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Laura J. Schwartz

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Models for Parenthood in Adoption Law: The French Conception

Laura J. Schwartz*

ABSTRACT

According to Ms. Schwartz, adoption in the United States is currently in a state of disarray and confusion because it has not achieved a satisfactory balance between biological and psychological parent-child relationships. U.S. adoption law has never adequately evaluated the relative importance of both types of relationships to the process of family formation. In contrast, although French adoption faces many of the same challenges as U.S. adoption, the French adoption process is not riddled with the same inconsistency and indeterminacy. Instead, French adoption law and government family policy reflect a societal consensus on the central and intrinsic importance of biological relationships. The manner in which French law strives for balance and compromise between biological and psychological relationships in establishing legal parentage warrants examination. Accordingly, in this Article, Ms. Schwartz examines the relationship between contemporary French adoption and that nation's history, traditions, and values. By doing so, the author encourages consideration of such a relationship in the United States in connection with reforms in U.S. adoption law.

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I. INTRODUCTION

The adoption of children raises the question of how to harmonize biological and psychological relationships.¹ The balance a society establishes between the two ties has far reaching effects on both children and adults. It not only determines how to confer and terminate parental status, but how to allow adoptees access to information about their biological origins.² Ultimately, this balance plays an important role in shaping the structure of families and is revealing of societal attitudes toward child development, social behavior, and family relationships.

At present, child adoption in the United States is undergoing critical scrutiny and reevaluation. While only the most extreme critics call for the abolishment of adoption,³ many observers believe extensive reform and restructuring of adoption laws are necessary.⁴ The most significant adoption issues revolve around the largely underregulated practice of "private adoption" (i.e., adoptions arranged by lawyers, rather than by state-operated or

1. The conflict between biological and psychological ties is a long-standing one. For example, the Old Testament contains the story of the adoption of Moses by the Pharaoh's daughter. *Exodus* 2. Aware of his origins, Moses ultimately betrayed his adoptive family in favor of his biological ties. *Exodus* 10. A contrasting example is that of Joseph, who was perfectly integrated into his adoptive family and country. *Genesis* 41:14. See PHILIPPE MALAURIE, COURS DE DROIT CIVIL: LA FAMILLE 363 n.14 (1989) (discussing these biblical stories).

2. In certain societies, striking this balance seems relatively simple. For example, the French Polynesian practice of "faamu" allows biological parents to give their children to infertile couples to rear. The legally binding transfer is often marked by a celebration and the resulting adoption has no clandestine aspect whatsoever; the adopted child not only knows the biological parents' identity but maintains contact with them. GERALD COPPENRATH, LA DÉLÉGATION D'AUTORITÉ PARENTALE: PRÉLUDE À L'ADOPTION EN POLYNÉSIE FRANÇAISE [THE DELEGATION OF PARENTAL AUTHORITY: A PRELUDE TO ADOPTION IN FRENCH POLYNESIA] 15 (1990).

3. The most dramatic attacks on adoption come from a network of birth parent organizations such as "Concerned United Birth Parents" (CUB), "Help Us Regain the Children," "Bonding by Blood," and "Finders Keepers," which view child adoption as an exploitation of the underclass and consider biological ties the most important basis of identity. In addition to lobbying for the legal abolishment of adoption, these groups urge pregnant women against adoption and encourage those who have done so to track down and contact the children they surrendered. Lucinda Franks, *The War for Baby Clausen*, NEW YORKER, Mar. 22, 1993, at 56, 58-59.

4. See e.g., Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991); Katharine Davis Fishman, *Problem Adoptions*, THE ATLANTIC, Sept. 1992, at 37, 39-42; *The Ties that Traumatize*, TIME, Apr. 12, 1993, at 48; *Adoption Country*, NEW YORKER, May 10, 1993, at 6; Michele Ingrassia & John McCormick, *Why Leave Children With Bad Parents?*, NEWSWEEK, Apr. 25, 1994, at 52.

licensed agencies);⁵ the lack of clarity and consistency in laws governing the rights of putative fathers;⁶ the growing numbers of foster children living in long-term "temporary" care;⁷ and the wisdom of "open adoption."⁸

Although the first United States adoption statutes were passed almost 150 years ago,⁹ neither U.S. law nor society-at-large has ever fully evaluated or declared its position on the ultimate importance of biological and psychological parent-child relationships. This Article argues that, as a direct consequence of this legal inertia, United States adoption is in disarray and riddled with confusion. An example of the current confusion in adoption is found in the termination of birth parent rights. Although U.S. law holds that biological ties should form the basis for legal parenthood,¹⁰ the standards governing surrender by biological parents (particularly with respect to fathers) are often unclear.¹¹ Furthermore, under U.S. law, no prerelinquishment counseling is required for birth mothers. In many instances, adoptions are

5. Certain states forbid private adoption and permit placement only by licensed agencies. See, e.g., MASS. GEN. LAWS ANN. ch. 210 § 2A, 11A (West 1987); MICH. COMP. LAWS ANN. § 710.28 (West 1993).

6. See, e.g., *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978), *reh'g denied*, 435 U.S. 918 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983). The rights of the father of a child born out-of-wedlock may not be ignored. When such a man has either financially supported or cared for the child, he is entitled to notice before his parental rights may be terminated. It remains unclear, however, how much support or care entitles a putative father to notice, or what rights a man unaware of his child's birth possesses. For some of the consequences of this uncertainty, see Don Terry, *Storm Rages in Chicago Over Revoked Adoption*, N.Y. TIMES, July 15, 1994, at A1, A12; *In re Doe*, 638 N.E. 2d 181 (Ill. 1994), *cert. denied*, 115 S.Ct. 499 (1994).

7. As of 1993, there were an estimated 462,000 children in foster care in the United States. Ingrassia & McCormick, *supra* note 4, at 58. For issues related to foster children of color, who constitute a disproportionate percentage of U.S. foster children, see generally Barthelet, *supra* note 4.

8. The term "open adoption" encompasses a range of noncodified practices from the biological mother screening the applications of candidates to select an adoptive home for her child, to face-to-face contact between the biological and adoptive parents, to—in the most "open" arrangements—full identification of all parties and even postadoption visitation privileges for the biological mother.

9. MASS. REV. STAT. ch. 324 (1851).

10. See, e.g., *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) ("[T]he custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder."); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (The right to conceive and raise one's child is "one of the basic civil rights of man."); *May v. Anderson*, 345 U.S. 528, 533 (1953).

11. See *supra* note 6; *infra* note 14.

arranged by lawyers hired by adoptive parents to represent their interests,¹² while birth mothers seldom have legal representation.

The confusion is not limited to infant adoption. Under U.S. law, when the biological parent-child relationship is irremediably broken, the "best interests of the child" standard mandates a termination of parental rights, followed by prompt placement of the child into a stable, caring, and permanent adoptive home.¹³ In practice, however, competing interests frequently are favored over the individual child's welfare. These interests include: the parental rights of biological mothers and fathers;¹⁴ the religious preferences of such parents with respect to adoptive placement;¹⁵ noncodified and often unwritten agency practices and policies; and the preservation of black cultural identity.¹⁶ Although isolated cases, such as the interstate custody battle for the child known as "Baby Jessica,"¹⁷ attract far greater public (and media) attention than discussions of the foregoing issues, their impact is no less dramatic and, ultimately, is more significant.

The chaotic state of contemporary U.S. adoption law suggests the utility of an examination of adoption and family formation in another industrialized country. Such an undertaking offers the potential for studying different approaches to challenges that are similar to those faced in the United States. These challenges include: a demand for adoptable children that greatly exceeds the available supply; children spending longer periods of time in "temporary care;" and conflicting interests with respect to preserving the anonymity of adoptive and biological parents.

French family law, particularly with respect to adoption, offers a sharp contrast to the ambiguous United States example

12. New York law prohibits attorneys from representing both parties to an adoption. A court clerk refers biological parents wishing legal representation to an approved attorney, whose legal fees may be paid by the adopting individuals. N.Y. SOC. SERV. LAW § 374 (Consol. 1993).

13. See, e.g., MASS. GEN. LAWS ANN. ch. 210, § 3 (West 1987); N.Y. DOM. REL. LAW § 111, 114, 119 (Consol. 1993).

14. See Ingrassia & McCormick, *supra* note 4; Susan Chira, *Adoption is Getting Some Harder Looks*, N.Y. TIMES, Apr. 25, 1993, § 4, at 1 (Parental rights of teenage mother reinstated one year after she abandoned newborn daughter in Connecticut hospital and child was placed with adoptive couple.); Terry, *supra* note 6; *In re Doe*, 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 115 S. Ct. 499 (1994) (Illinois Supreme Court confirms lower court's revocation of an adoption granted three years earlier for lack of consent by the biological, unwed father. The father did not assert his parental rights within 30 days of the child's birth, as required by law, because the birth mother had lied and told him their baby was dead.).

15. See, e.g., Laura J. Schwartz, *Religious Matching for Adoption: Unraveling the Interests Behind the 'Best Interests' Standard*, 25 FAM. L.Q. 171 (1991).

16. See, e.g., Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503 (1984); Bartholet, *supra* note 4.

17. See *infra* note 22.

and brings an important dimension to the delicate task of balancing biology and psychology. Not only does there exist a consensus in French society on the inherent importance of biological relationships, but this consensus is expressed firmly in the law. Indeed, adoption is one of several French legal institutions that both emphasize the preservation of biological relationships and implement rules to carry out this preference. An examination of French adoption is potentially illuminating and instructive for observers of its United States counterpart. It reveals not only the ways in which French law addresses the tension between biological and psychological ties, but the complex consequences of incorporating choices between such ties into legal institutions.

This Article examines the relationship between contemporary French adoption and France's history, tradition, and values. The aim of this Article is to encourage investigation into and discussion of the existence of such a relationship in the United States. In Part II, this Article begins by analyzing ways in which legal orders based on ideal biological or psychological relationship models *might* structure adoption. In a society following the "biological model," procreation would be the sole route to legal parenthood. In a society following the "psychological model," on the other hand, such a decision would be made by evaluating preexisting interpersonal adult-child relationships. In reality, neither United States nor French family law and adoption practice adhere strictly to either model. Although both legal systems aim to achieve a balance between the two idealized types, French law strongly emphasizes "blood" relationships and, thus, resembles more closely the biological model than does United States law. Nevertheless, biology has an important, if not always clearly enunciated, influence upon United States adoption practice.

Biological relationships are central to French values toward the family and society. In Part II, this Article sets forth the dominant role of "blood ties" in French society and examines adoption law as well as the French legal institutions of inheritance and nationality. One expression of the emphasis on biological ties may be found in the existence of simple adoption (*adoption simple*), an alternative form of adoption that preserves a relationship between an adoptee and the biological parents. More generally, in the two centuries since its formal reestablishment in postrevolutionary France, the institution of adoption has undergone enormous changes. As a consequence of these changes, contemporary adoption differs enormously from its seventeenth-century counterpart, which had the sole purpose of providing childless individuals with legal heirs.

Biology, however, is not an absolute arbiter. While the legal recognition and structuring of adoption is, of course, the most

common and significant limitation on strictly biological filiation in France, there exist other important limitations. Part III examines three such limitations: (1) the curious requirement of maternal recognition for a child born to an unmarried woman; (2) medically assisted procreation (i.e., artificial insemination); and (3) the unusual institution known as "anonymous childbirth." Notwithstanding such limitations and two centuries of changes in adoption law, an examination of recent adoption-related judicial decisions and legislation (carried out in Part IV of this Article) reveals a continuing preference for biological ties and uneasiness with the concept of psychological parenthood.

This Article explores a range of potential roles for biology and psychology in filiation (i.e., legal parentage) in order to illuminate some of the consequences of incorporating various choices between the two into the legal structure of adoption. This exploration reveals that a social consensus exists in France on the importance of preserving biological ties and that the consensus is enunciated clearly in both French law and government policy. If, as Robert Mnookin states, "legal rules, especially in an area touching upon substantial intrafamilial relationships, should not contradict deeply held and widely shared social values,"¹⁸ then no successful overhaul of United States adoption laws and regulations can or *should* occur without an evaluation of the consensus (if any) on the ultimate value of biological ties.

II. A COMPARATIVE APPROACH: MODELS FOR PARENTHOOD

The law of adoption lends itself well to comparative study. Over two hundred years ago, the Baron de Montesquieu catalogued the wide variety of laws found in different nations and concluded that, since "the temper of the mind and the passions of the heart are extremely different in different climates, the laws ought to be in relation both to the variety of those passions and to the variety of those tempers."¹⁹ More recently, the eminent twentieth-century French jurist Jean Carbonnier found the laws of modern western society virtually uniform, with the exception of family law, which remains "the seat of national idiosyncracies"²⁰ and, thus, a fertile ground for comparative law scholarship. Indeed, family law, perhaps more than any other legal discipline,

18. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 265 (1975).

19. BARON DE MONTESQUIEU, *THE SPIRIT OF LAWS* 221 (Thomas Nugent trans., 1899).

20. JEAN CARBONNIER, *FLEXIBLE DROIT* [FLEXIBLE LAW] 127 (2d ed. 1969).

involves social as well as legal processes and is inextricably connected to a nation's history, traditions, and politics.²¹ Thus, although the laws of both France and the United States acknowledge the potential importance to adopted individuals of both biological and psychological relationships, significant differences in legal history, philosophy, and culture remain.

Much of our thinking about the ways in which a society establishes—or should establish—legal relationships between adults and children is based upon a perceived dichotomy between biological and psychological relationships. Recent media attention and public interest in high profile legal battles between biological and adoptive parents, such as for the child known as “Baby Jessica,”²² can only heighten the perception that opposition between the two types of relationships is inevitable.

In order to establish a range of possible methods for establishing filiation, this Article utilizes this perceived dichotomy to develop ideal models for legal systems based upon biological and psychological relationships. The biological and psychological models represent the extremities of the continuum. By giving consideration to both types of relationships in determining filiation, a legal system will inevitably fall somewhere between the two extremes. The biological model grants primacy to biological ties and determines legal parentage through reference to the act of procreation. The psychological model, on the other hand, bases parenthood on an adult's physical care and emotional nurturing of an individual child. The linchpin of the psychological model is

21. As an example, in the late 19th-century, New York philanthropist Charles Crittenton established a nationwide network of maternity homes to care for unwed pregnant women and place their children for adoption. Following the U.S. Supreme Court's *Brown v. Board of Education* desegregation ruling, civil rights groups called for the desegregation of the Crittenton maternity homes. Rather than desegregate, the homes gradually closed. LINCOLN CAPLAN, AN OPEN ADOPTION 87-88 (1990).

