Adoption Practice, Issues and Laws 1958-1983

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In the past quarter of a century, since the founding of the Section of Family Law, the changes in American society and in adoption have been dramatic. Currently, hardly a week passes without a media account of one of the explosive issues in the field of adoption. Such open discussions were taboo everywhere twenty-five years ago. This article deals with the evolution of adoption from its ancient historical roots to the revolution going on in present-day America. It concludes with the challenges facing the professionals who deal with the adoption of children and the new problems of the adoptive triad.¹

I. Legal Roots and Historical Development

The practice of adoption is traceable back to antiquity: it was recognized in the Babylonian codes of Hammurabi² and legally regulated in Greece, Egypt, and Rome.³ In ancient Greece and Rome the purposes of adoption differed substantially from those emphasized...

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1. The adoptive triad is composed of the relinquishing parents, the person to be adopted, and the prospective adoptive parents.
2. One of the earliest recorded provisions for adoption appears in the Code of Hammurabi, 2285 B.C.:
   Section 185. If a man has taken a young child “from his waters” to sonship and has reared him up no one has any claim against the nursling.
   Section 186. If a man has taken a young child to sonship and when he took him his father and mother rebelled, that nursling shall return to his father’s house.
today. Then, the main objective was continuity of a particular family's male line. Persons adopted were usually male and often adult, in contrast to modern-day adoption of infants and children of either sex. Although references to adoption can be found in almost all ancient law, it is to the Roman Empire, with its highly organized institutions, that one must look to find a full account of the evolution of adoption in a society. Indeed, Roman laws offer an interesting parallel to U.S. adoption laws because their gradual changes reflect the changes in the social structure of that era, as ours mirror the societal needs of our increasingly complex nation.4

Roman adoption served the dual purposes of preventing the extinction of a family line and of perpetuating ceremonial ancestor worship. Roman law recognized two kinds of adoption: adrogation (adrogatio) and adoption (adoptio). Adrogation was the adoption of a person who was sui juris and independent. The person adrogated lost his independence and came under the patria potestas of the adrogans or adopting father. The other kind of adoption, adoptio, applied to the alieni juris or dependent person. Adoptio removed the adopted child from under the power of the paterfamilias and placed him within the patria potestas of a new family head. In both instances, the adoptee became the son and heir of the adopter. Under the Empire and Republic adoptio was effected after the father fictitiously sold his son three times, or his daughter and grandchild once. The individual's rights were strictly controlled by the head of his new family, who demanded absolute loyalty. By the time of Justinian, about 500 years after Christ, the individual was regarded much more clearly as a member of society than as a member of his family. This shift in allegiance and loyalty was reflected generally in Justinian's code of law. Specifically with regard to adoption, Justinian introduced a simpler proceeding before a magistrate in which the adopter, the adopted, and the natural family head were all required to participate. Under Justinian's code the adoptee could and usually did retain the right of inheritance from his birth father even after the adoption. Although the strength of the nuclear family was replaced by the power of the larger society, the adoptee's retention of the right

of inheritance from his birth father recognized the emotional importance of a person's origins and heredity. Today this Justinian approach would be called an "open adoption" with no secrecy.

While most U.S. laws are derived from English common law, adoption is one exception. As a social process and a legal institution, adoption never formed part of the English common law. As late as 1891, the Supreme Court of California held that adoption was "unknown to the common law and repugnant to its principles." As Professor Henry H. Foster has observed, early U.S. adoption laws used Roman law as a guide, with one important and basic difference: Roman law was based upon the needs and rights of the adoptive parents; whereas American law, from the beginning, protected the welfare of adopted children.

At the time of the founding of the Section of Family Law, modern state adoption laws were just over one hundred years old. In 1851 Massachusetts enacted the first "modern" state adoption statute which rendered public what had been private by providing for judicial supervision over the adoption process. Before its passage, adoption had been "a private legal act, like a conveyance of real estate or a commercial contractual transaction." Ben-Or asserts that the first known case of adoption in a common law state was in the colony of Massachusetts in 1693, when Governor Sir William Phips of Massachusetts mentioned his adopted son in his will. In 1716 this adopted son had his name changed in a private act in the General Court.

The term "adoption" [appeared] in the private document of the adoptive parent—his last will and testament and in the act of the legislature which not only ratified the adoption by approving the change of name of the adopted son, but also specifically added the words "as if. . . he had descended from the

5. Id. at 27.
6. Id. at 28.
7. To the British, blood lines were so important that legal adoption was not accepted until the Adoption of Children Act of 1926. The clear preference in inheritance was a blood-line successor, however distant in relationship. In extremely unusual cases, where it was absolutely imperative to provide an heir, illegitimate offspring of family members could, through complicated steps, be made legitimate heirs." Id. at 28. See also S. Katz, When Parents Fail 114 (1971).
8. Ex parte Clark, 87 Cal. 638 (1891).
10. Katz, Rewriting the Adoption Story, 5 Fam. Advoc. 9 (Summer 1982).
said Sir William Phips any Law usage or Custom to the contrary Notwithstanding."

Hence, for nearly 150 years before 1851, the Massachusetts General Court systematically recognized adoption as sufficient and valid grounds for a petition for change of name and passed numerous private acts in recognition thereof.

However, for hordes of orphaned children, placement with nonrelatives did not provide them with loving care or lead to any private petition before a state legislature for change of name. By the mid-1800s many east coast cities were plagued by gangs of street urchins. New York City in 1850 had about 10,000 vagrant children, wandering homeless, committing minor crimes, and living in great misery. The Reverend Charles Loring Brace of New York is credited with developing the "placing-out" system. Children's aid societies rounded up thousands of children and sent them west to farms where their hands were welcome. Newspapers of the day carried advertisements for children wanted for adoption, and parents either sold or gave them away. No legal regulations existed to control the wholesale distribution of children to uninvestigated homes where they were used as cheap labor.

