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

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

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

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

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

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

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

The rights picture

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

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

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