

BEYOND BIOLOGY: THE POLITICS OF ADOPTION & REPRODUCTION

ELIZABETH BARTHOLET*

It is exciting simply to be having this conference focused on adoption law and policy. I remember some nine years ago starting to plan a course dealing with adoption issues and wondering whether I would be able to justify its place in the Harvard Law School curriculum. It is also exciting to look around the room at the wonderfully diverse and knowledgeable group of people the *Duke Journal of Gender Law & Policy* gathered here to participate in these discussions of important issues involving adoption and the meaning of family.

My topic today has to do with adoption and, more particularly, adoption in relation to reproduction. By reproduction I mean three different things: (1) traditional reproduction, or the production of a child through normal intercourse between one man and one woman; (2) infertility treatment, or the use of medical technology to assist a man and a woman to produce a child using his sperm and her egg and womb; and (3) a variety of child producing and parenting arrangements that I have collectively termed "technologic adoption." By the latter, I mean arrangements that result in the social equivalent of either step-parent adoptions or full adoptions, where the child is produced in order to be raised by one or more parents who will not be genetically or biologically related. I am referring to such practices as donor insemination, surrogacy, both in its "traditional" and gestational form, egg donation or sale, and embryo donation or sale. One thing I find interesting about these arrangements is that while they do produce the social equivalent of traditional adoption, they do not involve the legal process required for such adoption—hence my term, technologic adoption.

"Defining Family" is the title of this conference. Adoption and reproductive technology have in common a tendency to push us to define family—to decide what we *want* family to be. Typically, we think of family as meaning a man and a woman raising their bio-product child. But both traditional adoption and non-traditional reproductive techniques make it clear that this definition of family is a matter of choice—it is not determined by nature. When birth parents choose to turn the child they produce over to

* Professor of Law, Harvard Law School.

This comment is based on a keynote address given by Professor Bartholet on April 8, 1994 at Duke Law School. Her remarks opened the *Journal's* Conference, *Defining Family: Adoption Law & Policy*. Minor editorial changes have been made to the text, but in all cases, every effort was made to retain the original voice of the speaker. Many of the ideas contained herein are discussed at greater length, and relevant sources are documented in ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION & THE POLITICS OF PARENTING* (1993).

others to raise, we call that new parent-child grouping an adoptive family. With the help of sperm banks, surrogacy brokers, and in vitro fertilization (IVF) clinics, men and women can contribute their sperm, eggs, and other child-bearing services to create a child for others to raise. Increasingly, we encourage such arrangements by permitting commercial contracts and calling the newly created social unit a family.

If we recognize that family is not necessarily defined and limited by biology, we have to think about some fundamental questions. One has to do with the significance of a biological link between parent and child—is it essential, or important, or not at all important? Another has to do with the concept of parenting—is it essential, or important, or not at all important to have there be two parents, one of each sex?

It is a cliché that we live in an era when the traditional understanding of family is breaking open. Although we still talk as if family means the husband-wife-child nuclear unit, we know that today the actual meaning of family for many people is the step-parent version of the extended family. We also know that roughly half our children spend a significant part of their childhood in single parent households, and that grandparents are doing the only actual parenting many children ever receive. We know that although laws used to forbid marriage and sex across racial lines, interracial marriages have risen dramatically in the last two decades, as has the incidence of mixed-race births.¹

Recent headlines in the newspapers demonstrate how reproductive technologies are raising a spate of new questions about the meaning of family. Do men have abortion rights? The Supreme Court of Tennessee held that they do in a case involving a custody battle over frozen IVF embryos.² Do post-menopausal women have a right to bear children? Increasingly, IVF clinics are serving such women through the use of donor/vendor eggs. The media recently featured two examples of such "miracle pregnancies," involving one woman in her late fifties and another in her early sixties.

Doctors are engaged in radical experiments with the production of human life that challenge us as a society to decide what, if any, commitments we have to "the traditional" or "the natural" in connection with the beginnings of life and family. Doctors have recently shocked the nation by revealing their success in cloning, or twinning, a human IVF embryo. In Japan, an embryonic goat is coming to term in an artificial womb. You can be sure that the doctors are thinking about the possibilities for bringing human embryos to term without the need for a human womb. We have recently read that scientists are hard at work on a project designed to enable an aborted female fetus to function as an egg mother: the idea is to implant the fetal eggs in an adult woman who cannot produce eggs, enabling her to give birth to a child whose genetic mother will never have lived.