Thus, while the Massachusetts Adoption of Children Act of 1851 did not introduce the institution of adoption to the laws of Massachusetts, it did transfer jurisdiction to the probate court and codify customary rules for "existing legal procedures—of indenture for the transfer of parental obligations, of the last will and testament for the transfer of inheritance, of private acts for the change of name." It became a model for legislation in most of the common law states in the United States. Its clear directive and grant of power to the court to determine whether petitioner(s):

are of sufficient ability to bring up the child, and furnish suitable nurture and education, having reference to the degree and condition of its parents, and that it is fit and proper that such adoption should take place. . . .

12. Id., at 265.
14. Ben-Or, supra note 11, at 268-269.
established the "best interest" formula as a hallmark of American adoption.

Today in the United States, though the motivation to adopt may still include an interest in continuing a family line, the key focus is upon creation of a parent-child relationship between adopting couple or single person and the adopted child. Professor Katz, writing at page 10 in the Summer 1982 issue of the Family Advocate, concluded with the statement:

In any discussion of adoption, however, we must not lose sight of its primary goal: to provide a permanent, secure, and loving home for a child whose birth parents are unable or unwilling to meet the child's needs. Throughout the process of change, we must never cease to ask the basic question: "Is it well with the child?"

It must be noted that such concern for the welfare of the child is a totally modern concept. Unwanted children were once disposed of by infanticide. Historically, children were recognized only as property or "chattel" of their parents or as wards of the state.16

Adoption as a Child Welfare Service

The term "child welfare" may be used to refer to: "(1) a field of services; (2) a specialized form of social work practice adapted to the needs of service programs for children; (3) the over-all well-being of children; or (4) the policies and activities that contribute to the well-being of children."17 For the purposes of this article "child welfare" refers to the specialized social work practice (protective services, foster care and adoption) which addresses the needs of a small proportion of children in the United States who belong to a minority of families unable or unwilling to adequately care for them.

During the hundred years between the 1850s and the 1950s adop-

16. "Roman law gave the father absolute control over his child, whom he could sell or condemn to death with impunity. This concept of absolute right carried over into English law, where it prevailed until the fourteenth century without appreciable change. In the Middle Ages childhood was not seen as the unique phase of life we now consider it to be. It was customary to send children as young as 7 into service or apprenticeship, where learning was secondary to the labor a child performed for his or her master. . . . It was not until the sixteenth century that children began to be looked on as being of particular interest, having important and specific developmental tasks to perform, and being worthy of affection." A. DERDEYN, Child Custody Contests in Historical Perspective, in ANNUAL PROGRESS IN CHILD PSYCHIATRY AND DEVELOPMENT 714 (S. Chess & A. Thomas eds. 1977).

tion became both a legal process and a child welfare service governed by state laws which typically required the following:

1. **Consent** of the birth parent or guardian (and of the older child over twelve or fourteen years) to assure that parental ties are not severed improperly or under duress;

2. An **investigation** (or social study) conducted by the placing agency to determine the suitability of the prospective home according to statutory criteria;

3. A probationary **trial period** in the adoptive home under appropriate supervision;

4. Issuance of a **final decree**, withheld pending evidence of satisfactory adjustment of adoptive parent and child to one another; and

5. **Secrecy** of the legal proceeding and provision for alteration of the child’s birth certificate.

It was believed that such a scheme protected children against being adopted by unsuitable persons, being casually removed from their natural homes, or being improvidently transferred by their parents into the custody of others. Responsibility for the required investigatory home study and supervision of the probationary trial period in the prospective adoptive home came to be vested in public and private licensed child welfare agencies, staffed by child welfare professionals. American adoption laws and practices attempted to make law mirror biology.

This tradition was based on the notion that the adopted child, by physical appearance alone, could have been the birth child of the adoptive parents. The adoptive parents were supposed to be people who, by physical appearance and age could have conceived the infant. Thus adoption laws were designed to imitate nature.  

Over the past fifty years, two organizations greatly shaped the growth and work of adoption agencies in the United States: the Child Welfare League of America, a privately supported national organization of affiliate member agencies, and the Children’s Bureau, a federal agency that is part of the Department of Health and Human Services, successor to the Department of Health, Education, and Welfare. However, it must be noted that the development of and preference for licensed agency placements did not erase the

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practice of independent, private adoptive placements which have continued on a parallel course.

**Private or Independent Adoptions**

Private placements reflect the recognized right of a birth mother to choose to give her child to whomever she wishes. But, often the "private" or "independent" adoptive placement is nothing but a legal fiction that deems a direct placement is made whenever a natural parent voluntarily consents to a placement arranged by an attorney, physician, clergymen, or other third person intermediary chosen by the natural parent. Such independent placements often come under legislative scrutiny because of concern that trafficking in children leads to the making of illegal profits at the expense of a child's welfare.

Some commentators are careful to divide the independent private placement practice into two categories: the "gray market" and the "black market." "Black market" refers to placements made by a middleman, a "baby broker" engaged in the business of providing babies for eager prospective parents. "This middleman has no altruistic reason for being in the baby business. He is in the trade for the profit and his fees are often exorbitant." In contrast, "gray market" refers to what is probably the majority of independent placements arranged "without profit by well meaning parties, friends, relatives, doctors and lawyers" in states recognizing such activity to be legal.

