Private Ordering, Legal Ordering, and the Getting of Children: A Counterhistory of Adoption Law

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INTRODUCTION

In a practice termed “deplorable” by British Prime Minister Tony Blair,1 “revolting” by the British Home Secretary,2 and “disgusting” by an Arkansas judge,3 children in the United States may be sought and offered for adoption on the Internet. A recent high-profile fraud related to Internet-facilitated adoptions—the adoption by a British couple of the American “Internet twins”—has provoked calls on both sides of the Atlantic to close this apparent loophole in adoption regulation.4 That the absence of regulation of Internet adoption advertising is widely called a loophole and a problem that needs to be fixed, suggests that adoption generally is conceived of as an area of comprehensive legal ordering. If adoption is viewed as an area that is, or should be, completely regulated, then the absence of regulation represents a gap or omission.

But is adoption a practice in which legal ordering is, or should be, paramount over private ordering? Under a private ordering model—essentially a contract model—parties define the form and substance of their transactions apart from any controlling, comprehensive legal regime. In a private ordering model applied to adoption, parties to the adoption are the active agents in creating and defining their families. Birth and adoptive parents select the methods they use to locate each other, choose with whom they will or will not deal, and develop the terms of the adoptive agreement between themselves. The law’s

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role under this model is limited to *evaluation* and *ratification*—acts of ascertaining that the child will not be harmed by the arrangement and of granting legal formality. Under the legal ordering model, legal institutions create the definition of adoptive families. The law’s role here relative to the parties is more expansive: determinations of who should adopt, how the adoptions take place, and centrally of what constitutes an acceptable family, are, under the law-centered paradigm, legal determinations. Thus, understanding adoption as primarily privately-ordered or legally-ordered has significant stakes for adoption participants and, more broadly, for the extent to which law constructs and reifies normative definitions of the family.

This Note examines legal ordering versus private ordering paradigms of adoption law and practice. The standard history of adoption presents adoption as a pure construct of law, a “creature of statute” invented by legislatures in the mid-nineteenth century. This history relates that legal institutions created, defined, and appropriately do define the adoptive family. The implication of this history is that such definitional power properly is within the scope of adoption legislation, not the parties to adoptive transactions. The secondary implication of this history is that courts must strictly construe adoption statutes on the ground that the adoption regime, as a creature of statute, arose in derogation of the common law. The uses of history in judicial construction have had great practical importance in recent cases concerning adoption by same-sex couples: courts have variously struggled to circumvent the strict construction in order to facilitate some adoptions and have taken refuge in the shelter of strict construction as a way to deny others.

In opposition to the dominant history, this Note proposes a “counterhistory” of adoption. This counterhistory presents adoption practice and law as nonstatutory, with deep private-ordering roots in contract law. An extrastatutory history supports an account of adoption as a primarily privately-ordered sphere. In addition to being more historically accurate, this account grants autonomy to adoption participants to create their own families without legislative impositions of normative definitions of the family. Instead of construing an area without regulation as a lacuna in legally-ordered regime, the counterhistory requires a justification for any legislative encroachment on private arrangements. Further, replacing the dominant history with one that recognizes a pre- or nonstatutory basis for adoption law would liberate courts from the constraints of strict construction, enabling them to approve more nontraditional adoptions or forcing them to openly state the nature of their opposition.


6. The stakeholders considered to be the “adoption participants,” and frequently referred to as the “adoption triangle,” are the birth parent(s), adoptive parent(s), and child or children. *E.g.*, Audra Behné, *Balancing the Adoption Triangle*, 15 PUB. INT. 49, 53 (1996-1997).
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This Note is divided into four Parts. Part I presents the dominant legal history of adoption as an American-made “creature of statute,” and speculates as to why this history may have arisen and become entrenched. Parts II and III present the alternative to the standard history. Part II examines the informal practices and uses of law by adoption participants before the enactment of adoption statutes. This Part relies on documentary evidence of American and European adoptions predating the first adoption statutes to argue: (1) that adoption practice flourished prior to and apart from statutes; and (2) that adoption law has a robust pre- and non-statutory existence.

Part III first assesses whether the passage of adoption statutes in the mid-1800s transformed adoption in the United States into a statutorily-bound regime, and argues that because adoptions continued to be transacted outside of the new statutory regimes, “statutorification” did not transform adoption from a primarily privately ordered regime into a statutory regime. Part III then turns to contemporary adoption practice to examine the current balance of legislative versus private ordering and argues that current adoption is a mix of the privately-ordered and legislatively-defined. Currently, the adoption process is privately-ordered (e.g., parties can advertise on the Internet) but the substance of adoptions—who may adopt, what kinds of families are permitted—is defined to a significant extent by statutes. These statutes embody norms concerning the religious, racial, sexual orientation, and age compositions of “standard” families.

Part IV focuses on the harms that the dominant history perpetuates and the work that this Note proposes the counterhistory should perform. First, it examines discriminatory content in contemporary statutes, including legislative preferences for racial and religious matching and the prohibition in some states against adoption based on the sexual orientation of the prospective parent. When courts have been called upon to apply these in cases of non-normative adoptions (i.e., adoptions in which the child and the prospective adoptive parents do not share race or religion, or where the prospective parents are homosexual), courts have relied upon the history of adoption to provide interpretive guidance. This Part examines several cases of proposed adoption by gay or lesbian prospective parents to show how courts’ reliance on the history of adoption law as purely statutory has led those courts to do one of two things. Either courts construe the statute strictly to defeat the proposed adoption, or alternatively courts engage in judisprudential backflips to allow the proposed adoption in a way consistent with a strict construction of the statute. In the first type of case, the mishistory of adoption as purely statutory has caused courts to deny adoptions that it otherwise would have granted, or has provided the court with a credible, nondiscriminatory basis—the requirement of strict construction—to reach a result contrary to the interests of the parties. In the cases where the courts have permitted the adoptions, they
have had to struggle through extensive, less-than-straightforward reasoning to do so. Defeating the notion that adoption is and should be primarily legally-ordered based upon the normative family as defined by law, in part through challenging the idea that adoption is a creature of statute, courts should be freer to interpret adoption statutes to permit any adoptions that serve the best interests of the parties. Conversely, stripped of the shield of the putative necessity of strict construction, courts disinclined to permit nonnormative adoptions will have to state explicitly their reasons for doing so. Defeating the mishistory of adoption as purely statutory has the potential thus to encourage greater transparency in legal decision making and public discourse about adoptions, and about family structures, as well as, perhaps, to facilitate a broader range of families.

I. THE MISHISTORY OF ADOPTION: SOURCES OF ADOPTION AS A "CREATURE OF STATUTE"

All major legal histories of adoption law and practice in the United States perpetuate the story that affective adoption—the adoption of children for purposes other than the procurement of heirs or additional labor—is an invention of American law, created by statute in the mid-1800s. Legal histories of adoption generally assert that, before the inauguration of affective adoption in the United States, the primary purpose of Western adoption was to provide adopting parents with an heir. Wigmore and others note that some form of adoption was recognized in the Babylonian Code of Hammurabi of 2285 B.C. Adoption, these histories recognize, was "regulated by law in Greece and Rome" and "Justinian . . . reduced the [adoption] system . . . to a code." Because of the putative absence of any practice of adoption in the centuries between the end of the Roman Empire and the passage of American statutes in the mid-1800s, "modern legislation upon the subject [of adoption] has derived its chief features" from the Roman law. Similarly, scholars, and courts relying upon them,
assert that English common law did not recognize the practice of adoption because the concept conflicted with the principles of inheritance. Thus “[a]doption was unknown to the common law.”

The putative absence of common law heritage has led scholars and courts to assert that American adoption statutes are *sui generis*: “In matters of adoption we have no heritage from either the common law, the ecclesiastical law, or from the civil law, but the matter is *entirely statutory.*” Thus in the United States adoption law is entirely “a creation of statute.” In the absence of common law precedent, American jurisdictions did not develop the concept of adoption jurisprudentially but deferred to legislative authority. Other writers attest to the dominance of the view of adoption as a recent, legal creation by noting the general agreement amongst scholars on this point. As Yasuhide Kawashima notes in his article *Adoption in Early America*, “Historians and legal scholars agree that the American law of adoption emerged in the middle of the nineteenth century with the 1851 passage of the Massachusetts statute.”

Adoption primarily fulfilled the purpose of wealth transfer from individuals or kin groups with no male heirs. E.g., Kristin Elizabeth Gager, *Blood Ties and Fictive Ties: Adoption and Family Life in Early Modern France* 38 (1996). The *pater familias* would adopt an adult male from within his family’s extended kin group to remedy the absence of a male heir or occasionally to provide for a worthy young man lacking an inheritance. Id. This practice bears almost no similarity in form or purpose to contemporary adoption.

12. Huard, supra note 9, at 745-46. An alternative explanation for the hostility of formal law to adoption is that adoption, in creating heirs for childless individuals, deprived the church of property that otherwise would have escheated to it. This thesis concerning the absence of formal legal sanction for adoption has been developed primarily by anthropologist Jack Goody who contends that, beginning in the fourth century, the church mounted a concerted effort to increase its wealth by capturing the bequests of childless families. Jack Goody, *The Development of the Family and Marriage in Europe* 72, 100 (1983).


