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Placing the Adoptive Self

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I. Introduction

In "Toward New Understandings of Adoption" (Chapter 1 of this book), Mary Shanley drops adoption into the cauldron of liberal political philosophy and asks us to consider whether, for purposes of permanent placement, children are better viewed as unencumbered individuals or as embedded selves with "ties to persons outside the adoptive family—genetic kin or a racial group."[1] The characterization of adoptable children as either unencumbered or embedded selves matters tremendously in terms of how adoption is understood and how policies are set: who gets adopted, by whom, how quickly, and under what terms. For the last thirty years or so, the issue has played itself out (though not always using the exact vocabulary of political philosophy) in two much disputed areas of adoption: transracial adoption (the placement of children across color lines) and open adoption (where both birth parents and adoptive parents possess some degree of identifying information about each other from the start). The basic argument is this. If children are essentially unencumbered, then it makes sense on developmental grounds to place them quickly with the first qualified family who wants them so that they can get on with whatever shape their newly situated little lives may take. That is, if the defining aspects of the self are made rather than derived, what matters for a child's well-being is

familial permanence, not "continuity." Under this view, no regulatory deference is owed (at least under the auspices of embeddedness) to the characteristics, traditions, or preferences of the child's original parents or community. Indeed, the child is no longer "their" child but rather a freestanding someone who, once adopted, can proceed with family life and the business of becoming encumbered anew. The policy implications of this autonomous measure of the self for transracial and open adoption seem clear. Rather than waiting for an adoptive placement that honors the constitutive significance of race, children may be placed across racial lines. In the United States this has most often meant the placement of darker children with whiter families. With regard to open adoption, the unencumbered child may be placed without the identification or participation of birth parents beyond their initial consent, as has long been the standard practice in traditional "clean break" adoptions.

In contrast, if children (even newborns) are linked significantly to their families of origin in ways that necessarily affect who they are and who they will go on to be, then racial or cultural or other significant sources of identity should count heavily in the selection of adoptive parents even at the cost to the child of delaying permanent placement. The constitutive links may be to individuals—typically the birth parent(s)—or to groups such as a racial or ethnic community. Depending on how we size up the importance of the links, the individual or the group may even be granted participatory rights in the placement decision. The rules governing the placement of Indian children on reservations provide an illustration. The federal Indian Child Welfare Act gives jurisdiction in custody matters to tribal courts and creates a legal presumption that the best interests of Indian children are served by placement with tribal members.[2] Deference to *individual* ties is found in the increasing number of states that permit the birth parent(s) to articulate preferences regarding the social, cultural, and demographic traits of the adoptive parents, including their amenability to ongoing birth parent contact with the child.[3]

Shanley explains all this as part of her project to reconcile these competing visions of the self as they play out not just in the liberal-communitarian debate but in the very real context of adoption placement policies. She wants to consider "whether or

to what extent the law should treat an infant available for adoption as an autonomous individual in need of a family or as an individual in part defined by relationships to persons or groups beyond the adoptive family." To that end, Shanley sets up three guiding principles. The first is simply that "the *child* should be at the center of the discussion"; after all, as Shanley reminds us, the very "purpose of adoption is to provide care to children."[4] This mirrors the familiar "best interests of the child" standard invariably announced (at least in law) whenever children are involved. The second principle repudiates the "biologism" of traditional adoption: that is, the established practice of treating adoptive families as if they were *identical* to biological ones—long the fiction that was encouraged by such social work policies as placing red-headed children with red-headed parents and by such legal requirements as replacing the child's original birth certificate with a postadoption certificate identifying the adoptive mother as the birth mother.[5] The third principle is the reconceptualization of adoptable children from "parentless" and "abandoned" to children necessarily tied to their families—and particularly their mothers—of origin.[6]

By sticking to these principles, Shanley is able to synthesize competing theories of the self and devise a regulatory scheme that "minimize[s] the conflict between values." She sensibly insists that children have needs for both security (the codeword for the demands of autonomous infants) *and* identity (the codeword for the demands of the embedded ones). Respecting security means that adoptable children require prompt placement with an eye to the adoptive family's availability rather than its similarities to the child's original parents or community. This is just as those on the "unencumbered" side of the debate would have it. Indeed, as things stand with regard to federal legislation, and excepting Indian children, they *do* have it: the 1996 Multiethnic Placement Act withholds federal funds from any adoption agency that uses race as a placement criterion.[7] But along with security, children's concurrent (*eventual* may be more accurate) need for identity means that adoptable children are also entitled to information about their birth family or group. The child "cannot be dealt with simply as an unencumbered individual without ties to specific others, but must be seen as someone with a specific story

of origin." Under Shanley's plan, that story of origin is acknowledged and effected by giving birth mothers—and not the child's collective race or group—some voice in expressing their understanding of their child's race and their preference (if any) for the kind of family in which the child will be placed. Moreover, a policy that honors ancestral ties must run in both directions. Thus Shanley favors nonsecrecy with regard to adoption records and supports legislation authorizing adult adoptees to find out who their biological parents are—not the right to a "social relationship" but at least the right "to know [their] specific history."

In this essay I want to focus on the special relationship Shanley establishes among placement decisions, embeddedness, and birth mothers. I shall later argue that the law should respect a different special relationship—one that also links mothers to placement decisions but that drops embeddedness from the equation. But Shanley's argument and the general case for birth mothers first. Their importance—even centrality—emerges from Shanley's formal project of "minimiz[ing] the conflict in values" between embeddedness and autonomy.[8] To be sure, she is very fair in considering the interests of *all* the players in the adoption triad—children should always come first, adoptive parents should be permitted to assert their racial preferences. But birth mothers are given a special place at the table, and for good reasons. For the last half century, birth mothers were denied much of a place at all. Their function in adoption was twofold: consent and disappear. This directive was not always unwelcome; part of the impetus for the confidentiality of adoption records in the 1950s came from birth mothers who feared (quite rightly) the stigma of unwed motherhood.[9] Since then, the legal and social consequences of illegitimacy for the much smaller number of post-*Roe* women who continue unplanned pregnancies have improved for both mother and child. But the increased acceptability (indeed praiseworthiness) of maternal decisions to *keep* a nonmarital child (to use the new vocabulary) is unmatched when it comes to mothers' decisions to *relinquish* the same child for adoption. Indeed, many young unmarried pregnant women now consider placing a child for adoption more stigmatizing than keeping it.[10] Thus until recently certain traditional adoption practices held steady. Birth mothers (if no longer *unwed*

mothers) remained invisible and uninvolved. As birth mother Jan Waldron has observed, "[T]here are millions of birthmothers in this country, yet most people will tell you they've never met *one.*"[11]

Shanley aims to improve this situation. In keeping with her third guiding principle (rejecting the adoptee-as-abandoned-by-uncaring-mother fantasy), birth mothers are now to be recognized for the work they do. Special consideration is given throughout to how one or another placement policy would improve their status and treatment.[12] Rather than being erased from the birth process (literally, when one thinks about the substitute birth certificate), birth mothers are to be meaningfully considered and included. Thus Shanley notes that open adoptions not only satisfy an adopted child's need for identity but also benefit birth mothers. Because adoptive parents know that their child may one day meet its birth mother, they will be more likely to demonstrate "not only love for and acceptance of the child, but acknowledgment of and respect for the original parents." Again, "recognizing the significance of the original parents in adopted children's construction of identity . . . might increase respect for birth parents, particularly birth mothers." Such recognition is especially necessary to offset the "structurally produced economic inequalities . . . that . . . cause some people to have to give up their children." The people Shanley has insistently in mind here are minority birth mothers. Noting "the disproportionate number of black children awaiting adoption," Shanley explains that attending to a birth mother's placement preferences "at least makes it harder to regard her simply as the supplier of a resource (babies) for others (adoptive parents)"; further, it would "counteract the disparagement of people, primarily women, who place their children for adoption and in particular would give dignity and voice to women of color."[13]

But the real power (and likely source of increased respect) that Shanley confers upon birth mothers is the link she establishes between birth mothers and embeddedness. To the extent that embeddedness is to be honored in placement decisions, Shanley gives the claim to birth mothers. The communitarian conception of the embedded self might seem to favor ascriptive characteristics associated with group identity, rather than mothers' preferences. But Shanley goes with the latter. Limiting her immediate argument to race, she urges that birth mothers be solicited with respect to specifying "the race of their child" and "the role (if any) that race should play in the child's placement." Her reasons make sense. Faulting the failure of federal adoption legislation to include the preferences of birth mothers, Shanley argues, "One would think that the birth parents, as the concrete link between the child and the racial group claiming an interest in or jurisdiction over the child's placement, would be the appropriate persons to present their understanding of their own and the child's racial identity" and concludes that "until children grow up to decide such matters for themselves, their parents' declarations of self-understanding and intent may properly be taken as a proxy for their own." I would modify this analysis slightly. While parental decisions are proxylike, the theory behind them is less one of substituted judgment than of superior judgment. The Supreme Court expressed it thus in *Parham v. J.R.*: "The law's concept of family rests on a presumption that parents possess what children lack in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that the natural bonds of affection lead parents to act in the best interests of their children."[14] There may be reasons in certain cases to subject the Court's observation about assumed bonds of affection to sharper scrutiny. *Parham* itself, where frustrated parents and guardians were institutionalizing mentally ill children is such an example. Yet the legal and intuitive starting point is clear: parents' decisions about their children's well-being are understood to be well-intended and presumptively right. Thus *whatever* parents decide on behalf of their children is in the child's best interests, whether or not it is proxy for what we imagine either the child or even some more knowing entity, such as an adoption agency, would decide.

