

What's wrong with adoption law?¹

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Adoption has played a major role in the news in the United States during the last few years. In several high-profile cases, courts have ruled that children raised from infancy by prospective adoptive parents must be transferred to their birth parents on the ground that until the birth parents are found unfit, their custody rights are absolute.² No consideration can be given, the courts have said in these cases, to the interests the children and the prospective adopters have in maintaining their relationship.

Public reaction to these cases indicates a widespread sense that something very wrong is happening. Popular sympathy is with the parents who have invested years of nurturing over those whose claims are based on biology. There seems to be a clear consensus that children's interests should count for more than they appear to, and that they will be furthered by valuing nurture more and nature less.

What few seem to realize is that these cases are typical of how the adoption system works, not aberrational. We cannot look at them as isolated examples of a basically reasonable system gone awry. And we cannot hope to fix what's wrong with adoption law by tinkering with the rules about unknown or unnamed birth fathers' procedural rights or adjusting standards for determining custody when children have been living with prospective adopters for a long time.

¹This article is adapted from an article by the same name that appeared in *Trial* 19–23 (February 1994). Prof. Bartholet treats these themes at greater length in her book *Family Bonds: Adoption and the Politics of Parenting* (Houghton Mifflin, 1993). See also Bartholet, *Beyond Biology: The Politics of Adoption & Reproduction*, 2 *Duke J. Gender L. & Pol'y* 5 (Spring 1995). This article's focus is on US adoption laws and policies. For an opposing viewpoint, see Appell & Boyer, *Parental Rights vs. Best Interests of the Child*, 2 *Duke J. Gender L. & Pol'y* 63 (1995).

²See, e.g., *Petition of Doe*, 159 Ill. 2d 347, 202 Ill. Dec. 535, 638 N.E. 2d 181 (1994), *cert. denied*, 115 S. Ct. 2599, 115 S. Ct. 2600 (1995), 115 S. Ct. 499 (1994) (Baby Richard case); *In re Clausen*, 502 N.W.2d 649 (Mich. 1993) (the Baby Jessica case); *In re B.G.C.*, 496 N.W. 2d 239 (Iowa 1992) (same); *In re Adoption of Michael H.*, 8 Cal. App. 4th 1633, 11 Cal. Rptr. 2d 261 (Ct. App. 1992) (the Stenbeck Case).

What is wrong with adoption law goes to the heart of the legal regime governing this form of family. These cases can provide insight into the problems with that regime. And they can give us inspiration about the potential for legal reform. The popular reaction to these cases demonstrates that the priority the law generally places on nature over nurture and on adults' rights over children's rights is seriously out of line with the common human understanding of parenting and family.

Adoption regulation is characterized by what I call "biologic bias".³ Laws and policies focus almost entirely on the negative – on what might go *wrong* when a child is transferred from birth parents to adoptive parents. Thus regulation is designed either to protect birth parents against having their rights to their child wrongfully terminated or to protect the child against being transferred to adoptive parents who might not provide a nurturing environment. Almost no adoption regulation takes a positive or facilitating form – for example, rules designed to ensure that children who need nurturing homes receive them at the earliest possible time.

Adoption regulation is premised on an understanding that adults and adult communities have rights in children, and that children "belong" either to their birth parents or to their racial or religious or ethnic or national communities. Birth parents are given powerful, constitutionally protected rights to hold onto their children. And children are regularly talked of as "precious resources" belonging to their racial group, ethnic community, or country of origin. The various nations, and the Native American tribes within this nation, have formal jurisdiction over "their" children, and the African American community has effectively been delegated jurisdiction over the African-American children in foster care.

The rights picture

We place an extremely high value on the right to procreate and the related right to hold onto our birth children. We place relatively little value on the right to develop and maintain parenting relationships that are not based on blood. There is an essentially absolute right to produce a child, but no right to adopt.

Foster parents, stepparents, and others who develop nurturing relationships with children are deemed to have no right to maintain these relationships. These adults and the children who have come to depend on them are subject

³ See generally Elizabeth Bartholet, *Family Bonds: Adoption and the Politics of Parenting* (1993).

to the whim of the blood-linked parents. Even in situations of serious abuse and neglect, the government is reluctant to interfere with birth parents' rights.