16. Carter, supra note 15, at 817-18. See also Bray v. Miles, 23 Ind. App. 432, 448 (1899) (stating that “[f]or the reason that it is purely statutory and in derogation of the common law, it has frequently been said that it is to be strictly construed”) (emphasis added). The recitation of adoption law history by the Bray court and other early courts, substantiating the finding that these statutes were “in derogation of the common law,” caused courts to impose a standard of strict construction on adoption statutes that courts did not apply to statutes with a common law history. Id. In Bray, this stricter standard led to the adult adoptee being disinherited from the will challenged in the case. See also Keegan v. Genaghty, 101 Ill. 26, *5* (1881) (stating that that “[t]he adoption of children is purely a creature of the statute, no such thing being known to the common law.”) (emphasis added); In re Thompson’s Adoption, 290 Pa. 586, 590 (1927) (stating that “[t]he subject of adoption has always been in the hands of the legislature”).

According to the standard narrative, adoption not only did not exist at law at this time but would have been anathema to mores of the family: prior to the 1800s, sources argue, adults recognized their children and others’ children as “chattel,” valuable primarily as a source of labor. It was not until the nineteen century’s “invention of childhood” that adults sought relationships with children that were principally emotional or affective instead of labor-based.

Although this history has been developed and reiterated by diverse sources, the historiography of legal adoption history is unclear; the development of the dominant story of adoption law deserves further study. Tentatively, this Section suggests several possible avenues through which this history developed, and developed traction. Scholarship in other areas of law presents evidence that early American courts resented the perceived encroachment by legislatures on a legal system that, until the mid-1800s, had remained almost entirely common law based. Confronted with the upsurge of statutes in most areas previously controlled, if at all, by contract and common law, courts may have claimed the statutes to be in derogation of the common law in order to arrogate to the courts the right to strictly construe—and thus limit or defeat—them. This move by courts could be seen as being directed at affecting the balance of power between courts and legislatures more than as making a statement on adoption.

Perhaps more importantly, scholars who first wrote on adoption may have emphasized the statutory nature of adoption because, working in the legal history tradition, the nonstatutory sources of adoption law and practice (discussed

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21. E.g., Roscoe Pound, Common Law and Legislation, 21 Harv. L. Rev. 383, 385 (1908) (decriing earlier and contemporary courts’ “orthodox common law attitude” towards a legislative innovations “of giving to it a strict and narrow interpretation, holding it down rigidly to those cases which it covers expressly.”); see also, Harlan Fiske Stone, The Common Law in the United States, 50 Harv. L. REV. 4, 12 (1936), reprinted in The Future of the Common Law 131-33 (Roscoe Pound ed., 1937) (describing same, stating that courts treated new statutes in the late eighteen and early 1900s as “to be obeyed grudgingly, by construing them narrowly and treating them as though they did not exist for any purposes other than those embraced within the strict construction of their words”).

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infra) were not visible or available to them. Far be it from this Note to survey legal historical and analytic methodologies. However, despite the extraordinary complexity of attempting to analyze competing legal analytical methodologies accurately, it is not inaccurate to state legal history methodologies up through the middle of the twentieth century primarily emphasized intra-legal, textual sources to the exclusion of social and empirical sources. As legal historian Robert W. Gordon notes, legal scholarship long held as “dogma that legal forms can be understood apart from their social context.” The influence of social history and the development of the “law and society” school of legal analysis have, in the later part of the twentieth century, significantly broadened the types of sources upon which legal scholars draw. The willingness to look at families and children as matters fit for serious academic attention, and social history methods that permit such investigation, are of more recent vintage than the early legal commentaries on adoption. The perpetuation of this history by more recent legal scholars may be explained by narrative momentum. Contemporary scholars (e.g., Kawashima, discussed infra) seem often merely to recite without examination the generally accepted “truth” that adoption did not exist prior to its statutory “creation”—perhaps for the very good reason that it is a generally accepted truth.

The most compelling justification for the standard history, though, seems to be its rhetorical correspondence with the great themes in the American identity


24. Gordon, supra note 23, at 70, arguing that “Law-and-Society studies are beginning to make a dent on the mainstream lawyers who, until recently, showed little more than scorn for Realist empiricism.” That US legal scholarship methodologies historically focused on legal texts independent of social context is particularly curious. As Gordon notes, “How ironic it is that the country whose... political origins lie in revolutionary protests organized by ‘the people out of doors,’ crowds explicitly claiming legal status and legitimacy; and whose history is so full of mass reform movements should have produced such a Tory legal literature, narrowly focused on official agencies... and almost completely indifferent to extra-institutional law-making.” Id. at n.34.

25. Ariès’s work is credited with establishing the family as a subject of serious study. Lee E. Teitelbaum, Family History and Family Law, 1985 WIS. L. REV. 1135, 1138 (“Before Philippe Ariès’ Centuries of Childhood, it is generally admitted, family history barely existed as a serious enterprise. In the... years since that work appeared, the body of work in this area has grown immensely.”).
and the American dream. According to the standard history, America, a land of self-invention and self-made men, naturally embraced self-made families in a way no other people had before; a land of opportunity for strangers, American families gave opportunity to stranger's children. And, as a people who express themselves through democratic law-making, Americans enshrined this spirit in laws made by bodies of ordinary citizens, the legislatures. The passage below, from a recent book on adoption in America, expresses the full myth power of the adoption-as-American-invention idea:

From the days of the “orphan trains” [between 1854 and 1929], adoption has been said to embody a distinctly American ideal. In England, adoption was not permitted by statute until this century, because social status and, thus, identity were seen as being determined by bloodline alone. The United States was a nation of immigrants who adjusted to new surroundings, made fresh starts, and shaped their own destinies, like children who were adopted.¹

This story of American adoption illustrates every element of the dominant history of adoption challenged by this paper. First, it states that adoption of this type arose de novo in America in the mid-1800s. Second, it links adoption to statutory law: it takes as the starting point for American adoption the time at which state legislatures passed the first adoption statutes and identifies the advent of adoption in Europe by looking at dates of statutory passage. Third, it identifies adoption as a uniquely American practice: Europe, obsessed with lineage, could not have developed adoption, particularly stranger adoption, while America embraced this way of forming families because all Americans are, in a sense, “adopted children.”

Perhaps most importantly, the story of American adoption relies upon adoption as a specifically statutory invention in order to buttress the claim for its Americanness. This passage shows that Americans can only claim adoption as uniquely our own if we emphasize dates of statutory passage as marking the inception of the practice because America passed its statutes before the retrograde Old World. By contrast, if adoption's practice is not identical with statutory passage but is instead a social practice accomplished through various legal forms, or without legal formality, then the Old World may have engaged in it as well. The claim for American invention of this form fails without the insistence on the statutory because the notion that Europeans practiced “American”-style adoption would undermine the American sensibility that this country was the first in the world to value people apart from birth status. In this way, the claim of statuoriness and of Americanness unite: this unity specifically supports the proud American strain of meritocracy and opportunity through distinguishing it from rejected European social mores.

Undoubtedly, the myth of American adoption has powerful rhetorical resonance; it captures essential features of the American self-image. But whatever

its power, the myth also obscures. It communicates a view of national identity, but places the power of identity creation in the hands of legislatures—under the adoption-is-purely-statutory view, legislatures establish the identity of the American family. This Note argues that the nonstatutory history of adoption, in addition to being more historically accurate, recognizes the creative roles played by adoption participants. Records demonstrate that individuals who sought to adopt or to place a child for adoption did so in colonial and early America and contemporaneously in Europe. These stakeholders demonstrated creativity in their use of contract law and, to a lesser extent, judge-made common law, to accomplish adoptions in the absence of statutes or Code provisions “permitting” adoption. While the standard histories lead with the law and impute to law the creative role of originating adoption, these sources support the argument, infra, that formal law has played the follower’s role, both temporally and substantively. Placed in this context, private adoption arrangements between individuals—whether forged in a geographic community or a community of interest on the Internet—appear continuous with the long tradition of adoption, not as loopholes in a statutory regime.

II. PRE-STATUTORY ADOPTION: EARLY EUROPEAN AND AMERICAN APPROACHES

Documentary evidence from France and England, primarily notarial contracts and public records from French and English public institutions, demonstrates that adoption and stranger adoption existed in Europe from at least the Medieval period forward. Records of such adoptions are particularly abundant from French sources spanning the sixteenth to eighteenth centuries. Following European tradition, or perhaps a desire for children that goes beyond the culturally-specific, affective adoption occurred from the earliest days in colonial America and the early United States. These American adoptions, like their European precursors, were effected primarily through contract or testamentary instruments; later, post-colonial adoptions occasionally received judicial or legislative ratification. These European and American sources show that pre-statutory adoptions were primarily private orderings; the role of law in these arrangements was limited to formalizing the private arrangements to the extent desired by the participants.

27. “Code” here refers generally to the formal laws of non-common law countries, e.g., the Code Civil in France.

28. Due to its early development of bureaucratic culture and highly-developed legal system, French records are most numerous. There is sparse documentary evidence of formalized adoptions during or prior to the Renaissance; it is unclear if the scarcity of documents reflects the infrequency of record-keeping or whether adoptions occurred infrequently.
A. French and English Practice of "American" Adoption, 1600s-1800s: Legal Shaping Through Contract by Adoption Stakeholders

French history of adoption, shaped largely by the work of Jean Pierre Gutton, notes that while adoption disappeared from the written law after Roman times, adoption practice flourished as a social reality throughout the medieval period and Enlightenment. Social historian Elizabeth Gager's extensive research into French public records archives has revealed notarial records and records of public institutions that cared for abandoned children; these records provide extensive evidence of adoption distinct from the "binding out" of most children for service. Two types of adoption occurred in early modern France. The first was the adoption of a child from its natural parent(s) by a family within the community. The second type was the adoption of an abandoned infant stranger by unrelated adults—true "American-type" adoption. These adoptions were distinct from the well-noted, historically-recognized practice of adopting an adult heir to ensure property transmission. Furthermore, they occurred primarily through private ordering outside the French Code Civil.