There will certainly be unhappiness with Shanley's policy conclusions by many in the adoption debates. Those who side with the long influential 1972 position statement of the National Association of Black Social Workers will dislike her dismissal of group interests or claims (other than as reflected in the birth mother's preferences); Elizabeth Bartholet and Richard Banks

will be dissatisfied with her refusal to dismiss race-based preferences of either birth mothers or adoptive couples.[15] Adoptive parents may balk at the endorsement of adoptee access to identifying information, and birth mothers may wonder whether Shanley's suggestion that they be "listened to" means that their opinions are to be heeded as well as heard.

But Shanley has prepared her readers for these various disappointments early on by introducing an idea from moral philosophy: the concept of moral remainder. This is the notion that the resolution of complex problems may not be as tidy and complete as our moral (or arithmetical) instincts might desire. In situations involving "a complex set of conflicting practical demands, each tied to a set of apparently morally reasonable supports, taking up one of these positions will not nullify moral demands of the alternatives not taken."[16] Thus even when the problem has been solved—that is, a workable policy has been set—there may simply be something left over and unresolved. In adoption, the remainder is some unsatisfied aspect of a morally reasonable claim asserted by one or more of the participants. At the same time, amidst all this justifiable dissatisfaction, children will have been placed in what we expect are permanent homes with parents who want them. The normative importance of the sheer fact of placement is a point worth emphasizing, for adoption is not simply an interesting problem upon which to test philosophical theories of the self. It is a practice (bordering on an industry) carried out by layers of participants applying shifting rules in multiple jurisdictions. The needs and desires of those involved—mothers, fathers, grandparents, and siblings from both the birth and adoptive families, not to mention lawyers, judges, social workers, and adoptees themselves—are concrete, often heartfelt, and likely to conflict. It is unlikely, then, that the theoretical basis of each player's interests will be wholly satisfied, and some will necessarily bear the weight of the unsatisfied remainder.

II. Three Arguments

I agree with Shanley's conclusions that birth mothers should, if they desire, have considerable say about where their children are placed. I disagree, however, about tying the position to the notion of embeddedness, and for several reasons. The first concerns the difficulties inherent in defining this much contested term so that its implementation in the real world of placement decisions will be clear, fair, and manageable. Thus while Shanley limits her argument (more or less) to ties created by race and ethnicity, we might ask if other claims to community or heritage also fall under the penumbra of embeddedness. Should a birth parent's religion, nationality, hair color, or union background matter in deciding where a child is placed? My second concern involves the problem of defection. If mothers are designated as spokeswomen for their babies' constitutive ties, what are we to do about birth mothers uninterested in maintaining them, mothers who decide they would rather start their child off in an entirely new direction? Should the law act on maternal preferences only if the decision honors an appropriate link (i.e., a link acceptable to the proponents of embeddedness), or may birth mothers decline the invitation as well?[17]

There is, however, a third reason to defer to birth mother preferences that is unconnected to the role of embeddedness in the construction of identity. I endorse giving birth mothers power over their child's destiny (or at least over the child's adoption placement) on the grounds that the right to choose substitute caretakers for one's child—even permanent ones—falls within the scope of authority all parents have, without special reference to adoption or to whether the birth mother votes communitarian or liberal. I argue that the decisional autonomy inherent in maternal status prevails over claims the child or group may have for communal affiliation (recognizing that in practice the preferences of mother, group, and child may coincide).

These points—the contours of embeddedness, the ungovernable nature of birth mothers' placement decisions, and an alternative basis for maternal involvement—are developed in the following three sections. First, however, I want to be clear about the facts on which this discussion proceeds. Adoption covers a huge sweep of circumstances: there are stepparent adoption, special needs adoption, fost-adopt programs, kinship adoption, and so on. Yet all of these proceed under one of two initiating events. Either the birth parents have consented to the adoption, or their rights have been terminated involuntarily by the state. In the latter cases,

where children have been removed from their families rather than relinquished by them, the children are often older, may well know their birth parents, and are more likely to have spent time in foster care. Certainly, considerations of embeddedness look quite different in such cases. The child may have its feet squarely in *two* families, a choice made not by policy but by circumstance. Claims regarding ties to families, customs, and communities of origin seem immediately more persuasive in cases where a child knows or may be returned to his or her family.

Shanley focuses our attention not on the predicament of older children in foster care but on "voluntary infant adoption" cases where the mother has decided from the very start to give up her baby for reasons satisfactory to her. Recognizing that such decisions are often made under constraints of time and circumstance, the law now attempts to safeguard their integrity through such mechanisms as (short) revocation periods, preconsent counseling, the removal of financial incentives, and permitting consent only after childbirth. Once such criteria have been met, the law credits the mother's decision as voluntary.[18] These are the cases Shanley posits here. While numerically a far smaller group than children in foster care, voluntarily relinquished infants test us more sharply on the potential limits of embeddedness and on the justifications for the birth mother's authority over the infant's postadoption self. Voluntarily relinquished infants also distance us from the difficult question of whether the state should concentrate on reunifying rather than terminating parents from their children in foster care, and the significance of embeddedness for that debate. Finally, because voluntarily relinquished infants are particularly marketable, they (or those concerned with the terms of their placements) drive agency practices and legal reform with special interest and vigor.

III. The Contours of Embeddedness

To the extent that children are, in Shanley's phrase, relational beings with ties to persons or groups outside the adoptive family, exactly which ties are deserving of respect for purposes of a placement regime? I have already noted that Shanley focuses on race, as debated in the adoption of black children by white families, and on ethnicity, as incorporated in the Indian Child Welfare Act. That focus has much appeal. In a society like ours, where racial distinctions are crucial to how life is experienced from cradle to grave, race is worth fighting about—or at least getting as right as we can—in the cradle context of adoption. This is especially so in light of racial practices in adoption over the last fifty years, where the pattern of traffic has gone entirely in one direction. The adoption by white parents of Indian and black children, and more recently of Chinese girls, has led to claims of ethnic plundering from members of at least the first two birth communities. Shanley urges maternal participation in placement decisions as a way to acknowledge, not sever, children's racial or ethnic ties and to remedy the "reinforce[ment of] white privilege" produced under the earlier regimes. But are there *other* ties similarly crucial to the construction of the (infant) self that justify extending placement suffrage to additional categories of birth mothers? Should, for example, a pious birth mother be entitled to a say with regard to her child's religious upbringing? Can a union mom insist on prolabor adoptive parents? Locating the borders of embeddedness is central to deciding with whom a child will be placed (and for what reasons) and who gets to make the decision (and why they do).

I want to suggest that at least in the context of adoption, embeddedness should be understood to mark a very small circumference. That is, if we take the notion of embeddedness to be based on a thesis about the way that a community constitutes the individual self, only a very few characteristics will make it onto the embeddedness shortlist. In thinking about what properly counts as such a marker, I want to distinguish embeddedness not from rival theories of autonomy but from characteristics or aspects of the self that are biological, genetic, or innate.[19] Shanley sometimes blurs the two, as when she contrasts the "freestanding individual" with "a person to whom these biological and social relationships are of continuing significance" or when she aligns advocates who "argue that knowledge of the genetic link between biological parents and child is part of the identity of both the biological parents and the child" on the side of embeddedness. But if embeddedness is to serve as the justification for maternal participation in placement decisions, it is important to identify its

limits. This is especially so in an age when mothers discharged from maternity wards are given not only instructions on bathing the newborn but (soon enough) detailed maps to their child's entire genetic structure—and therein potential claims to and by all sorts of genetically based communities.[20]

Let us then be clear: embeddedness refers to the effects of a social process, not a natural process (though of course it may be a social process that chooses to make something social of a natural process or an innate characteristic). The circumstances of a child's birth *may* support a claim of embeddedness (i.e., that links to the birth family or community are constitutively important), but, as we shall see, only when the community (either the birth community or the adoptive community) attaches great importance to the circumstances of the child's birth. Thus the background of the birth parent may be significant for a child adopted out of that background, but only if the adopted child has subsequent dealings with the interested birth community or if the adoptive community itself regards the child's birth circumstances as significant. An example of the first might be the adoption of a black child into a white family in a racially diverse and divided society. An example of the second would be the efforts of white adoptive parents of Chinese girls to honor their daughters' origins (Chinese names, Chinese language training, and so on).[21] To be sure, the distinction between communitarian-based markers and innate ones is sometimes blurry; certain ties between child and group would seem to be both social (tribal membership) and biological (tribal membership because one's mother is a member of the tribe). Such confusion is understandable, especially when the characteristic in question seems apparent: we think we know it when we see it.[22] But as the following cases illustrate, race (or color) is not always a reliable marker for potential claims of embeddedness. It is unexpectedly malleable, and racial assessments are not always correct.