It is interesting to contrast the social scene of the mid-1800s that contributed to enactment of the first U.S. adoption laws with the

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19. In a sense, "private placement" is a misnomer, since most adoption agencies are also private institutions. This phrase, however, has come to mean that no agency or institution is involved in the placement and is synonymous with the term "independent adoption." See Note, Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Gray-Market Adoptions? 18 DUQ. L. REV. 629, 630 f.n. 8 (1980) [hereinafter cited as Independent Adoptions]. See generally, W. MEEZAN, S. KATZ & E. RUSSO, ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS (1978) [hereinafter cited as ADOPTIONS WITHOUT AGENCIES] and H. WITMER, E. HERZOG, E. WEINSTEIN & M. SULLIVAN, INDEPENDENT ADOPTION: A FOLLOW-UP STUDY (1963).


21. Grove at 118.

22. Id.
social phenomena of the mid-1900s that spurred the development of and increase in the number of independent adoptions. As noted earlier, activities of the early children’s aid or “foundling societies” were indicative of a beginning larger movement for child welfare, of which passage of the early adoption statutes represented a part. This movement came about as a result of economic changes which made the stop-gap institutions of apprenticeship, service, and indenture unable to cope with the great numbers of children who had been neglected by their families (often due to abject poverty) and who were neglected, until the middle of the nineteenth century, also by society and the state.

At the end of the mid-1950s, public and private adoption agencies still followed intake policies and procedures which had the effect of limiting adoption to the perfect or near-perfect baby by the perfect prospective adoptive parents—infertile, but well adjusted, and well enough established in their community and career to be considered financially stable. Basic changes in agency philosophy were just beginning to result in placements earlier than after the first year of life. But these agency policies and procedures, coupled with fewer children being born or available during the Second World War years, contributed to a rise in independent adoptions with some high-priced “black market” operations which took advantage of the desperation of childless couples. An early 1950 Yale Law Journal student comment, “Moppets on the Market,”24 focused on this as a problem. And in 1955 the black market received notoriety when many sordid black-market incidents were divulged during U.S. Senate hearings led by Senator Kefauver.25

During the late 1950s and 1960s when many babies were available for adoption, independent adoptions declined; couples were actively sought by agencies and the waiting periods were not long. But in the 1970s increased availability of contraceptives and abortion, along with a generally declining birth rate, drastically reduced the supply of infants available for adoption. Many single parents, as the stigma of having a child out of wedlock lessened, made decisions to keep their

23. Presser, supra note 13, at 472.
babies. Prospective adoptive parents now were faced with interminably long waits or were offered older children with "special needs" who usually had come into the foster care system because of adjudicated abuse and neglect or abandonment. Due to all these factors, reduction in the supply of "ideally adoptable infants," with no appreciable reduction in the numbers of applicants seeking to adopt, forced many again to resort to illegal black market adoptions as the only means of procuring a child. 26

While enactment of the first state adoption statutes was part of an emerging child welfare movement to protect children by placement in approved homes, the growth today of independent adoption is both a reaction to established agency practices and policies and a response to the reduced supply of preferred infants. Despite rhetoric about providing a loving home for a child and meeting the needs of birth mothers who desperately desire an opportunity to continue their lives free of unwanted parenthood, the true focus of independent adoption is to service the needs of the adopter(s). 27

II. Significant Societal Changes and Shifts in Adoption

Adoption Issues in the 1950s and 1960s

During the early years of the Section of Family Law the questions that dominated discussions of adoption included:

Who may adopt? Who may be adopted? How important is it to match religion or race? When is a birth parent's consent unnecessary to complete adoption? Under what circumstances can a birth mother revoke her consent after she has relinquished her child? 28

Traditionally, all states required both parents of a legitimate child to give their consent to an adoption, unless their parental rights had been judicially terminated. Historically, only the mother of an illegitimate child had to consent to an adoption and the unwed father neither had to give consent nor was he given any notice or opportu-

26. SOROSKY et al., supra note 4, at 35. See also Landes & Posner, The Economics of the Baby Shortage, 7 J. LEGAL STUD. 323 (1978); and for further discussion of the supply and demand in the baby market, see STAFF OF THE SUBCOMM. ON CHILDREN AND YOUTH OF THE SENATE COMM. ON LABOR AND PUBLIC WELFARE, 94th Cong., 1st Sess. REPORT ON FOSTER CARE AND ADOPTIONS: SOME KEY POLICY ISSUES. 21 (Comm. Print 1975).


nity to challenge a pending adoption. Also traditionally, adopters were married couples, except perhaps for a single-parent adoption by a surviving step-parent or surviving grandparent, or by another relative following the death of one or both parents.

Traditional views about race and religion had already been subjected to reexamination due to the many transracial adoptions involving Asian children after the end of the Korean War. Beginning in 1956, thousands of Korean orphans or abandoned Korean children were brought to the United States and placed in American homes by voluntary organizations. Between 1958 and 1967 hundreds of American Indian children were placed in white homes through the Indian Adoption Project. Indian activist groups have since severely criticized findings by David Fanshel that these Indian adoptions were positive for the Indian children and their adopting parents. Perhaps even greater controversy was aroused by the upsurge in transracial adoptions of black children into white homes resulting from the civil rights movement of the mid-1960s. Sorosky, Baran, and Pannor report that between 1969 and 1971 the number of such transracial adoptions increased 40 percent. One of the first program priorities of the National Association of Black Social Workers, organized in the early 1970s, was to stem the tide of such transracial adoptions and to commence vigorous campaigns to increase the availability of black adoptive homes by educating agencies to the need to modify their policies and practices that formerly often disqualified black applicants, many of whom had relatively low incomes.