French public institutions tasked with caring for abandoned children, such as the Couche des Pauvres Enfans Trouvez in Lyon and the Parisian found-

29. As the Associations de Parents par Pays d'Origine, a French non-governmental organization for the promotion of international adoption, notes:

"Known and well-practiced from Athens to Rome, this form of filiation disappeared from the written law during the Dark Ages, around the year 800, not to return until the Revolution. Gutton has shown, however, in studying notarial archives and records of the civil bureaucratic institutions [hopitaux], that the practice of adoption never abated during the Middle Ages. The practice of abandoning infants into the care of third party or a hospital was a social reality of the ancien régime. To provide for the maintenance of "found children," the hospitals, without so stating, renewed the practice of adoption. At the same time, large numbers of children were "donated" between parties known to each other in transactions accomplished through irrevocable notarial contract. [Yet], no national laws on adoption existed at the time." (Author's translation.)

30. GAGER, supra note 11, at 8 (noting that “the desire for children among childless families, in combination with the growing numbers of destitute children... served to sustain adoption practices [in France] well into the eighteenth century”).

31. Id. at 10.

32. Id.

33. "Couche des Pauvres Enfans Trouvez" translates as “cradle of poor foundling children.” (Middle-French spelling of “enfants” (children) omits the “t” found in modern French spelling.)
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ling hospice *L'Hôtel-Dieu*, contain in their registers evidence of adoption of these children. Further evidence of adoptions from the *Couche* surfaces in the registers of different notaries who worked with that institution during the period from 1570 to 1677.

While early American formal law was silent on adoption, French formal law actively discouraged it: as a French legal commentator of the 1700s noted, "We do not recognize in this kingdom any other form of filiation, kinship, or civil alliance *than that which derives from blood and Nature.*"

Yet, legal discouragement did not prevent adoptions from occurring or from attaining legal formality through contracts created and ratified by the adoption participants. The presence of the Parisian and Lyonnais notarial records formalizing the adoptions demonstrates that the parties involved did want to accomplish the adoptions pursuant to contract and to formalize the transfer. These contracts record the names, residences, and professions of the adoptive parents and the name, sex, and age of the child; often they also detail how the child came to be placed for adoption. These documents also specified a contract of care between the adoptive parent(s) and the adoptee. A typical contract specified that the adoptive parents would provide a home, education, and apprenticeship (for a male child) or dowry (for a female child), and inheritance. Some of these terms would have appeared in binding out contracts. The last several terms, however, distinguish these contracts from service contracts. Through agreeing to provide a dowry for a girl and inheritance rights for a boy or girl, the contracts signal that the adults intended to include the children as full family members. Because the Justinian Code recognized the inheritance rights of natural children only, granting the inheritance right signified family membership and set the adopted child equal to a natural child. The contracts also often specified that the adoptive parents would give the child "parental . . . affection;" reciprocally, the adoptee agreed "to obey and honor" the adoptive parents. The promise of parental affection demonstrates the intimate, non-economic nature of the adoptions; that the child's contractual promise echoes the commandment to honor one's mother and father confirms that these adoptions established relationships perceived by the parties—and perhaps the cul-

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34. "*Hôtel-Dieu*" translates as "house of God."
35. GAGER, *supra* note 11, at 10.
37. SERRÈS, *supra* note 36 (emphasis added).
40. Id.
41. Id.
42. Id.
ture—as fully familial. Thus, these notarized contracts demonstrate profound similarities between adoption practices in sixteenth through eighteenth-century France and adoption practices in America from the seventeenth century through the present.

Adoption in England, only occasionally performed, followed a different course than in France both in practice and at law. English law, like French law, officially disfavored practices that could impugn bloodline as the basis for the descent of property. It appears that the legal and metaphysical gravity imputed to blood in England, however, caused adoption both to occur less frequently than in France and to gain less open legal recognition. At the same time, England’s less developed bureaucratic culture during the seventeenth and eighteenth centuries produced and left behind fewer records than French culture of the time. England possessed no public institution equivalent to the Couche des Pauvres Enfans, nor did any other similar public institution make and keep records of the disposition of children.

It is generally held that English law did not admit heirship that was not tied to blood lineage and that adoption was therefore unknown at English law. As Glanvill, an English legal authority of the eighteenth century, pronounced, “Only God can make a heres, not man.” Despite this categorical pronouncement against non-blood filiation, nineteenth-century English legal commentators acknowledged that some plurality existed in English law and practice around the permissibility of adoption. Sir Frederick Pollock and Frederic Maitland remarked in their monumental work The History of English Law that “far back in remote centuries Englishmen had seen no difficulty in giving the name heres to a person chosen by a land-holder to succeed him in his holding . . . .”

Pollock and Maitland further note that English law leaned toward a kind of recognition of adoption through the mechanism of legitimating children that clearly were not the offspring, or the legitimate offspring, of the parents who claimed them. As Bracton wrote, “[S]purious offspring . . . are legitimated sometimes, as it were by adoption . . . . [I]f the husband has taken the child into his house and . . . nourished it as his son . . . such a child will be adjudged to be the heir and to be legitimate.”

This brief passage conveys several important points about English adoption practice and English law’s approach thereto. First, that a passage on adoption appears in the major treatise on English law indicates adoption occurred often enough to merit Bracton’s commentary. Second, Bracton differentiates between arrangements under which a child is taken in and raised as the child of the fam-

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44. Id. at 398-99, citing 1 BRACTON, DE LEGIBUS ANGLIAE f.63b, 503 (Twiss ed. 1878).
45. 1 BRACTON, DE LEGIBUS ANGLIAE f.63b, 503 (Twiss ed. 1878), quoted in Huard, supra note 9, at 746 (emphasis removed).
ily versus not as child of the family; this suggests that both types of practices were known and distinguished. Third, Bracton records that a child "nourished . . . as [a] son" by the head of household would be "adjudged" by courts as the legal equivalent of a natural child. This indicates a willingness on the part of courts to recognize at law adoption-like situations where a child was raised as if it were the natural child of the family.

A more common method of providing for parentless children in England was that of binding out or putting out of the children for service. This institution, however, did not exist specifically to accommodate orphans, as children of all classes were bound out for service in England. As Phillippe Ariès noted in Centuries of Childhood, up through the early nineteenth century "a large part of the population . . . was still living . . . with the children separated from their parents." The practice of binding out children and the legal provision for needy children united in the English doctrine of parens patriae, the principle that king is father of all of the people. Henry VIII, never successfully a natural father but parens patriae to thousands, passed the first act ordering all vagrant children to be seized by the Crown and bound out. This pragmatic remedy to the problem of needy children survived in early America, at times providing an alternative to adoption and at times overlapping with it.

B. The Colonies: Binding Out for Service, Taking In for Care, and the Importance of a Parent's Will

The earliest records of colonial America present a picture of domestic relations continuous with contemporary Europe: As in England and France, children in the Colonies were bound out for service as apprentices. Also continuous with English law and practice, colonial leaders implemented the parens patriae concept to bind out children by agency of law. These acts were initiated by law, as distinguished from privately-ordered adoptions. The actors, in their official capacities, made a determination about the fitness of a child’s ex-

46. Presser, supra note 8, at 453.
48. Ariès, supra note 19, at 404.
49. See BLACK’S LAW DICTIONARY 1114 (6th ed. 1990) ("'Parens patriae,' literally 'parent of the country,' refers traditionally to role of state as sovereign and guardian of persons under legal disability such as juveniles or the insane . . . . Parens patriae originates from the English common law where the King had a royal prerogative to act as a guardian to persons with legal disabilities such as infants.").
50. O. JOCELYN DUNLOP & RICHARD D. DENMAN, ENGLISH APPRENTICESHIP AND CHILD LABOUR: A HISTORY 70 (1912).
51. ROBERT FRANCIS SEYBOLT, APPRENTICESHIP AND APPRENTICESHIP EDUCATION IN COLONIAL NEW ENGLAND AND NEW YORK 36 (1917).
52. GERALDINE YOUCHA, MINDING THE CHILDREN: CHILD CARE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 18 (1995).
isting situation and the superiority of an alternative one; the child and families concerned then complied. Adoption in the colonies existed distinct from binding out and demonstrated the inverse relationship between the participants and legal ordering—insofar as the parties resorted to it at all, law merely formalized adoptions arranged privately.

Generally, historians note the strictness of colonial parens patriae power over children. But acts under the parens patriae power provided for orphans, illegitimates, the abandoned or impoverished, and the neglected or abused. Minutes from a Salem town meeting in 1648 record how a town disposed of children needing care: Elders agreed that the “children of Reuben Guppy [are] to be placed out, the boy till the age of 21 years and the maid till the age of 18 years.”