The malleability of racial categories is revealed in a telling episode from the early twentieth century. In 1904, the New York Sisters of Charity sent a group of Irish orphans out west for placement with hardworking Catholic families in a remote Arizona mining town.[23] When the train arrived at its destination, the children were distributed by the priest to the eager prospective parents, all screened and approved by the local priest. Thus Anna Doherty was handed to Abigail and Andres De Villescas; Henry Potts went to Josefa and Rafael Holguin, Edward Gibson to Trancita and Francisco Alvidrez, and so on. Within the day, the white people of the town, having grasped that *Mexicans* were adopting the orphans, formed a posse and seized the children back by force. The aftermath—legal, social, and economic—was long and hard-fought, and the children were never returned to the Mexican families. And how had this violent "misunderstanding" come about? Historian Linda Gordon explains the effect of the trip west:

> Seven days on a train had left [the children] restless and cranky, but the nuns dressing them in their finest communicated to them the solemnity of the occasion waiting. Their long train ride had transported them from orphanhood to son and daughter. . . . [The children] did not grasp that this trip was to offer them not only parents but also upward mobility. Even less did they know that mobility took the form of a racial transformation unique to the American Southwest, that the same train ride had transformed them from Irish to white.[24]

The transformation (or improvement or confusion) of racial categories continues to the present. In recognition of the inadequacy of such gross classifications as "black" or "white," the 2000 census permitted respondents for the first time to check off multiple categories of race.[25] This reform resulted in part from lobbying by the parents of mixed-race children who argued that they could not accurately describe their children's racial composition under the existing "one or the other" system. The recognition of multiply raced people further complicates implementing embeddedness. The concept does not tell adoption agencies how to resolve conflict or competition among different communities of origin—when, for example, a child is Indian *and* black *and* Catholic *and* Brazilian.

The instability of categories—their amenability to expansion and redefinition—raises doubts about embeddedness as a basis for bestowing very much in the way of decision-making authority. Similar concerns also arise outside of race. What should be made, for example, of a Catholic birth mother faithful to the tradition

of the Latin mass who places her child for adoption with a Catholic family just when Vatican II and the vernacular guitar folk mass make an appearance? Has her preference been met—is the adoptive family what the mother understood "Catholic" to mean? Or would some nice Unitarians have done as well? Putting aside the fluidity of categories whether the changes come from within (internal reform) or without (social reclassification), should religion be considered an embedded characteristic in the first place? In New York, for example, at least for children adopted out of foster care, religion is treated as presumptively embedded: "[W]henever a child is placed in the home or custody of any person other than its adopted parents, such placement must, when practicable, be with a person of the same religious faith or persuasion as that of the child."[26] And how is the newborn's religion determined? Unless the parents have expressly stated otherwise, "it shall be presumed that the parent wishes the child to be reared in the religion of the parent."[27]

Even if we assume that racial or religious categories are fixed, our confidence about them is still challenged by a practical problem: the inability even of experts and intimates to know what they see. The problem arose in a tragic "switched-at-birth" adoption case from Georgia.[28] In 1983, two white mothers each gave birth to a baby boy on the same day at the same hospital. Jody Pope, married to a white man, gave birth to Melvin. Tina Williams, unmarried and planning to relinquish her child for adoption, gave birth to Cameron, whose father was black. Both mothers had seen their babies in the hospital several times, and each certified upon discharge that she had examined and was taking home her own child. In fact, through astonishing negligence, the two babies had been switched in the hospital sometime between birth and checkout. Pope therefore took home biracial Cameron, and white Melvin was placed with a foster mother pending his adoption by a mixed-race couple (white mother, black father) who had especially wanted a biracial child. The foster mother, aware of Melvin's pending placement, expressed concern to the adoption social worker that the infant looked so relentlessly white. An adoption consultant was brought in to help "resolve ambiguities" as to Melvin's racial make-up, and advised that "biracial children sometimes appear to be white in early infancy but experience

skin darkening over time." Melvin was then adopted by the mixed-race couple. When the children were four, the switch was discovered, and predictable negligence suits and custody battles followed.[29]

The case indicates both the importance attributed to color and its precariousness as a marker for race. Imagine a roomful of infant orphans who have kicked off their identification tags. How would social workers begin to sort them for purposes of successful adoption placement? The answer of the influential Child Welfare League of America is that "at the present time, children placed with adoptive families with similar distinctive characteristics, e.g., color, can become more easily integrated into the average family and community." Thus, as researchers note, "the conventions perpetuated by agencies, not the legal system, guarantee that created families will be homogeneous in looks and specifically, as the CWLA advises, in *color*."[30]

Switched-at-birth cases—real or imagined—are useful in thinking through the nature of embeddedness claims for adoption.[31] In a sense, traditional adoption has endorsed a switched-at-birth model: the adopted child is treated as if he or she were the adoptive parents' biological child from the moment of birth. And how do parents, community, and the switchees themselves respond upon learning they are not who they thought they were (or that the people they thought were their birth parents are not)? Let us imagine that Al Gore and George W. Bush were switched at birth and that each was then raised by the other's parents. Years later the mistake is uncovered. Gore, now the Republican candidate for president, learns that in fact he is from a long line of Democrats. Bush, the Democratic candidate, receives mirror-image facts.[32] To test whether this unintended swap matters, we might ask whether each man will now feel he has been "living a lie." Or will the revelation of political ancestry seem to each more like an interesting but vaguely remote historical fact? The second question directs us toward a more autonomous view of the self. What each man *chooses* to make of the information determines its importance, not the mere fact of it.

Would this be different if the essential switch were not one of political party but one of religion or class—say a baby placed by his Jewish parents with Christian parents in 1940 Germany? Or

the child of a disappeared Argentinean trade unionist placed with parents from the military elite? Or an American Indian child removed from the reservation and placed with white Protestant parents, a practice ended only by the Indian Child Welfare Act in 1978? These are but a few examples from among the many the last century richly offered up. Of course, in each of these cases, coercion, not choice, provoked the placement. The claims of parents (and perhaps of the parents' group) for recognition and continuity may seem stronger where the very point of the placement was to obliterate the characteristic that linked parent to child.

IV. Birth Mother Preferences

Shanley argues that birth mothers should participate in placement decisions because "as the concrete link between the child and the racial group claiming an interest in or jurisdiction over the child's placement, [they] would be the appropriate persons to present their understanding of their own and the child's racial identity." Indeed, when there is no apparent or participating father, the birth mother may be the only one who even knows what the universe of potential ties is. Moreover, having likely been part of the relevant community, she can most vividly understand the importance of continued association, whether in the form of immediate placement or subsequent disclosure of information.

Yet designating birth mothers as the spokeswomen for embeddedness does not guarantee that birth mothers will choose to honor the child's relational ties. The birth mother may have her own view of how a child of hers might flourish, a view that envisions a way of life quite different from that in which she was raised. From an embeddedness point of view, this looks like maternal contrariness or ingratitude. What explains this form of defection, and what should the law make of it? The Supreme Court has concluded that at least with regard to Indian children, a mother may not so choose. In the 1989 Supreme Court case of *Mississippi Band of Choctaw Indians v. Holyfield*, an unmarried Indian couple wanted the Holyfields, a white family, to adopt their newborn twins.[33] (Years earlier, Mr. Holyfield had been the birth mother's pastor.) In an attempt to defeat the tribe's jurisdiction

over the matter, the birth mother "went to some efforts to see that [the babies] were born outside the confines of the Choctaw Indian Reservation." The Supreme Court held that her efforts failed: no matter where the babies were born, their domicile—the key to tribal jurisdiction under the Indian Child Welfare Act—followed that of their mother and *she* was still domiciled on the reservation.

There is much of legal interest in the case—federal legislation elevating group rights over those of individual parents or over the interests of the child, for example.[34] But the facts alone are of interest to us here. The birth parents deliberately chose for their children lives different from their own. Reasons for doing so may differ. Birth parents may have a special fondness for particular prospective parents, as was likely part of the explanation in *Holyfield.* They may want a better material life for their children than they experienced or believe likely in the birth community. Parents may also affirmatively seek to distance the child from the very characteristic that is the source of their authority under an embeddedness delegation. Thus while in New York religious matching is the default rule, parents may choose differently. The statute makes clear that "religious wishes of a parent shall include wishes that the child be placed in the same religion as the parent or in a different religion from the parent or with indifference to religion or with religion a subordinate consideration."[35] In this regard, recall George Eliot's description of the long awaited reunion between Daniel Deronda and his mother. At their meeting, Deronda learns not only that his mother (and therefore he) is Jewish but that this was exactly why she gave him up: "And the bondage I hated for myself I wanted to keep you from. What better could the most loving mother have done? I relieved you from the bondage of having been born a Jew."[36] Whether children accept, applaud, or reject such decisions, and at what stages in their lives, we cannot reliably know. But suppressing communities of origin is not limited to birth mothers. Parents in general reinvent their family histories and lose religious or racial identification as they like.[37] Thus in nonadoptive contexts, parents may indeed "defect." Since we do not impose restrictions on apostasy or "passing" generally, it is not clear why we should burden such a decision in the context of adoption.