ABA POLICY STATEMENTS AND PUBLICATIONS
As noted earlier, there was no shortage of adoptable babies during the 1950s and 1960s, and most independent adoptions were "relative adoptions" which would not today be characterized as "black market." Yet as early as 1955, Wilbur M. Brucker, chairman of the ABA Standing Committee on Professional Ethics and Grievances, in replying to Attorney Joseph G. Gorman of California, unequivocally stated, "[I]t is the opinion of our Committee that it would be a viola-

29. SOROSKY et al, supra note 4, at 202.
tion of Canon 6 [of the Canons of Professional Ethics] for a lawyer to represent both the natural parents and the adopting parents in an adoption."31

It was routinely accepted that the local community or state should provide "adoption services through a duly-organized, legally controlled and licensed social agency in, or through which the several professionals essential to a sound adoption service work together—law, social work, medicine."32 Hence, the first policy statement, "Responsibility and Reciprocal Relationships in Adoption—Lawyer and Social Worker," developed by the Section of Family Law and approved by the ABA Board of Governors on October 8, 1964 (with a directive to issue and implement the statement through the National Conference of Lawyers and Social Workers), did not recognize a bona fide attorney role outside of an agency placement.

One of the most important recommendations (among several contained in the document) is the fourth point of the stated relevant considerations. . . . While recognizing that, in some jurisdictions, individuals, as such, may place or otherwise facilitate the adoption of minors, it should be emphasized nonetheless that social workers and lawyers, individually or jointly, when acting as individuals and not in cooperation with a qualified child placement agency . . . do not have the facilities and resources necessary to provide protection and services needed by all persons affected by the adoption.33

The concluding paragraph of this statement stressed that:

Both the lawyer and the social worker, jointly and severally, individually and through their respective professional associations and other appropriate

31. Wilbur M. Brucker letter of May 31, 1955, reprinted in Forum: Adoptions. 32 CAL. STATE BAR J. 343-344 (1957). Other relevant excerpts in response to Mr. Gorman's inquiry about the ethics of an attorney representing both the natural parents and the adopting parents in an adoption matter are:

". . . the ethical considerations are contained in Canon 6 of the Canons of Professional Ethics which forbids a lawyer from representing conflicting interests.

The adoption of a child is a matter of considerable importance. . . . The interests of the child are considered paramount. . . .

While it may appear in the ordinary case that no conflict of interest will arise between the natural parents and the adopting parents, it is inherent in the proceeding itself that the interest of these two sets of parents are not identical, but are legally separate and distinct. . . . Under these circumstances a lawyer who would represent both sets of parents would be representing conflicting interests. He could not render singleness of representation to one set of parents without subordinating the interests of the other set of parents. Also, the nature of this proceeding. . . . is such that the public interest is involved.

While Canon 6 can be waived by express consent of all concerned, given after full disclosure of the facts, manifestly this exception cannot be satisfied where the public is involved. It is impossible to obtain public "consent" and it certainly cannot be presumed."32


33. Id. at 104.
bodies, have an obligation and responsibility to devote their skills and their efforts to an improvement of adoption laws, principles, practices and procedures, and agency and institutional facilities and resources, so that society's concern for the well-being of the family may be reflected in the quality of community services provided in its behalf. 34

Three years later, in May 1967, the House of Delegates and the Board of Governors of the ABA approved in principle "A Guide for Collaboration of Physician, Social Worker and Lawyer in Helping the Unmarried Mother and Her Child." This guide, as amended at an Interprofessional Meeting at the Children's Bureau on May 25, 1966, was approved by the Family Law Section Council and membership at their meetings in Montreal in August 1966. Representatives of the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, the American Bar Association, the American Medical Association, the Child Welfare League of America and the Children's Bureau worked to develop this guide and sought approval by their organizations. The same above-quoted language regarding social workers and lawyers from the Section of Family Law's 1964 policy statement is repeated in the guide with an additional reference to physicians. The guide also specifically stipulated that:

The lawyer for the unmarried mother is responsible for counseling her regarding the legal consequences of keeping or of giving up her child and of her legal rights in respect to the putative father. If she releases the child for adoption, he must be sure that all legal requirements are met. *He should not represent the prospective adoptive parents.* If social services are available the lawyer should *avoid becoming involved with the placement of the infant or acting as an intermediary* (emphasis added). 35

The first four volumes of *Family Law Quarterly* all carry an "Annual Review of Decisions and Statutory Revisions Affecting Adoptions" covering the period September 1, 1965 to August 1, 1969. Felix Infausto, as chairman of the Section Committee on Adoption, and Mildred Shanley, as vice-chairman, prepared the first two surveys; the third and fourth reviews were authored individually by Chairman Infausto. The 1965–1966 review begins:

Decisional law . . . and statutory law [of the period] . . . reaffirm the principle that the states' primary concern in relation to the adoption of children is the promotion and protection of the best interests of the children affected. It is

34. *Id.* at 108.
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directed towards safeguarding the children's right to remain with their natural families, secure from intervention by the state so long as they are loved and receive proper care; their right to have their relationship to their natural families terminated when they are not loved or properly cared for by them; their right to a home in which they would have the opportunity to develop spiritually, morally, emotionally, intellectually and physically; their right to property as members of their new families; their right to privacy. 36

The survey then covered both involuntary and voluntary termination of natural family relationship; notice of adoption proceedings; the fitness of adoptive parents; the effect of adoption in creating a new legal relationship and clearly establishing the right to inherit from and through the adoptive parents; the necessity for confidentiality "to protect the child and his adoptive family from harassment" and abrogation of an adoption decree. Infausto and Shanley concluded that legislatures were enacting:

appropriate new laws for the further protection of children and the states' courts in their role as parens patriae [were continuing] to resolve questions on the basis of what is in the best interests of the children concerned, whether those questions [arose] in adoption proceedings, in proceedings to terminate parental rights or in other proceedings or actions. 37

However, when Chairman Infausto commented in the third review on new statutory and decisional law affecting adoptions during the period September 1, 1967, to December 31, 1968, he noted that legislative enactments and court decisions reflected efforts "to promote the best interests of adoptive children on the one hand, and to protect the rights of their natural and adoptive parents, on the other hand" (emphasis added). 38 Thus, at the end of the 1960s, the need to safeguard and equitably balance the sometimes conflicting interests of members of the adoptive triad was gaining recognition. And, in the fourth and final annual review to appear in Family Law Quarterly. Chairman Infausto noted that "the best interests of the child, fortunately, continues to be the guideline universally followed by both the legislatures and the courts of the several states," 39 although the rights of the natural and adoptive parents could not be ignored.