22. *In re Clausen*, 502 N.W.2d 649 (Mich. 1993), *stay denied sub nom.*, *DeBoer v. DeBoer*, 114 S. Ct. 1 (1993). Two days after her birth, an Iowa baby girl was surrendered for adoption by her unwed biological mother. The mother, Cara Clausen, named her boyfriend as the baby's father and he relinquished custody of the child as well. A lawyer placed the baby with a Michigan couple, the DeBoers. Several weeks later, Clausen attempted to withdraw her consent to the adoption, revealing that she had lied about the baby's paternity and identified Daniel Schmidt as the father. Schmidt filed a motion to block the adoption on the grounds that he had never relinquished his parental rights. After a two-and-a-half-year legal battle, the child, named “Jessica” by the DeBoers, was returned to her biological parents in August of 1993. The Schmidts changed her name to “Anna.” *Id.* For a description of another controversial case, involving revocation of an adoption several years after its pronouncement, see, Terry, *supra* note 6; *In re Doe*, 638 N.E.2d 181 (Ill. 1994), *cert. denied*, 115 S.Ct. 499 (1994).

“day-to-day interaction, companionship, and shared experience.”²³

Numerous consequences would flow from instituting legal systems based on either ideal type. For example, although a legal order that utilized the “biological model” might place in the care of other adults children whose birth parents could not care for them, such arrangements would not have the same legal consequences as filiation. Adopted children would not be considered the equivalent of, and, therefore, would not be legally assimilated to, biological children. Given the paramount importance of biological ties in such a society, individuals would have an unlimited right to search for their origins and establish legal parentage on that basis.

A legal order based on the “psychological model” would terminate children’s legal ties with their biological parents rather than place them into a temporary situation, such as foster care or a group home. In such a society, the legal status of an adopted child would be identical to that of a biological one. Given the primacy of psychological ties, the society would neither encourage nor sanction an adoptee’s search for birth parents (or vice versa). Moreover, actions to establish paternity or maternity on purely biological grounds would not be permitted. However, emotional ties between a care-giving adult relative and a child that predated the latter’s adoption might be maintained in the interest of the child’s *psychological* well-being.

Instituting either ideal model would fulfill a societal concept of parent-child relationships. Furthermore, it would bring enormous legal certainty to child custody adjudication. When deciding questions of custody, termination of parental rights, or foster care placement, courts would be sure of which standards to apply (i.e., in a “biological society,” legal parenthood would be established conclusively via medical tests²⁴ and, in a

23. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 19 (1973) [hereinafter GOLDSTEIN ET AL., BEYOND]. “[E]very child requires continuity of care, an unbroken relationship with at least one adult who is and wants to be directly responsible for [the child’s] daily needs.” JOSEPH GOLDSTEIN ET AL., BEFORE THE BEST INTERESTS OF THE CHILD 40 (1979). Goldstein, Freud, and Solnit argue that the legal system needs to take into account children’s “built in time sense, based on the urgency of their instinctual and emotional needs” and related “marked intolerance for postponement of gratification or frustration, and . . . intense sensitivity to the length of separation.” GOLDSTEIN ET AL., BEYOND, *supra* at 11.

24. The development of Human Leukocyte Antigen testing and DNA marking tests, known colloquially as “genetic fingerprinting,” makes it possible to establish paternity to a certainty greater than 99%. Ronald J. Richards, Comment, *DNA Fingerprinting and Paternity Testing*, 22 U.C. DAVIS, L. REV. 609 (1989); D.H. Kaye & Ronald Kanwischer, *Admissibility of Genetic Testing in Paternal Litigation: A Survey of State Statistics*, 22 FAM. L. Q. 109 (1988).

"psychological society," psychological observation and evaluation would be determinative).²⁵

Neither French nor United States adoption adheres strictly to these models. Rather, the law in each nation strives for balance and compromise between the two models. By examining French family law's deviations from the biological model, this Article uncovers the underlying attitudes and values of that society.

A. *The Importance of Biology in United States Adoption Practice*

Adoption practice in the United States acknowledges biological ties in a number of significant ways. First, adoptive families are usually "created" in imitation of biological ones (i.e., one father, one mother, and an infant or young child of the same race). Secondly, both adoption professionals and the law recognize the potential importance of biological ties to adoptees. This recognition is evidenced by the development of the practice known as "open adoption," which permits a range of pre- and postadoption contact between birth and adoptive parents²⁶ and by increased opportunities in most states for adoptees to obtain information about their biological origins, if not their actual birth records.²⁷

1. The Model Family

United States law structures adoptive families by promulgating laws and by operating and licensing adoption agencies, relying upon the biological family as a model.²⁸ In all

25. French novelist and playwright Marcel Pagnol posed (and answered) the question of determining fatherhood as follows: "In the name of God, who is the father—he who gives the child life, or he who pays for the baby's bottles? . . . The father is he who loves." MARCEL PAGNOL, *FANNY* act 3, sc. 10.

26. An "open adoption" is one in which the birth and adoptive parents share identifying information and there exists either pre- or postplacement contact between such parties. For a description of the range of open adoption options and interviews with participants in a particularly open arrangement, see generally, CAPLAN, *supra* note 21.

27. See *infra* text accompanying notes 37-39.

28. Elizabeth Bartholet uses the term "biologism" to describe the dominant view that adoptive families should be "constructed and treated in imitation of biology." Underlying biologism, according to Bartholet, are "widespread and powerful feelings that parent-child relationships can only work, or at least will work best, between biological likes . . . [as well as] powerful fears that parents will not be able to truly love and nurture biologic unlikes." Bartholet, *supra* note 4, at 1173. Indeed, biologism is so inherent a part of U.S. adoption that nontraditional arrangements that cannot pass as biological relationships, such as transracial adoption, adoption by homosexual partners, and open adoption, often provoke pessimism and hostility.

fifty states, adoption is based on a legal fiction that treats adopted children exactly *as if* they were the biological offspring of their adoptive parents.²⁹ An underlying belief of traditional adoption practice is that families created by adoption should be assimilated thoroughly to those created biologically, in order to foster the development of stable, loving relationships and provide children with a sense of psychological well-being. Thus, upon finalization of an adoption, the child's original birth certificate is sealed or destroyed and replaced with a certificate bearing the same date of birth as the original, but containing no mention of the birth mother or father and listing the adopting individuals as the child's parents.³⁰ Typically, there is no contact between the birth parents and the adoptive family and, following the adoption, no contact between the birth parents and the child.

Notwithstanding its good intentions, an adoption system modeled on the biological family may not meet the needs of many contemporary adoptive families. Rather, some psychologists argue, in certain situations, society "would serve adoptive families . . . better . . . by recognizing that they are *not* the same as families formed biologically."³¹ Adoptions increasingly involve older children rather than newborn infants,³² which not only results in additional challenges for adoptive parents and social workers, but creates a greater number of "failed" adoptions, in which the child returns to agency custody.³³ Not only are older adoptees more likely to experience traumatic separations from their natural parents,³⁴ but, by the time of their adoption, such

29. See, e.g., MASS. GEN. LAWS ANN. ch. 210, § 6 ("If the court is satisfied . . . that the child should be adopted, it shall make a decree, by which, . . . all rights, duties and other consequences of the natural relation of child and parents shall thereafter exist between the child and the petitioner and [the petitioner's] kindred, and such rights, duties and legal consequences shall . . . terminate between the child so adopted and [the child's] natural parents and kindred . . .").

30. See, e.g., N.Y. DOM. REL. LAW §114 (Consol. 1993) ("The clerk upon request of a person or agency entitled thereto shall issue certificates of adoption which shall contain only the new name of the child and the date and place of birth of the child, the name of the adoptive parents and the date when and the court where the adoption was granted . . .").

31. Fishman, *supra* note 4, at 39 (emphasis added).

32. In 1986, only 48.6% of all unrelated adoptions involved infants, according to the National Committee for Adoption. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK: UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 61 (1989) [hereinafter FACTBOOK].

33. An estimated 40% of permanent older child adoptions in the United States end either with the child's return to the agency or the abrogation of the adoption decree. RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISK, AND RESPONSES (1988), *cited in* Fishman, *supra* note 4, at 39.

34. In 1986, the most recent year for which statistics are available, the U.S. Department of Health and Human Services (DHHS) reported more than one million substantiated cases of child abuse or neglect nationwide. The DHHS

children may have already lived in several foster care settings, multiplying the number of "broken attachments" in their past. In the most extreme cases, abandoned or neglected children may be unable to adapt to the emotional intensity of family life accompanying traditional adoption.³⁵

2. Psychological Well-Being

Biological ties are potentially important to every individual, whether adopted or not. A significant body of psychological studies emphasizes the connection between people's knowledge of their biological origins and successful identity formation.³⁶ This premise has served as the justification for a wide range of actions, including the opening up of adoption records to adult adoptees and allowing pre- and postadoption contact between birth and adoptive parents.

Beginning in the 1970s, adult adoptees began to challenge the practice of sealing original birth records after an adoption. Although most of the lawsuits brought by adult adoptee organizations were unsuccessful, greater awareness and changing attitudes led a number of states to alter their laws and establish open records systems,³⁷ "Mutual Consent Registries,"³⁸ or other channels through which adoptees can identify and locate their birth parents.³⁹ Today, all fifty states have procedures enabling adoptees to obtain crucial medical information.

gathers statistics from state and local child welfare agencies. Fishman, *supra* note 4, at 39.

35. See *id.* at 69 (describing the "intolerable loyalty conflicts" created by placing such children into traditional nuclear families and proposing alternative situations: small group homes supervised by child care workers or a "friendship family," 10 to 12 children in a permanent relationship with adult caregivers).

36. Erik Erikson, for example, described a sense of identity derived from identification with one's biological past as "crucial" to normal personality development. ERIK H. ERIKSON, *IDENTITY AND THE LIFE CYCLE: SELECTED PAPERS* (Psychological Issues No. 1, 1959); ERIK H. ERIKSON, *CHILDHOOD AND SOCIETY* (1950). Erikson's theory of identity formation and subsequent empirical studies are discussed and summarized in DAVID M. BRODZINSKY ET AL., *BEING ADOPTED: THE LIFELONG SEARCH FOR SELF* 13-19 (1993).

37. In Alabama, Alaska, and Kansas, adult adoptees may obtain their original birth certificate listing the name of their biological parents. *FACTBOOK*, *supra* note 32, at 45.

38. In the 21 states that have enacted this regime, adoptees and biological parents may independently register their desire to meet; if both parties do so, the state social services agency arranges a reunion. *Id.* at 55.

39. An additional nine states have "Search and Consent" laws, allowing adoptees to request state adoption agencies to search for their biological parents and, if the parents consent, to provide the adoptee with specified information. *Id.* at 45. The remaining states have closed records systems; adoptees must petition the court for access to their original birth certificate or other information

B. *France and Biology: Adoption and Beyond*

French law and society have traditionally placed enormous emphasis on "blood ties" (i.e., relationships with biological origins). French judicial decisions and legal scholarship frequently use "blood" (*sang* in French) as a metaphor for the biological relationship (e.g., *être du même sang*—to be of the same blood, *la voix du sang*—the call of blood (i.e., the tug of family ties)).⁴⁰ The term "blood" recurs in nonlegal contexts as well.⁴¹ The metaphor probably originated in the belief of medieval scientists that human sperm contained blood particles that possessed all the elements necessary for the creation of life. According to this theory, a pregnant woman merely incubated and provided nourishment to the future human being during pregnancy.⁴² Biological ties are at the core of such diverse French legal institutions as filiation, adoption,⁴³ inheritance, and nationality. Nevertheless, despite the preeminence of biological ties, there exist in each of the foregoing areas both acknowledgment and increased recognition of affective relationships. This Article examines how each of the foregoing institutions incorporates such acknowledgment and recognition while maintaining the priority of "blood" ties.

concerning their biological origins. Although courts rarely give such consent, many have granted access to nonidentifying medical information. For a summary of state laws on access to adoption records, see *id.* at 45.

40. See, e.g., THIERRY GARÉ, *LES GRANDS-PARENTS DANS LE DROIT DE LA FAMILLE* [GRANDPARENTS IN FAMILY LAW] 56 (1989) [hereinafter GRANDPARENTS] ("The call of blood ties is so strong . . . the desire to create one's descendance so permanent that, with an astonishing frequency, specialists in artificial insemination receive requests from fathers-in-law to donate their sperm to inseminate their daughters-in-law.").

41. See, e.g., one version of the execution of Louis XVI: "He barely attempted a final declaration, of which only three words rose above the sound of drums—'God. France. Blood.'" François Furet & Mona Ozouf, *Fallait-il tuer Louis XVI?* [Was It Necessary to Kill Louis XVI?], *LE NOUVEL OBSERVATEUR*, Jan. 20, 1993, at 4, 5.

42. F. Héritier-Augé, *La Cuisse de Jupiter, Réflexions sur les nouveaux modes de procréation* [Jupiter's Thigh: Reflections on new methods of procreation], *L'HOMME, REVUE FRANÇAISE D'ANTHROPOLOGIE*, Apr.-June 1985, at 12, discussed in CATHERINE BONNET, *LES ENFANTS DU SECRET* [THE CHILDREN OF SECRECY] 35 (1992) [hereinafter BONNET, CHILDREN OF SECRECY].

43. Adoption is one of the three forms of filiation under French law. See *infra* notes 44-45.

1. Adoption

French law has extensive rules governing the establishment of legal parentage. Title 7 of the French Civil Code (*Code Civil*)⁴⁴ organizes filiation into three categories: "Legitimate," "Natural," and "Adoptive."⁴⁵ An examination of French laws, government family policy, and societal attitudes reveals a unified and cohesive orientation toward biological ties, which has a profound impact on adoption. This impact is most visible in the relatively small number of adoptions that occur in France: 6,500 per year, of which 1,500 are domestic, unrelated adoptions and 2,500 are international adoptions (involving a child born outside of France).⁴⁶ In comparison, 51,157 domestic, unrelated adoptions and 10,019 international adoptions (involving a child born outside of the United States) occurred in the United States in 1986.⁴⁷ Although the population of the United States is four times greater than that of France,⁴⁸ there are almost ten times as many adoptions annually. Moreover, biological ties are so intrinsically important in France that they seem inimitable. Consequently, as this Article explains, French adoption practice strives less than its United States counterpart to mimic the biological family.

a. Government Policy

Family policy in France, as embodied in its law and government policy, strongly encourages birth mothers, regardless of marital status or social class, to rear their children themselves rather than surrender them for adoption. This policy has an

44. Much of the law on filiation was established as a result of 1972 legislative reforms, spearheaded by Jean Carbonnier, having the express goal of eliminating legal inequalities between legitimate, natural, and adulterine children.