Some breakaway preferences spike maternal concerns about a child's future well-being with a kind of petulance. A short story by Canadian author Elyse Gasco describes a Catholic home for unwed mothers from the point of view of the unhappy, waddling residents: "And one day, when a nun was slightly short with her, unusually sour, her habit freshly ironed and stiff, [my roommate] said: 'I'm telling you. Give it to the Jews. They know how to laugh at themselves. They're even iffy on this hell thing.'"[38] And what I have called petulance is sometimes described by experts as a predictable stage in adolescent development.[39] The musings of columnist Dan Savage capture both perspectives. Having satisfied all the adoption agency's requirements, Savage anxiously waited to be chosen by some birth mother somewhere. But why, he wondered, would any young woman pick him and his male partner from among the agency's catalogue of attractive married heterosexual couples applying for the same position? Savage found comfort in the idea that there *was* a birth mother who would choose them: the hypothetical "Susan." Susan is sixteen and the daughter of strict fundamentalist Christians who are upset about her promiscuity, her punk boyfriend, and her pregnancy. They are, however, happy that she is "choosing life" over abortion, even if she insists on relinquishing their grandchild for adoption. Susan comes to the adoption agency, reads the resumes, and finds her revenge: she chooses the gay couple.[40]

While Savage's actual anxieties were eventually relieved (he was chosen), his daydream was recently acted out in a Tennessee Chancery Court, where the grandparents of a baby placed by its fifteen-year-old mother with a lesbian sought to set the adoption aside in favor of themselves. The grandparents argued that the "non-traditional structure" of the adoptive mother's home was not in the child's best interests.[41] The trial rejected their claim, relying on the near-glowing home study provided to the court. The appellate court affirmed that an adoptive parent's lifestyle *is* a factor but "does not control the outcome of custody or adoption decisions, particularly absent evidence of its effects on the child." The facts (and ultimate success) of the Tennessee case notwithstanding, it may well be that few birth mothers will choose gay parents for their children. Certainly gay couples are regularly informed that their chances for adoption will improve

if they will accept a "special-needs" child—one who is older than two, of color, handicapped, or already in foster care. There is also a reported case of a birth mother who surrendered her child to an agency in a traditional closed adoption, later discovered the child was adopted by a same-sex couple, and sought (unsuccessfully) to rescind the adoption.[42]

I present these examples not to suggest that birth mothers are particularly idiosyncratic or prejudiced but simply to point out that, like other parents, they too have preferences about how they would like their children raised. Their preferences are not always predictable or admirable or comfortable. But in this regard, their decisions are not so unlike the evaluations unmarried adults make in deciding whether a potential partner will be the kind of person they could imagine raising their child. In choosing a future mate/co-parent, singles are free to choose a partner from the same community or from a different one. Racial or ethnic similarity is not required; that was resolved in *Loving v. Virginia* in 1967.[43] So too, one could argue, with adoptive parents. A birth mother may insist on continuity, or she may not. If she is permitted to participate, there is no way to ensure that she will honor rather than disrupt relational ties between her child and any community of origin.

V. Alternative Bases of Maternal Authority

To review, using embeddedness as the basis for a birth mother's placement authority is problematic on several counts. Putting aside the deep question of how policy makers (or psychologists or political theorists) can be sure what constitutes the self, serious practical problems remain regarding the definition, scope, and enforceability of embeddedness in a placement regime. But while honoring birth mothers' preferences may disappoint those who would see them as an exercise of communitarian values, the practice is now actively supported for at least two other reasons.[44] The first urges placement authority as a reward or inducement for birth mothers not to abort. The second is market driven: giving birth mothers placement authority, if that is what birth mothers want, ought to increase the number of desirable infants released onto the adoption market. I put forth a third reason,

which, in contrast to the first two, plays no role at present in the politics of placement. It is that choosing adoptive parents for one's child is within the scope of custodial authority vested in all parents and is justified on that basis alone. I find only this third rationale appealing, even as it includes the first two, for reasons I shall set forth below. I begin, however, with an overview of the roles of morals and markets.

Morality first. Since the legalization of abortion in 1973, the commitment of many antiabortion advocates has broadened to include what might be seen as companion issues. An example from the 1980s was the heated dispute over the federal "Baby Doe" regulations, which reclassified parental decisions to withhold care from severely disabled newborns from the acceptable realm of parental authority to that of child abuse and discrimination. In piecing together why withholding care from newborns (in contrast, say, to withholding it from the elderly) became such a focus of public concern, Robert Mnookin explained that "[n]otwithstanding their defeat in Roe v. Wade, many right-to-lifers wish to carry on the political battle over abortion. . . . [T]he issue of the proper treatment of handicapped newborns serves important political ends by connecting abortion rights to children's rights."[45] Adoption works in much the same way but with broader appeal, as would-be adoptive parents may also benefit. The starting point for adoption activists motivated by prolife beliefs is simply that adoption is "the *best* solution for an unwed mother: Adoption clearly rises above abortion as a beneficial alternative for both mother and child, and arguably is superior in most instances to other life-affirming alternatives such as single parenting."[46] William Pierce, president of the National Council for Adoption, an umbrella organization now supporting agencies that oppose open records, contends that adoption is simply "not on the public agenda."[47] Much blame for this is laid at the door of abortion providers, who, it is argued, do not even "raise the issue of adoption with pregnant clients."[48] Others blame the federal government for the adoption movement's purported inability to "fight on level ground": "[S]ome women have always had abortions or single-parented, but the number has swelled to its present extent only when the federal government overrode state and local preferences and enshrined the

worst choice as a fundamental legal right, and the mediocre choice as a fundamental economic right."[49] How, then, from this perspective, can adoption be put back onto the public agenda of policy makers and the private agenda of birth mothers?

The marrying of proadoption and antiabortion advocacy has crept into public policy in a variety of enterprising ways. There are the "Adoption, Not Abortion" bumper stickers.[50] Sticking to the vehicular, there are also proadoption license plates. Drivers in Florida may now select "Choose Life" from among the forty specialized license plates ("Save the Manatee"; "Remember the Challenger Astronauts") offered by the Department of Motor Vehicles. Proceeds from the sales of "Choose Life" plates go to adoption agencies. When questioned why the license plates do not say "Choose Adoption," Tom Gallagher, the Florida Education Commissioner explained that "'Choose Life' basically is talking about adoption. And that's pretty much what it says."[51]

Beyond these rhetorically significant moves, prolife adoption advocates have had a serious impact on adoption agency practices. This is seen in the significant policy change of the many affiliates of Catholic Charities. Once faithful practitioners and proponents of traditional closed adoption, many Catholic adoption agencies now offer and promote open adoption, at least with regard to consensual contact or communication between birth mothers and adoptive parents.[52] A typical Catholic Charities adoption Web page now urges comparison shopping along the following lines:

> *Compare! All adoption agencies are not the same.*
> *Birthmothers*
> *You have all the choices!*
> *No obligation.*
> * You can choose either to have an open or closed adoption
> * You can choose to select & meet the family
> * Option to receive photos of & letters from your child as they grow
> * Direct placement—Never any foster care
> * Available day, night, weekend, & holidays—whenever you need us
> * Click here for more information[53]

The pitch here is directed wholly to the imagined preferences of the relevant consumer, the birth mother.

The second basis of support for birth mother participation in placement decisions is more directly concerned with the laws of supply and demand. The goal here is less to prevent abortion than to increase the supply of desirable candidates in the adoption pool. And here the issue of voluntary infant relinquishment becomes pertinent. There are adoptable American children in foster care, but they are generally older and wiser in ways that make them less marketable to the traditional clients of adoption agencies and lawyers.

As the National Committee for Adoption explained in 1989, "More than a million couples are chasing the 30,000 white infants available in this country each year."[54] To get those babies, agencies have sought to make adoption more attractive to birth mothers who, as the overwhelming majority of them already do, will otherwise choose either single parenthood or abortion. In the most comprehensive study of the shift in agency practices from closed to open adoption, the causal factors listed most often by agency staff were "client demand, changes in agency values, and competition from independent adoptions and other private agencies [already] offering openness in adoption placements."[55] Curiously, only five of the sixty-three agencies canvassed in 1993 listed "It's a right or entitlement" as a reason to offer open adoption, though whether the right referred to is that of the child or of the birth mother is not clear. In any event, by the 1990s, birth mothers had indisputably become the primary clients of agencies, and what they seem to want is some form of open adoption.[56]

And exactly why is open adoption desired by birth mothers? I put the case very simply. Open adoption recognizes birth mothers as *mothers* rather than as transient, anonymous participants in the adoption process. Traditional adoption, through requiring the strict confidentiality of records and complete termination of the parent-child relationship, sought to deny the fact. Consider the language of unconditional surrender required of parents whose children are adopted out of foster care in New York: "[T]he parent [acknowledges she is] giving up all rights to have custody with, visit with, speak with, write to, or learn about the

child, forever."[57] One young birth mother described the experience of the termination hearing:

> It was a paper already written out, just saying that once I signed those papers that I'd given up all right and say in the baby's life, legally. I just, that was it. And to someone to kind of just put a very large period at the end of a sentence like that was like, whoa, it, it hit hard. But, it's written blunt like that so you know. They can't make it cushy and comfortable in that respect 'cause you have to realize what is going on, and boy, did it! And it was pretty much went through in a matter of minutes, and that was it.[58]

In our society, however, motherhood is not usually experienced in a matter of minutes. It is generally understood as a more enduring undertaking. Of course, therein lies the policy conundrum of adoption. Is someone who voluntarily gives up a child to be counted as a mother for any purposes? Motherhood is a complicated status in our society, one that is revered and rewarded, but also one that is regulated, in part to make sure that mothers live up to the kind of behavior deserving of reverence. Distancing oneself from motherhood, whether by not having children at all or—perhaps worse—by giving away the children one has, is therefore a suspect act fraught with personal and social significance. Thus maternal decisions to separate from children under circumstances far less momentous than adoption—something as ordinary as going to work in the morning—are taken seriously, both by mothers themselves and by those who judge them. Such decisions are heavily influenced by dominant cultural views about the importance of children to women's identity and reputation.[59] Birth mothers, like everyone else, are keenly aware of this. In a study comparing two groups of birth mothers, "placers" and "keepers," more than half of the "keeper" group explained that "they could not emotionally handle the thought of placing their child for adoption," and many "placers" feared "peer reaction which views their behavior as selfish, unloving, and even incomprehensible."[60] The consequence of all this for adoption is that mothers who might in fact want to give a child up sometimes decide not to.