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37. Id. at 21.
Issues of the 1970s and 1980s

THE UNWED FATHER: CONSENT AND NOTICE

Undoubtedly, one of the major legal issues during the decade of the 1970s involved the unwed father and the consent requirement. As previously noted, only the consent of married parents (unless parental rights were involuntarily terminated because of adjudicated unfitness) was a necessary prerequisite for any adoption. Consent of the unwed father was not required: the unwed mother's relinquishment decision, if free from duress or other pressure, was sufficient. It was thought unfair to subject a child and prospective adoptive parents to the trauma of a disrupted placement because of a revocation of parental consent prior to finalization of the adoption decree. Adoptive parents were deemed entitled to assurances from the adoption agency that adoption was the suitable plan for any child placed with them and, moreover, that the child was legally free to be adopted.

Stanley v. Illinois. 405 U.S. 645 (1972), while not an adoption case but one of neglect and dependency, was a major case of the decade to affect adoption law. Stanley, for the first time, accorded the unwed father Fourteenth Amendment due process and equal protection rights to notice and a hearing on his parental fitness before losing custody of his children. 40 Kenneth R. Redden in Federal Regulation of Family Law states that:

Stanley left three critical questions unanswered. First, what was the scope of the substantive constitutional rights afforded to unwed fathers in adoption proceedings? Second, did the rights of unwed fathers spring from the equal protection clause or from the due process clause? Finally, to what extent are notice and opportunity to be heard to be extended to unwed fathers in adoption proceedings?

The impact of Stanley led to a variety of reactions by state courts and legislatures. 42 Nearly half of the states enacted statutes that required notice only to the unwed father who is either known, identified by the mother or has acknowledged the child. 43 On the other

40. 405 U.S. 645, 657, n.9 (1972).
43. Id. For such post-Stanley legislation see ALASKA STAT. §§ 20.15.040; 20.15.050 (Michie, 1975); COLO. REV. STAT. ANN. §§ 19-6-125 (Beadford-Robinson, 1973); MICH. STAT. ANN. § 27.3178 (555.31) (Callaghan, 1980); MINN. STAT. ANN. §§ 259.26; (Sloom 1) (WESL, 1971). See generally ADOPTIONS WITHOUT AGENCIES, supra note 19, at 150-152.
hand, some states took a broad view of Stanley, similar to section 48.425 of the Wisconsin Children’s Code of 1975 or section 24(e) of the Uniform Parentage Act. A small group of states ostensibly treat the unwed father and unwed mother the same with regard to consent. But close examination of cases under these statutes indicate that various procedures are utilized to move an adoption forward without the consent of a putative father. For example, California amended its consent statutes in 1975 to remove the distinction between parents of illegitimate and legitimate children. Under section 7004(a) of the California Civil Code a child having a “presumed father” cannot be adopted without the consent of both parents if living. But section 7004 also requires the unwed father to “receive the child into his home and openly hold out the child as his natural child” in order to come within the definition of a “presumed father.” Otherwise, an adoption may go forward with only the mother’s consent. Thus, although immediately following Stanley there was grave concern that the adoptive process could be indefinitely delayed while the putative father was sought, and for a time, virtually all adoptions were stymied in some states, it is now evident that in practice the unwed father’s consent is required only in limited circumstances. In the vast majority of states the burden is upon the unwed father to affirmatively assert his paternal interests in his child before his parental rights in that child will be recognized or guaranteed by the state.

The United States Supreme Court did not give any further guidance regarding the rights of unwed fathers until the 1978 and 1979 decisions of Quilloin v. Walcott and Caban v. Mohammed. Stanley, Quilloin and Caban, however, are of questionable application to adoption cases involving recently born children. Indeed, without so deciding, the Caban majority hypothesized tenuously that the interests of unwed fathers and unwed mothers might be distinguishable in proceedings for the adoption of a newborn child. Redden concludes that:

Caban did not equate the rights of unwed fathers and mothers to consent to

45. Such states include California, Delaware, Illinois, Michigan, Montana, Rhode Island, Utah, Virginia, Washington, and Wisconsin.
47. 441 U.S. 380 (1979).
48. Id., at 392.
adoption in all contexts. Rather, the decision restricted its scope to adoptions of older children where the father has established a substantial relationship with the child. Therefore, a state adoption statute that distinguished between the rights of unwed mothers and unwed fathers in the adoption of newborns would probably be constitutional, by the present Supreme Court’s formulation, as long as it provided adequate protection for the rights of unwed fathers of older children.\footnote{49}

A balance must be struck between the necessity of giving the unwed father opportunity to be heard on custody matters and the need to facilitate an expeditious placement of the child. The U.S. Supreme Court accepted *Lehr v. Robertson*\footnote{50} and *Kirkpatrick v. Christian Homes of Abilene, Inc.*\footnote{51} On April 12, 1983, the Supreme Court vacated the judgment of the Court of Appeals of Texas, Eleventh Supreme Judicial District, and remanded the *Kirkpatrick* case for further proceedings to determine whether under Texas’s voluntary legitimation statute (TEX. FAM. CODE ANN. § 13.10-13.09) petitioner father may obtain a decree designating himself as the father of his child. Perhaps *Lehr* may further clarify what rights are due a putative father and whether he can veto the plans of an unwed mother to relinquish a child for adoption.