Children have essentially no rights, although the system is supposed to operate in their best interests.⁴ Everyone knows that their best interests require nurturing homes and parenting relationships, but it is painfully obvious that children have no enforceable rights to these things.

We could flip this rights picture, up-end this hierarchical ranking of values. We could place the highest value on children and their interest in growing up in a nurturing environment. We could place a higher value on nurturing than procreation, and we might choose to do so in part because it serves children's interests.

The discrimination picture

The adoption system ranks prospective parents in terms of relative desirability, using factors that reflect the system's bias in favour of a biologic parenting model as well as a socially traditional family model.⁵ Heterosexual couples in their late 20s or early 30s with apparently stable marriages are at the top of the ladder. These are the people who can, if they are not infertile, produce children, and who should in the system's view be parents. Single applicants and those in their late 30s and 40s are placed lower on the ladder, along with people with mild disabilities. Gays, lesbians, and those who are significantly older or seriously disabled are generally excluded altogether.

The adoption screening system also ranks and categorizes children waiting for homes. The children are placed on their own desirability list, with healthy infants on the top, somewhat older and less healthy children next, and the oldest and most seriously disabled children at the bottom. Children are also classified according to race and ethnic and religious heritage. African-American parents are given African-American children, and Catholic parents are given the children of Catholic birth parents.

Discrimination is the name of the game in adoptive parenting. Those who procreate live in a world of near-absolute parenting rights. Those who would adopt have no rights. They must beg for the privilege of parenting and do so in a state-administered realm that denies them both the right to privacy and the civil rights that we have come to think of as fundamental.

Differential treatment on the basis of age, race, religion, and disability has been outlawed in almost all areas of our communal lives in the United States.

⁴Wendy A. Fitzgerald, *Maturing, Difference, and Mystery: Children's Perspectives and the Law*, 36 *AZ. L. Rev.* 11 (Spring 1994).

⁵See Barthelet, *supra* note 3, at 62-85.

Increasingly the law forbids discrimination on the basis of marital status and sexual orientation. It is only in the area of adoption that our system proclaims not simply the right to discriminate on all these bases but the importance of doing so. It is not just the prospective parents who are treated shabbily, but also the children, in whose best interests the system is supposedly designed.

The race picture

Current race matching policies constitute a national scandal.⁶ In all 50 states, public agencies insist on same-race placements, holding African-American and other minority race children for months, years, and often their entire childhood in institutional or foster care rather than placing them with waiting white families. We have been subsidizing same-race recruitment and placement for decades and have radically revised the eligibility standards for African-American adoptive parents in an attempt to place some of the waiting children. However, there are still nowhere near enough African-American families available.

The foster care population is exploding, with almost half a million children now in out-of-home care and the numbers projected to escalate rapidly in coming years.⁷ Children of colour account for half the foster care population and African-American children for over one-third.⁸

Race matching practices are doing serious damage to black children. The evidence demonstrates beyond any doubt that adoption is vastly preferable to foster care. Delay in adoptive placement has been regularly proven to be the single most important factor affecting adoptive adjustment. Studies of transracial adoption have consistently found the children flourishing and comparing well on every factor, including measures of black identity and sense of comfort with the black community, with children raised in same-race homes.⁹

Race matching advocates claim to speak for the African-American community, but there are strongly conflicting views within this community. Surveys reveal support among African-Americans for transracial placement as preferable to foster or institutional care, and very limited sympathy with the idea of

⁶ See generally *id.* at 86–117; Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) [hereafter Bartholet, *Race Matching*]; Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 *Duke J. Gender L. & Pol'y* 99 (Spring 1995).

⁷ Sara Glazer, *Adoption: Do Current Policies Punish Kids Awaiting Adoption?*, 3 *CQ Researcher* 1036 (Nov. 26, 1993); Bartholet, *supra* note 6, at 93, 242–43 nn. 2, 3.

