning." *Id.* at 397.

[206] *Id.*

[207] For a broader discussion of post-adoption contact agreements as contracts, see Sanger, *supra* note 121.

contact by the adoptive parent,"[208] many courts have been reluctant to enforce such agreements.[209]

At best, states have been wildly divergent in their willingness to enforce such agreements.[210] The breadth of that divergence makes it particularly difficult to enter into post-adoption contact agreements with interstate adoptions because the parties need to determine which state's law will apply.[211] Given some courts' reluctance to apply traditional contract principles to those agreements,[212] no guarantee exists, for example that a choice of law provision would be honored. All of this leaves the enforceability of the contract even more in question. Thus, states need to craft statutes that make clear that post-adoption contact agreements can be enforced, and to provide mechanisms for resolving disputes when they arise.

B. Mediation

Mediation has long had a place in resolving disputes of legal issues related to families. It has been a part of child protective services and child welfare cases for the past thirty years.[213] Although mediation has many different variations, at

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[208] Widner, *supra* note 126, at 359.

[209] *See, e.g.*, Birth Mother v. Adoptive Parents, 59 P.3d 1233, 1235 (Nev. 2002) (finding that a post-adoption contact agreement was not enforceable without a specific Nevada statutory provision allowing for such agreements).

[210] *See supra* Part II.B.

[211] *See* Widner, *supra* note 126, at 360.

[212] *Id.* at 359 ("[A]doption is a creature of state statutory law, and for both this reason and important public policy reasons, adoption is not covered by general common law contract principles.").

[213] *See* Marilou Giovannucci & Karen Largent, *A Guide to Effective Child Protective Mediation: Lessons from 25 Years of Practice*, 47 FAM. CT. REV. 38, 38 (2009) (explaining that thirty years ago California, Colorado, and Connecticut created programs "that brought together parents, child welfare agency staff, attorneys, and others with a trained mediator to discuss dependency cases"). Mediators also often assist parties with creating divorce and pre-marital agreements. *Id.*

its most basic, mediation involves an impartial third party who "acts as a catalyst to help others constructively address and perhaps resolve a dispute, plan a transaction, or define the contours of a relationship."[214] A core value of mediation is "self-determination,"[215] which allows the parties to retain control over the outcome. In mediation, the mediator acts as a facilitator, giving each party the space to tell his or her story and to truly be heard.[216] In a standard mediation, each side is given the opportunity to fully tell her story, often with little interruption. This feature alone can be of tremendous benefit for all parties in the context of post-adoption sibling visitation. It permits the child to have a voice in the proceedings, and presents the opportunity for the child to explain his or her feelings about losing the relationship with her siblings post-adoption.

For the adoptive parents, who may be the most reluctant to explore mediation, there can be many benefits of mediation. First, hearing the child express her feelings about the loss of the sibling relationship may cause the adoptive parents to reconsider their position, particularly in situations where the adoptive parents have been opposed to any ongoing contact between siblings. Second, even in situations where the adoptive parents continue to oppose ongoing contact with a sibling post-adoption, the adoptive parents will also have the opportunity to tell their story, which may include legitimate concerns over ongoing contact with siblings who, for example, may be engaging in dangerous behaviors. Listening to the adoptive parents express those concerns can provide a context

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[214] CARRIE J. MENKEL-MEADOW, LELA PORTER LOVE, ANDREA KUPFER SCHNEIDER & JEAN R. STERNLIGHT, DISPUTE RESOLUTION: BEYOND THE ADVERSARIAL MODEL 266 (2005).

[215] *Id.* at 270.

[216] *Id.* ("Mediators promote party empowerment and self-determination by carving out space and time for each side to tell their stories and be heard in a meaningful way.")

for the child to understand why the sibling relationship will not continue, a context that currently is absent in the law.

Mediators engage the parties in crafting solutions that will address the parties' particular needs and concerns. Such engagement "in finding and power in choosing the solution means the parties are invested in the outcome, and hence the resolution is more durable."[217] Crafting such solutions in a post-adoptive sibling visitation context can be particularly valuable. For example, an adoptive parent who hears about post-adoption contact with siblings may initially balk at the idea because the adoptive parent might envision it as weekly visits in his home. He may be more open to considering it if instead it takes the form of weekly Skyping or FaceTime chats.[218]

Although it is clear that mediation allows the parties to be "active participants in a collaborative process,"[219] the role of the child who is not considered a traditional "party" is less clear. Some of the factors to consider regarding the degree of participation of the child include the

> "child's age and developmental level, emotional status, an ability to understand the nature of the mediation process and to articulate wants and provide relevant input, the relevance to the child of the issues being mediated, the desire to participate, case dynamics, and the ability to provide the child

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[217] MENKEL-MEADOW ET AL., *supra* note 214, at 270.