Technologic adoption practices involve the abandonment of ideas about family that have traditionally been considered central. These practices encourage men and women to surrender their sperm and eggs, their embryos,

1. Jill Smolowe, *Intermarried . . . With Children*, TIME, Fall 1993 Special Issue, at 64.
2. *Davis v. Davis*, 842 S.W.2d 588, 604 (Tenn. 1992).

and even their children to others for whatever fee is necessary to encourage the surrender. Men are typically paid for their sperm and women for their eggs in what doctors like to call sperm donation and egg donor programs. Surrogate mothers are paid to surrender the children they bear. IVF patients are encouraged to donate some of their embryos for use by other patients by a variety of methods including, in some programs, agreements to reduce the cost of the "donor" patients' treatment. As these transactions become more common and acceptable, we seem to be jettisoning the notion that a biologic link is central to the parenting relationship.

Technologic adoption also opens parenting opportunities to a variety of non-traditional parent types—to single, lesbian, gay, and older prospective parents, for example. Straight single women, lesbian singles, and couples have made increasing use of donor insemination as a route to parenting. Gay men now look to surrogacy as providing them with equivalent parenting opportunities in the future.

In addition to expanding the categories of people who are eligible for parenthood, reproductive technology is also being used to reinforce traditional ideas of family. Infertile couples are encouraged to invest ever more of their lives in high tech treatment designed to enable them to produce the procreative child of their dreams. Donor insemination and surrogacy are generally designed to provide couples with a look-alike substitute for the child they were unable to produce.

Traditional adoption practices represent a similar study in contrasts, simultaneously reinforcing and breaking away from traditional ideas of family. Adoption by definition breaks away from the traditional idea of family, since it involves the transfer of a child from its birth parents to new parents with whom there is no biological link. At the same time, adoption law reinforces the significance of biologically linked parenting. Virtually all adoption regulation takes a negative or restrictive character, reflecting the underlying premise that the transfer of a child from birth to adoptive parents is an inherently risky proposition. Thus, adoption regulation is for the most part designed either to protect birth parents and children from being wrongfully separated from each other, or to protect children from being placed with unfit or otherwise inappropriate adoptive parents. There is almost no adoption regulation that takes a positive or facilitative form to ensure that children in need of homes receive them at the earliest possible time.³

If you look at the way in which adoption regulation attempts to shape the adoptive family, you again see the law reinforcing traditional notions about family. The sealed record tradition creates the new adoptive family in the image of the traditional nuclear family, with one set of parents only.

3. The proposed Uniform Adoption Act, UNIF. ADOPTION ACT (1994), and the Multiethnic Placement Act, Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994) (to be codified at 42 U.S.C. §5115a (1994)), stand as limited exceptions to this general principle. The Uniform Act has numerous provisions designed to facilitate the adoption process. The Multiethnic Placement Act prohibits agencies that receive federal funds from using race to delay or deny adoptive placements.

For more discussion about transracial adoption, see relevant articles in 2 DUKE J. GENDER L. & POL'Y (No. 1 1995).

Sealing the records effectively eliminates the existence of the birth parents, preventing adoptees from finding out who they are and from being discovered by them. Furthermore, the parental screening system is designed to select adoptive parents who fit a traditional parenting profile. Ranked at the top of the adoption agencies' prospective parent lists are husband-wife couples of child-bearing age who obey the social rules—they go to church, they do not marry across religious or racial lines, and they stay married long enough to demonstrate marital stability. The system for matching waiting children with prospective parents is also designed to create adoptive families that fit the social and biological norm of family. Rules often limit older adopters to children of an age comparable to the age their biological children would have been. In earlier times, rules required that parents and children be matched for looks so that the adoptive family could pretend to the world that it was in fact a "natural" family. Rules still require matching for race, preventing children of color from finding homes with white parents even if the only alternative is placing the children in foster care limbo.⁴

The reality of adoption today flies in the face of the law's traditional bent. Large numbers of birth and adoptive parents are finding their way through and around the law to form the kinds of families they want. Their efforts are facilitated by the private adoption system, which operates free from much of the restrictive regulation that shapes the public adoption world. As a result, there is increasing "openness" between birth and adoptive families. They may exchange identifying information, send letters and photographs on an on-going basis, meet with each other, and even engage in regular visitation. Thus, significant numbers of adoptive families are experimenting with variations on the theme of the closed nuclear family. Also, non-traditional parent types are finding their way through the adoption maze in increasing numbers despite the bias against them. Single, lesbian, gay, and older adopters are managing to parent through adoption, whether by agreeing to take the older, hard-to-place children from the public agencies, or by pursuing private or international adoption. And adoptive parents are forming families across racial, cultural, and national lines, despite the strong regulatory restrictions on such adoption.