⁸ Bartholet, *supra* note 3, at 95, 243 n. 6.

⁹ *Id.* at 101–06; Bartholet, *Race Matching*, *supra* note 6, at 1207–26.

delaying or denying adoptive placement solely because no same-race adoptive family is available.¹⁰

Race matching practices cannot be justified in the name of affirmative action. Affirmative action programmes are supposed to benefit members of the subjugated minority group. They are supposed to help us overcome our racist legacy – help us get to the point where race-conscious policies are no longer necessary. Race matching adoption practices, by contrast, do demonstrable harm to African-American children in the interest of promoting ongoing race separatism in the family.

Clearly race matters, and matters a lot, in a society that continues to be torn apart by racial hostilities. The question is what to do with the difference that race makes. Transracial families, whether formed by marriage, procreation, or adoption, are families that are intensely conscious of racial differences and human similarities. They are trying to work through, in an intimate context, issues of racial heritage and multiculturalism that our society is struggling with on many levels. States should do nothing to prohibit or discourage the formation of such families.

The federal government has recently taken an important step designed to limit the states' use of race in the adoption and foster systems. A law enacted in August of 1996 provides that race shall not be used to delay or deny child placement, and threatens states with significant financial penalties for any violations.¹¹

The international picture

International adoption is a significant part of the total adoption picture.¹² In the United States and other industrialized Western countries, the number of children surrendered or abandoned by their birth parents has been limited recently by contraception, abortion, and the increased tendency of single parents to keep their children. As a result, there are few children available for adoption compared with the numbers of people eager to adopt. In poor

¹⁰Bartholet, *supra* note 6, at 1236 n. 206.

¹¹US H.R. 3448, Small Business Job Protection Act of 1996, §1808 Removal of Barriers to Interethnic Adoption (August 20, 1996). This law replaces federal legislation enacted just two years earlier which had also prohibited use of race to delay or deny placement, but had simultaneously authorized consideration of race in placement decisions. See Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No 103-382, 551-54, 108 Stat. 3518, 4056-57 (1994) (codified at 42 U.S.C. §5115a (1996)).

¹²See generally, Bartholet, *supra* note 3, at 118-63; Elizabeth Bartholet, Center for the Future of Children, 1 International Adoption: Current Status and Future Prospects 89 (Spring 1993); Bartholet, International Adoption: Propriety, Prospects and Pragmatics, to be published in 13 *J. Am. Acad. Matrim. Law* (forthcoming 1996).

countries there are few prospective adopters, but vast numbers of children in need of homes. For most of the homeless children of the world, international adoption represents the only realistic opportunity to have a permanent family.

In recent decades, the number of children placed for adoption across national borders has increased dramatically. But this increasing openness to international adoption is colliding with a new hostility to it. The politics are similar to those in the debate about transracial adoption in the United States. Children are said to belong to their "roots" and in their communities of origin. And there is widespread acceptance of the notion that it is shameful to send homeless children abroad rather than take care of them in their country of origin.

The problems that should be seen as central to the international adoption debate have to do with the misery and deprivation that characterize the lives of huge numbers of the children in the world. Countless millions of children die of malnutrition and of diseases that should not kill, and millions more live in miserably inadequate institutions or on the streets. These are the real problems of the children of the world.

International adoption should be seen as an opportunity to solve some of these problems for some children. It should be structured to maximize this positive potential – to facilitate the placement of children in need of nurturing homes with people who can provide them.

Of course, international adoption can play only a limited role. Long-term solutions lie in reallocating social and economic resources, both among countries and within countries, so that children can more generally be cared for by their birth families. But since cosmic reordering is not on the immediate horizon, international adoption serves the interests of at least those children for whom parents can be found.

Obviously the laws governing international adoption should be designed to guarantee that adoption does not create new problems. Adoption should not be used to break up viable birth families. We need laws that prohibit baby buying, and we need procedures effectively limiting adoption to situations in which birth parents have voluntarily surrendered their child or have had their parental rights terminated for good reason.