[218] Additionally, for children being adopted from foster care, there may be agency supports that can be put in place, such as providing children with calling cards or transportation supports to visit with a sibling outside of the adoptive home.

[219] *See* Giovannucci & Largent, *supra* note 213, at 42.

> adequate support during and after mediation."[220]

Moreover, the parties need to examine the reasons behind the child's participation.[221] A child can be involved in the mediation in a number of ways. The mediator can interview the child or the "child can write or dictate something to be read in mediation. The session can be structured so the child's participation is for a particular portion and purpose, or the child can be present for the entire joint session."[222] Providing an avenue for the child to participate can greatly increase the likelihood of reaching an agreement that will best meet the needs of all the parties.

Although the number of states that have allowed post-adoption contact agreements has significantly increased,[223] states have lagged behind other areas of family law in the use of mediation to facilitate such agreements. While some state statutes include the use of mediation to address and resolve disputes by providing for mediation when problems with a post-contact agreement arise,[224] almost all have failed to use

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[220] *Id.* at 43.

[221] *Id.* (citing Arlene H. Henry, *Mediating Child Protection disputes – A Canadian Perspective: Are We Leaving Room for the Child at the Table?* 4TH WORLD CONGRESS ON FAMILY LAW AND CHILDREN'S RIGHTS (March, 2005), http://www.mediator-roster.bc.ca/Henry_Mediating_CP_Disputes.pdf)).

[222] *Id.*

[223] *See supra* Part II.B.

[224] Currently, Arizona, California, Connecticut, Louisiana, Minnesota, New Hampshire, Oklahoma, Oregon, and the District of Columbia require parties to participate in mediation before they are able to bring petitions to enforce or modify a post-adoption contact agreement. ARIZ. REV. STAT. ANN. § 8-116.01; CAL. FAM. CODE § 8616.5; CONN. GEN. STAT. ANN. § 45a-715; LA. CHILD. CODE. ANN. art. 1269.8; MINN. STAT. ANN. § 259.58; N.H. REV. STAT. ANN. § 170-B:14; OKLA. STAT. ANN. tit. 10 § 7505-1.5; OR. REV. STAT. § 109.305; D.C. CODE § 4-361. In Florida and Maryland, the court *may* choose to refer the parties to mediation before an

mediation to "define the contours of a relationship" in a post-adoption contact agreement. That is, unlike other areas of family law where mediation is now routinely used to assist parties with creating an agreement, only the Louisiana and New Hampshire statutes specifically allow for a post-adoption contact agreement to be mediated *prior* to its signing.[225]

The New Hampshire post-adoption contact statute provides for voluntarily mediated post-adoption contact agreements to be enforceable only for those adoptions involving children who have been in foster care or otherwise in the legal custody of the state agency.[226] Its stated purpose is

> "to facilitate the timely achievement of permanency for children who are in [foster care] by providing an option for the parties to enter into a voluntarily mediated agreement for ongoing communication or contact that is in the best interests of the child, that recognizes the parties' interests and desires for ongoing communication or contact, that is appropriate given the role of the parties in the child's life, and that is legally enforceable by the courts."[227]

enforcement action is brought. *See* FL. STAT. ANN. § 63.0427; MD CODE ANN., FAM. LAW § 5-308. In Massachusetts, a party can voluntarily choose mediation before moving to enforce the agreement. MASS. GEN. LAWS ANN. ch. 210 § 6C.

[225] Louisiana allows for it only upon the parties' request. LA. CHILD CODE ANN. art. 1269.3(C) ("If requested by the parties, the court may refer them to mediation to assist them in confecting a continuing contact agreement.").

[226] N.H. REV. STAT. § 170-B:14 ("Except in cases involving the department . . . no such arrangement or understanding shall be binding or enforceable at law or in equity.").

[227] *Id.* § 170-B:14 (II).

And while the New Hampshire statute allows others to participate in the mediation upon consent of the parties, only the birth parents, potential adoptive parents, and foster care agency (if involved) can be parties to the agreement that is reached through mediation.[228] The child who is the subject of the adoption proceeding cannot be a party to the agreement in New Hampshire, even through a guardian ad litem, nor can the child participate in the mediation without consent of all the parties.[229]

VI. A Model For Moving Forward

While approximately half of the states have enacted statutes that recognize post-adoption contact agreements in some form, the majority of those statutes are problematic for a number of reasons. First, the statutes often limit the parties who can enter into the post-adoption contact agreements to biological parents and adoptive parents. This limitation does little to aid those children in foster care who are legally without a biological parent. The statutes also prevent a child from being a party to the agreement, even through a guardian ad litem. Second, the vast majority of those statutes do not provide a mechanism for biological relatives other than birth parents to retain visitation rights.[230] Therefore, they do little to ensure that children who are adopted have a legally enforceable way to continue their relationships with their siblings post-adoption. Third, many exist purely as "agreements" with no enforcement mechanism. Lastly, these statutes all require that the adoptive parents consent to the

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[228] *Id.* at II(b) ("Other people may be invited to participate in the mediation by mutual consent of the department, birth parents, and prospective adoptive parents. However, these invitees shall not be parties to any agreement reached during that mediation.").