While it is not recorded why the children were removed, it is clear that such a placing represented a normative or community judgment about the suitability of the situation for the children; law here expressed and imposed the judgment. By contrast, in cases where parties effected an adoption instead of a foster-type placement, the adoption represented the parties’ deliberate departure from the default of binding out. Adoption and binding out also exhibit different directional relationships between the participants and the law. In binding out, legal notions of child welfare, effectuated through the parens patriae power, determined the placements. In colonial adoptions, consistent with European adoption practices, individuals structured their own arrangements and utilized law secondarily.

1. Colonial Wills as Evidence of “True” Adoption: Placement By Will and Affirmation of Affect Through Heirship

While scant work has been done on adoption during the colonial period, the work that has been done reveals that adoption, fully consistent with the modern definitions thereof, occurred during the colonial period. In the earliest colo-

54. YOUCHA, supra note 52, at 18.
56. It is also clear that such a placement did not constitute an adoption: The time limit (“till the age of 18 years”) establishes a temporary care relationship akin to fosterage instead of a family-like bond that endures in perpetuity.
57. See discussion infra Part II.
58. Kawashima, supra note 17, at 677. Although Kawashima’s paper uncovers the documentary history of adoption in colonial wills and contracts, he also asserts that adoption law is purely statutory. While wills and deeds are legal documents—there is no contention that these instruments were illegal or legally defective—Kawashima does not consider them as part of the legal history of adoption. Rather, he considers adoption law narrowly as statutory law developed specifically around adoption. This leads
nial times, these adoptions occurred both informally and through written instruments—primarily wills, deeds, and other testamentary bequests that transferred a child subject to adoption. These colonial wills specified the disposition of the child, even going so far as to name contingent alternative devisees for the child should the first devisee be unable to take the child or later become incapacitated. This care in ensuring the placement of the child in a family that would agree to raise it as their own demonstrates the importance to these individuals that their children be raised as family members, not as apprentices.

Participants in these placements at times referred to the transaction as an "adoption." More frequently, the document does not use term adoption; yet, all the indicia of "modern" adoption were present, rendering these transfers adoption-in-fact, if not in name. An early record from Plymouth Colony demonstrates the adoption-like nature of these placements of children pursuant to the death of their parent(s). The record states that "Lawrence Lichfeild lying on his Death bedd sent for John Allin and Ann his wife and Desired to give and bequeath unto them his youngest son Josias Lichfeild if they would . . . take him as their child." When the Allins inquired for how long Lichfeild wanted them to keep Josias, Lichfeild replied "for ever." It is significant that Lichfeild specified "for ever," which implies the permanency of a family bond; when children were "bound out" out for apprenticeship, the child would be kept only until majority. "For ever," "as their child," and the "if" contingency, mark this transfer as distinct from "binding out."

Wills provide another type of evidence for adoption during the colonial period. The bequests to children in the wills of those who had received a child to raise demonstrate the strength and nature of the bond between the adult and child. Thus, colonial evidence of adoption is bounded by wills: The wills or dying requests of birth parents usually initiated the adoptive transfer and the wills of the adults receiving the child demonstrate the affective, adoption-in-fact nature of the relationship formed through the transfer.

Supporting the contention that these placements constituted adoption-in-fact whether the term "adoption" was employed or not is the extent to which the receiving adult(s) included the unrelated child in a will. The 1686 will of
Henry Bemett, who raised two girls unrelated to him from their infancy,64 bequeathed to the girls his entire estate and referred to them in his will by his own surname.65 The bequest of property alone could signal family-like attachment; the reference to the girls by his own surname shows that Bemett raised the girls as his daughters. Similarly, in 1769, Georgia resident William Russell provided in his will that a “dowry of 300 pounds sterling” should be provided “to Anna Hunter, Dr. Joseph Hunter’s daughter,” whom Russell had raised.66

These placements share hallmarks of what is now termed “adoption.” In these situations, the child was reared by parties other than the biological parents and frequently by adults that were not part of the child’s family or extended family.67 The placement of a child generally came about due to orphanage or the inability of the biological parents to provide for the child, but the subsequent arrangement was not merely for child welfare—which might have proceeded as a state act under the parens patriae power—but for the purpose of creating family-like relationships. The familial purpose was reinforced by the fact that adoptors often were childless adults who sought to obtain or “replace” a child.68 The presence in these transactions of every defining characteristic of the “modern” American-type adoption, except for the formality of a court proceeding pursuant to statute, argues that adoption did in fact exist in its modern form prior to statutory enactment and even prior to the birth of the United States.

dence of pre-statutory adoption. Immersed in the legal centrist approach to adoption history, he writes that, “[h]istorians and legal scholars agree that the American law of adoption emerged in the middle of the nineteenth century with the 1851 passage of the Massachusetts statute, ‘An Act to Provide for the Adoption of Children.’” Id. at 677.

64. Prior to the Victorian era and its cult of true womanhood, it was common for men to receive custody of and rear children; the assumption that women are more fit to rear children is of recent vintage. Drew D. Hansen, Note, The American Invention of Child Support: Dependency and Punishment in Early American Child Support Law, 108 YALE L.J. 1123, 1130-31 (1999). For a general discussion of the association of the Cult of True Womanhood with child rearing, see John Demos, The American Family in Past Times, in AMERICAN FAMILIES, supra note 53, at 74, 80-83. (“Rooted at the center of the Home stood the highly sentimentalized figure of Woman. It was she who represented and maintained the tender virtues . . . . The careful rearing of children was the most important activity of the True Woman.”).

65. 2 MARYLAND CALENDAR OF WILLS, 1685-1702, at 6 (1968), cited in Kawashima, supra note 17, at 692.


67. Many of these transfers pursuant to will devised the child to a relative. Id. However, Kawashima, in his work on colonial wills, found that assignment of the child to an unrelate party for that party to rear as his or her own child was “common.” Kawashima, supra note 17, at 683 (citing ABSTRACTS OF COLONIAL WILLS OF THE STATE OF GEORGIA, 1733-1777, at 121 (1962)). It is unlikely that true “stranger” adoption could have occurred in the early colonies; while adoption may have existed in these small settlements, strangers probably did not.

68. For example, note the 1720s case of Robert Stevens and his wife, who, after the death of their only son, took in an infant boy to raise, ABSTRACTS OF THE WILLS OF THE STATE OF SOUTH CAROLINA, 1670-1740, at 63, 105 (1960), cited in Kawashima, supra note 17, at 690; and the case of May Bickley and his wife, childless New Yorkers who, in the early 1700s, each “adopted” a child to raise, 2 ABSTRACTS OF WILLS ON FILE IN THE SURROGATE’S OFFICE, CITY OF NEW YORK, 1708-1728, at 272-73 (1894), cited in Kawashima, supra note 17, at 690-91.
Not only do the Bernett and Russell-Hunter adoptions demonstrate that adoptions transpired extra-statutorily at this time, they also hold a moral for contemporary adoption debates about what constitutes an appropriate adoptive family. Bernett and Russell appear from the records to be childless men who adopted daughters. Bernett received the girls as infants; it is not clear at what age Anna Hunter was adopted by Russell. Under a regime that defines requirements for adoptive parents through building normative judgments into the law about appropriate families, such arrangements might not pass muster: parties like these might be precluded from adopting because of suspicion about their sexual preferences, or because they would provide a single-parent home.

2. Adoption Practice in Post-Colonial America: Contract, Private Legislative Enactments, and Court Orders

By the late 1700s, legal formalities attesting to the existence of adoption had expanded from wills and bequests to include private legislative enactments, court orders granting a change of name of the adopted child, and various forms of contract. Adoptions began to be performed by private agreement, similar to a conveyance of real estate, that was authenticated by making a public record. Through this period, wills also continued to provide evidence of adoption. The term “adoption” also began to occur throughout these documents with greater frequency. These legal forms simultaneously demonstrate both that adoption and adoption law preexisted the statutory laws of the mid-1800s. Further, they evidence a model in which law works to ratify private arrangements instead of the contemporary conception that views any unregulated area of adoption practice as a problematic “loophole.”

Legislative records of name changes in Maryland reveal the linkage between name-changes and adoptions. These private enactments fulfilled two
purposes. Primarily, they served to effect a name change. Subsidiarily, they
specified that the name change was sought for a child that the party sought to
adopt or had adopted. For example, a Pennsylvania bill entitled “An Act to
Change the Names of Certain Persons Therein Named” provided, in part, “Be it
enacted . . . that Eliza Jane Jarvis . . . the adopted child of James and Hannah
Miles, shall henceforth be called and known by the name of Eliza Jane
Miles . . .”

75 In another case, an 1824 Maryland bill granted the petition of
George Jacob to change the name of Louisa Decoutres to Louisa Jacob. The
bill noted, in a “whereas” clause, that Jacob “wishes to adopt the said Louisa as
his daughter.”

76 These bills’ open recognition of the adoptions additionally sig-
nals that Maryland lawmakers viewed adoption as legal. That the primary pur-
pose of these bills was to effect the name change and not the adoption itself in-
dicates that the legislature viewed adoptions as ordinary, lawful occurrences
that parties could transact between themselves by contract or other agreement.

After 1868, Maryland transferred the authority to grant name changes pur-
suant to adoptions from the legislature to the state circuit courts, perhaps be-
cause courts accommodate large numbers of cases more easily than a legisla-
ture.77 In Massachusetts, between 1781 and 1851, the General Court granted
one hundred and one such orders.78 A commentary from this time period on
adoption suggests that these statistics, culled recently from old and incomplete
records, may significantly understate the number of adoptions that actually took
place. David Dudley Field, drafter of New York’s Field Code and advocate of
adoption law reform, remarked that “thousands of children” were “adopted
every year” in New York state.79 Field’s observation that “thousands” of adopt-
ations occurred annually in a single state indicates that the frequency of adoption
may be significantly underreported in surviving court records. Because judicial
or legislative ratification was not necessary for an adoption to be completed, it
is possible that these remaining records pertain to the exceptional situations and
illustrate the “tip of the iceberg” of the phenomenon of pre-statutory adoption.