45. A proposed 1992 amendment to the *Code Civil* replaced the terms legitimate and natural filiation with "filiation during marriage" and "filiation outside of marriage," legitimate child and natural child with "child of married parents" and "child of nonmarried parents," and legitimization with "legal recognition." Although approved by the *Assemblée Nationale*, the amendment was rejected by the *Sénat*. 1992 *Journal Officiel de la République Française* [J.O.] 1286 (May 15, 1992); 1992 J.O. 3754 (Dec. 8, 1992).

46. CONSEIL ÉCONOMIQUE ET SOCIAL, L'ADOPTION: AVIS ET RAPPORTS DU CONSEIL ÉCONOMIQUE ET SOCIAL [REPORT BY ECONOMIC AND SOCIAL COUNCIL] 44 (1990) [hereinafter ECONOMIC AND SOCIAL COUNCIL].

47. The federal government has not routinely gathered adoption statistics since 1975. It is difficult, therefore, to state any precise figures regarding United States adoption. However, the National Committee for Adoption periodically conducts surveys and compiles information on state regulations and statistics. See generally FACTBOOK, *supra* note 32.

48. In 1993, the population of the United States was 258,104,000 and the population of France was 57,566,000. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1993 at 840, 842 (1993) [hereinafter CENSUS].

enormous impact on adoption law and practice. For example, in the United States, certain states allow a mother to make a binding and irrevocable surrender of her child immediately after giving birth.⁴⁹ In France, however, both biological parents have three months to retract their consent to an adoption.⁵⁰ Thus, in France, no child is legally adoptable before the age of three months. Even if a mother wishes to surrender an infant for adoption at birth, the child is placed in foster care for three months, at state expense, to allow the woman time to reconsider her decision.⁵¹ During these initial three months, French law favors the possibility of preserving the biological relationship between mother and child over stability and continuity of care for the infant, despite an established body of psychological studies emphasizing the importance of maternal contact and bonding to successful infant development.⁵²

Social acceptance of unwed mothers coupled with the government's providing financial support to such women further diminish the supply of adoptable children in France. The evolution of the terminology typically used to describe a woman who bears an out-of-wedlock child is one sign of this acceptance. From the Middle Ages through the first half of this century, unwed women were called "girl mothers" (*filles-mères*), a term carrying condescending and pejorative connotations.⁵³ During

49. For a survey of state laws, see FACTBOOK, *supra* note 32, at 22-33. Some states even hold valid a *prebirth* consent to adoption, where such consent is ratified by postbirth acts demonstrating a present intention to surrender the infant for adoption. See, e.g., CMS v. Goforth (*In re* Adoption of HMG), 19 Fam. L. Rep. (BNA) No. 13, 1152 (Ind. App. Jan. 19, 1993) (Pregnant 16-year-old signed a consent to a couple's adoption of her child. Seventeen days after giving birth, the woman requested that the hospital social services begin adoption arrangements and authorized the release of her child to the couple.).

50. CODE CIVIL [C. CIV.] art. 348-3 (Fr.).

51. When Article 348-3 was promulgated in 1966, some legislators sought an even longer waiting period. Jacqueline Rubellin-Devichi, *Personnes et Droits de la Famille*, 89 REVUE TRIMESTRIELLE DE DROIT CIVIL [R. TRIM. D. CIV.] 249, 257 (Apr.-June 1990). In addition, as a deterrent to baby selling, only state operated or approved agencies may place children under two years of age for adoption. C. CIV. art. 348-5.

52. See, e.g., G.H. Peterson & L.E. Mehl, *Some Determinants of Maternal Attachment*, 135 AM. J. PSYCHIATRY 1168-73 (1978), *discussed in* JOHN BOWLBY, A SECURE BASE: PARENT-CHILD ATTACHMENT AND HEALTHY HUMAN DEVELOPMENT 15 (1988) (The most significant factor in successful maternal bonding is the length of time the mother is separated from the newborn immediately after birth.); M. Lynch, *Ill-Health and Child Abuse*, LANCET, Aug. 16, 1975, *discussed in* BOWLBY, *supra*, at 17. (Abused children are more likely to have been separated from their mother for forty-eight hours or more immediately after birth or during the first six months of life).

53. Simone Signoret, the French actress and social activist, had an out-of-wedlock child in 1946. Her autobiography recounts an incident from her sixth

the 1970s, use of the term "single mothers" (*mères célibataires*) became more common.⁵⁴ At present, journalists, jurists, and social workers increasingly use the sociologically abstract (and morally neutral) label of "female single-parenthood" (*monoparentalité féminine*).⁵⁵

Similar social acceptance does not exist for a biological mother's decision to relinquish her child for adoption, limited legislative efforts notwithstanding. In 1984, the Family Social Assistance Code (*Code de la Famille et de l'Aide Sociale*, hereinafter CFAS) was amended to replace the word "abandon" in connection with the relinquishment of a child for adoption⁵⁶—implying desertion and even physical risk to the child—with the phrase "entrusted to the [state child welfare agency]" (*Aide sociale à l'enfance*, hereinafter ASE).⁵⁷ In so doing, lawmakers hoped to encourage the "evolution of attitudes and attenuate the reprobation surrounding those . . . women who are unable to raise their children themselves."⁵⁸ This linguistic

month of pregnancy, when she went to collect the supplemental butter and milk rations issued to expectant mothers:

When it was my turn—the head of the rations office demanded: "Give me your *livret de famille*" [the official pamphlet in which each family records births. Today, single mothers receive a *livret*; in Signoret's day, however, such pamphlets were provided only to married couples.] "I don't have [one.]" I replied.

Her "Then we'll put *filles-mères*" rang out very loudly for the benefit of everyone present. Since I was neither deserted by a wicked man nor depressed, I repeated, "Yes, *filles-mères*" with a smile In the following months it became a game for her Even before it was my turn, above the heads of the other women, she called out loudly: "Well then, still no *livret de famille*?" and I replied, "No, still *filles-mères*."

SIMONE SIGNORET, LA NOSTALGIE N'EST PLUS CE QU'ELLE ÉTAIT [NOSTALGIA ISN'T WHAT IT USED TO BE] 74-75 (1976).

54. The difference between *filles-mères* and *mères célibataires* is roughly equivalent to that between "unwed mother" and "single mother" in English.

55. CATHERINE BONNET, GESTE D'AMOUR: L'ACCOUCHEMENT SOUS X [ACT OF LOVE: ANONYMOUS CHILDBIRTH] 32 (1990) [hereinafter BONNET, ACT OF LOVE]. The evolution of terminology has been primarily at the professional level. Many French men and women continue to use the term *filles-mères*.

56. CODE DE LA FAMILLE ET DE L'AIDE SOCIALE [C.F.A.S.] art. 61-2 (repealed June 7, 1984) (Fr.).

57. Since the decentralization of the French social welfare system in 1985, each regional department has had an ASE responsible for child welfare in the department.

58. Jacqueline Rubellin-Devichi, *Jurisprudence Française en Matière de Droit Civil: Personnes et droits de famille*, 85 R. TRIM. D. CIV. 729, 730 (1986). At the time of the amendment of the CFAS, an observer characterized the term "abandon" as "unfortunate" because it carried "judgmental and moralizing" connotations likely to discourage women who might otherwise surrender their children for adoption from doing so. *Id.*

change has not entered everyday speech or legal jargon, however, and widespread use of the word "abandon" continues.⁵⁹

Further evidence of the acceptance of single motherhood in France may be seen in the government aid provided to such women, as parents in financial difficulty. This support, one of many available family benefits (*allocations familiales*), is administered throughout France by local offices of the Family Benefits Fund (*Caisse d'allocations familiales*), itself a branch of the extensive French social welfare system, collectively known as Social Security (*Sécurité Sociale*). The benefits are comparatively generous: an unmarried woman is currently entitled to 3,021 francs a month during each month of her pregnancy, plus an additional 925 francs a month from the fourth month of her pregnancy until the child's three-month birthday.⁶⁰ If the woman's income falls below a stipulated minimum, she can continue to receive this latter benefit until the child is three years old.⁶¹ Furthermore, as a single parent, she will receive 4,953 francs a month from the child's date of birth until the child reaches the age of three.⁶² This last amount represents her maximum allowable monthly income and is reduced by income received from other sources, as well as by the 925 francs a month allocation discussed above.⁶³ The *Sécurité Sociale* covers the costs of prenatal care and the baby's delivery.⁶⁴ To put these amounts in context, in 1991, the most recent year for which such statistics are available, the average annual salary of an unskilled

59. Some individuals with intimate knowledge of adoption affirm this word choice as deliberate and desirable. Members of *Affiliation Adultes Adoptés*, an organization of adult adoptees, consider "abandon" to be the psychologically accurate term for the adopted child's emotional experience, regardless of the age at which the child is adopted. They argue that neither society nor adoptive families ought to deny adoptees the reality of this experience, which is integral to their personal histories. Meeting of *Affiliation Adultes Adoptés* in Nantes, France (Mar. 31, 1992).

60. DOMINIQUE FREMY & MICHELE FREMY, QUID 1994 at 1408, 1409 (1994) [hereinafter QUID 1994]. In order to qualify for the 925 franc monthly allocation, the woman must comply with certain requirements. She must: (1) declare her pregnancy to her health insurance company and local Family Benefits Fund prior to her fifteenth week of pregnancy; (2) undergo at least one medical exam before her third month of pregnancy; (3) thereafter, undergo monthly visits until the baby's birth; (4) take her baby for three medical exams (within a week of the birth, at nine months and two years old). FAMILY BENEFITS FUND, LE GUIDE DES ALLOCATIONS FAMILIALES [GUIDE TO FAMILY BENEFITS] (nonpaginated) (July 1992) [hereinafter GUIDE 1992].

61. QUID 1994, *supra* note 60, at 1409 (1994).

62. This amount is calculated by adding together the 4,028 franc monthly allocation for a single parent (*Allocation de parent isolé*) and the 925 franc monthly allocation for a young child (*L'allocation pour jeune enfant*). *Id.*

63. GUIDE 1992, *supra* note 60.

64. CODE DE LA SÉCURITÉ SOCIALE [C. SÉC. SOC.] art. L. 321-1 (Fr.).

worker in France, net of social security taxes, was 82,200 francs for men and 66,400 francs for women⁶⁵ (translating into 6,850 and 5,533 francs, respectively, on a monthly basis). Therefore, a single woman receiving family benefits receives at least seventy-two percent of a worker's average earnings.

These benefits for single mothers are also generous when compared to aid provided to such women in the United States. In the United States, benefits can vary dramatically from one locale to another. In New York State, for example, a single mother with one child would receive approximately \$668.50 per month in allowances for rent, utilities, and food stamps,⁶⁶ an amount falling short, not only of an unskilled worker's earnings, but of the poverty line.⁶⁷ In 1992, the median weekly earnings of an unskilled worker in the United States were \$393 for men and \$279 for women⁶⁸ (approximately \$20,436 and \$14,508, respectively, calculated on an annual, i.e., fifty-two-week basis). A single mother receiving benefits in New York is expected to live on between thirty-nine and fifty-five percent of an unskilled worker's earnings. Thus, while the French government strives to maintain single mothers at an economic level similar to that of a production worker, U.S. government aid to single mothers does not generally take these women out of poverty.⁶⁹ Indeed, a recent study noted that, when adjusted for inflation, the value of welfare payments in New York City had declined twenty percent since 1975.⁷⁰

In France, the family benefits paid to unmarried mothers and pregnant women are aimed primarily at working-class and lower middle-class women. The idea underlying this aspect of the French government-funded support system is that financial

65. QUID 1994, *supra* note 60, at 1802 (stating 1991 statistics on net annual salaries, private and semi-public sectors provided by INSEE, the French national bureau of statistics).

66. Telephone Interview, Division of Economic Security, New York State Department of Social Security (July 8, 1994). This monthly amount is computed by adding together the monthly allowance for rent and utilities of \$468.50 and the average monthly allowance in food stamps of \$200.

67. For a single parent with one child, the poverty line is \$9,165.00. CENSUS, *supra* note 48, at 441.

68. *Id.* at 426.

69. For a more extensive discussion of the subject, see Kahn & Kamer, *Social Assistance: A Counter Overview*, 8 J. INST. SOCIOECON. STUD. 93 (1983-84), cited in MARY ANN GLENDON, *THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE* 237 (1989) (Studies reveal that in France, Germany, and Sweden, a single mother of two lives on 67%-94% of the average wage of a production worker, while in the United States, such a woman is expected to live on less than half a production worker's wage.).

70. Celia W. Dugger, *Researchers Find a Diverse Face on the Poverty in New York City*, N.Y. TIMES, Aug. 30, 1994, at A1.

difficulties are the primary cause of child abandonment and neglect and, therefore, monetary assistance is the most efficient solution: providing parents with adequate resources will enable them to keep and rear their children.⁷¹ For unmarried pregnant working-class and lower middle-class women, the family benefits program offers a financially viable alternative to terminating a pregnancy or surrendering the child for adoption. At the core of this philosophy is a belief in the primacy of the biological relationship. The philosophy, however, does not encompass, or even acknowledge, the possibility of *nonfinancial* reasons that make an individual unable or unwilling to parent a child. Such reasons might include psychological or medical problems, emotional immaturity, a situation incompatible with parenthood, or simply a lack of interest.

The French government's commitment to the preservation of biological families goes beyond monetary assistance. The government vigorously and extensively disseminates information about family benefits in both the public and private sectors. For example, the law requires a physician contacted by a pregnant woman seeking an abortion to provide her with written material explaining all of the benefits to which she will be entitled if she elects to continue her pregnancy.⁷² Following such an initial medical consultation, the woman is required to talk to an accredited social service agency or family counseling organization.⁷³ During this second consultation, a social worker advises the woman how to cope with her current situation, "with the idea of allowing her to keep her child," rather than undergoing an abortion. The social worker also provides her with information on available "emotional, moral and financial support."⁷⁴ Should the woman elect to terminate the pregnancy, the *Sécurité Sociale* fully funds the cost of an abortion.⁷⁵ Thus, French law is able to advance several goals simultaneously. These goals include:

71. According to a government social worker, "No parent should ever have to abandon a child for financial reasons." Interview with Mireille Bernardet, Social Worker, *Direction des Interventions Sanitaires et Sociales* (D.I.S.S.) in Nantes, France (Nov. 30, 1991). The regional social welfare agency (D.I.S.S.) in Loire-Atlantique, Ms. Bernardet's administrative region, states that its "objective is to provide necessary support, whether financial, educational or psychological, to families in difficulty, in order to help them assume the care of their children." D.I.S.S., PRÉSENTATION DE LA DIRECTION DES INTERVENTIONS SANITAIRES ET SOCIALES 26 (Mar. 1991).

72. CODE DE LA SANTÉ PUBLIQUE [C.S.P.] art. L. 162-3 (Fr.). This written material also contains information on the possibility of surrendering a child for adoption.