But if we accept that birth mothers are, at least for some finite period, full-scale mothers, it cannot surprise us that some may

miss or mourn or wonder about a child relinquished for adoption. As one birth mother put it, "[I]f I'm going to give this baby up, I don't need to know an exact location, but, did they take this baby off, like and they're working him on a farm, or is he in the city?"[61] Another birth mother wrote to the lawyer arranging the adoption of her son: "Dear Mr. Kaplan, It would ease my heart to know that Finn is healthy and happy. Is there any way? Many thanks, Diana." Until the 1980s, the legal answer to these questions was a flat "no."[62] Around that time, however, encouraged by the success of adult adoptees in obtaining records and occasional (consensual) reunions, birth mothers began to "come out," to organize, and to move subtly from therapy to lobbying.[63] Through such organizations as Concerned United Birth Parents, they have pressed for greater (that is to say, any) openness in adoptions from the very start of the adoption process, rather than twenty-one years later and then only at the adoptee's initiative. To be sure, not all birth mothers want a continued connection or some vestige of authority over their child, but many do. The form, degree, and desire for openness differ. Some mothers want simply to name the child and ask the adoptive parents to honor that significant selection. Others seek the promise of information, such as a yearly letter or photo, or the adoptive parents' agreement to give the child a memento or letter from its mother when it is older. Still others want to select the adoptive parents and sometimes to negotiate some form of ongoing contact. All of these arrangements are included within the parameters of what is now called open adoption, and almost all agencies now offer it to their clients.

Whether or not these various agreements brokered ("mediated" in agency speak) by agencies will be upheld by courts is another matter. Courts initially asked to enforce such agreements, most often by birth mothers whose visitation had been cut off, commonly refused to do so on grounds of public policy.[64] Open adoption agreements were understood to violate the letter and spirit of existing laws severing all ties between birth mother and child for the purpose of establishing the child securely in its new family. Slowly, however, courts began to detect and to articulate a public policy that *favored* enforcement. Thus the Maryland Court of Appeals noted that such agreements might well "foster [adoption] in those cases where the natural parent and adoptive parent are known to each other and the natural parent is reluctant to yield all contact with his or her child."[65] Open adoption was seen not simply as benefiting a particular child but as central to sustaining adoption as a social institution.[66] About twenty-five states have now authorized "post-adoption agreement contact statutorily."[67] Most provide that enforcement is contingent on the court's determination that the agreed-on contact is in the best interests of the child.

But in addition to (perhaps) offering an alternative to abortion and (perhaps) increasing the number of infants in the adoption pool, there is a third and independent reason to honor birth mother participation in the placement process. The case is straightforward: making decisions about the care and custody of one's child falls within a well-established bundle of parental rights. These include the right—and the obligation—to provide care for one's children, whether personally or by arranging for a surrogate caretaker. We see this in a variety of circumstances outside the context of adoption as parents regularly determine where and with whom and for how long their children will live. Thus parents may send children to summer camp or to boarding school or to live with Aunt Louise. And even when the child's new placement is not with kindly Aunt Louise but in a mental institution—a decision not always taken with the child's interests exclusively in mind—the Supreme Court has made clear that "our precedents permit the parents to retain a substantial, if not the dominant, role in the decision."[68] Divorcing parents too are entitled to decide between themselves which one will have custody of the kids, and under such agreements, one parent may significantly decrease or even cease contact with the children. Nonetheless, such decisions are rubber-stamped by courts as a matter of course.[69] And in cases where custody is contested, providing for substitute care during the marriage has been recognized as evidence of everyday parenting. Thus in states that use the "primary caretaker standard" to determine custody, "arranging for alternative care (i.e., babysitting, daycare, etc.)" has been one of the enumerated criteria for determining which parent managed parental responsibilities before the divorce and therefore should get custody after.[70] The standard explicitly recognizes

that separating from a child is not inconsistent with concern about its well-being. Finally, parents may choose substitute caretakers for their children in anticipation of a permanent separation. All states now provide for the testamentary appointment of guardians and the rule is clear: "In the absence of facts or circumstances disqualifying testamentary guardians, the statutory right of the parent, duly and lawfully exercised by the execution of his or her will, must be respected and maintained by the court."[71]

All of these examples—custody, babysitting, guardianship, summer camp—reflect the law's respect for parental determinations regarding the provision of substitute care in the parent's absence, whether the arrangement is temporary, long term, or permanent. Adoption simply provides another type of separation on the spectrum of acceptable absences that necessitate a surrogate caretaker. I suspect we may be unused to thinking of adoption in the same breath with other separations. Adoption is somehow bigger, combining as it does both voluntariness *and* permanence. Nonetheless, the law has appreciated that even the decision to give up a child for adoption may be an appropriate exercise of maternal judgment in just the way I am describing. Consider a 1992 Texas case in which a birth mother, on the day her baby was born, relinquished her parental rights and handed the baby over to an adoptive couple she had earlier chosen. The next day the birth mother decided she had made a huge mistake and wanted the baby back. (The Texas revocation period had not expired.) The couple argued that by "voluntarily leaving it in the possession of another [with] an intent not to return," the birth mother had abandoned the baby and therefore no longer had any rights over the child. The trial court agreed, but the case was reversed on appeal. The appellate court held that in turning the child over to the couple under the terms of an open adoption, the birth mother was not "disregarding her parental obligations, as contemplated by [the Texas abandonment statute], but instead was attempting to affirmatively provide for [the baby's] welfare through others." Thus the court properly distinguished between disregarding a child's welfare and securing it.[72]

The argument here is not that all birth mothers must or should choose open adoption. Many prefer traditional adoption,

perhaps because they desire no further contact with the child, because they trust an agency's ability to select parents, or because by relinquishing the baby to a particular agency such as Catholic Charities, they have secured for their child the essence of what they want in adoptive parents (a Catholic upbringing) without needing to know exactly who will be doing it. Birth mothers with drug or other problems may also choose a closed adoption to avoid possible rejection by couples they might choose.[73]

My argument is not even that all birth mothers will choose well. This possibility is hinted at in my earlier spite and petulance examples, though it may be difficult to know whether bad motives produce bad decisions. Certainly, data suggest that at least some teenage birth mothers choose open adoption for reasons less connected with the child's needs than with their "self-related concern about their own ability to know the child." As researchers explain, "Given the developmental status of adolescence in regard to altruism versus self-concern and the difficulty for teens to think through the long-term consequences of behavior, this finding of self-interest is not surprising."[74] It has also been suggested that because this is a final, "last-shot" decision on the birth mother's part, there is no incentive for her to choose the adoptive parents with particular care; she bears none of the consequences of a bad decision, as she need never deal with the child again.

But this game theory objection does not ring true for me. First, it is odd to imagine that a birth mother would deliberately choose against her child's interests. Just because the adoption is *good* for her—and doesn't "self-concern" motivate many/most maternal decisions to leave children, even if only temporarily?—it does not follow that she will want things to go *badly* for her child. Second, even if the birth mother might be so inclined, the law does not permit her to choose *too* poorly. All states require the judge to certify that the order of adoption is in the child's best interest and the court's determination on that point trumps whatever placement preferences a birth mother may have. In the Tennessee case discussed earlier, the court heard the grandparents' arguments against their daughter's choice of a lesbian adoptive mother, acknowledging that while Tennessee law respects "the biological parent's right to choose a prospective

adoptive parent," it remains "the trial court's duty to protect the child's best interest."[75] (The court upheld the adoption.)

We might also keep in mind that there is little quality control on parental decision making outside of adoption. People have children and some raise them badly.[76] In this regard it would seem that birth mothers are perhaps ahead of the pack. They are at least *aware* that they may raise their children badly, simply by virtue of not wanting to raise them at all, and they are acting responsibly on that knowledge. What birth mothers want, and what all other parents get as a matter of course, is some recognition that they are their child's parent and have contributed to their child's life in some manner or form beyond childbirth itself: a name, a photo, securing good adoptive parents.