But it makes no sense to focus solely on the problems that might be created by international adoption while ignoring the very real problems of abuse, neglect, and exploitation suffered by homeless children in the absence of such adoption. It is patently absurd to talk as if the real dangers for children were that they might be stolen or bought from their birth parents to be transferred to other adults for purposes of abuse and exploitation.

International adoption clearly represents an extraordinarily positive option for the homeless children of the world. Most of these children will not be

adopted otherwise. They will instead live or die in inadequate institutions or on the streets. To the limited degree that foster care is available in these countries, it is likely to be no better than foster care in our country and is often much worse, amounting to little more than indentured servitude.

Critics of international adoption engage in false romanticization in talking about the dangers of tearing children from their ethnic and cultural roots and their communities. These children do not live in richly supportive communities where they have an opportunity to appreciate their ethnic and cultural heritage; they live in states of near-total deprivation. Those who survive to grow up are apt to face virulent forms of racial and ethnic discrimination in their own countries, based on their racial or ethnic status or simply on the fact that they are illegitimate or orphaned.

Similarly false romanticization is involved in the concern expressed about adopted children losing their national identities. The fact is that the United States is seen as the land of opportunity for many adults in the countries that have large numbers of homeless children. Life is hard for most people who live in place devastated by poverty, war, or natural disaster. Many of these people would emigrate to the United States if they could.

The evidence provides no support for the critics of international adoption. The research shows that internationally adopted children and their families function well and compare well on various measures of emotional adjustment with other adoptive families and with biologic families.¹³ These are striking findings, since most international adoptees have had problematic pre-adoptive histories that could be expected to cause adjustment difficulties. The studies show that adoption has for the most part been extraordinarily successful in enabling even those children who have suffered extremely severe forms of deprivation and abuse in their early lives to recover and flourish.

In the end, it is clear that the debate over international adoption has little to do with genuine concerns about risks to children. There can be no doubt that international adoption serves children's interests. If these interests were actually to govern adoption decisions, as they are supposed to, we would eliminate current barriers to international adoption and facilitate placement of children needing adoptive homes.

The debate instead has to do with how national communities perceive their group interests. Children are the innocent victims, pawns sacrificed to notions of group pride and honor. Poor countries feel pressure to hold onto what they term "their precious resources". Rich countries fear doing anything that might look like colonialist exploitation.

¹³ Bartholet, *supra* note 3, at 158, 249–50 n. 23; Bartholet, *International Adoption: Propriety, Prospects and Pragmatics*, *supra* note 12, TAN 50–57.

However there is no genuine clash between the interests of the sending and receiving nations. International adoption serves a *symbolic* function for those in power. Sending countries can talk about their homeless children as precious resources, but it is entirely clear that the last thing they need is more children to care for. Clamping down on international adoption constitutes an easy, relatively cost-free way, though, to stand up to the United States and other industrialized nations.

At the same time, rich countries have no burning need for these children; international adoption is not seen as serving any significant national interest. So the homeless children end up as “resources” that the receiving countries are quite willing to give up to further the national interest in improved relations abroad.

We should stop thinking of children as resources belonging to their racial or ethnic or national community of origin. We should take seriously the principles enshrined in international human rights documents that recognize children’s rights to a loving, nurturing environment and that purport to make children’s best interests determinative in matters relating to adoption.

Sending and receiving countries need to agree on a legal framework for international adoption that would facilitate placement. The model should be one in which each of the key decisions in the adoptive process is made carefully by a responsible agency and then deferred to by all others. All duplicative processes should be eliminated.

Agreements that already exist between some sending and receiving countries provide examples of how two nations’ laws can be coordinated to ease the adoption process. Receiving countries should revise their adoption, immigration, and naturalization laws to remove impediments to international adoption.

For the United States, this would mean development of specific agreements with other nations, either under the aegis of the new Hague Convention on intercountry adoption¹⁴ or apart from it.

We should also move swiftly to eliminate the immigration law provisions that now restrict US citizens to adopting only those children who satisfy the narrow orphan definition.¹⁵ These provisions exclude all children who in some technical sense have two parents – even if those parents are demonstrably unable or unwilling to care for their child and are eager to arrange for adoption.