73. C.S.P. art. L. 162-4.

74. *Id.*

75. C. SÉC. SOC. art. L. 283.

protecting potential human life, promoting population growth, preserving biological families, and ensuring women's freedom of choice.⁷⁶

In contrast, no cohesive governmental policy exists in the United States to encourage women to carry their pregnancies to term, or to rear their children rather than surrender them for adoption. One consequence of this policy void is the development, under the open adoption rubric, of an unaffiliated private adoption network, consisting of lawyers, agencies, and other organizations, that offers a wide range of services to pregnant women considering adoption. These services include psychological counseling, financial assistance, and opportunities for women to screen, meet, and select their children's adoptive parents.⁷⁷ The cost of these services is borne (to the extent permitted by state law) by couples seeking to adopt via a lawyer or adoptive organization. One might expect that this private network would exert pressure on pregnant women who avail themselves of its various services to surrender their children, once born. Yet, this does not seem to be the case. In fact, some United States adoption professionals observe that the more counseling a birth mother receives, the less likely she is to surrender her child for adoption, a result consistent with the French experience.⁷⁸

b. Abortion

State-supported single motherhood is not the sole reason for France's shortage of adoptable infants. Both contraception and abortion are legal,⁷⁹ fully funded by the *Sécurité Sociale*, and available to adults as well as minors.⁸⁰ Indeed, an estimated 250,000 abortions are performed every year in France, or 30 to 35

76. Danielle Keats Morris, Case Note, *Planned Parenthood v. Casey: From U.S. "Rights Talk" to Western European "Responsibility Talk,"* 16 *FORDHAM INT'L L. J.* 761, 763-64 (1993).

77. At least one private agency provides birth parents with education and vocational training. Telephone interview with Marlene Piasecki, Director of Adoption, "Golden Cradle," in New Jersey (Mar. 10, 1991).

78. *Id.*; telephone interview with Raymond Cheroske, Director of Adoption Services, Children's Home Society of California (Apr. 19, 1991).

79. The *Code Civil* uses the phrase "voluntary interruption of pregnancy" (*l'interruption volontaire de la grossesse*) instead of abortion. Until the tenth week of pregnancy, an abortion is available at the woman's request, subject to the satisfaction of certain social and administrative requirements. C.S.P. art. L. 162-1. However, following this initial period, an abortion can only be performed if two physicians certify that continuing the pregnancy will endanger the life of the pregnant woman or that the child will be born with an incurable medical condition. C.S.P. art. L. 162-12.

80. A minor needs the consent of a parent or legal representative to undergo an abortion. C.S.P. art. L. 162-7.

per 100 births.⁸¹ Recent statistics indicate that seventy percent of French women will have at least one abortion during their lifetime.⁸² In contrast, in 1992 (the most recent year for which such statistics exist), 1,529,000 abortions were performed in the United States, representing 27.5 percent of all pregnancies and 25.9 abortions per 1,000 women between the ages of 15 and 44.⁸³

c. Long-Term "Temporary" Care

Another factor contributing to the French "baby gap" is the fact that, as in the United States, children often remain in temporary situations, such as foster care, for extended periods of time. While the majority of domestic adoptions involve children who are at least twelve years old, sixty percent of the children in the care of public agencies, residing either in foster families or group homes, entered such care before the age of three.⁸⁴ Indeed, it was considered a "remarkable innovation"⁸⁵ when, in 1984, the CFAS required the ASE to annually review the status of each child entrusted to its care.⁸⁶

French law contains ample means to take children out of foster care and free them for adoption. Three separate provisions in the *Code Civil* provide grounds for courts to terminate existing parental rights upon formal demand by the ASE.⁸⁷ These provisions, however, are utilized infrequently. Instead, as in the United States,⁸⁸ social workers wield great influence with respect to the termination of parental rights. French judges grant approximately ninety-seven percent of such ASE requests.⁸⁹

81. *Histoire de la Conception [The History of Conception]*, 584 POPULATION ET AVENIR [POPULATION AND THE FUTURE] 7, cited in BONNET, ACT OF LOVE, *supra* note 55, at 44.

82. MOUVEMENT FRANÇAIS POUR LE PLANNING FAMILIAL, FÉCUNDITÉ, CONTRACEPTION, AVORTEMENT [FERTILITY, CONTRACEPTION, ABORTION] (1986), cited in BONNET, ACT OF LOVE, *supra* note 55, at 44 n.72.

83. Stanley K. Henshaw & Jennifer Van Vort, *Abortion Services in the United States 1991 and 1992*, 26 FAMILY PLANNING PERSPECTIVES 100, 100-01 (Alan Guttmacher Inst. 1994).

84. ECONOMIC AND SOCIAL COUNCIL, *supra* note 46, at 9. Seventy percent of the children in the care of French public agencies are over twelve years old.

85. Jacqueline Rubellin-Devichi, *Réflexions pour d'indispensables réformes en matière d'adoption* (1991) (unpublished updated version of an article by the same name (Rubellin-Devichi, *infra* note 149), on file with author).

86. C.F.A.S. art. 60.

87. C. CIV. arts. 348-6, 350, 378.

88. See, e.g., Barholet, *supra* note 4, at 1192 n. 73 ("Courts are unlikely to intervene to help bring to the surface what is going on in the ordinary placement decision. Agencies are treated essentially as parents, with near-absolute discretion to decide what to do with the children within their custody.")

89. ECONOMIC AND SOCIAL COUNCIL, *supra* note 46, at 50.

However, like their United States counterparts, the majority of French social workers seem reluctant to invoke the grounds necessary to permanently cut biological ties. Consequently, only 200 such requests for termination of parental rights are made per year.⁹⁰

2. French Adoptive Families: Some Observations

Adoption in France differs from its United States equivalent, both in contemporary practice and historical background. As this Article states in Section A, traditional "closed" adoption in the United States is meant to create a psychologically stable and healthy environment for the adopted child and strengthen the child's bond with the adoptive parents, by imitating the structure and appearance of a biological family.⁹¹ Although French adoption professionals undoubtedly have similar goals, it is generally far more difficult for French adoptive parents to act *as if* their children were born to them. First, the three-month waiting period precludes the adoption of newborns. In fact, infant adoption rarely occurs in France. Secondly, French adoptions, whether domestic or international, increasingly involve children of color. Therefore, notwithstanding the fact that adoptive and legitimate filiation are equal for all legal purposes under the *Code Civil*, families formed by adoption cannot "pass" as biological ones.

For some adoptive parents, their family's "different" appearance creates feelings of isolation and frustration. At a 1991 regional meeting of Adoptive Childhood and Families (*Enfance et familles d'adoption*, hereinafter, EFA)—a French organization of adoptive families—parents participated in a discussion self-consciously entitled, "Adoptive Parents: Are They Parents Just Like Any Others?"⁹² One mother in the group vented her irritation with the attention and curiosity that her multiracial family attracts.⁹³ She spoke wistfully of her desire for her family to "blend in" and how "wonderful it would be to eat in complete anonymity at McDonald's on a Saturday afternoon."⁹⁴

Although some multiracial adoptive parents may be discouraged by their situation, others find that being "different" is not without certain benefits. At another meeting, the adoptive mother of three Mauritian youngsters argued that parenting

90. *Adopter un enfant étranger*, LE NOUVEL OBSERVATEUR, Sept. 29, 1993, at 4, 6.

91. See *supra* text accompanying notes 26-30.

92. Meeting of EFA in Nantes, France (Nov. 24, 1994).

93. *Id.*

94. *Id.*

children of a different race made it impossible to avoid the issues of adoption and abandonment and, in fact, sometimes facilitated conversations with the children on these sensitive and important topics.⁹⁵ As an example, she related how, once, at the end of a frustrating day with her chronically misbehaving eldest son, she declared, "No matter how disobedient you are, no matter how many things you break in this house, I will never abandon you."⁹⁶ After several seconds of stunned silence the boy began sobbing and demanded, "Then why did *she* do that? Why did my other mother abandon me?"⁹⁷ Following this outburst, the mother reassured her son of her love and commitment to him. She attributed subsequent and continuing improvements in the child's behavior to such discussions.⁹⁸

To U.S. observers, French adoptive parents may appear insecure about their status. It may also appear that their society views them with suspicion. This situation is a consequence of the fact that, although the institution of adoption has long existed in France, until as recently as 1976, its primary function was to provide childless individuals with legal heirs.⁹⁹ Therefore, for most of its history, a French adoption consisted of one adult adopting another. Indeed, minors only became adoptable in 1923, after the First World War orphaned thousands of French children.¹⁰⁰ At that time, the minimum age required of the adopting person was lowered to forty.¹⁰¹ It was not until 1939 that tribunals were first allowed to abrogate ties between biological parents and their children, and not until 1976, following major revisions to the *Code Civil*, that French law permitted adoption by persons who already had children, and hence, legal heirs.¹⁰² In contrast, since the passage of the very first U.S. adoption laws, U.S. law has focused on the needs of the child adoptee. French family law now has a similar focus. Once the legal rights of biological parents are terminated, the *Code Civil* requires a consideration of the interest of the child (*l'intérêt de l'enfant*) when granting an adoption.¹⁰³ This view represents a

95. Meeting of *Affiliation Adultes Adoptés*, in Nantes, France (Mar. 31, 1992).

96. *Id.*

97. *Id.*

98. *Id.*

99. See *infra* text accompanying notes 104-07, 111-15.

100. ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, ADOPTION, 3 (2d ed. Aug. 31, 1983).

101. *Id.*

102. *Id.* at 4. Such an adoption was first permitted in 1966, but required the consent of the President of the Republic.

103. The revision of the law of divorce in 1975 established the importance of the child's interests—*l'intérêt de l'enfant*—in making postdivorce custody decisions. C. CIV. art. 287. Prior to this revision, the law granted custody to the

shift away from the biological model. Analyzing the interest of the child is likely to involve consideration of the child's psychological needs and existing emotional relationships.

3. A Brief History of Adoption in France

Contemporary French adoption's consideration of the interest of the child/adoptee represents a significant departure from both pre- and postrevolutionary French law and tradition.¹⁰⁴ The origins of French adoption are rooted in Roman law. In that ancient society, the institution of adoption, which was reserved for elite citizens, served several purposes. It was a means for a *paterfamilias* with no male descendants to reinforce the strength of his household (*domus*).¹⁰⁵ Adoption enabled an individual to both assure the continuation of his name and, if a member of the senate aristocracy, to secure a political heir.¹⁰⁶ The institution had both social and religious aspects: the adoption of a plebeian male elevated the adoptee to patrician status and, at the same time, initiated him into the domestic religion of his new family. Henceforth, the adoptee would carry on the private worship of the household gods.¹⁰⁷

Unrecognized by canon law, adoption disappeared in France from the medieval period until its revival at the time of the French Revolution.¹⁰⁸ However, notwithstanding the absence of a legal structure, a means existed for parents to leave their children with charitable institutions.¹⁰⁹ In 1638, St. Vincent de Paul created an institution known as "Foundlings" (*Enfants Trouvés*) for children abandoned to the church. The government granted official sanction to the organization in 1670, but child welfare was not the government's principal goal. Rather, a Royal Edict suggested several potential benefits to the state in assuming the care of foundlings: "Some may become soldiers and serve in our

spouse not at fault. The interest of the child standard was introduced into the law of adoption the following year. C. CIV. art. 353.

104. "The interest of the child standard is the keystone of all family law reforms of the last 20 years." MAYMON-GOUTALLOY, 1987 DALLOZ-SIREY, JURISPRUDENCE [D.S. JUR.] 349 (1987), cited in MALAURIE, *supra* note 1, at 373 n. 58.

105. Upon marriage, a daughter became part of her husband's household and therefore submissive to the power of a different *paterfamilias*.

106. Hugues Fulchiron & Pierre Murat, *Splendeurs et misères de l'adoption*, in ABANDON ET ADOPTION 92, 92 (Autrement No. 96, Feb. 1988).

107. 11 ENCYCLOPEDIA OF RELIGION 198 (1987). Such worship included funeral sacrifices, as well as *parentalia*—visits to the family tomb to honor dead ancestors with offerings of food, wine, and flowers.

108. ENCYCLOPÉDIE DALLOZ, DROIT CIVIL, ADOPTION 3, *supra* note 100.

109. See *infra* text accompanying notes 110, 203-04.

armies and others, workers or dwellers in the colonies we establish for the good of commerce in our kingdom."¹¹⁰

Following the Revolution, adoption was reestablished formally by resolution of the legislative assembly. In keeping with its preoccupation with individual liberty, the legislative assembly viewed adoption as a form of contract between adults. The purpose of this contract was to provide heirs for childless individuals, while simultaneously ensuring social harmony by preventing the accumulation of wealth in collateral relatives.¹¹¹ No consideration was given, during either the pre- or postrevolutionary period, to meeting the needs of the foundling/adoptee. Complete adherence to the biological model made any assimilation of adoption to a "blood" relationship impossible. Instead, French law viewed adoption as an instrument useful to both the state and certain adult members of society.

It was only at Napoleon's instigation that specific laws on adoption finally entered French law in 1804, with the drafting of the first *Code Civil*. The Emperor's immediate motivation was his own inability to produce an heir by his wife, Josephine. Indeed, adoption under the 1804 Napoleonic Code (*Code Napoléon*)¹¹² was very different from both the U.S. and modern French institutions. Adoption was permitted only by an individual who was (1) at least fifty years old, (2) fifteen years older than the adoptee, and (3) without legitimate offspring.¹¹³ The *Code Napoléon* viewed adoption as the formalization of an already existing relationship between two adults rather than the creation of a new one. Therefore, in addition to the foregoing criteria, it was also necessary for the adopting individual to have furnished care to the adoptee for at least six years prior to the adoption, or for the latter to have either saved the life of his new parent in combat or rescued him from a fire or flood.¹¹⁴ Once pronounced, the adoption did not cut the adoptee's biological ties; rather, the

110. J. DEHAUSSY, *L'ASSISTANCE PUBLIQUE À L'ENFANCE, LES ENFANTS ABANDONNÉS*, 22 (1951), *quoted in* BONNET, *ACT OF LOVE*, *supra* note 55, at 24.

111. JEAN CARBONNIER, *2 DROIT CIVIL: LA FAMILLE* 537 (1989).

112. The Civil Code was known as the *Code Civil des Français* until 1807, when it became the *Code Napoléon*. Napoleon's name was removed from the code in 1816, during his exile, but was reestablished in 1852 by the Emperor Napoléon III. JEAN-LUC AUBEAR, *INTRODUCTION AU DROIT* 226 n.7 (1988).