Open adoption in any of these variations permits the exercise of such ordinary parental authority in the context of what is never an ordinary decision. The significance of birth mother participation for adoption practices is made clear by considering the work it does for adoption vocabulary. At present, the verbs typically (awkwardly, reluctantly) used to describe what birth mothers do with their children are *surrender, relinquish,* or *give up.* Consider the difference for the mother—and for the child—when it is understood that the mother *placed* her child. Indeed, the adoptive parents too might benefit from knowing something of the birth mother, in part to satisfy their child's questions when the questions finally arise. Elyse Gasco describes an adoptive mother who, without any facts to tell her daughter, makes up what she hopes is an appealing story. But as the mother thinks of her daughter's original mother, she thinks this:

> Stupid, stupid girl. Why couldn't she have left her daughter something? A letter, a glove, a piece of her stupid hair. Was she a moron? A simpleton? Probably a cruel and reckless beauty queen. Probably an impossibly loose bully. It is as though Mother's own love is weak, watered down, muted and she is being forced into speaking like a ventriloquist through the mouth of this dummy dummy girl. Surely, thinks Mother, you were the type of person everyone followed behind picking up pieces.[77]

I therefore agree with Shanley that birth mothers should be given a voice in choosing the kind of family in which their child will be placed, though whether such preferences should be limited only to those mothers who fall within the present penumbra of embeddedness is another matter.

VI. Conclusion

Mary Shanley is after an adoption regime open enough to give adult adoptees sufficient information to "construct a coherent story of origin, an explanation of how they came into the world." This is admirable and, as Shanley explains, can be achieved by opening adoption records or by opening adoption itself through contact or communication between the family of origin and the adoptive family. Even the provision of nonidentifying birth parent information secures some of the values encompassed by the idea of embeddedness: the sense that we are not "self-made" but rather that each of us is vitally informed by our relation to a community of origin and is entitled at least to know what that community is. There are, of course, risks in all this. Ongoing or later initiated contact with birth mothers may be difficult and the release of birth records does not always result in a *pleasing* story of coherence. It may throw into disarray whatever invented story has been functioning as placeholder for the true one.[78] Consider P. D. James's novel *Innocent Blood,* in which the adopted heroine constructs a lovely story of origin for herself: her biological mother a beautiful servant girl at a country estate; her father, a handsome gentleman passing by. She is then dumbstruck to learn upon obtaining her birth records under Britain's Adoption Records Act that her father was *not* a nobleman but a child molester, still serving time for the murder of one of his hapless victims, and that her mother was his willing accomplice.

Of course, for most of us life is neither a fairy story nor a P.D. James thriller. But that all adopted children will not have been given up by Cinderella figures is not my point. It is rather to suggest that all adults desire a coherent and satisfying story of origin. I suspect that there are few among us who, if given a red pencil, would not rewrite a page or two of the original text. Even children living with their natural parents sometimes challenge the script. Many—particularly in early adolescence—entertain "adoption fantasies" as the only explanation for how they

could have ended up with such awful so-called biological parents.

I want therefore to frame my conclusion around a more functional phrase that I have borrowed from Elyse Gasco. In another of Gasco's brilliant short stories about adoption, a young adopted woman describes a brief conversation with her counselor: "Finally he clasps his hands together hard and I think I can see the blood in his nails. He says: Eventually, you will find a story you can live with. And he opens his hands again, reading the lines to see if he's right."[79] It is the "story one can live with" that provides the project for many adult lives. This is not to say that adoption doesn't matter, and that the real problem is just a shortage of good therapists. Rather, in thinking about placement regimes, it seems useful not to substitute one idealized concept—here embeddedness—for the earlier fiction that if we only pretend adopted children are exactly like biological ones, everything will turn out just fine. Many aspects of an adopted child's life may change in ways that produce someone of different temperament, tastes, habits, and beliefs than the person who might otherwise have resulted. It may be impossible to know which of these attributes are essential to the construction of the self and would therefore be preserved or nurtured by a placement scheme that takes embeddedness into account.[80] Consider the matter of birth order, now understood to be a significant feature in personality development. An overburdened birth mother may relinquish her third child, who by virtue of adoption now becomes an oldest child, with all the personality peculiarities that attend that distinction. If birth order is crucial to what one becomes, should *it* be then replicated within the adoption scheme in the interest of securing a more authentic self?

This returns us to the concept of remainders. It seems likely that adoption will always produce a moral remainder. The interests of the three central parties—not to mention the complicated interests of the adoption industry, political groups, and ethnic communities for whom adoption is of symbolic as well as practical significance—are unlikely to converge. The question then, is: Who is to bear the burden of the remainder? Whose morally reasonable claim will be left unsatisfied, squeezed out of the equation, stuck forever behind a lower-case "r"? Under the regime of

closed adoptions, birth mothers bore the weight. The very fact of their maternity was obliterated by the practices of traditional adoption. Thus although it was argued that the system benefited everyone (kids got parents, childless parents got kids, unwed mothers got a second chance), birth mothers as beneficiaries limped in a very poor third.

The active participation of birth mothers changes all this. The emotional complications of adoption are now distributed more evenly across the three major participants, with adoptive parents perhaps shouldering the greatest adjustment. Once secure in adoption's protective wrap, they now begin with their child's birth mother in mind, if not in sight. This may not be the burden many have feared; initial studies of open adoptions indicate that most adoptive parents do well under the new system. Many are relieved to have the rules of contact clear and established up front. Yet concern about possible entanglements with intrusive birth families cause some to pursue children by other means, such as turning to foreign adoption.[81] Of course, it is too early to know what the consequences, good and bad, of open adoption will be for the various players. Certainly, birth mothers must still come to terms with their decision and with the experience of loss that often and understandably accompanies it.

Returns on how children fare in all this are sparse. So far it appears that children in open adoptions are secure in their adoptive homes and that adoptive parents also find some relief that the terms of engagement are clearly established from the start. To be sure, empirical research findings do not always matter much with regard to family law reform. In custody law, for example, joint custody replaced a maternal presumption, which replaced a paternal presumption. In each case, it was argued that the child benefited by the change, but in fact, each shift resulted from a mix of politics with contemporary theories about families, gender roles, or children's needs. So too with adoption. The very preference for adoption (in contrast to orphanages) reflected 1950s postwar assessments about the social and political importance of the nuclear family, with as much attention given to the benefits of children for couples as to the benefits of parents for children. This is all to say that policy shifts are rarely based on the state of developmental research alone. The effects of open adoption on

children's developmental well-being remain speculative and will likely take generations to measure and assess. Thus whether birth mothers should participate in placement decisions is likely to be worked out, like much else in family law, without benefit of empirical data.

In all of this, adoption law and practices are guided by enormous cultural changes in the composition and the meaning of family. As families become increasingly blended outside the context of adoption—with combinations of blood relatives, step-relatives, de facto relatives, and ex-relatives sitting down together for Thanksgiving dinner as a matter of course—birth families and adoptive families knowing one another may not seem so very strange or threatening at all. There will simply be an expectation across communities that ordinary families will be mixed and multiple. With that in mind, we should hesitate before establishing embeddedness as the source of a mother's authority over her child's placement. It is a concept that only sounds cozy in great part because it simplifies the relational complexities of the world in which we live.

NOTES

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1. For the idea of the encumbered self (and the opposing liberal image), see Michael Sandel, *Liberalism and the Limits of Justice* (New York: Cambridge University Press, 1982), 54–62.

2. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (1978).

3. See Joan H. Hollinger, *Appendix 13B: Agreements and Court Orders for Post-Adoption Contact between Adoptive Families and Birth Parents or Other Birth Relatives in Adoption Law and Practice* (New York: Matthew Bender, Update 2000).

4. This was not always adoption's purpose. Historically, adoption was used primarily to benefit the adopting male parent by providing the necessary heirs to mourn, inherit, and carry on the family line. The American states were among the first to "distinguish the *adoptee* as the prime beneficiary." See Jamil S. Zainaldin, "The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796–1851," 73 *Northwestern University Law Review* 1038, 1041 at n. 42 (1979). Certainly adults continue to benefit from adoption, if perhaps secondarily; indeed, it is the competing preferences among adults that now complicate policy formation.

5. See particularly Judith Schacter Modell, *Kinship with Strangers* (Berkeley: University of California Press, 1994).

6. There is, of course, a tension between the move away from the "biologism" in the first point and honoring it through deference to the birth mother (whose ties to the child are essentially biological) in the second.

7. 42 U.S.C.A. § 5115a (West 1995).

8. The focus on birth mothers, in contrast to birth parents or birth fathers, reflects the fact that most adoptions still proceed without the participation of birth fathers. See Mary L. Shanley, "Unwed Fathers' Rights, Adoption, and Sex Equality: Gender-Neutrality and the Perpetuation of Patriarchy," 95 *Columbia Law Review* 60 (1995). Participation from the paternal side sometimes comes from grandparents seeking to block the adoption of their grandchild. While grandparents have no legal standing to intervene as progenitors, their interests might be subsumed under a group embeddedness claim.

9. Wayne Carp, *Family Matters: Secrecy and Disclosure in the History of Adoption* (Cambridge, Mass.: Harvard University Press, 1998). Thus the unhappy (and unsuccessful) opposition of several Oregon birth mothers who surrendered children over the last thirty years under a secrecy regime to recent legislation opening birth records retrospectively upon the sole request of adult adoptees. See *Jane Does 1–7 v. Oregon*, 164 Ore. App. 543, 993 P.2d 822 (Or. 1999).