75. 1844 Pa. Laws 212, cited in Presser, supra note 8, at 463, n.102 (second emphasis added).
76. 1824 Md. Laws, ch. 150 (emphasis added), cited in Carol County, 577 A.3d at 26 n.8.
77. Carol County, 577 A.2d. at 26 n.8.
78. CARP, supra note 55, at 7. The number of adoptions may have significantly exceeded the num-
ber of legal name changes, which were primarily of importance for, e.g., inheritance and land convey-
ance.
79. DAVID DUDLEY FIELD ET AL., CIVIL CODE OF THE STATE OF NEW YORK/REPORTED COMPLETE
BY THE COMMISSIONERS OF THE CODE 36 (1865), quoted in HELEN L. WITMER & ELIZABETH HERZOG,
INDEPENDENT ADOPTIONS 24 (1963) (emphasis added). In 1865, the commissioners of the proposed
Civil Code for New York (David Dudley Field and his colleagues) wrote: “The total absence of any
provision for the adoption of children is one of the most remarkable defects of our law. Thousands of
children are actually, though not legally, adopted every year; yet there is no method by which the
adopting parents can secure the children to themselves except by a fictitious apprenticeship, a form
which, when applied to children in the cradle, becomes absurd and repulsive.” Id.
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In all of the states mentioned, private bills and court orders only formalized name changes of adopted children; they did not formalize the adoptions themselves, which proceeded either without any legal formality or by contract. The private bills and court orders of this period demonstrate the gradual development of the law of adoption around the ongoing practice of adoption. The temporal relationship between these adoptions and the legal proceedings is noteworthy—that the legal proceedings occurred after the adoptions literally demonstrates the responsive role of formal law relative to the actions of the adoption stakeholders.\(^8\)

III. CONSOLIDATION AND CONTINUITY: CONTEXTUALIZING THE RISE AND IMPACT OF ADOPTION STATUTES

A. Origins and Scope of the First Statutes: Reducing the Burden on Courts and Legislatures

That adoption statutes arose in the mid-1800s has already been noted.\(^8\) Statutes arose at this time within the context of the growing number of adoptions formalized at law throughout the late seventeen and early 1800s, and the development of statutes more generally as a feature of American law. During the mid-1800s, American law underwent a large-scale movement to simplify the common law through the passage of general statutes and the creation of restatements.\(^8\) Areas of law previously adjudicated through individual legislative and judicial acts became subject to new statutes. For example, prior to the 1850s, private judicial or legislative acts were necessary not only for adoptions but for the granting of divorces and charters of incorporation; the mid-1800s saw the creation of the first general enabling statutes governing all these areas of ongoing practice.\(^8\) Rather than being seen to inaugurate American adoption, or even American adoption law, the early statutes should be understood in the

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\(^8\) Further, that courts and legislatures granted these acts in respect of pre-concluded adoptions demonstrates that, at this time, adoption was legal and practiced in the absence of statutes.

\(^8\) See supra note 17 and accompanying text.

\(^8\) This historical moment of transition from a primarily common law system to a significantly statutory system has long been recognized. See, e.g., CALABRESI, supra note 20, at 83-85; James McCanley Landis, Statutes and Sources of Law, in HARVARD LEGAL ESSAYS 213 (1934); Robert Ran- toul, Oration at Scituate, in AMERICAN LEGAL HISTORY: CASES AND MATERIALS 317-19 (Kermit L. Hall et al. eds., 2d ed. 1996). Non-statutory collections of the common law, such as the Restatements, also originated during this time period. See, e.g., CALABRESI, supra note 20, at 85.

\(^8\) Massachusetts passed its divorce enabling statute the same year as the adoption statute, 1851. Divorces were granted by individual legislative act prior to the enactment of the statute. 1851 Mass. Acts ch. 82 § 2. For a discussion of the trend toward codification, see generally Gunther A. Weiss, The Enchantment of Codification in the Common-Law World, 25 YALE J. INT'L L. 435 (1999) (discussing the history of codification and emphasizing the development of the Field Code); Glen Weissenberger, Evidence Myopia: The Failure to See the Federal Rules of Evidence as a Codification of the Common Law, 40 WM. & MARY L. REV. 1539, 1567-74 (1999) (giving a general overview of the move towards statutes, with examples of the transformation of areas previously governed by common law).
context of the codification of non-statutory legal practices.

Beginning with Mississippi in 1846 and Texas in 1850, state legislatures began to enact general adoption bills to replace the practice of granting particular bills. These first adoption statutes arose at least in part out of the need to reduce the burden placed on courts by numerous petitioners seeking legal formalization of their adoptions and clarification of inheritance rights. As Calabresi has noted, "[T]he nature of nineteenth-century codes [is that] they were on the whole collections of the common law. . . . They represented solutions to problems that had been dealt with by the courts for centuries." The 1851 Massachusetts statute, which provided a model for statutes subsequently enacted in other states, differed from the Mississippi and Texas statutes in its establishment of the requirement of judicial oversight. The Massachusetts law required approval of the adoption based upon findings made by the court. It did not, as distinct from private enactments and orders and from the Mississippi and Texas statutes, place legal imprimatur on completed adoptions.

The real novelty of the 1851 statute is thus that it, for the first time, inverts the priority of formal law relative to private action by inverting a portion of the time sequence: under the 1851 statute and statutes modeled on it, legal proceedings must come first and the actual adoption comes after. The Massachusetts statute created a judicial safety-check of the private arrangement. Yet, even this temporal shift did not alter the basic directionality of legal ratification of a fundamentally privately ordered transaction. Further, although there are novel aspects to the Massachusetts statute, its impact on actual adoption practice was negligible, as discussed infra at Part V, lessening its import as the initiator of American adoption.

None of the early statutes altered the basic assumption that law had no role in defining or structuring the adoption transaction, nor did the statutes create a role for the state to determine the criteria constituting the "best interests" of the child. In fact, these statutes may not have been child-welfare centered at all. In arguing for New York to approve an adoption statute, David Dudley Field fo-

84. Carp, supra note 55, at 11.
85. The specific legislative intent underlying the first adoption statutes remains somewhat conjectural, however, as legislative records were not made or maintained. Presser, supra note 8, at 444 (noting that "few documentary sources exist which explain the motivations of the adoption lawmakers").
86. Calabresi, supra note 20, at 83-84.
89. See Sokoloff, supra note 8, at 18.
90. See id.
91. 1851 Mass. Acts ch. 324; see discussion, infra Part III.B, of judicial name change orders in respect of adoptions completed without court proceedings.
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cused on the need to protect the interests of adoptive parents.\(^\text{92}\) In the absence of a clear legal regime, he argued, biological parents could unscrupulously ex-tort repeated payments from adoptive parents in return for allowing them to keep a child to which they had become attached.\(^\text{93}\) He thus argued for a legal process to confer on adoptive parents the equivalent of clear title to the child.

B. The Impact of Statutes on Adoption Practice

To end the analysis of adoption law history at the rise of adoption statutes, with the conclusion that adoption existed prior to their passage, does not speak to whether private ordering remained central to adoption law and practice after their passage. This Section examines whether the legal changes during the 1850s replaced the primacy of individual arrangements with legally-centered adoption arrangements. It concludes that the principal feature of adoption practice after the first statutes were passed was continuity with pre-statutory practices—the preponderance of adoptions through the early 1920s continued to transpire through extra-statutory contractual agreements.

1. The “Child Question” of the Mid-1800s and the Orphan Trains

There is no doubt that there was a “child question” in the 1800s. Urbanization and immigration brought vast numbers of people into the cities, particularly Manhattan. The “three great waves” of immigration, running from the early 1800s to 1914, brought over thirty-five million immigrants through New York City.\(^\text{94}\) By the mid-1800s, approximately one and a half million immigrants lived in poverty in Manhattan tenements; approximately three thousand children were abandoned and/or homeless.\(^\text{95}\)

The concentration of destitute children in New York and Boston caused these cities to become the first large-scale focus of child welfare efforts, including adoption. New York’s first public attempt to deal with poor and vagrant children was, as with much early American legal activity, modeled on English law: the city established almshouses similar to those extant under English Poor Laws.\(^\text{96}\) In 1736, the city opened the Infant Hospital on Riker’s Island as an adjunct to its almshouses. Not a model child welfare program, approximately ninety percent of the children sent to Riker’s Island died there in child-

\(^{92}\) Field et al., supra note 79, at 36.

\(^{93}\) Id.


\(^{95}\) Patrick, supra note 94, at 20 (giving population figures); Stephen O’Connor, Orphan Trains: The Story of Charles Loring Brace and the Children He Saved and Failed xiv (2001) (presenting child homelessness figures).

\(^{96}\) See generally Hansen, supra note 64, at 1131-33 (discussing the rise in family desertion and poverty in Nineteenth-Century America).
Private efforts necessarily supplemented such public efforts, although not in any large-scale way until significantly later. In 1850, a Boston religious organization called The Children’s Mission began shipping homeless or destitute children by train to rural areas of the East Coast and Midwest. The Mission’s trains provided a model for the better-known “orphan trains” of New York’s Children’s Aid Society.