113. *CODE NAPOLÉON* [C. NAP.] art. 343 (Fr.). A separate institution, the *tutelle officieuse*, provided for the care of children during their minority, but did not continue into their adulthood. C. NAP. art. 355 (repealed).

114. C. NAP. art. 355 (repealed); Fulchiron & Murat, *supra* note 106, at 97.

adoptee added the name of the adoptive "parent" to that of the biological family.¹¹⁵

The rules and system for adoption under the *Code Napoléon* matched its goal: the minimum age requirement of fifty acted as a presumption of infertility and, furthermore, an adult adoptee was more likely to have already produced his own offspring, thus assuring an orderly transmission of property into the next generation. This narrow goal for the institution of adoption left no room for consideration of the adoptee's interests or welfare.

4. French Adoption Today

a. Legal Forms of Adoption

French law contains two forms of adoption. The first form is full adoption (*adoption plénière*),¹¹⁶ which is similar in structure to U.S. adoption. The second form is limited adoption (*adoption simple*).¹¹⁷ A child adopted "simply" (i.e., in the latter manner) usually adds the name of the adoptive parents to that of the natural parents¹¹⁸ and, for certain purposes, "remains in [the] family of origin."¹¹⁹ In an *adoption simple*, only the adoptive father and mother have parental authority and the power to make decisions involving the child's welfare.¹²⁰ The relationship between the adoptee and the biological parents, however, is not completely severed. The adoptee may inherit from both families¹²¹ and reciprocal duties of material support continue to exist between the adoptee and the biological parents.¹²² Although

115. C. NAP. art. 348 (repealed). Another solution was subsequently introduced for abandoned children. Beginning in 1850, those over the age of 12 and in the care of the state were sent to the French colony of Algeria. They worked on farms or as servants to French nationals and many of them died of cholera and malnutrition. Danielle Laplaige, *Enfants du malheur, enfants du péché* [Children of Unhappiness, Children of Sin], in ABANDON ET ADOPTION, *supra* note 106, at 78, 82.

116. C. CIV. arts. 343-59.

117. C. CIV. arts. 360-70.

118. A court has discretion to decide that an adoptee will only use the name of the adopting parent. C. CIV. art. 363.

119. C. CIV. art. 364.

120. C. CIV. art. 365.

121. A child adopted simply has the same inheritance rights as a biological child or a child adopted fully, *except that* the simple adoptee is not entitled to a portion of the *réserve* of the adopting parent's ascendants (i.e., parents, grandparents). C. CIV. 368.

122. C. CIV. art. 367.

an *adoption plénière* is irrevocable once pronounced,¹²³ an *adoption simple* may be revoked under the following circumstances: (1) upon demand of the adopting parent before the adoptee reaches fifteen; (2) by the adoptee's biological family before the child reaches eighteen; and, thereafter, (3) directly by the adoptee.¹²⁴ During the adoptee's minority, an *adoption simple* may be transformed into an *adoption plénière* at the request of the adopting parent.¹²⁵ Structurally, *adoption simple* represents adherence to the biological model because a child adopted simply is not thoroughly assimilated to a biological child.

b. Who Is Adoptable

The CFAS charges the ASE with a number of duties related to the material, educational, and psychological support of minors and their families.¹²⁶ In the aggregate, these departmental agencies are responsible for the daily welfare of more than 700,000 children across France.¹²⁷ However, only a fraction of such children, approximately 7,700, are wards of the state (*pupilles d'état*) and therefore adoptable.¹²⁸ The remainder have been placed in foster or other temporary care by either a judge or their parents.

To be declared a *pupille d'état* and thus freed for adoption,¹²⁹ a child must fit into one of the following descriptions: (1) a child of unknown or unestablished filiation;¹³⁰ (2) a child surrendered for adoption; (3) an orphan in need of guardianship; (4) a child whose parents have been stripped of their parental rights for reasons of abandonment, incapacity, physical abuse, or conviction for certain crimes;¹³¹ or (5) a child declared judicially abandoned after a year or more of parental neglect.¹³²

123. In the case of death of the adoptive parents, the adoptee may be readopted by another family. However, this second adoption does not rupture the legal ties established with the first adoptive family. C. CIV. art. 346.

124. C. CIV. art 370. Such demands must be based on "serious reasons" and are extremely rare.

125. C. CIV. art. 345.

126. C.F.A.S. art. 40.

127. Pierre Verdier, *La machine dépassé par la machine*, in ABANDON ET ADOPTION, *supra* note 106, at 69, 72.

128. ECONOMIC AND SOCIAL COUNCIL, *supra* note 46, at 45.

129. C.F.A.S. art. L. 61.

130. This category includes foundlings as well as infants whose mothers gave birth anonymously. See *infra* text accompanying notes 198-207.

131. C. CIV. arts. 378-1.

132. C. CIV. art. 350.

c. Who May Adopt

The *Code Civil* sets forth basic criteria for adoptive parents.¹³³ A married couple or a single, divorced, or widowed individual¹³⁴ may adopt a child. A married person may also adopt as an individual. In such a case, however, the consent of the nonadopting spouse is necessary.¹³⁵ The *Code* requires adopting couples to be married for at least five years¹³⁶ and a minimum of fifteen years older than the adoptee.¹³⁷ The age difference is reduced to ten years in stepparent adoptions. In all cases, the age requirement may be further reduced at the discretion of the court pronouncing the adoption.¹³⁸ Persons adopting as individuals must be at least thirty years old, and fifteen years older than the adoptee.¹³⁹

d. *Adoption Plénière* or *Adoption Simple*?

The vast majority of adoptions pronounced each year in France are *adoptions plénières*.¹⁴⁰ Although EFA describes the choice between the two forms of adoption as "whether or not to make the adopted child . . . perfectly integrated, regardless of [the child's] ethnicity or origins, in the bosom of [the] adoptive family or country,"¹⁴¹ such a characterization is both misleading and inaccurate. It presumes, not only that it is the adoptive parents, rather than a judge, who choose the form of adoption pronounced, but that, in all instances, *adoption simple* is inherently inferior to *adoption plénière*.

An *adoption simple* typically involves an older child or stepchild. The *Code Civil* permits an *adoption plénière* only until the age of fifteen¹⁴² and, following the 1993 passage of a new law, forbids its pronouncement in stepparent adoptions where legally recognized ties exist between the child and the parent not married

133. C. CIV. arts. 343, 344.

134. Ten percent of adoptions are by nonmarried persons. ALAIN BÉNABENT, *DROIT CIVIL: LA FAMILLE* 436 (1988).

135. C. CIV. art. 343-1.

136. The time requirement serves as an indication of marital stability rather than a presumption of sterility. BÉNABENT, *supra* note 134, at 436.

137. C. CIV. art. 344.

138. *Id.*

139. C. CIV. art. 343-1.

140. As of 1990, an average of 3,800 *adoptions plénières* and 2,300 *adoptions simples* are pronounced each year. ENFANCE & FAMILLES D'ADOPTION, *ADOPTION SIMPLE, ADOPTION PLÉNIÈRE: POUR QUI?* 34 (Accueil, Revue Trimestrielle No. 6-7, Nov. 1990) [hereinafter *ADOPTION SIMPLE*].

141. *Id.* at 3.

142. C. CIV. art. 345.

to the adopting individual.¹⁴³ According to an EFA study, eighty-five percent of all *adoptions simples* are either interfamilial or stepparent adoptions.¹⁴⁴ Little is known about the former phenomenon, but, in the sample studied, eighty percent of the latter adoptions occurred when the child had reached majority.¹⁴⁵ Presumably, in such cases, the adopting stepparent sought legal recognition (including inheritance rights) of emotional bonds developed during the adoptee's minority. Additionally, a small number of international adoptions result in the pronouncement of an *adoption simple*, usually against the adoptive parents' wishes.¹⁴⁶

In France, judges both determine the form of an adoption and make the formal pronouncement in open court.¹⁴⁷ One court, describing the choice between *adoption plénière* and *adoption simple*, declared *adoption simple* to be the solution whenever granting an *adoption plénière* "would accentuate the discrepancy between biological reality and legal fiction and tend to jeopardize the psycho-emotional equilibrium of the child . . ." ¹⁴⁸ According to Jacqueline Rubellin-Devichi, a prominent French family law scholar, every adoption fits this description. Thus, she would expand the use of *adoption simple*. Rubellin-Devichi proposes—thus far unsuccessfully—a reformation of the *Code Civil*, requiring each adoption to begin as an *adoption simple* for a two- to three-year period, in order to foster the development of emotional ties between the child and the biological family.¹⁴⁹

143. See *infra* text accompanying note 252. In the latter instances, only an *adoption simple* may be pronounced. This was already the course of action followed by a number of courts using powers under article 1173 of the Code of Civil Procedure.

144. ADOPTION SIMPLE, *supra* note 140, at 18.

145. *Id.*

146. International adoptions present a conflict of law problem in France. Following a 1990 decision by the *Cour de Cassation*, while the conditions and effects of the adoption are determined by the law of the adoptant's country (i.e., France), the court must also determine the nature of the consent (i.e., whether what was consented to under the law of the adoptee's country was an *adoption simple* or *plénière*). Judgment of Jan. 31, 1990 (Pistre), Cass. civ. 1re, 1990 Bull. civ. I, No. 29.

147. C.C.P. art. 1173; C. CIV. art. 353.

148. Judgment of Dec. 5, 1984, Trib. Gr. Inst., 1986 J.C.P. II, No. 20561 note F. Boulanger. In this case, the court was faced with an *adoption plénière* request in the context of a surrogacy arrangement. A husband inseminated the sister of his infertile wife. The birth mother cared for the child for two years, at which point the woman placed the girl directly with her sister for adoption. French law permits such a direct placement once a child is two years old. C. CIV. art. 348-5.

149. Jacqueline Rubellin-Devichi, *Réflexions pour d'indispensables réformes en matière d'adoption*, 1991 D.S. CHRON. 209, 213 [hereinafter Rubellin-Devichi, *Réflexions*]; Jacqueline Rubellin-Devichi, *Préface* to GRANDPARENTS, *supra* note

Implicit in Rubellin-Devichi's proposal is the belief that adoptive affiliation differs so significantly from biological parenthood that it warrants different legal treatment. While this belief may be unsettling for many in the United States, it is, in fact, the same belief that underlies many "open adoptions" in the United States. Indeed, Rubellin-Devichi's proposed reform resembles an attempt to codify and foster "open adoption" in France.

5. Beyond Family Law: Inheritance and Nationality

France's emphasis on "blood" ties is not unique to its system of adoption or family law. Rather, this emphasis is part of a common thread in French law and culture and affects diverse legal institutions such as inheritance and nationality.

a. Inheritance

For purposes of determining heirs and dividing the property of a decedent, French law views biological relationships as more significant and (literally) more valuable than either relationships formed by marriage or the liberty to dispose freely of one's property. The *Code Civil* does not permit a parent to disinherit a child. Instead, the estate of a decedent (*du cuius*) is divided into two parts: the reserve (*réserve*) and the disposable portion (*quotité disponible*). An individual has no control over assets in the *réserve*,¹⁵⁰ which pass according to fixed rules and must be divided among the decedent's children (whether legitimate or natural, biological, or adoptive).¹⁵¹ Those assets outside of the

40, at 7, 11. At the end of this initial period (sooner if the biological family is not interested in developing a relationship with the adoptee), the adoptive parents would be permitted to request the conversion of the *adoption simple* into an *adoption plénière*.

150. The size of the *réserve* varies according to the number of the decedent's children. If the decedent had one child, for example, the *réserve* is one-half of the estate. If the decedent had two children, the *réserve* will be two-thirds of the estate. If the decedent had three or more children, the *réserve* is three-fourths of the estate. C. CIV. art. 913.

151. C. CIV. arts. 358, 913. Certain natural children may have inferior inheritance rights. Where the decedent is survived by both (a) a child conceived during an adulterous relationship and (b) a spouse or legitimate child from the marriage during which the adultery occurred, the adulterine child is entitled to one-half of what would have been received if all of the decedent's children were legitimate. The remaining one-half is distributed among the legitimate children. C. CIV. art. 760. French law permits the adulterous spouse to avoid this situation by making a bequest to the adulterine child in settlement of such child's interests. C. CIV. art. 763-2.

réserve form the disposable portion¹⁵² and may be disposed of either by *inter vivos* gift or testamentary bequest.¹⁵³

Thus, French law guarantees to children a portion of their parents' estate. However, a surviving spouse is *not* entitled to part of the reserve. Therefore, when a decedent is survived by children or other qualifying relatives, the surviving spouse may be effectively disinherited if, either during the decedent's lifetime or via testamentary bequests, the decedent disposed of those assets in the disposable portion.¹⁵⁴ Surviving spouses inherit automatically from a deceased spouse *only* when there are no children or relatives in the decedent's maternal or paternal line.¹⁵⁵ French law grants only a usufruct (*usufruit*)¹⁵⁶ to surviving spouses in the form of a right to lifetime use of and income from property in the decedent's estate.¹⁵⁷ If the usufruct is insufficient to maintain the surviving spouse, after one year that individual may demand additional income from the decedent's estate.¹⁵⁸ Hence, for inheritance purposes, biological ties are consistently placed ahead of marital relationships.

b. Nationality

The tension between "blood" and "nonblood" ties is at the heart of a controversial political issue in contemporary France: the acquisition of French citizenship. Biology plays a significant role in the transmission of French nationality. There are two principal philosophies of citizenship: rights based on (1) "blood"

152. C. CIV. art. 913.

153. C. CIV. art. 913-1.

154. The property interests of the surviving spouse are addressed by the laws of matrimonial property. C. CIV. art. 1387 et seq. Unless they elect otherwise, all assets acquired by either spouse during their marriage, whether through work or income on individual or joint assets, are held equally in a common fund (the community). C. CIV. art. 1401. Therefore, the estate of a married decedent contains only half of the community.

155. C. CIV. arts. 765, 766.

156. C. CIV. art. 767. As with the *réserve*, the amount of the *usufruit* varies according to the number of the decedent's children (e.g., one-fourth of the estate if the deceased spouse left surviving children and one-half if the decedent left only collateral heirs).

157. There is enormous support in France for legal reform to improve the treatment of surviving spouses. Eighty percent of the respondents to a 1981 poll stated that a surviving spouse should receive a greater portion of a deceased husband or wife's estate. A 1991 legislative proposal suggested permitting surviving spouses to make an election of either the entire *usufruit* or one-fourth of the decedent's transmissible property. PROJET DE LOI [DRAFT LEGISLATION] NO. 2530 (*Assemblée Nationale*, Dec. 23, 1991) (Fr.). In a situation where the decedent left no descendants, the surviving spouse would choose between the entire *usufruit* and one-half of such property.