THE CHANGING ADOPTION POOL: SPECIAL NEEDS CHILDREN

As discussed *supra*,\footnote{52} the numbers of newborn infants offered for adoption declined during the 1970s. Research data collected by the Child Welfare League of America\footnote{53} showed that more children entered the foster care system annually than left it either to return to their biological families or to move into new adoptive homes. Two major reasons were identified to explain this situation: (1) many of these children were in “special circumstances”\footnote{54} and could not be

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\footnote{49} REDDEN. *supra* note 41, at 81–82.

\footnote{50} *Lehr* was decided on June 27, 1983. 9 FAM. L. REP. (BNA) 3077 (June 28, 1983). See *infra* note 87 for the holding of the case.

\footnote{51} No. 82-647, petition for certiorari filed October 12, 1982. 9 FAM. L. REP. 2110 (BNA) (December 9, 1982).

\footnote{52} See text accompanying note 26 *supra*.

\footnote{53} See E. SHERMAN. R. NEWMAN. A. SHYNE. *CHILDREN ADrift IN Foster Care: A STUDY OF ALTERNATIVE APPROACHES* 3 (CWLA Research Center 1973).

\footnote{54} “Special circumstances” refers to one or more conditions such as: (1) physical or mental disability. (2) emotional disturbance. (3) recognized high risk of physical or mental disease. (4) age. (5) sibling relationships. (b) racial or ethnic factors that might limit opportunities for adoption. See *Katz* & *Gallagher. The Model State Subsidized Adoption Act*. 4 *CHILDREN TODAY* 8 (Nov.-Dec. 1975).
adopted without public financial assistance; and (2) foster children were often not legally free to be placed in permanent living arrangements. To meet the needs of children in special circumstances, the Children's Bureau commissioned the drafting of a Model State Subsidized Adoption Act and Regulations and funded a grant to the Boston College Law and Child Development Project to develop a model act to govern termination of parental rights.

Many states quickly enacted programs that followed the Model State Subsidized Adoption Act and Regulations which DHEW Secretary Matthews approved and signed in July 1975. Under the leadership of the Children's Bureau efforts were launched to promote the concept of subsidized adoption and to overcome such traditional ideas as: (1) that an adoptive family must assume full responsibility for a child's needs to establish its parental ability; (2) that a child would feel stigmatized by knowledge that his parents received money to adopt him; or (3) that no self-respecting family would willingly accept a subsidy, nor should government pay people to adopt children.

By the end of the 1970s all but seven jurisdictions had some type of subsidized adoption. Experience had demonstrated that subsidy was a viable strategy for moving youngsters into permanent placements. Although states realized substantial cost savings, there continued to be strong federal disincentives to the adoption of children in foster care because, as soon as a foster child was adopted, the state would lose the federal foster care matching funds formerly received for such child and would have to cover all future subsidy payments solely from state resources. Finally, the Adoption Assistance and Child Welfare Act of 1980 provided for ongoing adoption subsidy payments and the section 125 of the Economy Recovery Act of 1981 added a new section 222 to the Internal Revenue Code.

57. The seven jurisdictions without subsidy included: Arkansas, Guam, Hawaii, Mississippi, Puerto Rico, Virgin Islands and Wyoming.
under which a taxpayer may deduct up to $1,500 of "qualified adoption expenses" (fees, court costs, attorney fees and other legitimate expenses) related to the adoption of a "special needs" child.

THE RIGHT TO KNOW: SEALED RECORDS CONTROVERSY

As noted, secrecy has been the hallmark of the adoptive process. But during the 1970s adoptees organized and began to assert a "right to know" the truth about their birth parents, their genetic background and the circumstances of their adoptions. According to Sorosky, Baran, and Pannor, Oedipus, Hercules, and Moses would feel at home if they were to attend a present-day militant adoptees' meeting.

Ancient records, legends, and myths are replete with references to adoption and the needs of adoptees to unravel the mystery of their origins. . . . The heartfelt cry of Oedipus, "I must pursue this trail to the end, till I have unravelled the mystery of my birth," is repeated in many early writings.60

In this area of "right to know" the rights of adoptees collide with the privacy rights of birth parents and pose a dilemma for adoptive parents. Most states statutorily seal adoption records and thereafter provide very limited access. Birth certificates are amended by substituting the names of the adoptive parents for the names of biological parents. The original birth record is sealed and only the amended certificate is a matter of the public record.61 In contrast, Virginia grants an adult adoptee access to all information collected "in separate files which shall not be open to inspection or be copied by anyone other than the adopted child. . . ."62 A growing number of other states63 allows an adoptee to petition the court for access to the court record or file upon a showing of good cause or because the welfare of the child or public requires it.

60. Sorosky et al. supra note 4. at 25.
While adoptees argue that limited access to records denies them a
correct right which natural children have, agencies and birth parents argue
that opening adoption records, even to the most interested party—
the adoptee—is an invasion of the birth parents' privacy. Though the
efforts to amend state statutes grew during the 1970s, the experience
in Massachusetts was typical. In 1979, for the fourth consecutive
year, the Massachusetts legislature's Judiciary Committee refused to
deal with the complex legal and emotional issues. After hearing more
than half a dozen proposed bills, the Judiciary Committee reported
all out unfavorably. 64

At the close of the 1970s adoption agency practices were changing
in ways which may minimize the "right-to-know" dilemma in the
future. Agency workers discussed with relinquishing parents their
willingness to have a child contact them in the future. Detailed vital
genetic history was gathered and preserved. Also, as the pool of
adopted children began to include many older youngsters who had
memories about life with their birth families, and adoptive parents
who as foster parents knew and had contacts with birth parents, the
very character of adoption began to change from a totally closed in­
stitution to a more open process. Hence, "open adoption" is a con­
cept that encompasses more than just "opening" adoption records. It
is the antithesis of the old adoption mode that attempted to mirror
biology. Rather, it harks back to the time of Justinian when all par­
ties of the adoptive triad had to appear before a magistrate and the
right to inherit from the biological father was recognized even after
an adoption decree.