10. See Michael D. Resnick et al., "Characteristics of Unmarried Adolescent Mothers: Determinants of Child Rearing Versus Adoption," 60 *American Journal of Orthopsychiatry* 577, 583 (1990).

11. Jan Waldron, *Giving Away Simone* (New York: Time Books, 1995), xvii.

12. The only place in Shanley's proposal where the interests of birth mothers are relegated regards the confidentiality of records. Shanley proposes that "except in cases in which [disclosure] would put a woman in grave danger, the adult adoptee's right to know his or her specific history overrides an adult's right to privacy."

13. Shanley notes "the web of social and economic injustice—including poverty, lack of access to birth control, and stigmatization of unwed

motherhood—that leads women both in the United States and abroad to relinquish their children for adoption." It is important to note, however, that poverty no longer so clearly leads women in the United States to choose adoption. Indeed, the higher a pregnant teenager's social-economic status, the more likely she is to place her child for adoption than to keep it. She is more likely to have plans for herself—educational, occupational, relational—that she believes early single motherhood will thwart. See Christine A. Bachrach et al., "Relinquishment of Premarital Births: Evidence from National Survey Data," 24 *Family Planning Perspectives* 27, 31 (1992).

14. *Parham v. J.R.*, 442 U.S. 584 (1979).

15. Elizabeth Bartholet, *Nobody's Children: Abuse and Neglect, Foster Drift, and the Adoption Alternative* (Boston: Beacon, 1999); Richard Banks, "The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences through Discriminatory State Action," 107 *Yale Law Journal* 875 (1998).

16. Janet Farrell Smith, *The Realities of Adoption* (Lanham, Md.: Madison, 1997).

17. One ground of skepticism regarding communitarianism has been that the communities typically included within its framework are what Marilyn Friedman has called "imposed communities," such as families. These stand in contrast to communities that are *chosen*, such as friendship. See Marilyn Friedman, "Feminism and Modern Friendship: Dislocating the Community," 99 *Ethics* 275–90 (1989). We should recognize of course, that for children, *all* communities are imposed, whether they are biological or adoptive.

18. To be sure, the line between voluntary and involuntary is not always sharp. It is not always clear, for example, that a homeless mother has *voluntarily* decided to separate when she places her daughter in foster care after a social worker tells her that neglect proceedings will start if she doesn't. See Clara Hemphill, "City's Homeless Policies Create a House Divided," *Newsday*, Apr. 13, 1989, 6. Thus while certain separations are voluntary (and intended to be temporary), the circumstances that have provoked them may not be. See Somini Sengupta, "Despondent Parents See Foster Care as the Only Option," *New York Times*, Sept. 1, 2000, B1.

19. Historically, the "genetic" circumstances of a child's birth did play a determining role in adoption placements. The issue arose with regard to illegitimacy in the early decades of the twentieth century. It was considered a matter of scientific fact that unwed mothers passed their sexual deviancy to their offspring; illegitimate children were therefore "encumbered" right out of the adoption pool. By the 1950s, psychological explanations for unwed motherhood replaced biological ones, and it

was suddenly safe to adopt children no longer viewed as blighted by the circumstances of their conception. See Ricki Solinger, *Wake up Little Susie: Single Pregnancy and Race before Roe v. Wade* (New York: Routledge, 1990), 168, n. 77.

20. This is not to deny that children are born with certain traits that, at least as a starting point, we take as fixed, profoundly significant for identity, and not subject to alteration by new parents. A child's sex is an example. No matter how much adoptive parents might prefer a girl (as the majority of would-be adoptive parents do), they may not turn a boy into a girl to satisfy that preference. For an upsetting and instructive case of infant sex reassignment, see John Colapinto, *As Nature Made Him: The Boy Who Was Raised as a Girl* (New York: HarperCollins, 2000). After the baby's penis had been obliterated in a botched circumcision, his young parents were advised by doctors at the Johns Hopkins Sex Reassignment Clinic to raise the child as a girl. The child—renamed, dressed, and socialized to be sweet and feminine—struggled unknowingly against this imposed sexual identity. At the age of fourteen, he was told the truth and thereupon chose to live as a boy, a volitional and apparently successful re-reassignment. For our purposes, the case marks one extremity of an innateness spectrum on which other traits might be plotted, as we consider whether other characteristics work in the same way as sex.

21. See Karin Evans, *The Lost Daughters of China* (New York: Tarcher/Putnam, 2000).

22. And are surprised when we are wrong, as in "Funny, you don't look Jewish."

23. Linda Gordon, *The Great Arizona Orphan Abduction*, (Cambridge, Mass.: Harvard University Press, 1999); see also Matthew Frye Jacobson, *Whiteness of a Different Color: European Immigrants and the Alchemy of Race* (Cambridge, Mass.: Harvard University Press, 1998).

24. Gordon, *The Great Arizona Orphan Abduction*, 19.

25. The five racial categories are American Indian/Alaskan Native, Asian, African American, Native Hawaiian/Pacific Islander, and white. Steven A. Holmes, "New Policy on Census Says Those Listed as White and Minority Will Be Counted as Minority," *New York Times*, March 11, 2000, A9. Curiously—and of special interest to the white citizens of Arizona studied by Linda Gordon—Hispanic is considered an ethnic, not a racial, category. Thus under Directive No. 15, which establishes the federal race and ethnicity standards, Mexican Americans are presumptively white.

26. N.Y. C.L.S. Family Court Act § 116(c) and (g).

27. Ibid. Different religions have different views on the inheritability of religious affiliation. Some Christian denominations reject infant baptism on the ground that the religion must be embraced by the informed

choice of the new member. Even among denominations that allow infant baptism, it is still understood as something distinct (in theory if not in practice) from straight inheritability. It is not clear how the concept of embeddedness would help make sense of these tangles.

28. *Pope v. Department of Human Resources*, 209 Ga. App. 835, 434 S.E.2d 731 (1993)

29. Ibid., 733. The parents lost the suit against the hospital for the switch. Prior to the discovery, Pope's husband had divorced her, claiming he could not have been the father of Cameron. Pope then kept Cameron, her (nonbiological) child, and also gained permanent custody of Melvin (her biological child) following a heated custody fight and an appearance on Oprah.

30. Judith Modell and Naomi Dambacher, "Making a 'Real' Family: Matching and Cultural Biologism in American Adoption Law," 12 *Adoption Quarterly* 3, 6–7 (1997).

31. Consider, in this regard, Mark Twain's *Pudd'nhead Wilson.*

32. I put aside the question of whether "coming from a long line of Democrats/Republicans" is the same thing as "being" a Democrat/Republican. Is party embedded? Should birth mothers be permitted to request party placements? And would this apply in the case of any registered Democrat/Republican or only those who come from a long line? (I put even further aside former candidate Nader's view that the distinction is meaningless.)

33. 490 U.S. 30 (1989).

34. Thus while the claim of embeddedness is articulated as being in the child's interest, it is not always made entirely on his or her behalf. The best the Supreme Court could say in *Holyfield* was that "[i]t is not ours to say whether the trauma that might result from removing these children from their adoptive family should outweigh the interests of the Tribe—and perhaps the children themselves—in having them raised as part of the Choctaw community" (54).

35. N.Y. C.L.S. Family Court Act § 116(c) and (g).

36. The passage from *Daniel Deronda* continues:

> "I am glad of it," said Deronda, impetuously, in the veiled voice of passion. He could not have imagined beforehand how he would come to say that which he had never hitherto admitted. . . . But the mother was equally shaken by an anger differently mixed, and her frame was less equal to any repression. The shaking with her was visibly physical, and her eyes looked the larger for her pallid excitement as she said violently, "Why do you say you are glad? You are an English gentleman. I secured you that." "You did not know what you secured me. How could you choose my birthright for me?" said Deronda, throwing himself sideways into his chair again, almost unconsciously, and leaning his arm over the back while he looked away from his mother. . . . "Ah!"—here her tone changed to one of a more bitter incisiveness—"you are glad to have been born a Jew. You say so. That is because you have not been brought up as a Jew. That separateness seems sweet to you because I saved you from it." George Eliot, *Daniel Deronda* (New York: Penguin), 689-93.

37. See Philip Roth, *The Human Stain* (New York: Houghton Mifflin, 2000). For a nonfictional account, see Gregory H. Williams, *Life on the Color Line: The True Story of a White Boy Who Discovered He Was Black* (New York: Dutton, 1995).

38. Elyse Gasco, "A Well Imagined Life," in *Can You Wave Bye Bye Baby?* (New York: Picador, 1999), 11.

39. Thus in a study of unwed mothers, a number of the young women reported that one reason for getting pregnant was "spiting their parents." See Resnick et al., "Characteristics of Unmarried Adolescent Mothers."

40. "'Mom, Dad,' says Susan when she gets home from the hospital, 'I GAVE IT TO FAGS! I HOPE YOU'RE HAPPY. YOU WOULDN'T LET ME HAVE AN ABORTION SO I GAVE YOUR GRANDCHILD TO FAGS! FAGS!'" Dan Savage, *The Kid* (New York: Dutton, 1999), 90–91. In Savage's daydream, this causes the parents to die instantly of heart attacks; Susan *and* the baby then come live with the adoptive fathers.

41. *In re Adoption of M.J.S.*, No. W1999-00197-COA-R3-CV (Oct. 5, 2000, Tenn. Ct. of App.); see http.//pub.bna.com/fl./9900197.htm.