[229] *Id.* That said, "[i]f the child is 14 years of age or older, the agreement also shall contain the written assent of the child." *Id.* at II(e).

[230] *See supra* note 82.

ongoing visitation post-adoption, but provide no incentive for the adoptive parents to consent. The statutory requirement of consent is not surprising given the United States Supreme Court's decision in *Troxel v. Granville* striking down a third party visitation statute because the statute failed to give "special weight" to the legal parent's wishes regarding visitation. Because the *Troxel* Court failed to articulate a clear standard defining "special weight," states have enacted statutory provisions requiring the adoptive parent to agree to the visitation.

To overcome these limitations, states should broaden the scope of the post-adoption contact provisions in their statutes to address the very real needs of those children in foster care who are legally parentless. First, the statutory provisions should include the possibility of post-adoption contact with biological siblings. That is, at the very least, they should allow for the birth siblings to be parties to the post-adoption contact agreement. Given the importance of the sibling bond and the harm that befalls most children when that bond is broken, the statutes should not limit post-adoption contact to birth parents alone. Moreover, unlike a child whose parental rights have not been terminated for whom a visitation agreement with a birth parent is likely to provide opportunities for visitation with siblings, a child in foster care whose parental rights have been terminated legally has no "birth parents," and therefore no avenue for visitation with his siblings. Second, the statutes should allow for either the state foster care agency, which has legal custody for children in foster care, or the children themselves, through a guardian ad litem, to petition for visitation with their biological siblings, and enter into a post-adoption contact agreement. Third, the state post-adoption contact agreement provisions should provide that the agreements be legally enforceable.

Lastly, to the extent that a state views *Troxel* as constraining its ability to allow post-adoption contact with

biological siblings without the consent of the adoptive parent, states should rely on mediation to encourage the adoptive parent to seriously consider the long-term benefit to the child of allowing, and even facilitating, post-adoption visitation with siblings-of-origin. Employing mediation can have the benefit of giving voice to the adopted child's wishes about continuing contact, which may lead the adoptive parents to be more likely to enter into a post-adoption contact agreement. It can allow for creative ways to structure post-adoption contact beyond "traditional" in-person visitation, through technology such as Skype, FaceTime, and videos. It also decreases the chances of the parties not complying with the agreement given that parties are more likely to comply with mediated agreements that they have had a voice in creating. Finally, mediation can provide a wider range of enforcement mechanisms, including returning to mediation when facing difficulties with compliance or with requests for modification of the agreement.

VII. Conclusion

The bonds between siblings are often the strongest that children will form in their lifetimes; for many they are simply irreplaceable. Nowhere is this more true than for the hundreds of thousands of children living in foster care as a result of suffering from abuse or neglect in their homes-of-origin. Studies have repeatedly demonstrated that the bonds siblings form with each other when they have suffered trauma at home are often even stronger than those in other families. These children have learned to rely on each other to cope with and endure tremendous difficulties. Moreover, children often become even more emotionally reliant on their siblings when the rights of their biological parents are terminated; they have seen their legal connection to their biological parent permanently severed, and they cling even more fiercely to the connection they have with what remains of their biological family. And yet, now that the children are in foster care and

have been "freed for adoption," in most states they face the potential of having the bond with their biological siblings permanently severed as well. The traditional view of adoption in this country over the course of the last century was that legal adoption is a complete severing of ties with the family-of-origin, replacing that family with new, loving, adoptive parents who have all of the fundamental Due Process rights in the "care, custody and control of their children" that were once accorded the biological family.

Over the past thirty years, a movement toward a more open model of adoption has gained traction across the United States, with over half of the states enacting statutes that allow birth parents and adoptive parents to enter into post-adoption contact agreements. On the whole, however, these statutes are not broad enough to address the difficulties of children adopted out of foster care who wish to maintain their relationships with their biological siblings. State statutes should broaden the description of family members who can be parties to such agreements to include biological siblings and the adopted children themselves. Moreover, they should provide mediation services for prospective adoptive families adopting children from foster care. Through such mediation the child would have an opportunity to give voice to her concerns about losing contact with her siblings permanently. Doing so could increase the willingness of the adoptive parents to enter into a post-adoptive contact agreement allowing for the real possibility of a child who is adopted out of foster care to avoid the devastating psychological effects of permanently losing contact with his siblings-of-origin.