The orphan trains began their massive transit of children in 1854, the result of a private effort spearheaded by Rev. Charles Loring Brace, a graduate of the Yale Divinity School and founder of the Children’s Aid Society (CAS). Believing that placing children with families was superior to institutionalization in orphanages, Brace replicated The Mission’s practice of sending children to rural families. CAS moved a stunning number of children. From the first train in March 1854 to the end of 1874, CAS placed approximately twenty thousand children. By 1890, CAS had placed eighty-four thousand children—an average of four thousand children per year from 1874 to 1890. The orphan trains continued until 1927, placing a total of about one hundred and fifty thousand children with rural families.

These thousands of placements shared three salient characteristics for the purposes of this analysis. First, they were contractual or quasi-contractual. Second, they did not transpire under color of statute or as part of a government program. Third, most of the transfers were informal—no court proceeding attended or legitimated them.

2. Contractual Placements by Charitable Organizations Share Features of Earlier Contract-Based Adoptions

CAS placed children with families pursuant to contracts that set forth the

98. PETER HOLLORAN, BOSTON’S WAYWARD CHILDREN: SOCIAL SERVICES FOR HOMELESS CHILDREN, 1830-1930, 44 (1989) (“Children’s Mission orphan trains were used to place children on farms throughout New England.... [A]gents took bands of thirty to fifty children by train to... communities where local churches made informal indenture... or adoption arrangements in respectable families.”).
99. The term “orphan train,” though widely used to describe this model of placement, is misleading because many of the children were not orphans. O’Connor estimates that over half of the children placed had living parents who may or may not voluntarily have surrendered their children. O’CONNOR, supra note 95, at xix-xx. The Catholic population of New York often criticized the CAS as engaging in “institutionalized child-snatching.” Id. at 168-69.
100. See PATRICK ET AL., supra note 94, at 22, 30.
102. Id.
103. Id.
104. See generally PATRICK ET AL., supra note 94, at 40-41 (describing one of the last orphan trains, in 1927).
terms of the placement, allowed for the return of the child, and divided fees and
costs between the parties. The contractual nature of CAS's child placement
renders it continuous with earlier American and Continental adoption practices
effectuated through personal or notarial contracts; further, the terms of the CAS
contracts echo those of prior American and French contracts.

Contracts were an integral part of the placement of the children. As the or-
phan trains stopped in various towns, the children disembarked and put on
"shows" to attract the attention of prospective adoptive parents. These in-
cluded song-and-dance routines and rehearsed pleas such as, "Please will you
be my daddy?" or "Please can I be your little boy/girl?" Although these
shows might strike a modern observer as "revolting" or "deplorable," they, like
Internet advertisement, served to create awareness in the communities and in-
terest in adopting the children.

During a show, each child wore a two-sided card around his or her neck. The
card served as the adoption contract between CAS and the adopting party
or parties.

A standard card read:

**THE CHILDREN'S AID SOCIETY OF NEW YORK**

... 

The Society reserves the right to remove a child at any time for Just cause.

Date of placing _________

Name of child _________

Age _________

... 

**Terms on which the Children are Placed in Homes**

Applicants must be endorsed by the Local Committee.

Children under 14 years of age if not legally adopted, must be retained as members
of the family, schooled according to the Educational Laws of the State, and com-
fortably clothed until they are 18 years old. It is then expected that suitable provi-
sion will be made for their future.

Such contracts constituted the *entire legal transaction* and formal transfer
of a child to a receiving party for most of the children placed by CAS.

Other organizations contemporary with CAS also extensively placed chil-
dren through contractual agreements. The New York Sisters of Charity of St.

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105. See CAS contracts reproduced below.
106. PATRICK ET AL., supra note 94, at 33, 35.
107. Id.
Vincent de Paul, for example, established a similar service in 1869 exclusively for Catholic children.\footnote{109} The Sisters’ contract denotes the placement of the child as an “indenture.”\footnote{110} Terming the placement an indenture granted parental rights without requiring court ratification of an adoption.\footnote{111}

Although the Sisters used the term “indenture,” the contract’s terms made clear that the receiving family took the child under fully adoption-like conditions. Terms addressing care and right to property clearly rendered these placements de facto adoptions: Article II of the contract required that the child be “treated with care and tenderness as if he were in fact the child of the parties of the second part”; Article VIII required that, irrespective of subsequently formal adoption, the child would have full inheritance rights “as if he had been the natural and legitimate child of the parties of the second part.”\footnote{112} Substantively, parental affection and the right to inherit are goods bestowed upon one’s children only, not upon indentured servants. Further, the language “as if he were in fact the child of the parties” and “as if he had been the natural and legitimate child”\footnote{113} make sense only in the adoption context.

A final, extra-statutory method of adoptive placement also attests to the continued existence of adoption as a primarily privately-structured arrangement—the advertisement of children for adoption. Well after the enactment of statutes requiring court supervision of adoptions, parties engaged in “advertising” children—a practice that was apparently “widespread.”\footnote{114} These ads offered both to give away and to transfer the children for a fee paid directly to the parent(s) or to a facilitator, much like contemporary advertising for adoptions.

C. Assessing the Impact of Statutes on Adoption Regimes and Participants

CAS records show that most children were raised by the families with which they were placed. Yet, according to the best available estimate, only twenty percent of those placements received formal approval under the new adoption statutes.\footnote{115} Given that approximately 150,000 children were adopted to rural families by CAS, this means that fewer than 30,000 of the adoptions

\begin{itemize}
\item \footnote{109} PATRICK ET AL., supra note 94, at 50.
\item \footnote{110} Id. at 51.
\item \footnote{111} Id.
\item \footnote{112} Id. (emphasis added).
\item \footnote{113} Id. (emphasis added).
\item \footnote{114} MARGARET KORNITZER, CHILD ADOPTION IN THE MODERN WORLD 347 (1952).
\item \footnote{115} The only empirical study of adoption formalization amongst CAS placements was performed in a somewhat ad hoc fashion by PATRICK ET AL., supra note 94. In the 1980s, Patrick, Sheets, and Trickel contacted as many CAS “orphan-train” children as they could locate; due to the lack of original and intervening record-keeping and the death of many of the individuals who would have been children between 1854 and 1927, only thirty-nine surviving orphan-train children were located. Of these, all thirty-nine had lived until majority with their family of placement. However, only eight of these families, or about twenty percent, had formalized the adoptions in court. Id., supra note 94, at 43. To extrapolate, 120,000 of the 150,000 CAS adoptions-in-fact may not have been formalized under statute; however, further empirical research is necessary.
\end{itemize}
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were formalized under statute. For the overwhelming majority of adoptions during this time period—around 120,000 CAS adoptions alone—the existence of adoption statutes was irrelevant. The transfer of children from CAS and other organizations pursuant to contract locates these placements—said to mark the beginning of American adoption, as discussed supra—squarely within the history of adoption as a privately-ordered transaction.

Placement contracts used by CAS and other charities strikingly resemble the French notarial contracts effected between adoption participants. Both early French and later American contracts note the transfer, specify the minimum duties owed between the parties, and create a formal record thereof. While these adoption practices are not culturally or substantively identical, these similarities create a strong “family resemblance.”116 During the late 1800s and early 1900s, vast numbers of children became part of new families through such contracts. Because these adoptions-in-fact occurred without other legal formalities, it seems that most adoptions post-dating the first statutes remained non-statutory. Thus, the chapter of American history generally credited with marking the birth of adoption through law instead supports the contention that adoption has continuously existed primarily as a non-statutory private ordering both before and after the “statutorification” of the 1850s.117

Moving into the present, adoption today remains predominantly privately ordered and minimally regulated for prospective adoptive parents who meet the normative model of the standard or “traditional” parents. These norms, and the regulation of those who diverge from them, constitute the discussion of Part IV. Of the approximately 130,000 legal, non-relative adoptions in the United States annually, about eighty-five percent are transacted privately; only about fifteen percent occur through state agencies or state-regulated agencies.118 Contemporary private adoptions occur in ways similar to early adoptions in Europe, colonial America, and the early United States. Adoptive parents may make a direct arrangement with the birth parent(s). Here, the parties may know each other, as with adoptions recorded in early France and colonial America, or may have located each other through advertisements, as was common in American adoptions during the turn of the twentieth century.119 Alternatively,

117. CALABRESI, supra note 20 passim. “Statutorification” is Calabresi’s term signifying the transition from a common law regime to a primarily statutory law regime for any given area, and the subsequent proliferation of statutes in that area. Id. at 1-2.
119. See discussion supra Part II.A-B.
120. See supra Part II.B.2. See Singer, supra note 118, at 1481, for a general discussion of how prospective adoptive parents locate children privately, particularly noting the role of advertising.
the parties may employ a facilitator, an agent who typically works in a profession that offers repeat contact with women who need to place a child—obstetricians, clergy, and attorneys.\textsuperscript{121} Facilitators typically are agents, such as obstetricians, clergy, and attorneys, whose professions offer them repeat contact with women who need to place a child.\textsuperscript{122} Or, a facilitator may conduct a business that obtains clients through advertising in various media. These private adoptions are significantly faster and more flexible than public agency adoptions.\textsuperscript{123} Predictably, the Internet increasingly serves both as a medium for information about available homes and available children and as a vehicle through which matches occur between them.\textsuperscript{124} Across the states, private placements through direct contacts and unregulated or lightly-regulated facilitators constitute the norm. Forty-three of the fifty states permit parents to place their children with unrelated prospective parents through direct or intermediated private arrangements.\textsuperscript{125} The formalization of these arrangements varies across states but generally requires that the parties undergo a brief “home study” by a social worker.\textsuperscript{126} The parties then appear before a judge, who grants or denies the adoption petition.\textsuperscript{127}

IV. LEGAL VERSUS PRIVATE ORDERING IN CONTEMPORARY ADOPTION: HOW JUDICIAL CONSTRUCTION OF STATUTORY REGIMES POLICE THE BOUNDARIES OF FAMILY NORMS

A. Why the Mishistory Matters: What Is at Stake in the Contemporary Understanding of Adoption Law as a Creature of Statute

If privately arranged, minimally-regulated adoptions dominate the current adoption reality, why is it significant if courts, legal scholars, or other legal actors assert that adoption’s history is purely statutory? Why does the a

\textsuperscript{121} Id. at 1480.