INDEPENDENT PLACEMENTS: LAWYER FEES AND CONDUCT
Unlike the legislative activity during the 1970s in response to Stanley.
few state legislatures established effective controls for the protection
of involved parties in the area of adoption fees and compensation. 65
Concern about black and gray markets in babies did increase during
the 1970s, especially as the supply of adoptable infants began to be
drastically reduced. It was reported that it could take up to five years
to adopt an infant less than one year old through an agency. 66

66. ADOPTIONS WITHOUT AGENCIES. supra note 19. at 102.
Testimony before the U.S. Senate revealed that most black market placements involved at least one state with comparatively weak adoption laws and procedures.67 In some instances, question was raised about the propriety of lawyer activities in connection with private independent adoption. A New Jersey probate court, in the 1972 case of In re Adoption of P., held that because of:

the importance of public knowledge and concern... [it would] provide copies of those portions of the transcript relating to the activities of Mr. A.L. to the Attorney General of the State of California and to its bar association for consideration by them of disciplinary proceedings as may be appropriate.68

Albert L. Podolski, Chief Justice of the Probate Courts of the Commonwealth of Massachusetts, speaking at the annual meeting of the Family Law Section in Montreal on August 13, 1975, urged the abolishment of baby buying by limiting independent adoption placement.69

It is in the area of the private placements that lawyers may have ethical problems. Who, for instance is the attorney's client? Is it the natural parent, the child, or the adopting parents?... The American Bar Association Code of Responsibility makes no specific mention of ethics in regard to adoption. This lack may stem from a reluctance to attempt to establish ethics for every specialty of the bar, but it is suggested that the subject of adoption is serious enough to warrant the establishment of particular guidelines for members of the bar.70

For the protection of children a few states and the District of Columbia took the severe stance of completely outlawing all private adoption.71 Other state legislatures enacted varying remedial approaches which attempt to discourage exploitation and abuse by placing restrictions on the fees that may be collected by intermediaries, by requiring that all fees be reported and approved by the court, or by limiting the types of persons who may facilitate a nonagency placement. However, without national uniformity, the

67. Independent Adoptions, supra note 19, at 631.
68. Polow, The Lawyer in the Adoption Process, 6 Fam. L. Q. 72 (1972). Text of In re Adoption of P., Morris County Court, Probate Division, Docket No. M-14-379, January 10, 1972 (Unreported) is printed by the Editors of the Quarterly as a service to the family law bar because of the unlikelihood that the decision would be officially reported.
70. Id., at 552.
stringent laws of one state can be circumvented by parties' crossing the state line to take advantage of more liberal laws in a neighboring or distant jurisdiction. Making state procedures and practices uniform is crucial to the curtailment of black market abuses. Even proponents of independent placements by lawyers now acknowledge the need for "national guidelines and an end to nonconformity among the states on this issue." 72

LAW REFORM EFFORTS

"As part of the Child Abuse Prevention and Treatment and Adoption Reform Act of 1978 [Pub. L. No. 95-266], 73 Congress directed the Secretary of the Department of Health, Education, and Welfare to study placements by persons or agencies which are not licensed or regulated by any governmental unit." 74 Title II of the act mandated the drafting of model adoption legislation and procedures. A seventeen-member national advisory panel was convened to make recommendations and a proposed model act was first published in the Federal Register of February 15, 1980. 75 Public hearings were held during the spring of 1980 in each of the ten DHHS regions. Many individuals and groups, 76 including the Section on Family Law, submitted detailed critiques to DHHS Secretary Harris. 77 After substantial redrafting, final model legislation, entitled the Model Act for the Adoption of Children with Special Needs, was published in Volume 46, Number 195 of the Federal Register of October 8, 1981 at page 50022.

In Secretary Schweiker's introductory summary to the final model legislation, he distinguished it from the February 1980 draft proposal by its particular focus on special needs children.

To encourage and facilitate such adoptions, the final Model Act provides for financial assistance to families who adopt special needs children, expands the grounds for adjudications freeing such children for adoption, clarifies the roles of adoption agencies and State adoption administrations in arranging and providing support services for adoption, and includes various other provisions to

72. See Carsola & Lewis, supra note 27, at 4023.
73. 42 U.S.C. § 5114 (Supp. II 1978); see Independent Adoptions, supra note 19, at 630, n. 10.
76. Comments were received from 17,202 persons. 46 Fed. Reg. 50022. (1981).
77. For discussion of Family Law Section Chairman Thomas D. Cochran's letter to Secretary Harris, see Howe, Adoption: New Rules for the Million-Dollar Matching Game. 3 Fam. ADVOC. 25-26 (Fall 1980).
promote and assist the permanent adoptive placement of special needs children.