This conflict between the law and the reality of adoption represents, to a significant degree, a conflict between the law and popular will—at least the will of those adults directly involved in adoptive arrangements. It raises the question whether traditional adoption law is good or bad in attempting to restrict and limit private desires in matters related to the formation of families and the rearrangement of parenting responsibilities.

It could be a good thing to flout private will in order, for example, to protect children who will not be able to protect themselves in a private

4. See, Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

The Multiethnic Placement Act, *supra* note 3, is designed to limit race matching practices, prohibiting the use of race to delay or deny foster or adoptive placement. The Act does, however, specifically permit agencies to use race as a factor in making placement decisions.

contract regime. Thus, in my view we need more in the way of restrictive regulatory law in the realm of reproductive technology, which currently operates in a free market regime. I think that the state has a role to play in this area in protecting the vulnerable from exploitation and oppression and in making certain vital "family" decisions. We should not be leaving entirely to doctors and other private parties decisions about what kind of experimentation with human embryos is appropriate, what kind of eugenics will be allowed through the aid of reproductive technology, whether genetic material and childbearing services should be commercialized, and whether sex selection should be systematically practiced.

Restrictive adoption regulation might be justified by the goal of protecting children's best interests or by other valid societal concerns about the shape of the family. But in my view, current adoption law is not justified. I believe that this law systematically hurts children, although it is almost always rationalized as serving children's best interests. We live in a world with millions on millions of children who are in desperate need of a nurturing home. If we really cared about children's interests, we would design adoption law to facilitate the placement of these children with people who could provide the parenting they need. Existing adoption law instead creates barriers that effectively prevent these children from finding homes.

I also see current adoption law, in combination with reproductive policies, as systematically hurting women generally, and infertile women in particular. We induce infertile women to spend ever more of their lives pursuing infertility treatment, and we drive them away from adoptive parenting. We do this by glorifying procreation and childbirth, while at the same time stigmatizing infertility and adoption. We do it by allowing reproductive technology to operate in the free market, while at the same time creating a restrictive regulatory regime in the adoption area. And we do it by subsidizing procreation through health insurance, tax laws, and employer benefit packages, while at the same time making adoptive parents pay every step of the way for the adoption costs created by restrictive regulation.

The cult of fertility and childbearing that is at the heart of these combined policies represents a profoundly limiting and confining vision of the role of women. Ultimately, these policies may deny many women what they most want—the parenting experience. Even repeated, technologically-advanced medical treatment will often fail to overcome the infertility problem. By contrast, adoption could easily satisfy both the adult's need to parent and the child's need to be parented, if only the law were designed to facilitate, rather than impede, the process.

Finally, I see adoption law as hurting society more broadly. We live in a world that has no need for more people. We are rapidly destroying our environment because of our inability to handle the people we already have. It seems crazy to drive those who want to parent away from already existing children who need homes and into the production of new children. To the degree that society's adoption rules are designed to reinforce traditional notions of family, they are not accomplishing the goal because of our commitment to a free market regime in the reproductive area. It makes no sense to discourage transracial adoptive families, when increasing numbers of black

and white adults are choosing to marry and procreate across racial lines. It also makes no sense to discourage single, lesbian, gay, and older prospective parents from adopting when they are free to reproduce and, indeed, the reproductive industries are encouraging them to do so. The net impact is not to reinforce traditional notions of family, but simply to push people who want to parent away from adopting the children in need of homes and toward producing new ones, through means which may constitute the social equivalent of adoption.

The politics of adoption and reproduction are, to me, both puzzling and problematic. As I have criss-crossed the country during the past year, speaking to various audiences and to the media, I have been struck by the loneliness of my position as adoption advocate. My pro-adoption pitch seems to me innately appealing. I would think that there would be widespread concern with the way in which the law now structures adoption as a last resort. I would think there would be general agreement on the irrationality of social policy that drives people away from giving homes to kids who need them in order to create more kids in a world that cannot handle those it already has—social policy that restricts traditional adoption, while at the same time enabling and encouraging people to engage in technologic adoption.

I would also think that there would at least be significant support in many quarters for my more radical position that adoption should be seen as a positive alternative family form. Social policy is premised in part on an assumption that adoption's differences are necessarily and inherently negative differences—that only to the degree that adoptive families can look like the norm of family can they be good. But many of us who live adoption—are part of an adoptive family—experience the differences as positive.⁵ It seems at least worth thinking about ways in which it might be positive to have a family defined by social relationship rather than biology, in which children have more than one set of parent figures, and in which parent-child relationships cross genetic, racial, and national lines.