This restriction is an anomaly: Virtually all jurisdictions in the United States and throughout the world permit parents to surrender their children for adoption without regard to whether the child has one parent or two.¹⁶

¹⁴Convention on Protection of Children and Cooperation in Respect to Intercountry Adoption, May 29, 1993, 32 I.L.M. 1134.

¹⁵8 U.S.C. §1101(b) (1)(F) 1995, Cong. R. H11387 §457; 8 C.F.R. §204 (1996).

¹⁶See Bartholet, *supra* note 3, at 147–48.

The United States should eliminate this irrational limit on adoption and treat all children found to be available for adoptive placement by appropriate authorities in foreign countries as eligible for an immigrant visa.

We should revise our laws to ensure that other countries' adoption decisions are honoured by our courts, so foreign adoptees are expeditiously given the full rights of a child adopted within the United States, and so adoptive parents are spared the necessity of duplicative adoption proceedings. We should develop simple procedures to ensure that every foreign adoptee receives an English-language birth certificate from a US agency upon submission of a foreign adoption decree. We should make US citizenship automatic upon completion of adoption, just as it is now automatic for all children born to US citizens whether they are living here or in other countries.

And we should build into the new agreements that we develop with other countries mandates that push everyone to streamline the adoption process in recognition of the fact that children deserve nurturing homes now. Delay hurts, and it may do permanent injury.

Breaking down the barriers

Powerful forces in today's world are aligned against adoption. For example, the adoption search movement, which advocates for open adoption records, has been extremely successful in getting out the message that biology is fundamental in defining the meaning of parenting. The movement's most vocal leaders argue vehemently that all parties to adoptions – birth parents, adoptive parents, and adoptees – suffer profound and permanent damage as a result of the breach in genetic continuity that adoptive arrangements involve. These leaders have called for the elimination of adoption as we know it today and have urged its replacement by permanent guardianship, arguing that children should be kept with their birth parents under almost all circumstances.¹⁷

Recent developments in the law have expanded unwed fathers' rights to claim custody over their birth children. It is because of this shift in the law that in a number of recent cases children placed in adoption have been taken from the adoptive parents and transferred to birth parents despite findings that the child's best interests would have been served by the adoption.¹⁸

The current tendency to glorify group identity and to emphasize the importance of ethnic and cultural roots has made transracial and international

¹⁷ Annette Baran & Reuben Pannor, *It's Time for Sweeping Change*, Am. Adoption Cong. Newsl., Summer 1990, at 5.

¹⁸ See, e.g., cases cited supra note 2.

adoption newly suspect. Adoption critics have focused on the potential for exploitation that they see inherent in adoption because it so often involves the transfer of children from less- to more-privileged people, from black- and brown-skinned families to white families, and from Third- to First-World nations.

But while adoption may arise out of situations that are socially and economically unjust it does not cause that injustice. And anti-adoption policies do not help alleviate that injustice. Thus it does not help birth mothers to tell them that they cannot or should not relinquish their child for adoption, without regard to whether they are in a good situation to raise a child. Adoption, like abortion, may be the best choice available to them. Current policies preventing transracial adoption are not likely to help the African-American community in this country. Indeed by holding black children in inadequate institutions and foster care rather than giving them good permanent homes, we are harming not only those children but in the long run the larger racial community. Children who grow up without nurturing homes are children at risk – children who are far more likely to contribute to the cycle of poverty and destruction than to become happy and productive members of society or leaders in their communities. Closing down international adoption does not put poor countries in a better economic position or a better power position with respect to foreign governments. It is simply a symbolic gesture “for” the nation and “against” the foreigners. It is a gesture that, like other anti-adoption moves, is easy and cheap to make because the children at issue have no political clout; their voices are not heard.

We need to eschew the symbolic politics now being practised in the adoption arena. We need to recognize that adoption in fact generally works extremely well for all parties to the arrangements – for birth mothers and for impoverished countries not in a position to care for children in need, for the infertile and for others interested in parenting, and most of all for children. And we need to revise our adoption laws radically to reflect this reality.