Several sections included in the earlier draft of the model legislation which were not relevant to facilitating the adoption of special needs children were omitted from the final version. These provisions concerning revocation of relinquishment, putative fathers, and private (unlicensed) adoptive placement.78

The federal government was not alone in attempting to develop new model legislative approaches to adoption. The National Conference of Commissioners on Uniform State Laws (NCCUSL) first promulgated a Uniform Adoption Act in 1953. However, it was only passed by two states: Montana and Oklahoma. A Revised Uniform Adoption Act was promulgated in 1971 and three additional states enacted it: New Mexico, North Dakota and Ohio. Following publication of the DHHS model in February 1980, NCCUSL appointed a special drafting committee to review the federal model act and to assess what changes or revisions might be needed to bring their 1971 Revised Uniform Adoption Act into step with judicial decisional law and modern problems, conditions and philosophies. While John C. Deacon, NCCUSL president, wrote Secretary Harris opposing the federal model as "unworkable in its present concept and form," NCCUSL did not take any definitive action to commence revision or amendment of its 1971 act.79

In 1980 Family Law Section Chairman Thomas D. Cochrane appointed and requested the executive officers of the Section Adoption Committee to work on developing a model state adoption act80 which might offer solutions and approaches different from the federal DHHS model that the Section was on record as having opposed.81

79. See Howe, supra note 77, at 24.
80. Only the National Conference of Commissioners on Uniform State Laws (NCCUSL) drafts and promulgates uniform laws. A uniform law, in contrast to a model act, must embody a solidly achieved public consensus about what ought to be the proper legislative response to some given problem. The measure of the success of a uniform act is how widely adopted it is by the different state legislatures. The purpose of a uniform law is to have it adopted by a large number of states so that practice in a given area will no longer vary from state to state.
A model act, in contrast, is offered by its drafters as an alternative approach. It may either reflect a narrow or widely-held policy bias about what should be the solution to a recognized legislative omission in state or federal statutory enactments. A model act should provide a starting point for those who study it; it should provide such reviewers with innovative approaches which may be totally or partially accepted, or rejected. A model ought to generate discussion which hopefully leads to informed change or strengthens a legislator's resolve that an existing statutory scheme is preferred.
81. See Howe, supra note 77, at 25, 37.
Drafts developed by the Adoption Committee and presented to the Council in January and August of 1982 encountered some very strong and heated opposition because they were deemed to be too "pro-agency" and "anti-private" placement. Hence, when the Council met in January 1983, it directed the Committee to submit another draft that would treat agency and private independent adoptions in "a balanced, even-handed, non-preferential manner."

III. Challenging Issues for the Future

Technology and Adoption

Is there any future for the human institution of adoption as it has been practiced over the years? Once the acceptable social solution for the curse of infertility, will adoption now become obsolete because of scientific breakthroughs such as in vitro fertilization, or will it remain only for the maltreated, bereaved, and abandoned children of the lower classes?

A recent Boston Globe Science, Health and Technology Report announced that advances in fertility drugs and microsurgery have helped many barren couples in recent years. "Perhaps, half of all infertility now can be treated successfully by medical or surgical means. But that still leaves millions more who need either an Old Testament miracle or a modern-day medical breakthrough to have a baby of their own." There is also alarming evidence that the incidence of sterility among persons of child-bearing ages is spreading, perhaps as the result of yet to be identified environmental factors or pollutants. According to the Globe staff columnist, "Some worry that a frozen 'embryo bank' would open the door to more exotic developments, such as transfer of the embryos to the wombs of surrogate mothers." Artificial insemination and frozen sperm banks are today commonplace. Legislative bills to govern and regulate surrogate motherhood contracts are beginning to be presented in various legislatures. These are our present societal realities, not imagined wonders of the next century.

83. Id. at 46.
84. Id.
85. See Legislative Notes. 9 Fam. L. REP. 2368-2369 (BNA) (April 12, 1983) for surrogate parenthood bills introduced in Arkansas, Kansas, and New York.
86. A discussion of surrogate motherhood is beyond the scope of this article. For a full
Roles for Lawyers

The challenges of the legal profession, especially the practicing family law bar, have never been greater. Given the realities of the supply and demand for babies, and given man's hitherto uncontrolled proclivity for trying the untried, the practicing family law bar must prepare itself for a new role to offer effective legal counsel to those who seek new ways to establish families. In this age of private ordering, the age-old concept of parens patria still has urgency. If an adoptive placement does not work out, a child is irreversibly harmed. If there is some mishap with a surrogate birth, who bears the responsibility for the child—the surrogate mother, the adoptive parent, or the state? If adoptees have suffered anguish in the past attempting to unravel the mysteries of their birth, what new psychic traumas await the child for whom no birth parents can be identified? It has been asserted that learning begins even before birth, and that the fetus responds to changes in the mother's mental and physical condition. If that be so, what may be the long-run impact on the fetus carried by a surrogate mother whose mind-set is that she is only carrying a "product" for another, so that when birth occurs she suffers no loss in giving up the child? Enough is known today about what psychosocial and emotional needs of children must be met if they are to grow to healthy and self-supporting maturity. In the last analysis, it is the public's economic interest that is at stake.

Can our past experiences with adoption as a legal and social process provide guidelines for resolving the professional and ethical dilemmas of the future? The present enthusiasm for delegalization and deregulation, which has permeated fields as disparate as business, law and medicine, should not invade adoption. Whenever a new family unit is created by the traditional means of a legal adoption of a child relinquished by its birth parents, or by the deliberate creation of a child through some new or future technology, the important issue is that child and its human rights. Society must reject

analysis, see the following article in this issue: In Vitro Fertilization and Embryo Transfer by Annas and Elias.
any practice which treats any life as a consumer's product. The family law bar can be the pilot which establishes new routes to ensure the safety and dignity of all members of the adoptive triad.  

87 While this article was in press the U.S. Supreme Court on June 27, 1983, decided Lehr v. Robertson, 9 FAM. L. REP. (BNA) 3077 (June 28, 1983). The Court held by a vote of six to three that a putative father who failed to submit his name to a state register of putative fathers and who had never established a custodial, personal, or financial relationship with his child need not be given special notice of an adoption proceeding. The fact that the father had begun a paternity action was not sufficient to demonstrate his "full commitment to the responsibilities of parenthood" entitling him to greater constitutional protection.