Yet the status quo is a profoundly anti-adoption and pro-natalist status quo. Powerful political forces are pushing for policies that would make adoption even more of a last resort, policies that would make biology even more important to the definition of family. There seems to be an increasing sense that children “belong” in some fundamental sense to their birth families and to their racial and national groups of origin. One of the most active forces for change in adoption policy is the search movement, which advocates for greater access to birth records. Its most vocal leaders speak the language of biological determinism and argue for the essential quality of biological parent-child links. Characterizing adoption as an inherently exploitative, abusive arrangement, they take the position that birth parent rights should never be severed. They call for an end to the legal form adoption takes today, arguing that in those last resort situations in which children absolutely must be removed from their parents, they should be placed with permanent guardians rather than adoptive parents.

5. The author has two adopted children, both born in Lima, Peru.

Racial matching advocates espouse a related kind of racial determinism, arguing that black children can only realize their true identity when part of the black community.⁶ These advocates have been extremely successful in preventing the transracial placement of children waiting for adoptive homes.

People talk of a burgeoning children's rights movement, and it is true that recent adoption scandals like the Jessica DeBoer case have triggered a general concern with the law's deference to biologic parent rights at the expense of children's interests. Despite the media attention to such cases and popular sympathy with the adoptive family relationship, policy makers in this country are overwhelmingly committed to family preservation and family reunification. The Children's Defense Fund, the Child Welfare League of America, and the Clinton Administration have tended to equate child welfare with biologic family preservation, and have done nothing to promote adoption as a means of guaranteeing children's rights to a nurturing home.

Left-leaning political forces—groups styling themselves as liberal, progressive or feminist—tend to be either hostile to adoption or silent on the topic. This is particularly disturbing to me both because I see myself as generally aligned with, rather than against, these groups, and because I think that they are key to effecting needed change in adoption policy.

I will touch briefly on three examples that reflect my concern about the nature of left-leaning politics in the adoption area. The first involves the transracial adoption debate. State adoption agency policies throughout the nation require that children be matched with same-race parents. As a result, black children are regularly held for months and years at a time, often for their entire childhoods, rather than being placed with any of the many waiting white parents. These policies are clearly damaging to children. The evidence is overwhelming that delay or denial of permanent placement injures children both in the short and the long term. At the same time, there is not a shred of evidence that transracial placement poses any problem for the children involved. Studies show that transracial adoptees do as well with respect to every measure social scientists use in assessing human happiness and psychological health as children placed in same-race homes. Same-race matching policies are in clear violation of the law, both adoption law, which makes children's best interests the governing principle, and race law, which prohibits race-conscious action by the state except in those limited instances when it can be justified as legitimate affirmative action. Why then do we have these policies? We have these policies because a limited number of black leaders have demanded and promoted them. And we have these policies because white liberals have acquiesced, and because the organizations that describe themselves as the friends of children and of civil rights have acquiesced.

My second example involves international adoption. Untold millions of children in foreign countries live in desperate need for a nurturing home. Their only real-world alternative to adoption is life or death on the streets or in orphanages. The opponents of international adoption argue that it robs

6. See *supra* note 4.

children of their precious cultural heritage, but they pay little attention to the limited opportunity unadopted children will have to enjoy that heritage. Recent political moves resulted in closing down international adoption programs in Romania and China for significant periods of time. Although programs in both countries have now opened up again, adoption law reform in Romania has meant severe restrictions, limiting the number of children who are able to obtain homes. For many Romanian children, the alternative to international adoption is condemnation to what are at best cleaned-up versions of the institutional hellholes that were revealed to the world with the fall of the Communist regime. In China, ninety-eight percent of the children available for adoption are girls. The temporary close-down of international adoption there presumably left many Chinese children to the fate reserved for unwanted baby girls in China—death at birth, or placement in an orphanage, where death rates are said to range from twenty to ninety percent.

The politics of international adoption parallel those of transracial adoption. They were played out in the course of the Spring 1993 Hague Conference negotiations which produced a draft Convention on intercountry adoption.⁷ Various organizations describing themselves as the friends of children and defenders of human rights took the position that international adoption should be seen as the enemy. They advocated for its elimination. When they were unable to accomplish that, they settled for a convention which created significant new barriers between the children in need of homes and the parents in foreign countries anxious for the opportunity to adopt.

My final example involves the feminist stance on adoption. Many feminists have been outspoken in their criticism of various reproductive technologies and of surrogacy arrangements. But feminists have been largely silent on the topic of adoption, and some have spoken out against it. For example, the recent edition of the Boston Women's Health Collective's *Our Bodies Ourselves*, takes an extremely hostile position on adoption.⁸ The advice given to birth mothers is pure and simple: abortion is good, and adoption is bad. Adoption is bad because it will lead to lifelong pain for the birth mother and lifelong problems for the child. The book refers those who want more information to "thoughtful professional leaders" who turn out to be the search movement's most hostile-to-adoption contingent. It includes excerpts from their writings in which they argue that adoptive relationships are inherently abusive, exploitative, and otherwise problematic, and accordingly, that adoption should be eliminated even as a last-resort family choice.

