

Beleaguered Families: Identity Ascription and the Politics of Adoption

A Commentary on a Panel Discussion by
Richard Banks and Joan Hollinger*

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The first half of the twentieth century introduced images of a “Leave It to Beaver” version of the ideal adoptive family. Storybooks such as *The Chosen Baby*, which presented the adoptive family version of the stork mythology, portrayed the typical adoption as a baggage-free white newborn swooped up by the nurturing arms of a white man and his wife.¹ The complexities witnessed in adoptions today were unimaginable. Consequently, the contemporary battles over the semantics of the word “couple,” intraracial minority adoption, interracial adoption, and the emergence of links attaching the biological parents to the newly formed adoptive family, did not yet exist. This was not due to a lack of challengers, but rather because heightened governmental intervention in adoption cemented into place specific definitions and assumptions that came to dominate the discourse surrounding adoption politics. It is this intervention that forms the heart of the current debate surrounding adoption practices in the United States. At one end of the intervention spectrum is the position described by Professor Joan Hollinger, who questions the ever-increasing role government plays in the movement from closed to open adoption records. On the other end of the spectrum, Professor Richard Banks expresses skepticism towards the position that less governmental intervention can adequately respond to the modern complexities of adoption. He asserts that because adoption is a legally defined family relationship, it necessarily requires governmental regulations for efficient and proper functioning.

In the last thirty years, adoption policy in the United States has shifted from closed to open adoption records. The previously dominant closed adoption record policy rested on the theory that adoptive families are a “complete substitute” for biologically based families. In order to make a successful substitution, policy-makers believed that an adopted child needed all connections with her biological past severed to allow the adoptive family to raise the child without competition from her biological past. Adoptive parents were to replicate the biological parent/child relationship. This assertive-

* This commentary was written in response to a panel discussion moderated by Michael Wald, Professor, Stanford Law School, featuring Richard Banks, Associate Professor, Stanford Law School, and Joan Hollinger, Visiting Professor, University of California at Berkeley School of Law. The presentation, entitled “Beleaguered Families: Identity Ascription and the Politics of Adoption,” was given on November 10, 1999, at Stanford Law School. The event was sponsored by the *Stanford Journal of Legal Studies* as the finale to a series of family law activities sponsored by Stanford Law School students.

¹ See generally VALENTINA P. WASSON, *THE CHOSEN BABY* (Carrick and Evans Inc., 1939).

equivalence model of adoption prevailed among child welfare experts and the common law, contending that the only way to create a “complete substitution” was to insist on anonymity and strict separation between biological and adoptive parents.²

However in the final quarter of the twentieth century, the closed records view came under greater challenge from many participants in the adoption process; it was criticized by adoptees, birth parents, and an increasing number of neutral and adoptive families.³ Rather than denial, the acknowledgment and acceptance of difference became a new incantation in contemporary adoption practice.⁴ Adoptive families were no longer considered “complete substitutes” but as “distinctive” in their own right. This new approach began dismantling the old closed records view, and the government started to embrace openness in records as a sort of panacea to guarantee successful adoptions. For example, it was no longer considered pathological for an adopted child to search for his biological parents, as was the case in the days of closed records. In fact, the new openness orthodoxy came to see it as pathological for an adopted child not to seek out his or her biological history.

Adoption law became reactive to this emerging majority. Statutory changes were enacted to guarantee access to birth certificates and records.⁵ Within the last eight to ten years at least sixteen states have enacted statutes recognizing post-adoption contact agreements between the biological and adoptive families, provided that the parties understand that the adoption cannot be challenged.⁶ States have even gone so far as to enforce such contracts in court.⁷ Open adoption was touted as enabling birth mothers to reduce their sense of loss, adopted children to treasure a piece of their past, and adoptive parents to gain access to information potentially critical to caring for their adopted child’s developmental, medical, and emotional needs.⁸

While the trend towards open adoption excited many interested individuals and groups, it intimidated and raised the concerns of others. Today, it is typical for adoptive parents to be informed, prior to adoption, that the hope of getting a child like them is linked with accepting the openness principal and the importance of biological continuity for their adopted child’s development, usually in the form of a contact agreement with the biological parents. As a result, potential adoptive parents who do not wish to share what they consider to be their own child are now focusing their child searches abroad in countries where they can bring back to the United States a child with less likelihood of

² See JOAN H. HOLLINGER ET AL., ADOPTION LAW AND PRACTICE § 1.04 (1999).

³ See KENNETH WATSON, *The Case for Open Adoption*, in PUBLIC WELFARE 24 (1988).

⁴ See DAVID H. KIRK, ADOPTIVE KINSHIP: A MODERN INSTITUTION IN NEED OF REFORM (1981).

⁵ See HOLLINGER, *supra* note 2, § 13-A.04.

⁶ See *Id.* § 13-B.01.

⁷ See, e.g., *Weinschel v. Strople*, 466 A.2d 1301, 1305 (Md. Ct. Spec. App. 1983).