42. "Lengthy Adoption Battle End in Gay Couple's Favor," *New York Times*, Dec. 27, 1994, A10.

43. *Loving v. Virginia* 388 U.S. 1 (1967).

44. To clarify, open adoption in general has additional bases of political support. Adult adoptees are probably the predominant force behind opening records and facilitating contact. (See Web sites of ALMA, the Adoption Liberty Movement Association, and the newer Bastard Nation, at www.bastards.org and www.almanet.com.) Their concerns, however, have focused on access to their family of origin rather than on the manner of selection of their adoptive family. The latter, and particularly the participation of the birth mother, is the focus here.

45. Robert Mnookin, "Two Puzzles," 1984 *Arizona State Law Journal* 1984 (1984): 667. Mnookin uncovered a three-way synergy among the prolife movement, advocates for the handicapped, and hospital organizations.

46. Donna Warner, "Pro-Life Approaches to Adoption," in *Adoption Factbook III* (Washington, D.C.: National Council for Adoption, 1999),

281. Several of its "facts" have been challenged as unsupported. One example is the *Factbook*'s claim that a regime of nonconfidentiality of records will increase abortion.

47. William Pierce, "Twenty-One Barriers to Adoption to Address in the Twenty-First Century" in *Adoption Factbook III*, 558.

48. See Patrick F. Fagan, "Adoption: The Best Option," in *Adoption Factbook III*.

49. Martin Olasky, "The Antiabortion Abortion Movement's Future," *Wall Street Journal*, Dec. 13, 1995, A14.

50. Until the early 1990s, prolife adoption advocates (though not necessarily adoption agencies) commonly listed themselves in the Yellow Pages under "Abortion Services." Women who sought their help were then strongly counseled not to abort but to place the child for adoption. Such misrepresentation is now prohibited as false advertising; the Yellow Pages now include a bold-faced notice that distinguishes "Abortion Alternatives" from "Abortion Providers."

See John Henderson, "Texas Official Urges U.S. to Ban Misleading Anti-Abortion Ads," *Houston Chronicle*, Sept. 21, 1991, A4; Lisa Petrillo, "Abortion-Rights Side Claims Classified Victory," *San Diego Union-Tribune*, Nov. 24, 1991, B3.

51. "'Choose Life' License Plates Cause Controversy in Florida," CNN Talkback Live, Nov. 29, 1999, Transcript No. 99112900V14. Elizabeth Toledo of the National Organization of Women responded that "[not] only [did the legislature] adopt the slogan that is often used in anti-abortion campaigns, but the moneys have to go to organizations that can't even make a referral [for an abortion]."

52. In contrast, the National Right to Life and the National Council for Adoption continue to lobby against any legislation that would disclose identifying information about the birth mother at the request of an adult adoptee. They argue that the possibility of such disclosure is so painful as to drive pregnant women into abortion. See Jonathan Riskin, "Fans, Foes, Debate Bill to Open Adoption Records," *Columbus Dispatch*, Jan. 24, 1994, 2C; Dureen Cheek, "Law Puts Adoption Privacy at Stake," *Tennessean*, Sept. 3, 1995, 1B. In this regard, consider the availability in France of *accouchement sous X*, which provides a method of anonymous childbirth. The mother signs into the hospital under the pseudonym of "X," and after delivery the baby is put immediately in the custody of social services for adoption placement. See Laura J. Schwartz, "Models for Parenthood in Adoption Law: The French Connection," 28 *Vanderbilt Journal of Transnational Law* 1069, 1106–08 (1995). The law is explicitly intended to deter illegal abortion and infanticide; about seven hundred babies a year are born *"sous X."*

53. http://www.adoptionservices.org/

54. "It's a Seller's Market," *Life*, Sept. 1988, 80.

55. Harold D. Grotevant and Ruth G. McRoy, *Openness in Adoption: Exploring Family Connections* (Thousand Oaks, Calif.: Sage, 1998), 35. Researchers Grotevant and McRoy underline what was *not* on the list: "[V]ery few agencies cited research as a factor leading to change in practice." It is unclear from their study whether the research to which they refer concerns the reported difficulties of adoptees who suffer because of not knowing of their origins or the difficulties faced by birth mothers in closed adoptions. It is noteworthy for empiricists to understand how little developmental research findings have to do with the placement of children.

56. While it appears many birth mothers prefer open adoption, "popular demand" may also have taken on a life of its own. That is, to satisfy perceived demand, all agencies offer open adoption; many that did not either went out of business or feared they would. Further, adoptive parents are informed if they will not even consider open adoption as an option, they are unlikely to be chosen. Most therefore agree. Thus open adoption may be somewhat self-fueled.

57. N.Y. Soc. Serv. Law §§ 383-c(5)(b)(ii) (Mckinney Supp. 1996).

58. Birth mother quoted in Barbara Yngvesson, "Negotiating Motherhood: Identity and Difference in 'Open' Adoptions," 31 *Law and Society Review* 53–54 (1997).

59. See Carol Sanger, "Separating from Children," 96 *Columbia Law Review* 375 (1996).

60. Resnick, "Characteristics of Unmarried Adolescent Mothers," 583.

61. Birth mother, quoted in Yngvesson, "Negotiating Motherhood," 52.

62. Unless there was an informal, or, as Barbara Yngvesson puts it, "outlaw" arrangement between birth mother and adoptive family.

63. The therapeutic model is captured in "Once-Silent Mothers Raise Voices," *New York Times*, May 8, 1994, 26 (reporting celebration by support group for birth mothers). See also the Web site of Concerned United Birthmothers at www.cubirthparents.org.

64. There is some suggestion that the birth mother is more often the party who fails to meet the terms of the agreement, not by demanding more contact than contracted for but by failing to request or participate in meetings to which she is entitled under the agreement.

65. *Weinschel v. Strople*, 466 A.2d at 1306 (Md. 1983).

66. Recognition of market forces is also found in a California statute authorizing parents to set aside an adoption if the child "shows evidence of a pre-existing developmental disability or mental illness" of which the

parents had no knowledge at the time of the adoption. Cal. Civil Code § 227b. In *Adoption of Kay C,* a fourteen-year-old adoptee whose adoptive parents sought to revoke her adoption challenged the statute on various constitutional grounds. The Court of Appeals rejected her arguments, noting that "[i]t is unquestioned that the promotion of adoptions is a legitimate state purpose. . . . Although the primary purpose of adoption is to promote the child's best interests, the adoptive parents' interests also deserve some consideration. . . . [A] couple must be allowed to consider a variety of factors, including their ability to parent a child who they believe may never form an emotional bond with them. . . . *Thus it is rational to conclude that more adoptions will occur given the alternative provided by section 227b." Adoption of Kay C.,* 228 Cal. App. 3d 741 (1991) [emphasis added.].

67. See Hollinger, *Appendix 13B,* § 13B.

68. *Parham v. J.R.,* 442 U.S. 584, 604 (1979). Parents control not only with whom their children will live but also for how long they may *visit.* In 2000, the Supreme Court reaffirmed this right even as against visitation with loving, involved grandparents. *Troxel v. Granville,* 530 U.S. 57 (2000).

69. See Sally G. Sharp, "Modification of Agreement-Based Custody Decrees," 68 *Virginia Law Review* 1263, 1264 (1982).

70. See *Garska v. McCoy,* 278 S.E.2d 357, 363 W. Va. (1981).

71. *Gardner v. Hall,* 26 A2d 799, affd. 31 A2d 805 (1942); see also *Bristol v. Brundage,* 24 Conn. App. 402, 589 A2d 1 (1991) (probate court erred in appointing orphan's grandmother as co-guardian along with child's uncle, who was sole guardian named by deceased mother; guardianship statute should be interpreted as mandating appointment of parent's choice unless the appointment would be detrimental to the child).

72. *Swinney v. Mosher,* 830 S.W.2d 187, 193–94 (1992).

73. For an excellent account of how an adoptive couple assesses whether to proceed with an adoption after learning that the birth mother drank heavily in early pregnancy, see Savage, *The Kid,* 112–27.

74. Marianne Berry, "Risks and Benefits of Open Adoption," 6 *Future of Children* 125, 130 (Spring 1983).

75. *In re Adoption of M.J.S.*

76. As Legal Services Director Danny Greenberg has observed with regard to the law's ability to fix children's lives, "Remember that some kids get the good parents and others get the sons of bitches."

77. Gasco, *Can You Wave Bye Bye Baby?* 224.

78. Birth mothers too construct stories of origin; thus the immense disruption when the story is challenged by virtue of unwelcome contact

with an adult child who has obtained records once sealed. Voluntary reunions would seem another matter, as are those that follow adoptions under a known regime of open records.

79. Gasco, *Can You Wave Bye Bye Baby?* 21.

80. See Frank J. Sulloway, *Born to Rebel: Birth Order, Family Dynamics, and Creative Lives* (New York: Pantheon Books, 1996).

81. In this regard, Joan Hollinger notes that the number of foreign adoptions has doubled from fewer than eight thousand in 1989 to over sixteen thousand in 1999. Joan H. Hollinger, "Authenticity and Identity in Contemporary Adoptive Families," *Journal of Gender Specific Medicine* (forthcoming).