Why this combination of hostility and silence from feminists? It is understandable that some feminists would react against the anti-abortion forces' apparent embrace of adoption as the preferred alternative to abortion. But the thinking feminist should be able to see that the anti-abortion forces have in fact never provided significant support for adoption. They have for the

7. Hague Conference on Private International Law: Final Act of the 17th Session, including the Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption, 32 I.L.M. 1134 (1993).

8. BOSTON WOMEN'S HEALTH BOOK COLLECTIVE, *THE NEW OUR BODIES, OURSELVES: A BOOK BY AND FOR WOMEN* 346-351 (1992).

most part simply used adoption as a club with which to beat abortion rights activists over the head. And to the degree there is some genuine support for adoption among pro-life groups, that should not alone be enough to make adoption anathema to pro-choice feminists.

There are feminists who have spoken up for adoption, and some of them are here at this conference. But why are there so few? It seems to me to make perfect feminist sense to extend our understanding of reproductive rights to include what I call adoption rights—the birth mother's right to surrender her child for others to raise, the infertile woman's right to adopt children in need of nurturing, and the child's right to a home.

Why, more generally, are the left-leaning political forces aligned against, rather than for, adoption? We need to know why in order to begin to think about how to turn things around. We need to understand the current politics of adoption in order to begin to think how to shape the politics of tomorrow.

I think that left-leaning political forces oppose adoption because they see it as inherently exploitative. The exploitative picture is easy to paint. Adoption involves, generally speaking, the transfer of children from the poor and disadvantaged to the relatively well-off, from people of color to white people, from Third World to First World nations. The photograph of the impoverished, dark-skinned, single, Latin American woman handing over her newborn to the happy white couple who have flown from the United States to take the child back to their empty nursery is a poignant one. While there is truth to this picture, it simultaneously represents a fundamental distortion of reality.

Adoption has to do with problems of oppression and disadvantage, but it does not cause those problems. And to be anti-adoption does nothing to solve those problems. Anti-adoption forces talk about the importance of a poor country's holding onto its children, its "precious resources," but the last thing most poor countries actually need is more poor children.

Nonetheless, anti-adoption rhetoric constitutes a powerful rallying cry for leaders of the oppressed. After all, slave holders in this country did take black children from their birth mothers, and First World countries have taken precious resources from Third World countries over the centuries. Furthermore, anti-adoption demands are winnable. When leaders of the oppressed demand "their children" on behalf of their community, leaders of the more powerful groups and nations may actually accede to the demand. We should not understand this as an act of unusual generosity inspired by sudden pangs of conscience. Children have no choice; their interests can be easily sacrificed. Anti-adoption forces win their battles in the name of serving children's interests and fighting for the disempowered against the exploitative powers of the world. But no one should be fooled. It does nothing to empower the disempowered to insist that single birth mothers keep "their" children when they are in no position to raise them, or to insist that Third World nations keep "their" children when it means they will be destined to live on the streets or in orphanages, or to insist that the black community in this country keep "their" children when it means they will be destined to grow up in foster care.

The reality is that adoption is used as a scapegoat. It is easier to lay blame for conditions of oppression than to address them. It is easier to point to adoption as the problem, than to focus on the reality of poor birth mothers and their children and to think seriously about how to improve their lives. And it is certainly easier to restrict or even eliminate adoption, than to correct the problems of social injustice and economic disadvantage.

Adoption cannot solve society's problems in any global sense. But it can enable a significant number of birth mothers and children to live infinitely better lives than they would otherwise. It also can open our eyes to a different vision of family and community—one in which we see children in need as belonging to all of us in the sense that we feel a responsibility for their care.

We need to reshape adoption politics so that we can begin to reshape adoption policies. We need to make others understand that to be for adoption is consistent with—and not in conflict with—attempts to remedy social injustice.

And, if we want to effect any real change, we need to get organizations involved on the pro-adoption side. Real adoption reform will not happen simply because some of us care as individuals and are committed to using our energies to press for change. It will happen only if we have organizations that are capable of fighting effectively for change. A major problem now is that there is no significant organizational support for needed adoption reform. So, we have to change the thinking in existing organizations or create new ones.

I will end with a challenge—a challenge to those of you who agree with these goals—to come up with ideas in the course of this conference as to how we can move forward to accomplish true adoption reform.