⁸ See HOLLINGER, *supra* note 2, § 13.02.

future involvement with the child's biological ties. Moreover, some adoptive parents who receive a child from a single mother also fear that under the openness principal, the birth father will eventually be able to force the adoptive parents to share the child with him. As a result of increasing enforcement of post-adoption agreements in the court system, many older children adopted by foster parents also must embrace these adoption agreements, even though burdensome problems with their biological families might have existed in the past.⁹

While Hollinger points out both the pros and cons of such agreements, she does not attempt to resolve the issues; instead, she challenges the involvement of the law in adoption practices altogether. Although Hollinger acknowledges the importance of the law in creating the adoptive parent/child relationship, she believes that post-involvement may be unnecessary, or at the least could be less intrusive. She explains that not long ago social workers vigorously supported the policy of completely severing adopted children from their biological pasts; yet they now contend that complete openness is the only acceptable approach to healthy adoption. This abrupt about-face in social policy requires increased skepticism of the actual value of openness and increased government intervention in adoption. Hollinger criticizes the courts' and legislatures' haste to establish a policy of complete open adoption in the post-adoption world, when significant questions regarding the actual structure of adoptive families and the benefits to them of an openness policy remain unanswered. In many ways, she would rather see society defer to the laissez-faire custom of trade rather than black letter law in determining how eligible children will be adopted. With an expanding range of individuals now entering the adoption system (i.e. gays, lesbians, single parents, and interracial parents), adoption is still in a state of metamorphosis. Enacting strict standards might distort or inhibit the more organic process of a less regulated system.

On the other hand, Professor Richard Banks contends that even stricter government standards are needed in the regulation of adoptive relationships. He believes that adoption law focuses too much on the notion of choice. Birth parents have the choice of the "type" of parent they want to raise their child. Adoptive parents have the choice of the "type" of child they want to bring into their household. Government has the ultimate choice of the "type" of family it permits to be created. Banks suggests that this frames the question poorly, since such choice has an inherent exclusionary element to it. Instead, Banks proposes that we look to a normative vision which focuses on individuals, rather than to the paradigm of choice when creating adoption policy.

Racial adoption patterns has been a key concern surrounding choice. Until recently, race matching was an acceptable form of adoption placement.¹⁰ Race matching policies require that adoptive parents be matched to children on the basis of race. For example, it would be impossible under these policies for a white parent to adopt an

⁹ See *Id.* § 13.02[3][2].

¹⁰ See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875, 878 n.8 (1998).

African-American child. Proponents reason that race matching is important because it benefits the child and furthers her best interests by: (a) strengthening her sense of identity, (b) promoting her cultural development and growth, and (c) providing her with necessary coping skills for relating to the world as a member of a particular race. This presupposes that a child can only understand her heritage through an intraracial family.¹¹ Interestingly, both Hollinger and Banks contend that recent studies on the development of adopted children have revealed no compelling evidence that children raised in interracial families are more likely to experience problems than adopted children raised in intraracial families.

In 1994, with the passage of the Multiethnic Placement Act, race matching fell into disfavor.¹² Race matching was no longer permitted in federally funded adoption agencies, because statistical analysis showed that it produced racial inequality in adoption. In California, African-American children are four times less likely to be adopted than any other race—even less likely to be adopted than drug exposed babies.¹³ These statistics are even more troubling since African-American children are disproportionately represented in adoption agencies. But the question is: has the elimination of race matching solved the problem?

According to Banks, it has been unsuccessful. Through the elimination of race matching, the government took the choice away from adoption agencies; however choice by adoptive parents remains. This policy, termed “facilitative accommodation,” allows adoptive parents to specify a racial preference for potential adoptees. Studies show that a majority of adoptive parents are white, and that white parents are more likely to adopt a child who is severely disabled than a child of a different race. This leads to the conclusion that racial inequality in adoption practices will persist so long as parents can select their adopted children based on race.¹⁴ Banks asserts that facilitative accommodation should be treated by the courts as a racial classification and subjected to strict scrutiny.¹⁵ Although facilitative accommodation policies are intended to further the best interest of the child by discouraging placement with adoptive parents who do not want them on account of their race, Banks states that there is little evidence that facilitative accommodation is necessary to avoid inappropriate placement.¹⁶ He argues that matching individual children with parents, rather than excluding an entire group of children on the basis of race, most efficiently achieves the best interests of the child. He

¹¹ See *id.* at 879 n.11.

¹² See *id.* at 900 n.105.

¹³ See *id.* at 881 n.20.

¹⁴ See *id.*

¹⁵ See *id.* at 908 n.146.

¹⁶ See *id.* at 909.

further suggests that adoption agencies should allow prospective parents to spend time with a child before adoption in order to determine whether a good match exists.¹⁷

Ultimately, Banks would like to see a strict nonaccommodation policy put into effect. Through this policy, race-blind adoption would take place within federally funded adoption agencies.¹⁸ He makes clear however, that the goal of this policy is not to promote multiracial families per se, but instead to override the mechanisms of racial inequalities embedded in the current system.¹⁹ His policy attempts to facilitate the adoption of children who are not currently being adopted—in this case, minority children form the largest group in the adoption pool, and are not being adopted at the same rate as other children. Banks argues that our society needs to start focusing on the rights of the children rather than the rights of parents and others.

From Banks to Hollinger, it becomes evident that the debate over the present metamorphosis of adoption law and policy is still in its cocooning stage. Both offer very different, potentially conflicting pictures of the proper role of government in its development, and the path government should take in erecting a sound adoption policy. Although considerable distance remains to be covered, the adoption system in the United States has evolved considerably from the narrow, storybook image of the adoptive family portrayed in *The Chosen Baby*. Today, the story might tell of an Asian mother and father telling the tale of the stork to their ten month African-American boy who visits his biological mother every other Saturday. But is this story complete? Or, is a third edition already in the making? History indicates that the answer is yes. Gay and lesbian advocates, single parent households, and other combinations of suitable, loving parents hold the pen to the next chapter in adoption policy making.

¹⁷ *See id.*

¹⁸ *See id.* at 943.

¹⁹ *See id.* at 942.