158. C. CIV. art. 207-1.

(*jus sanguinus*, in French, *droit du sang*) and (2) place of birth or physical presence (*jus solis*, in French, *droit du sol*). The theory of *jus sanguinus* bases citizenship on ethnicity or blood ties. Germany, for example, bases its law of citizenship upon this philosophy. In Germany, an ethnic German from Eastern Europe, whose ancestors left Germany a century ago, can acquire German citizenship, while the German-born and reared child of a Turkish "guestworker" often cannot.¹⁵⁹ In contrast, United States nationality is based on the philosophy of *jus solis*.¹⁶⁰ Under U.S. law, birth on U.S. territory is sufficient to acquire citizenship.

The law of French nationality is a hybrid, granting citizenship on the basis of blood ties and territorial connection, with the government recently placing a significant limitation on the latter method. Regardless of an individual's birthplace, a child is French from birth if at least one parent is a French citizen (*droit du sang*).¹⁶¹ A child born in France of two non-French parents, although not French from birth, may acquire French nationality at the age of eighteen (*droit du sol*).¹⁶² Prior to recent reforms, the latter child *automatically* became a French citizen at eighteen if the child had resided continually in France for the preceding five years (i.e., since the age of thirteen).¹⁶³ In the wake of a 1993 law,¹⁶⁴ the French-born children of non-French citizens must request citizenship between the ages of sixteen and twenty-one by "demonstrating their intent to become French."¹⁶⁵ Presumably, this requirement will be satisfied by registration for military service or application for a French identity card. However, the government may deny citizenship to applicants who have committed a criminal act or misdemeanor, or been incarcerated for more than six months. The French government, of course, does not have similar discretion with respect to the children of French citizens.¹⁶⁶

159. For a discussion of the German view of nationality in the context of skinhead violence (its "blood fantasies are part of the official definition of identity"), see Jane Kramer, *Neo-Nazis: A Chaos in the Head*, NEW YORKER, June 14, 1993, at 52.

160. U.S. CONST. amend. XIV, § 1. Since 1952, the law grants U.S. citizenship to a child born outside of the United States who has at least one parent who is a U.S. citizen.

161. CODE DE NATIONALITÉ [C.N.] art. 17 (Fr.).

162. C.N. art. 21-7.

163. C.N. art. 44 (repealed 1993).

164. Law no. 93-933 of July 22, 1993, C.N. art. 21-7. The law was introduced by the conservative government in reaction to sharp increases in both immigration and unemployment.

165. C.N. art. 21-7.

166. The revision of the *Code de Nationalité* has provoked tremendous controversy in France. In declaring his opposition to the new law, Jack Lang, a former Socialist Minister, declared that "to be born on and grow up upon the soil

III. CONSENSUS AND COMPROMISE: LIMITS ON THE BIOLOGICAL MODEL

Notwithstanding France's traditional emphasis on biological relationships, French law does not view them as absolute. In addition to permitting certain immigrants and the French-born children of foreigners to acquire French citizenship and placing adoptive and biological children on equal footing for inheritance purposes, the *Code Civil* recognizes and structures adoption as a form of filiation¹⁶⁷ and allows for the termination of parental rights in cases of abuse or neglect.¹⁶⁸ Furthermore, in recognition of certain superseding interests, French law places significant and specific limits on the establishment of filiation *solely* on biological ties. Three such limits are described below and provide useful insights into how French law balances and resolves inevitable tensions between biological ties and other interests.

A. *Limit No. 1: "Natural" Maternal Filiation*

Lawmakers and legal scholars in France often express a need to establish "biological truth" as the fundamental guiding principle of the law of filiation. With this aim, in 1992, a bill was introduced in the French legislature that, among other proposed revisions, sought to eliminate elaborate and antiquated existing rules for bringing paternity actions¹⁶⁹ and to allow such suits to be brought—and determined—on the basis of biological evidence, such as DNA marking tests (sometimes referred to as "genetic fingerprinting").¹⁷⁰ Although the National Assembly, the lower chamber of the legislature (the *Assemblée Nationale*), passed

of France is to instill a tie . . . with our nation To demand a voluntary act . . . from the French-born children of foreigners is to proclaim they do not have the same legitimacy as children born of French parents, from whom we require no such act. It will establish a hierarchy between the *droit du sang* and *droit du sol* . . ." Jack Lang, *L'insulte faite à la France [The Insult to France]*, NOUVEL OBSERVATEUR, May 12, 1993, at 45.

167. See *supra* Part II.B.4.

168. C. CIV. art. 350.

169. The *Code Civil* provides that out-of-wedlock paternity may be judicially declared: (1) in case of abduction or rape occurring during the period of conception; (2) in case of seduction achieved by fraud, abuse of authority, promise of marriage or betrothal; (3) where paternity can be unequivocally established by means of letters or other writings from the putative father; (4) where the putative father and the mother cohabited during the period of conception; or (5) where the putative father contributed to the child's maintenance. C. CIV. art. 340.

170. See *supra* note 24.

much of the reform package, the Senate, the upper house (the *Sénat*), voted most of the bill down.¹⁷¹

One unsuccessful provision in the 1992 reform package proposed altering the complicated and widely-criticized process for establishing the legal parentage of a child born to an unmarried woman. In such instances, after the mother's name is entered on the birth certificate, legal paternity *and* maternity must be established via one of the following additional actions: (1) formal recognition (which may also occur before the child's birth); (2) demonstration that the child has a possession of status (*possession d'état*)¹⁷² with regard to the parent in question; or (3) legal judgment.¹⁷³ In the vast majority of situations involving out-of-wedlock births, both parents employ the first method.¹⁷⁴ Many unmarried women are unaware that listing the child's name on the birth certificate will not, by itself, establish legal maternity and, consequently, do not take the necessary additional step of formal recognition. If such a woman dies before recognizing her child, one of the other methods must be used.

The rationale for this widely criticized¹⁷⁵ law is a paternalistic one: a perceived need to protect women from assuming unwittingly the charge—and, presumably, the stigma—of unwed motherhood. This goal outweighs the otherwise paramount interest of preserving biological ties and, therefore, the law imposes the additional requirement of an affirmative and voluntary legal act to establish maternal as well as paternal natural filiation. In the context of a legitimate filiation, the preexisting act of marriage presumably satisfies this requirement.¹⁷⁶ Despite changing social mores and overwhelming

171. 1992 J.O. 1284-1304 (May 16, 1992); 1992 J.O. 3723-25 (Dec. 9, 1992).

172. The term *possession d'état* refers to a child's apparent status with respect to a particular adult, i.e., whether the putative parent "treats the child as a member of [the parent's] household." C. CIV. art. 313-1.

173. C. CIV. art. 334-8.

174. According to French government statistics, 75% of children born out-of-wedlock are recognized by their father by the end of the calendar year of their birth and approximately 85% are recognized within three years of their birth. 1992 J.O. 720 (Apr. 28, 1992); 1992 J.O. 3734 (Dec. 9, 1992).

175. See, e.g., Jacqueline Rubellin-Devichi, *Réflexions sur la réforme attendue du droit de la filiation* [Reflections on Awaiting Reform], in *MÉLANGES OFFERTS À ANDRÉ COLUMER*, 397, 406-7 (1992). "It is absurd and inequitable—and as a consequence contrary to the International Convention on the Rights of Children and the European Convention on Human Rights and Fundamental Liberties—to require a woman to recognize her child to whom she has given her name and made a part of her household, in order to protect [the child] from any contestation if she should die."

176. MALAURIE, *supra* note 1, at 309.

social acceptance of unmarried motherhood,¹⁷⁷ in 1992, the National Assembly, nevertheless, rejected a proposal to eliminate the requirement of maternal recognition and establish legal maternity whenever an unmarried woman places her name on a child's birth certificate.¹⁷⁸

B. *Limit No. 2: Medically Assisted Procreation*

1. A National Sperm Bank

Another limit on biological ties applies in the context of medically assisted procreation by means of an anonymous sperm donor.¹⁷⁹ In France, most artificial insemination is carried out by the Center for the Study and Preservation of Human Eggs and Sperm (*Centre d'Étude et de Conservation des Oeufs et du Sperme Humaine*, hereinafter CECOS).¹⁸⁰ Since its founding as France's first sperm bank in 1973, CECOS has facilitated an estimated 17,000 births.¹⁸¹ There are currently 30 CECOS centers in operation, facilitating approximately 2,000 births each year.¹⁸²

One of the rejected amendments to the *Code Civil* would have codified certain aspects of CECOS operating procedure¹⁸³ by forbidding any establishment of filiation between an anonymous

177. See *supra* text accompanying notes 53-72.

178. 1992 J.O. 1287 (May 16, 1992).

179. The French health system provides full reimbursement for artificial insemination, which is considered a medical treatment for sterility.

180. MARIE-ANGE D'ADLER & MARCEL TEULADE, *LES SORCIERS DE LA VIE* [THE MAGICIANS OF LIFE] 24-156 (1956) [hereinafter *SORCIERS*]; Bonnet, *CHILDREN OF SECRECY*, *supra* note 42, at 72-80; GENEVIEVE DELAISI DE PARSEVAL & ALAIN JANAUD, *L'ENFANT À TOUT PRIX* [THE CHILD AT ANY COST] 149 (1983).

181. Philippe Gand, *Bioethique et Pratique Judiciaire*, 1991 *REVUE JURIDIQUE DEL'OUEST* 16.

182. Judgment of Sept. 21, 1987, Cour d'appel (Toulouse), 1988 *Dalloz-Sirey, Jurisprudence*, [D.S. Jur.] 184, 186, note Huet-Weiller.

183. CECOS has strict rules and procedures, certain of which differ from those of its U.S. counterparts. Unlike sperm banks in the United States, CECOS does not pay its donors because, under French law, the human body cannot be the object of a commercial transaction. C. CIV. arts. 6, 1128; Judgment of May 31, 1991, Cass. ass. plén., 142 *LES PETITES AFFICHES* 13 (Nov. 27, 1991) (declaring surrogate mother arrangements unenforceable). In addition, all sperm donors must be married, have fathered at least one child, and obtain their wives' consent to the procedure. As for the donee, CECOS will only inseminate a woman who it determines to be in a "stable relationship" with an infertile partner. Although it is not necessary for the couple to be married, CECOS does not provide its services to single women or lesbian couples. DE PARSEVAL & JANAUD, *supra* note 180, at 149.

sperm donor¹⁸⁴ and the resulting child,¹⁸⁵ and barring all actions to contest such a child's existing filiation (legitimate if born to a married woman, natural if born to one who is not) on the basis of the artificial insemination.¹⁸⁶ Had this measure been passed, once a husband consented to his wife's insemination, he could not later disavow paternity. With respect to unmarried couples, a man who consented to the insemination of his partner and then refused to recognize the child would incur financial responsibility for both mother and child.¹⁸⁷

2. Judicial Solutions

Adopting this reform would have provided a uniform resolution to the problem that arises when a man initially consents to artificial insemination of his partner, but subsequently disavows paternity. At present, French courts hearing such cases resolve them in different ways.¹⁸⁸ For example, in 1990, a trial court in Bobigny refused to allow a husband to disavow a child conceived via artificial insemination.¹⁸⁹ The court held that the father did not meet the requirements of the law because he did not prove that the child was conceived in an *adulterous* relationship. In fact, the *Code Civil* contains no such requirement; it merely stipulates that a husband may disavow paternity "if he proves facts showing that he cannot be the father."¹⁹⁰ The court rejected the biological model by focusing on the well-being (and financial needs) of the child and proclaimed that, in the instant situation, "the search for

184. The organization keeps all donor activity and participation strictly anonymous.

185. 1992 J.O. 1288 (May 16, 1992); 1992 J.O. 3757 (Dec. 8, 1992) (*Sénat* rejection of C. CIV. art. 340-1).

186. 1992 J.O. 1288 (May 16, 1992); 1992 J.O. 3722 (Dec. 8, 1992) (rejection of C. CIV. art. 311-20).

187. 1992 J.O. 1288 (May 16, 1992); 1992 J.O. 3757 (Dec. 8, 1992) (*Sénat* rejection of C. CIV. art. 340-1-1). Certain senators proposed adding an exception for a man who did not consent to the woman's insemination or who demonstrated that the child was conceived in an illicit relationship rather than by artificial insemination.

188. In theory, the decisions of courts in France are only binding on the case at bar and have no precedential value. However, previously decided cases are extremely influential and French lawyers often cite them in arguments.

189. Judgment of Jan. 18, 1990, Trib. gr. inst., 1990 D.S. Jur. 332, note C. Saujot.

190. C. CIV. art. 312.

biological truth leads to a dead end and a solution contrary to the child's interests."¹⁹¹

Later that year, the *Cour de Cassation*¹⁹² upheld a decision by the Court of Appeal of Toulouse that simultaneously (1) granted an annulment of recognition to a man who had agreed to the artificial insemination of his companion and (2) awarded damages to the child.¹⁹³ The *Cour de Cassation* agreed with the lower court's reasoning that, in both consenting to the artificial insemination and recognizing a child he knew not to be his biologically, the man constructively undertook the obligation to behave as a father and meet the unborn child's future needs.¹⁹⁴ Certain legal commentators (*arrêlistes*), who are law professors and write the case notes that accompany French decisions (*arrêts*), preferred this solution to that formulated by the Bobigny court.¹⁹⁵ They found this solution to be in harmony with the fundamental principle of "biological truth" and better suited to meeting the present and future financial needs of the child. One *arrêliste* argued that "the child's interest, which is not served by maintaining an artificial judicial tie, is adequately protected by awarding monetary damages."¹⁹⁶ In the view of another *arrêliste*, it would be both "fruitless to imprison a man in the role of father which he does not want to take on" and "dangerous to introduce such a concept into a law founded on the truth of filiation."¹⁹⁷

CECOS policy and operating procedures reject the biological model by barring the establishment of any legal relationship between anonymous sperm donors and the resulting children.

191. Judgment of Jan. 18, 1990, *supra* note 189 (upheld on appeal), translated in Jacqueline Rubellin-Devichi, *France: Statutory Law Meets with Turbulence in the Courts*, 30 J. FAM. L. 319, 325 (1992).

192. The *Cour de Cassation*, France's highest court, has the power to uphold prior decisions by lower courts or to declare them erroneous.

193. Judgment of Sep. 21, 1987, *Cour d'appel* (Toulouse), 1988 D.S. Jur. 184, note Huet-Weiller, cited in Judgment of July 10, 1990, *Cass. civ. 1re*, 1990 Bull. Civ. I, No. 196.

194. *Id.*

195. *See supra* note 189.

