Rewriting the Adoption Story

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The Old Version Was Based on More Fiction Than Fact—the Belief that Law Could Mirror Biology. Today’s Adoption Procedures Are More Realistic

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? These questions of the ’60s were based on traditional thinking of adoption. Today’s questions are not only based on changes in family patterns but on a new way of thinking about the concept of adoption.

The institution of adoption was incorporated into U.S. law in 1851, when Massachusetts enacted the first American adoption statute that provided for judicial supervision over adoptions. In other states, adoption was a private legal act, like a conveyance of real estate or a commercial contractual transaction. Before 1851, other state statutes merely authenticated and made a public record of private agreements.

For the past century, our adoption laws and practices have followed the Roman legal tradition of attempting 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 appearance and age, could have conceived the infant. Thus, adoption laws were designed to imitate nature.

Throughout history, a birth mother has had two options: she could choose the adoptive parents and relinquish her child to them—often without going to court; or she could leave the decision to a licensed private or public social service agency that would receive the child, obtain the relinquishment, and then place the child—usually with a childless couple. Most American adoptions consisted of unwed mothers, whose newborn or infant children were released directly from a hospital nursery or a special short-term foster home. For an unwed mother, adoption was a socially acceptable alternative.

But times have changed. The patterns of earlier years are now the exception, not the rule. Today, adoption is usually the end of a process that began as a child neglect or abuse proceeding. While there are still some newborns being placed for adoption, the typical profile of the adoptive child in the ’80s is a three-to-five-year-old youngster who has lived with his or her birth mother, then with a series of foster parents, and has lacked a permanent home for at least a year. The birth mother usually has failed to rehabilitate herself, and the most likely candidates to adopt the child are the child’s foster parents.

Foster care has become a first step toward adoption. In the past, foster parents often were excluded as candidates because of the matching physical requirements and factors such as financial eligibility. Now, foster parents often are given priority because they have formed strong emotional bonds with the child. They have become the child’s “psychological parents.”

Government-subsidized adoption programs, which provide the financial support for children to be adopted by their foster parents, was an idea in the ’60s. It became a reality in the ’70s and is being implemented in the ’80s.

CHILDREN BORN OUT OF WEDLOCK

During these 20 years, there has been a great deal of litigation over the status and rights of children born out of wedlock. The U.S. Supreme Court has moved in the direction of declaring illegitimacy a suspect classification under the Equal Protection Clause of the Constitution. The legal distinction between legitimate and illegitimate

BY SANFORD N. KATZ
The open records issue needs rethinking

births has been blurred, and some state statutes have eliminated the distinction altogether—stating that all children are legitimate. But the highest court in the land has not gone that far.

This new attempt to give illegitimate children the same rights as legitimate children has encouraged legislative change, particularly in the area of parental consent. For years, the child born out of wedlock was considered the child of the mother. And unless an unwed father acknowledged legitimacy or was declared the father through judicial proceedings, he was virtually a legal nonentity. Not only did the father have no rights to the custody of his illegitimate children, but the children had no rights to the companionship of their unwed father.

Although Stanley v. Illinois, 405 U.S. 645 (1972), was not an adoption case but a case of neglect and dependency, it had a major effect on adoption law. Stanley held that an unwed father who had sired and lived with his three children and their mother intermittently for 18 years was, upon the mother's death, entitled to a hearing before his children could be removed for reasons of neglect. Under Illinois law, Mr. Stanley was not considered a "parent" and thus was not entitled to due process of law because he was not married to his children's mother. The Supreme Court stated in a footnote that its decision also affected adoption.

This case and many that followed it, such as Rothstein v. Lutheran Social Services, 405 U.S. 1051 (1972), where the father's rights were considered, have had an impact on all state adoption statutes. In most instances, fathers of children born out of wedlock now must be accorded the opportunity to consent to the adoption of their biological offspring. But there are practical problems in providing this opportunity. Procedures to implement Stanley are still being worked out by states to ensure fairness to the biological father without jeopardizing the adoption of the child.

OPEN ADOPTION

"Open adoption" is a concept of the 1980s that represents a new idea about adoption. It is the antithesis of the Roman ideal—it does not seek to imitate nature and makes no attempt to be a fiction. The essence of open adoption is to provide the child with the opportunity to maintain ties with his or her biological family.

Traditionally, adoption required the complete termination of the biological parent-child relationship, for both legal and practical reasons. Once adoption was decreed, the child was no longer considered the child of the birth parents. Ties with the biological family were severed, unless the child's adoptive parents chose to continue some contact, usually in intra-family adoptions.

Today, most adoptees are older children who have memories of their earlier childhood and have some contact, if minimal, with their birth families. In cases where contact has been beneficial, but not so positive as to demand return to their birth parents, some courts have made allowances in the decree for visitation by certain members of the biological family. This is usually done only if the child desires it.

Open adoption is controversial because it challenges the basic goal of adoption—to accomplish a complete transplant of a child from the birth family to the adoptive family. Some opponents prefer that contact with the biological family be accomplished voluntarily, without decreeing it, or that guardianship be used rather than adoption.

With open adoption, the mystery of biological birth is eradicated. The price, however, is that it creates a different model for the parent-child relationship. The question is whether society is ready for it.

LOOKING AHEAD

During the next decade, states that forbid private adoptions are likely to reexamine that policy and the roles of professionals in the adoption process. I anticipate that our legislatures will ask whether it is fair to give agencies a monopoly in the placement of children for adoption of newborns or whether birth parents should be allowed to choose a suitable family for their child.

Other questions facing us in the '80s include: In states that do not allow private adoptions, how can adoptive applicants be assured of fair treatment? Is surrogate motherhood a socially acceptable alternative to traditional adoptive placement? Should there be state regulation of this newly adapted scientific method, or should women and physicians alone be the sole decision makers?

The open records controversy will continue. The debate over whether adoptive children have the legally protected right to inspect their adoption records should prompt states to reevaluate their legislation. The open records issue is an emotional one that needs rethinking. By changing the laws to allow free access to the records by anyone in the adoption triad, we will radically alter adoption in America.

Because adoption has existed in essentially one form for over one and one-half centuries, changes that affect underlying assumptions and strongly felt social values have been, and will continue to be, slow in coming. Those involved in adoption reform must be patient.

The Family Law Section's Adoption Committee is developing a new Model Adoption Act. The Committee is trying to propose an act that takes into account what adoption of children means in the '80s and how it can be accomplished with fairness to all the participants.

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?"