\textsuperscript{122} Lucas, supra note 118, at 555.

\textsuperscript{123} For a detailed treatment of private, agency, and state agency practices and regulation across the states, see generally JOAN HEIFETZ HOLLINGER ET AL., ADOPTION LAW AND PRACTICE (2000) 1-68. Hollinger reports that prospective adoptive parents who pursue an independent adoption typically wait under a year for a child whereas an agency adoption may take as long as eight years. Id.

\textsuperscript{124} E.g., Kelly Costigan, Going It Alone, TOWN & COUNTRY, June 1993, at 61 (noting the beginning of Internet use for locating or placing children for adoption); Friel, supra note 4; Maggie Johnson, Aspiring Adoptive Parents Face Greed, Competition, Exploitation, L.A. TIMES, Apr. 23, 1995, at A1 (reporting that the Internet gives new market power to birth mothers, who can select prospective parents through specialized websites); Lyall, supra note 4, at A3 (involving twins who were adopted via a California broker found on the Internet); Roughton, supra note 4 (discussing an adoption planned via e-mail through an Internet broker).

\textsuperscript{125} Joan Heifetz Hollinger, Introduction to Adoption Law and Practice, in HOLLINGER ET AL., supra note 123, at 1-69-1-70.

\textsuperscript{126} The home study assesses that the child seems well-cared for and that there are no particularized bases for doubting the prospective parents' ability to provide an adequate home, such as evidence of substance abuse or domestic violence. Id.

\textsuperscript{127} Id.
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“counterhistory” of adoption amount to more than a historical curiosity? The answer is that the (mis)conceptualization of adoption as primarily statutory does important work in contemporary law: it supports the continued exclusion of broad categories of people from adopting children.128

Adoption statutes specifying who may adopt, and judicial constructions thereof, have encoded and largely continue to encode major normative biases of what a standard family looks like. These statutory regimes do their norm-policing work in every adoption, regardless of whether the arrangement arose privately or through an agency. Agencies implement statutory exclusions directly. In privately-arranged adoptions, courts implement the statutes’ norm-policing content through granting or denying the adoption petition based upon construction of the statute.129

Thus, judges are gatekeepers. Their views of the history and legitimate scope of adoption law affect their choice of interpretive approach and ultimate result. The history of adoption as a creature of statute influences judges in two ways. First, it imposes the “in derogation of the common law” requirement of strict construction, which affects the actual exercise of interpretation. Second, the idea of adoption as a creation of law lends appropriateness to the legislative endeavor of defining what constitutes an appropriate adoptive family—conceptually, the history of adoption law as a legislative invention may influence judges to accept overt legal imposition of traditional norms as appropriate legislative exercises where they otherwise might subject such exercises to more skeptical scrutiny.

B. Discriminatory Content in Contemporary Adoption Statutes

Explicit and implicit discrimination in adoption statutes abounds. Adoption statutes in almost every state have discriminated on the basis of religion, prohibiting inter-religious adoptions;130 a significant minority of state statutes continue to incorporate some preference for religious matching.131 Statutes and judicial interpretations thereof have institutionalized race bias by prohibiting adoptions across racial lines; further, adoption workers governed by such statutes “assigned” a race to children of ambiguous appearance or multi-ethnic

128. See discussion infra Part IV.C, notes 139-167 and accompanying text.
129. Hollinger, supra note 125, at 1-71-1-72.
parentage, determining not only the adoptive home but the child's identity.\textsuperscript{132} Courts have also interpreted adoption statutes to support discrimination against potential adoptive parents on the basis of age.\textsuperscript{133}

Most contentious in recent years, many statutes either explicitly discriminate against gay/lesbian prospective parents or silently discriminate through omitting gay family structures. Section 63.042 of the Florida Statute, for example, provides: "No person eligible to adopt under this statute may adopt if that person is a homosexual."\textsuperscript{134} In 1998, the House adopted an amendment that bans unmarried couples from adopting children in the District of Columbia.\textsuperscript{135} The record expresses that the amendment's purpose is to bar same-sex couples from adopting. As Representative Riggs stated, the amend-

\begin{enumerate}
\item \textsuperscript{132} Some states continue to require by law a preference for same-race adoptions. \textit{E.g.}, MIA. STAT. ANN. § 259.29 (West Supp. 1997), which provides in pertinent part, "the authorized child-placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with . . . a family with the same racial or ethnic heritage as the child . . . ."

Race preference statutes led to significant delays or non-placement of children that otherwise would have been adopted. A Pennsylvania case from 1990 illustrates: the state agency refused adoptive placement to a black child in its care first because individuals seeking to adopt him were single and then because several married couples seeking to adopt him were not of his race. After six years, the agency removed him from the "adoptable" list because, after years of temporary foster placements, he was unable to bond with adults. William Raspberry, \textit{Why Won't Adoption Agencies Place Black Children}, \textit{Washington Post}, Dec. 22, 1990, at A15. Courts, in part in reliance on the strict construction of adoption statutes, have upheld the statutes' racial distinctions.

To avoid these harms, some recent adoption reform statutes prohibit delaying adoptions on the basis of race. \textit{E.g.}, ARIZ. REV. STAT. ANN. § 8-105.01(A) (West 1996); WASH. REV. CODE ANN. § 26.33.045 (West 1997) (providing that adoption shall not be delayed or denied on the basis of race). California only repealed its statute's incorporation of racial matching preferences in 1995. CAL. FAM. CODE §§ 8708, 8710 (West 1994).

The perpetuation of such statutory provisions has been buttressed by courts' use of the history of adoption as statutory. Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (upholding removal of black child from white foster parents and denial of foster parents' adoption application on the basis of race). For in-depth, thoughtful considerations of interracial adoption, see generally R. Richard Banks, \textit{The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action}, 107 YALE L.J. 875 (1998), and Elizabeth Bartholet, \textit{Where Do Black Children Belong? The Politics of Race Matching and Adoption}, 139 U. PA. L. REV. 1163 (1991). It is beyond the scope of this paper to address the complex history of racial preferences in adoption or assess the merits of racial preference, which numerous scholars both assert and challenge.
\item \textsuperscript{134} E.g., Child v. Stangler, No. 92-0850-CV-W-6, 1992 WL 396318, at *2 (W.D. Mo. Dec. 28, 1992) (finding against adoption because "age . . . was similar to that of a biological grandparent"); Sheehow v. Plier (\textit{In re Tachick}), 210 N.W.2d 865, 870 (Wis. 1973) (barring adoption due to "larger age difference than the normal age difference . . . between the natural parents and their children").

\item \textsuperscript{135} 1997 Fla. Laws ch. 77-140 (1977). Florida is not alone in this policy. \textit{E.g.}, An Act Prohibiting Homosexuals From Adopting or Being Foster Parents, Ch. 343, § 343:1, 1987 N.H. Laws 379, 379-380 (stating legislative findings supporting statute prohibiting gay people from adopting and becoming foster parents); \textit{In re Opinion of the Justices}, 530 A.2d 21, 26 (N.H. 1987) (holding, in response to question by the New Hampshire legislature, that a bill prohibiting gays and lesbians from adopting would not violate substantive rights under state or federal constitutions). By contrast, Vermont has passed a statute expressly permitting unmarried couples to adopt. VT. STAT. ANN. tit. 15A, § 1-102(b) (1997) ("If a family unit consists of a parent and the parent's partner, and adoption is in the best interest of the child, the partner of a parent may adopt a child of the parent").
\item 144 CONG. REC. H7399 (daily ed. Aug. 6, 1998). The amendment in question was proposed by Rep. Largent, for Rep. Largent's explanation of the amendment, see 144 CONG. REC. H7382 (daily ed. Aug. 6, 1998).
\end{enumerate}
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ement aims to counter “those who would seek to legitimize same-sex activity” and to block “the claim by homosexuals that they should be able to adopt.”

New Hampshire similarly banned gay adoption in the name of children’s best interests, without permitting particularized findings of fact as to whether a given placement would or would not serve the child’s needs in light of other available alternatives.

In blocking gay adoptions, these statutes are a reaction to the view that social acceptance of same-sex orientation could be promoted through allowing gays to adopt. This concern with not “promoting” homosexuality trumps particularized concern for individual children or prospective parents, using the adoptive family as the site for drawing boundaries about permissible family forms. Rigg’s statement opposing gay adoption on the basis that it could “legitimize same-sex activity” makes clear the social norm-policing function of adoption statutes over their putative best interests purposes.