196. Judgment of Jan. 18, 1990, *supra* note 189, at 336, note C. Saujot. *See also* Jacqueline Rubellin-Devichi, *Procréation assistées et stratégies en matière de filiations [Medically Assisted Procreation et Strategies for Filiation]*, LA SEMAINE JURIDIQUE [J.C.P.], May 22, 1991, at 181, 183 ("This remedy appears perfectly adapted [to the situation] . . . [I]t avoids [imposing] an imitation paternity . . . which will not inform the child of [the child's] origins, . . . provides financial compensation and does not prevent the mother from finding a social father for the child, notably through a stepparent adoption after a new marriage.")

197. Judgment of Sep. 21, 1987 *supra* note 193; 1988 D.S. Jur. at 187. Still a third proposed solution would have required a husband to legally adopt the child resulting from his wife's artificial insemination.

French courts are not in disagreement on this point, but they are divided as to whether *nonbiological* ties, such as a relationship with the mother and consent to her insemination, form a sufficient basis on which to impose paternity. This confusion reflects a lack of social consensus. It is unclear, however, whether there exists a genuine division of public opinion on the subject or merely a gap in French society's comprehension and assimilation of scientific developments.

C. Limit No. 3: Anonymous Childbirth

A third significant restriction on the strict establishment of filiation along biological lines involves a practice known as anonymous childbirth, colloquially, "childbirth under X" (*accouchement sous X*) (i.e., a pseudonym). This unusual institution¹⁹⁸ permits a woman to give birth without her name ever being noted on the child's birth certificate or in hospital records. In theory, her identity is unknown even to hospital personnel. After delivery, the child is automatically given to the ASE. The mother, like all other parents, has three months to reevaluate her decision and establish filiation with the child.¹⁹⁹ If the mother does not change her mind at the end of the three-month period, the ASE places the child for adoption. An estimated 50,000 "anonymous childbirths" have taken place in France since the practice was first authorized by the Vichy government in 1941.²⁰⁰ At present, of the approximately 800,000 babies born annually in France, an estimated 700 are born "anonymously."²⁰¹

The primary goal of anonymous childbirth is the prevention of illegal abortion (i.e., occurring beyond the ten-week legal limit)

198. Luxembourg and Italy are the only other European countries that permit a mother anonymity.

199. BONNET, CHILDREN OF SECRECY, *supra* note 42, at 100-02 (criticizing the application of the three-month waiting period to placement of babies born "anonymously" as, "three long months of anguish and sadness for these women who know the baby is deprived of parental love, three long months for these children in affective solitude"). Bonnet, who is not a lawyer, cites informal statistics indicating that barely 10% of women who give birth anonymously change their mind and ultimately establish filiation with their child. *Id.* at 100-01. She proposes reforming the law to make an anonymous mother's decision to surrender her child irrevocable after 48 hours. If a woman needs additional time to make a decision, Bonnet advocates reducing the waiting period from three months to one. *Id.* at 186.

200. For background on the establishment of anonymous childbirth, see *id.* at 128.

201. Isabelle Maury, *On "Abandonne" en France*, in ABANDON ET ADOPTION, *supra* note 106, at 20, 21.

and infanticide.²⁰² Anonymous childbirth represents a formalization of certain long-standing French practices with respect to child abandonment.²⁰³ The most direct antecedent of anonymous childbirth was the system of *tours*, established by Napoleon in 1811, and not officially abolished until 1904. The *tour* was a revolving wooden box built into the niche of a poorhouse. Parents could place a child into the box and, by pulling a cord, ring a bell inside the building. Nuns would then push the turntable and take in the child, without having seen the parents.²⁰⁴

Notwithstanding attacks on the institution, anonymous childbirth seems more secure than ever following its 1992 inclusion in the *Code Civil*.²⁰⁵ The continuous existence and recent ratification of this institution,²⁰⁶ in a society otherwise preoccupied with the primacy of biological ties, is highly

202. Debates in the National Assembly have acknowledged such goals. 1992 J.O. 730 (Apr. 28, 1992); *Pourquoi la loi?*, in ABANDON ET ADOPTION, *supra* note 106, at 98, 101. For profiles of women who gave birth anonymously, see generally BONNET, ACT OF LOVE, *supra* note 55, at 48.

203. See Laplaige, *supra* note 115, at 78.

204. *Id.* at 80; BONNET, ACT OF LOVE, *supra* note 55, at 27-28. A number of theories have been advanced to explain the establishment of this system. According to one theory, the *tours* had a charitable purpose: to serve as a deterrent to infanticide by providing for the noncriminalized abandonment of children and, simultaneously, to lessen the burdens of impoverished families lacking the means to raise a child. Another theory suggests that Napoleon foresaw a use for children with no other attachments; the Imperial decree establishing the *tours* specified that all foundlings and abandoned children raised by the state were entirely at its disposition and, therefore, could be drafted into military service. A third theory holds that the main goal of the institution was to protect the father of the illegitimate child against the unwed mother revealing his identity. Whatever the motivation for their establishment, the *tours* flourished: by 1801, 63,000 children had been abandoned in this manner, by 1815, 84,559 children and by 1833, the number had risen to 127,507. *Id.*

205. C. CIV. art. 341-1. Anonymous childbirth survived attempts to abolish it following France's ratification of the United Nations Convention on the Rights of the Child in 1990. United Nations Convention on the Rights of the Child, Nov. 20, 1989, U.N. Doc. A/44/736, 28 I.L.M. 1456 (ratified by France Aug. 6, 1990). At the time, critics charged that the institution of anonymous childbirth was in conflict with Article 7 of the Convention, which proclaims, a child "shall have . . . as far as possible, the right to know and be cared for by his or her parent." *Id.* Art. 7. As a ratified treaty, the Convention is binding and supersedes other French laws. FR. CONST. art. 55. The prevailing view, however, is that the Convention does not threaten anonymous childbirth. First, the actual language of Article 7 ("as far as possible") indicates that the right to knowledge of one's origins is not absolute. Second, Article 6 of the Convention proclaims "the child's right to survival," a right presumably enhanced by anonymous childbirth's deterrence of infanticide.

206. Ironically, the new law will have little practical effect because anonymous childbirth is already authorized and regulated by Articles 47 and 81 of CFAS.

significant. It reveals a tacit acknowledgment of certain societal goals, such as the prevention of infanticide, that outweigh the preservation of strictly biological relationships. It also indicates a hesitancy to fully embrace "biological truth" as the sole basis of legal parenthood. Moreover, by disallowing filiation on the basis of artificial insemination and permitting and regulating anonymous childbirth, French law recognizes that, in some situations, psychological ties are preferable to biological ones and, in the case of anonymous childbirth, intense societal and governmental encouragement of childbearing and rearing may create tremendous social pressure for a woman to keep a child she would prefer to surrender for adoption.²⁰⁷

IV. ENDURING PREFERENCES FOR BIOLOGICAL TIES IN THE FRENCH JUDICIARY AND LEGISLATURE

As this Article previously discusses, the evolution of adoption and the development of an "interest of the child" standard in France indicate an increasing appreciation for the importance of psychological relationships. At the same time, this standard introduces tremendous uncertainty into a process that was formerly precise and determinative. Meeting French adoption's traditional goal of providing a childless individual with a legal heir was far easier than ascertaining what is emotionally best for an individual child. In the United States, Robert Mnookin characterizes the "best interests of the child" standard as inherently indeterminate, and thus both unpredictable and vulnerable to the disproportionate influence wielded by the personal values of judges and social workers.²⁰⁸

Indeed, despite French family law's movement away from the biological model, individual judges still sometimes favor the

207. See, e.g., BONNET, ACT OF LOVE *supra* note 55, at 48. ("Our society will not hear of the reasons which lead a woman to abandon a child because it bases maternal feelings on biology. By calling the woman who bears a child the 'mother,' we enclose her in a contradiction that forbids a clear renunciation of motherhood.")

208. Mnookin, *supra* note 18, at 264. For Mnookin, indeterminacy "flows from our inability to predict accurately human behavior and from a lack of social consensus about the values that should inform the decision." *Id.* As a partial replacement to the "best interests of the child" standard, which he views as "unworkable," Mnookin proposes adopting "less ambitious and more determinate" legal standards. Such alternative standards would contain restrictions on the discretion of judges, set outside time limits on temporary care at the time of a child's removal from the parental home, and give preference to the psychological parent over all others claiming custody, including biological parents. *Id.* at 280, 286.

biological model when applying the law. This phenomenon may be due to their uneasiness about including psychological needs in a determination of the interests of a child. As an examination of selected French family law decisions reveals, judges are best at evaluating a child's affective needs when such needs exist in the context of a biological relationship. Thus, to a large extent, French courts continue to favor "blood ties."

A. *Rejecting Adoption in the Interests of the Biological Child*

In the face of the inherent indeterminacy of the "interest of the child" standard,²⁰⁹ French judges and lawmakers seek refuge in those areas where social consensus and tradition *do* exist, namely relationships formed by biology. An appellate decision by the *Cour de Paris*,²¹⁰ involving a request for a stepparent adoption, demonstrates acutely the bias demonstrated in favor of biological ties and against psychological/affective ties. In this case, a lower court denied a man's petition for an *adoption plénière*.²¹¹ The man was the biological father of a seven-year-old daughter, Perrine, through a first marriage that ended in divorce.²¹² Five years prior to the decision, the father had remarried and now sought to adopt his second wife's eight-year-old son, Cyrille, from *her* first marriage.²¹³ Although the would-be adoptive father's ex-wife had custody of Perrine, he exercised regular visitation rights.

On appeal, the *Cour de Paris* affirmed the lower court's denial, objecting further²¹⁴ to the fact that, once adopted, Cyrille would live in a manner that was both emotionally and financially advantageous to that of the father's "own" child (i.e., his biological daughter), whom he saw only during scheduled visitations.²¹⁵ The court cited testimony by the petitioner's first wife that their

209. In France, Rubellin-Devichi observes, the very concept of the "interest of the child" is susceptible to differing assessments and eludes all judicial norms. See Rubellin-Devichi, *Réflexions*, *supra* note 149.

210. Judgment of Feb. 26, 1985, Cour d'appel, 1986 J.C.P. II, No. 20561, note François Boulanger.

211. The lower court's denial of the adoption request was made pursuant to article 353 of the *Code Civil*, discussed *infra* text accompanying notes 221-22. In its decision, the trial court declared that the "artificial introduction" of a brother of the same age, but living in a different household, might be viewed by the daughter as a rivalry for the affection of her father. *Id.*

212. Judgment of Feb. 26, 1985, *supra* note 210.

213. *Id.*

214. French appellate courts are not bound by the decisions of trial courts regarding facts or law. Rather, they hear each case *de novo*. JOHN C. NEWMAN, FRENCH TAX & BUSINESS LAW GUIDE ¶ 1-575 (1994).

215. Judgment of Feb. 26, 1985, *supra* note 210.

daughter was "sickened" to hear Cyrille call her father "Papa."²¹⁶ Therefore, the court concluded, granting any adoption whatsoever would, in the eyes of the biological child, favor, on both a financial and psychological level, a child who was a nonrelative.²¹⁷ Furthermore, an adoption could potentially jeopardize the family life of the petitioner by increasing the likelihood of emotional rejection by his biological daughter.²¹⁸

Under Article 1173 of the Code of Civil Procedure (*Code de Procédure Civile*), either court could have denied the requested *adoption plénière* in favor of an *adoption simple* in order to preserve Cyrille's ties with his biological father's family.²¹⁹ Instead, the court focused wholly on the interests of Perrine, the petitioner's biological child, and rejected the adoption petition outright. Apparently, neither court was persuaded by the father's insistence that a good relationship existed between the two children, who had known each other for five years, or by the fact that he had provided for the long-term financial interests of his daughter by transferring property to her at the time of his second marriage.

Article 353 of the *Code Civil* authorizes a judge to determine whether pronouncing an adoption in the presence of already existing descendants will "compromise family life."²²⁰ If the judge concludes in the affirmative, the judge may, under the same provision, deny the requested adoption.²²¹ This power is contingent upon gauging the probability of an inherently unpredictable event: the disruption of the relationships that make up "family life." Yet, the *Code Civil* provides courts with no guidelines for reaching such a determination: it neither specifies what constitutes a disruption of family life nor suggests the appropriate procedure or evidence for the court to consider. Indeed, in the present case, there is no indication that either of the courts consulted any outside sources in arriving at their respective decisions. Rather, the judges seem to have reacted viscerally and with hostility toward remarriage and stepparent adoption, suggesting to one commentator the view that adoption is only appropriate for sterile couples, and not for those who can or already have biological offspring.²²² Such a view indicates a

216. *Id.*

217. *Id.*

218. *Id.*

219. CODE DE PROCÉDURE CIVILE [C.C.P.] art. 1173 (Fr.). Following legislation passed in the fall of 1992, such a pronouncement will be obligatory. See *infra* text accompanying note 251.

220. C. CIV. art. 353.

221. *Id.*

222. Judgment of Feb. 26, 1985, *supra* note 210.

preference for the biological model and disapproval of legal equality for biological and nonbiological children living in the same household.

By considering the adoption's psychological effects on the biological child only, the court ignored the child whose interests should have been the focus of the decision, the would-be adoptee. One *arrêtiste* saw nothing strange in this focus, observing that "it might indeed be painful for the legitimate child to see a half-brother by adoption of the same age, not at all of the same blood, living amply,"²²³ and thus Perrine's life with her mother could be compromised. This commentator further suggested that the judges might not have been so severe had they been convinced that, before considering the adoption of his new wife's child, the petitioner was, first and foremost, a good "blood father."²²⁴

This view indicates that neither court was concerned with predicting future family disruption, but sought instead to punish the father for the breakup of his first family unit. Such an observation also indicates uncertainty as to what Article 353 means by "family life." Should the court have considered the relationship between Perrine and her father or between Perrine and her mother? A punitive approach seems pointless. In the instant case, it did not result in a reconciliation between the father and his first wife (and thereby a reconstitution of his daughter's biological family) and, ultimately, deprived Cyrille of the opportunity to reconcile his legal and social status. Moreover, this approach is unlikely to act as a deterrent to divorce.

B. A Challenge by Biological Children

The judicial preference for biological ties is not limited to those situations where the would-be adoptive parent has young biological children. Indeed, one court held the *adult* biological children of an adopting individual to have the right to intervene in the adoption procedure "in order to preserve their family life."²²⁵ The *Tribunal de Grand Instance* of Versailles ruled simultaneously, however, that the independent adult children of a man seeking to adopt (simply) his second wife's child could not justify their claim that pronouncing such an adoption would disrupt their family life because they would not be required to live with the adoptee.²²⁶

223. Rubellin-Devichi, *supra* note 58, at 739.

224. *Id.*

225. Judgment of May 21, 1984, Tr. gr. inst. 1985 Gazette du Palais [G.P.] 11.

226. *Id.* The court expressly refused to consider the adoption's effect on the petitioners' future inheritance from their father.