C. Judicial Interpretation in Reliance on the Statutory Mishistory and the Need for a “Counterhistory”

The Florida and amended District of Columbia statutes are exceptional in their naming of gays as a prohibited class. Where a statute is explicit, a court is arguably bound by it to deny adoption petitions by the excluded class. However, statutes usually imply the exclusion of gays by excluding unmarried couples and/or the unmarried partner of a biological parent from adopting. With these statutes, judicial interpretation of the statute is the key to whether the class at issue can adopt. It is in these cases that the court’s understanding of adoption as a statutory creation instead of as an institution drawing on multiple sources of legal and social authority, influences judicial interpretation of the statutes at issue.

In the major cases in which courts had to determine if the state’s adoption statute permitted the adoptive arrangement that the parties sought, judges explicitly relied on the dominant history of adoption law to guide their interpretation of the statute. In In re M.M.D. & B.H.M., a District of Columbia pre-anti-gay amendment adoption case, the court made clear the severe limits on interpretation imposed by strict construction, and how those limits relate to the understanding of adoption as a creature of statute. The court stated that,

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136. Id. at H7343 (statement of Rep. Riggs).
“[a]ccording to strict construction doctrine,” courts have “consistently held legislation derogative of the common law accountable to an exactness of expression and have not allowed the effects of such legislation to be extended beyond the necessary and unavoidable meaning of its terms.”

In both *In re Adoption of Tammy* and *M.M.D.*, divided courts engaged in feats of reasoning in order to route around the strict construction requirement and find in favor of the petitioners. In a third case, *In the Interest of Angel Lace M.*, the court’s strict construction a statute identical to that in Tammy caused the court to find against the petitioners—even though the court simultaneously found that the adoption would have been in the best interests of the child. These cases demonstrate the need for a “counterhistory” of adoption to provide judges with a different understanding of the role of law in defining the adoptive family and to furnish them with different interpretive tools.

1. Adoption of Tammy and M.M.D.

   In *Adoption of Tammy*, in which a Harvard professor and her partner sought jointly to adopt the biological daughter of one of the women, and *In re M.M.D.*, concerning the adoption of a girl by male domestic partners, courts decided whether the adoption statutes in question could permit these family arrangements. In both of these cases, the courts resorted to the history of adoption law to guide their interpretive process. The Tammy court noted, “[t]he law of adoption is purely statutory, and the governing statute... is to be strictly followed in all its essential particulars.” Similarly, the M.M.D. court noted that “[b]efore 1895, when Congress enacted its first adoption statute, adoptions were unavailable in the District of Columbia because adoption was not possible at common law.” For this reason, the M.M.D. court also asserted that it was required to construe the statute in question strictly.

   After asserting that they must strictly construe the adoption statutes because of their history, both courts performed jurisprudential acrobatics so that “strict
construction” of the statutes permitted the parties to adopt. The difficulty this task posed is evidenced by the length of the *M.M.D.* opinion: *M.M.D.* engages in over twenty pages of close linguistic interpretation in order to arrive at a “strict” reading that permits adoption by same-sex unmarried partners. With a different history to recite, courts could ratify such family forms more easily and directly.

*Tammy* and *M.M.D.* reached permissive outcomes through ostensibly strict construction. However, strict construction continues to defeat non-standard adoptions more often than it admits them. Strict construction became the point of law that split the *Tammy* court: in the Court’s 4-3 opinion in favor of the adoption, the three dissenting judges argued that the court lacked the power to liberally interpret the statute to permit the adoption irrespective of whether the adoption served Tammy’s best interests. As Judge Lynch wrote in the *Tammy* dissent, “[s]ince adoption is a creature of the Legislature, and in derogation of the common law, the statute must be strictly construed.” Although Lynch stated that he believed Susan and Helen, birth mother and nonbiological mother respectively, to be excellent parents and the adoption in Tammy’s best interests, he asserted that he could not reach that result under the language of the statute. “[T]he court’s decision,” he wrote, “which is inconsistent with the statutory language, cannot be justified by a desire to achieve what is in the child’s best interests.” Rather, because the statute in question did not expressly or implicitly contemplate the adoption of a child by two unmarried parties, the court was precluded from interpreting the statute to achieve that result.

2. In the Interest of Angel Lace M.

In a case following *Tammy*, a Wisconsin court denied an adoption petition identical to the *Tammy* petition—proposed adoption by a mother and her same-sex partner of their daughter—on the basis of strict construction. After the

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151. *Id.* at 846-49; *Tammy*, 619 N.E.2d at 321.
152. 662 A.2d at 846-49
154. 619 N.E.2d at 322-23 (Lynch, J., dissenting) (citing Davis v. McGraw, 92 N.E. 332 (Mass. 1910)).
155. *Id.* at 321-22.
156. *Id.* at 322 (emphasis added).
157. *Id.*
158. 516 N.W.2d 678.
lower court denied the parties’ adoption petition, Angel’s mother and her partner appealed.\(^{159}\) No party sought to defend against the appeal.\(^{160}\) The biological father, the nominal party in interest opposing the adoption,\(^{161}\) did not oppose the adoption.\(^{162}\) The state’s attorney general, who ordinarily would have defended an appeal against the state, “declined to participate . . . to defend the order of the circuit court and the constitutionality of the adoption statutes.”\(^{163}\) In effect, no party, in interest or otherwise, opposed this adoption. In order that the opposing side could be argued, the Wisconsin court resorted to appointing private counsel.\(^{164}\) Thus, Angel Lace M. presents the spectacle of the Wisconsin Supreme Court effectively appointing private counsel to itself to justify its decision to deny an adoption sought by all parties. Under a private ordering paradigm, this adoption would have occurred. Under a legal ordering paradigm, in part buttressed by the erasure of adoption’s nonstatutory legal history, a legally constructed definition of adoptive parent controlled—to the harm and over the objection of all parties, including the state’s own attorney general.

The Angel Lace M. court agreed with state social workers and expert witnesses that Angel’s adoption would serve her best interests.\(^{165}\) However, it found that it did not have the power to interpret the statute to permit the adoption.\(^{166}\) Here, the court turned to the statutory nature of adoption law, reciting the now-familiar cant that adoption did not exist at common law. “Adoption proceedings,” the court stated, “unknown at common law, are of statutory origin and the essential statutory requirements must be substantially met to validate the proceedings.”\(^{167}\) The court reiterated later that “since [adoption] was unknown to the common law, [it] is purely statutory and the statutes must be strictly followed.”\(^{168}\) Interpretive canons and language in the statute itself urging that the best interests standard govern did not sway the court to depart from its asserted requirement of strict construction.\(^{169}\)
CONCLUSION

Although there is plurality amongst courts—and amongst judges on the same court—as to whether adoption statutes must be strictly construed in deference to legislatures or liberally construed in deference to the best interests principle, the erroneous understanding of adoption as purely statutory clearly continues to create problems and impose costs. These costs include the direct hardship to families that cannot accomplish otherwise beneficial adoptions, the efficiency loss of judges’ repeated extensive reconsideration of the strict construction issue (as evidenced by the thirty-plus page analysis in M.M.D.), and the cost to the integrity of judicial decision-making where judges use strict construction as a subterfuge.

As Karl Lewellyn noted, there are “two opposing canons [of statutory interpretation] on almost every point”; a judge’s choice of canon more often justifies a result than dictates it. From their dissent in Tammy, it seems Judges Lynch and O’Connor found themselves bound by strict construction to find against the parties. While the Tammy dissenters may have been unwillingly constrained, other decision-makers could employ strict construction as jurisprudential cover for underlying opposition to an adoption. If the understanding of adoption law as purely statutory were not entrenched, judges who oppose such arrangements ideologically would not be able to claim that their conclusions were determined by strict construction. Rather, the absence of such shelter might force them to state the substantive grounds for their objections to the adoption. Where a judge openly speaks in the “contested idiom of morality”—“outing” the moral subtext of a decision, so to speak—it can force an open reconsideration of the subject and, in certain instances, inspire legislative action that favors the group in question. Thus, eliminating the strict construction fallacy as either a constraint on well-intentioned decision-makers or a refuge for reactionary ones would lead to better, more efficient, and perhaps more honest outcomes in nontraditional adoption cases.

Adoption in the United States both historically has been and currently should be a private ordering ratified by law. In challenging the “law first” standard history of adoption, this Note attempts to provide a historical and norma-
tive basis for the position that families themselves should determine their membership and methods of formation. Reclaiming the pre- and non-statutory legal history of adoption is important because it legitimates participant-driven and -defined adoptions. If adoption law is understood as having created adoption, defined what it is—and may or may not be—then definitional power resides in legal institutions. A different history thus serves as an important tool for creating a new future. Recognizing that adoption practice and law have permitted diverse families to form according to the needs of their participants suggests that law should play a more limited role in defining the content of adoptive homes. The role of law should instead be that of evaluator and ratifier of the arrangements individuals come together to create. More immediately, the "counterhistory" of adoption may free certain decision-makers to expand their interpretation restrictive or silent statutes to permit these family forms. Or, in stripping away the shield of strict construction as a justification for denial of a nontraditional adoption petition, this different history may force decision-makers to express their prejudices in an open, contentious idiom of discrimination—which may also help bring about reform. Adoption and adoption policy "implicate[] our most deeply held beliefs and values about family, community, and identity."[174] These values are too important to be constructed by prejudice and mistake.

174. Banks, supra note 132, at 878.