The motives of the courts in this case and the preceding one seem particularly perplexing when considered in the context of current French social practices. The annual number of divorces doubled between 1960 and 1975 and doubled again between 1975 and 1985. At present, approximately forty percent of all marriages in France end in divorce.²²⁷ As a result, more than half of the nation's estimated fourteen million children under the age of eighteen do not live with both of their biological parents.²²⁸ Of these children, one million are part of a divorced household and 60,000 live with a parent and that parent's new partner.²²⁹

One psychiatrist believes it is precisely the change in social customs that has provoked the preference for biological ties. Dr. Janine Noël sees French society

increasingly clinging to the idea of biological continuity as a source of security, since the traditional notion of the family has shattered and there are now all sorts of families which are no longer the legitimate family of yesteryear: single-parent families, children legitimized by a later marriage of their parents, step-families, . . . as well as adoption, which, in assimilating the adopted child to the legitimate child, has dealt a blow to the definition of the traditional family.²³⁰

Dr. Noël's perception is that the French idealization of the traditional family (two married parents with biological children) persists in spite of—or perhaps because of—changing social patterns. This view would provide at least a partial explanation of the *Cour de Paris* and *Versailles* court granting additional rights to biological children.

This Article previously suggests that French courts are not keeping pace with the scientific developments that have a direct impact on questions of filiation, such as artificial insemination and genetic testing for paternity.²³¹ There appears to be a similar gap in understanding with respect to fundamental social changes. Increasing numbers of French marriages end in divorce. In cases where the divorcing couple has children, their marital split may be followed by cohabitation, remarriage to a new partner, or single parenthood. Yet, despite the radically altered composition of contemporary French families, French courts maintain the biological model as their ideal and favor biological ties when deciding cases.

227. 1992 J.O. 718 (Apr. 28, 1992).

228. *Id.*

229. *Id.*

230. SORCIERS, *supra* note 180, at 113.

231. *See supra* Part III.B.2.

C. Grandparents

As the legitimate family with biological children becomes an increasingly atypical family unit, French jurists and lawmakers are preoccupied with securing the rights of grandparents. Grandparents represent biological continuity through their link to the traditional family of yesteryear. Indeed, they seem to have become a symbol for the rupture²³² that stepparent adoption wreaks on the biological family. Significantly, grandparents are being accorded rights on the basis of both biological and psychological ties with their grandchildren.²³³

1. Legal Rights of Grandparents in France

In France, grandparents are viewed as both indispensable to their grandchildren's psychological development and as performing a societal function by passing on their knowledge of history and traditions. The grandchild-grandparent relationship has been eloquently summarized as "a veritable necessity" for the child's affective development.²³⁴ Grandparents are the representatives of the past:

They introduce the concept of a bygone era into the child's perspective and, at the same time, that of the continuity of life and the carrying on of generations. They give the child one of [the] first experiences of history, old age, and, later, of death and they condition the child for the death of [the child's] parents, because it is they who die first.²³⁵

As for the cultural significance of the grandparent-grandchild relationship:

[It] . . . is also . . . a tie of lineage. In their grandchildren, grandparents have the satisfaction of seeing their blood, their history, sometimes their name,²³⁶ and a part of their being perpetuated after them. Every word from a grandfather to his

232. This rupture has fiscal as well as emotional consequences. See *infra* note 241.

233. See *infra* text accompanying notes 234-51.

234. GRANDPARENTS, *supra* note 40, at 24.

235. *Id.* at 202.

236. *Id.* at 24. See Judgment of May 21, 1974, Cass. civ., 1976 D.S. Jur. 173, note Le Guidec. The *Cour de Cassation* held that grandparents, whose grandchildren were the object of an *adoption simple* by the mother's second husband, have the right to contest a court's decision that the children would henceforth use only the surname of the adopting stepparent. Article 363 of the *Code Civil* grants judges discretion to make such a choice. According to the *arrêtiste*, "[I]n this case, . . . the grandparents represent their deceased son, carrying the family name, wanting it to be maintained and protected in their grandchildren's generation." *Id.* at 174.

grandson is also a continuation of the former through the latter, which gives their relationship a particular intensity.²³⁷

Thus, grandparents serve a purpose for both their grandchildren and society-at-large. Not only do grandparents make a valuable contribution to their grandchildren's emotional formation, they also lend continuity to French life and preserve and transmit traditional French values.

2. Recent Legislative Developments

Grandparents have been mentioned explicitly in the *Code Civil* since 1970 and have been the subject of judicial decisions involving both their affective and biological roles.²³⁸ The *Code Civil* forbids parents from impeding, absent serious motives, personal relations between their child and the child's grandparents.²³⁹ When parents and grandparents are unable to agree on how these personal relations should be maintained, a court is authorized to step in and may even grant regular visitation rights to the grandparents.²⁴⁰

Not surprisingly, given the emphasis on biological relationships and the cultural importance of grandparents, French courts are sensitive to the impact of stepparent adoptions on these family members. When an *adoption plénière* is granted in such a situation, it effects a legal rupture between the child and the family of the "adopted out" parent (the man or woman not married to the adopting stepparent).²⁴¹ Prior to 1992, when facing a stepparent's request for such an adoption pronouncement, courts responded in different ways. Some refused to pronounce the requested *adoption plénière*. Instead, using their prerogative under Article 1173 of the *Code de Procédure Civile*, such courts granted an *adoption simple*, thereby leaving in place the adoptee's ties with the biological family, including both sets of grandparents.²⁴² Another approach certain courts employed was to pronounce the requested *adoption*

237. GRANDPARENTS, *supra* note 40, at 24.

238. See *infra* notes 239-40.

239. C. CIV. art. 371-4.

240. This does not mean grandparents will automatically get such rights. See, e.g., GRANDPARENTS, *supra* note 40, at 202 (describing a case in which the court canceled visitation rights for a grandmother who sought to turn her granddaughters against their mother).

241. As a consequence of this rupture, when adopted out grandparents leave property to their ex-grandchildren, higher estate taxes (60% instead of 40%) apply. *Id.* at 99.

242. "The tribunal may . . . pronounce an *adoption simple*, even if presented with a demand for the pronouncement of an *adoption plénière*." C.C.P. art. 1173.

plénière and, simultaneously, grant visitation rights to the (now former) grandparents, pursuant to Article 371-4 of the *Code Civil*. This provision gives courts the power to accord visits "in exceptional cases, to other persons, whether related [to the adopted child] or not."²⁴³

In one such case, a widowed mother left her infant son in the care of his paternal grandparents, who cared for him for the next two years.²⁴⁴ Following her remarriage, the woman's new husband sought to adopt her son.²⁴⁵ Justifying its decision to grant visitation rights to the grandparents, the court declared "the rupture of all ties with the biological family is a judicial fiction destined habitually to protect the child, but one which cannot be validly and seriously invoked, as in this case, contrary to the interest of the child."²⁴⁶ Thus, in adherence with the psychological model, the grandparents—blood relatives—were granted rights based on their psychological bonds with their grandchild.

For some *arrétistes* and other legal observers, even if the result was satisfactory, the court's reasoning was not.²⁴⁷ They believed the decision relied too heavily on the discretion of individual judges and did not *automatically* guarantee visitation rights to the grandparents.²⁴⁸ One observer viewed the threat of a rupture of the legal tie between grandparent and grandchild as an exceptional situation by definition, thereby warranting Article 371-4 visitation rights.²⁴⁹ An *arrétiste* questioned whether the court would have invoked its Article 371-4 powers if the grandparents had not cared for the child so diligently and for such an extended period.²⁵⁰

The issue of what form of adoption is to be granted to stepparents is now presumably resolved in the wake of the passage of a new law. Article 345-1 of the *Code Civil* allows a stepparent to obtain an *adoption plénière* only when the child has no legal filiation with the parent not married to the adopting individual. For example, if a woman marries (or remarries) after having a child during a previous relationship (whether marital or

243. C. CIV art. 371-4.

244. Judgment of Apr. 21, 1983, Cour d'appel, 1984 D.S. Jur. 109, note Hauser.

245. *Id.*

246. *Id.*

247. Rubellin-Devichi, *supra* note 58, at 737; Roger Nerson & Jacqueline Rubellin-Devichi, *Personnes et droits de famille*, 83 R. TRIM. D. CIV. 294, 313 (1984).

248. Rubellin-Devichi, *supra* note 58, at 737.

249. Nerson & Rubellin-Devichi, *supra* note 247, at 313.

250. Judgment of Apr. 21, 1983, *supra* note 244.

not), a court may only grant her new husband an *adoption plénière* if the biological father never established any legal filiation whatsoever (legitimate or natural) with the child. If either type of filiation was established, by whatever means,²⁵¹ the stepparent can only be granted an *adoption simple*, thereby preserving legal ties with the father's family, including the grandparents. This reform will not protect grandparents who have, or wish to develop, a relationship with grandchildren with whom their adult child fails to establish filiation. Such cases, presumably, will be rare.

V. CONCLUSION

This Article discusses how French law performs the difficult but necessary task of balancing psychological and biological ties in the context of adoption. Identical problems and issues exist in contemporary French and United States adoption: a demand for adoptable children that is greater than the available supply; increasing numbers of children spending longer periods of time in "temporary care;" and conflicting desires of the various parties to the adoption with respect to confidentiality and anonymity.

At present, tremendous upheaval and conflict exist in United States adoption law and practice. Although both biological and psychological ties are acknowledged to be significant, U.S. law does not address the question of how conflicts between the two are to be speedily resolved. Lawmakers have failed to establish clear rules with respect to the termination of unwed paternal rights, mandatory counseling and representation for biological mothers considering adoption, or postadoption contact between biological and adoptive families. This confusion results in indeterminacy and inconsistency in adoption practice, mistrust and hostility between birth and adoptive parents, and, in the most extreme instances, protracted legal battles (e.g., the battle for "Baby Jessica").

Although France is far from an "ideal biological model" society, in which procreation would serve as the sole basis for legal parentage, French law, nevertheless, expresses a consensus on the intrinsic importance of biological ties. The *Code Civil* allows both parents three months to retract their consent to adoption. As a consequence, newborn adoption is nonexistent in France because no child may be legally adopted before the age of three months. Moreover, French government policy both reflects and facilitates an increasing acceptance of unwed maternity in

251. See *supra* text accompanying notes 172-74.

France by providing counseling and financial support to single mothers before and after the birth of their children.

Differences in contemporary French and U.S. adoption may partially be explained by examining their respective origins. Unlike U.S. adoption, which, since its inception, has focused on providing homes for abandoned or orphaned children, French adoption, for much of its history, was oriented toward providing childless individuals with legal adult heirs. French law provides for two forms of adoption: *adoption plénière*, analogous to U.S. adoption, and *adoption simple*, an alternative, more limited, and less utilized form of adoption. Children adopted "simply" do not sever all ties with their biological families, but rather retain certain rights and duties toward their families and often continue to use their names. *Adoption simple* demonstrates a recognition by French lawmakers that it is not always necessary or advisable to completely sever adopted children's bonds with their biological families.

While, historically, French courts pronounced *adoptions simples* far less frequently than *adoptions plénières* (especially when very young children were involved), in the wake of the passage of a new law, *adoption simple* is the obligatory form of adoption in those stepparent adoptions where the adopted out parent previously established legal filiation (legitimate or natural) towards the child. In pronouncing an *adoption simple* in such situations, a French court grants custody, parental authority, and ultimate responsibility for the child's welfare to the stepparent with whom the child has day-to-day contact and, presumably, a significant psychological relationship. At the same time, the court maintains the child's legal ties with the family of the adopted out parent. The *adoption simple* pronouncement simultaneously preserves biological ties (and any related psychological ties) and recognizes psychological ones. In such adoptions, the adoptive family neither imitates nor completely replaces the child's biological relatives, but rather supplements their relationships by providing necessary stability and care.

The value placed on biological ties extends beyond both filiation and the family law context, reaching the French systems of inheritance and nationality. By reserving a portion of a decedent's assets for equal division among descendants, the *Code Civil* prevents parents from disinheritting their children, a protection not provided to surviving spouses. In the nationality context, although the law permits certain children of non-French parents to obtain French citizenship upon their reaching majority, following the passage of a new law, such individuals must clear additional hurdles not required of those born into French families.

The foregoing emphasis notwithstanding, there is also an increasing appreciation and recognition, by both French law and society, of the importance of psychological parenthood. Indeed, significant limitations exist in France on the power of biological ties. The most obvious limitation is the existence of adoption as a form of filiation legally equivalent to legitimate and natural filiation. Another important limitation is the requirement of maternal recognition of an out-of-wedlock child. An additional limitation is found in the noncodified practice of artificial insemination, as carried out by CECOS, a government-funded network of sperm banks. Still another limitation exists in the unusual French institution known as anonymous childbirth. This practice permits a woman to give birth and surrender her infant for adoption, thereby severing the biological link with her child, without revealing her identity on the child's birth certificate or hospital records.

Given France's traditional emphasis on biological ties, these limitations were not established easily or without conflict. In fact, an examination of French judicial decisions demonstrates that judges are sometimes unsure how to resolve such conflicts. In the adoption context, where the *Code Civil* is silent or offers insufficient guidance, some judges fall back on tradition and familiar values that favor biological ties.

The treatment of the rights of grandparents under French law demonstrates the importance placed on both biology and psychology. Grandparents occupy an important place in French society, despite, or perhaps because of, enormous changes in social customs in recent decades. Grandparents not only represent a continuity of tradition and an individual family's lineage, but, potentially, make a significant contribution to their grandchildren's psychological development.

French courts have the power to grant visitation rights to grandparents under certain circumstances. While in the past courts used various legal means to ensure that stepparent adoptions did not cut children off from their "other" grandparents, such techniques are no longer necessary. Following the passage of a new law, all requests for adoption made by stepparents will have a uniform resolution: the stepparent will be granted an *adoption simple*, unless the child has no legal filiation of any kind—and therefore presumably no psychological relationship—with the parent not married to the stepparent.

It is likely to be much more difficult to establish a consensus on the importance of preserving biological ties in a multi-ethnic, heterogeneous society such as the United States than it is in France. However, the present state of U.S. adoption law and practice provides a powerful incentive for just such an evaluation of the ultimate worth of biological ties in the adoption context.

The French example of *adoption simple* shows that setting priorities in this area need not lead to rigidity or increased conflict and hostility between biological and adoptive families. In the United States, the increasing popularity of open adoption arrangements and the willingness of adoptive parents and agencies to allow biological mothers and fathers varying levels of involvement in all phases of the adoption process indicate flexibility on the part of both adoptive and biological parents. Ultimately, however, the only way to end the uncertainty and inconsistency undermining United States adoption is for lawmakers and jurists to make hard choices and establish clear rules.

