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ABSTRACT: As of late summer 2022, adopted adults in only ten of the fifty US states hold the right to obtain a copy of their original birth certificate, an example of what Daniel Heller-Roazen historicizes as forms of nonpersonhood. In its cynically transactional embrace of adoption, the Dobbs decision smugly ignores the vexed history of adoption and personhood rights. In its warm embrace of common law precedent to criminalize abortion, Dobbs cavalierly offers adoption as a pat solution, oblivious to the irony that adoption did not exist in common law. Dobbs adoptees will too often face lives shadowed historically by forms of legal, social, and civil diminishment.

KEYWORDS: adoption, abortion, origins, common law, personhood, nonpersons

THREE MAPS TELL AN INTERWOVEN tale about abortion and adoption. Enlarging by the month, one map tracks state restrictions on abortion in the US in the wake of the June 2022 Supreme Court decision (Dobbs) to overthrow the federal right to abortion established in Roe v. Wade in 1973, a decision that returns US abortion law to fifty contested state legislatures and constitutions: “we thus return the power to weigh those arguments to the people and their elected representatives” (35).¹ Data-driven opposition to this reversal alertly points to a second map which closely tracks the first: states with the least support for women and children display the most extreme restrictions on reproductive rights.²

Compounding the injustices foregrounded by these two overlapping maps, a third map tracks in the same pattern of states a primary injustice in current state
ADOPTION, ABORTION, AND NONPERSONS

Adoption laws governing knowledge of and access to origins. As of late summer 2022, adopted adults in only ten of the fifty states hold the right to obtain a copy of their original birth certificate. The other forty states exhibit a range of restrictions on access to original birth records, including some states that maintain full restriction. The set of fifteen states that still enforce the full restriction of original adoptee birth records correlates closely with the maps of increased abortion restrictions and decreased support for women and children: the old South (Texas, Louisiana, Mississippi, Florida, Georgia, South Carolina, Tennessee, Kentucky, West Virginia) and the libertarian West (New Mexico, Nevada, Idaho, Wyoming, North Dakota).

What’s at risk? The Dobbs decision implants a breathtakingly naïve sentence about adoption to shore up its project to criminalize abortion: “a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home” (34). Among the many gaping holes in that assertion, it should be noted that, in fifteen states, a Dobbs baby as an adult adoptee will be denied access to their original birth records, a fundamental human rights violation.

The current confluence of attacks on the rights of women and children warns us that the ongoing work to open adoptee birth records in the US may stall or, worse, square off against gerrymandered state legislatures happy to return adoption to the “Baby Scoop” era of secrecy and shame that dominated US adoption for three decades after the Second World War until the advent of Roe in 1973. During this period especially, the women and children of adoption were shunted into the set of nonpersons historicized by Daniel Heller-Roazen, where “individuals remain physically present in the societies to which they belong, yet their rights and prerogatives are reduced to the point at which their social, legal, and civil personalities may be nullified. These are people tainted and degraded” (8).

In sharp contrast to these US retreats, other nations are currently drafting formal apologies and passing new adoption laws to remedy historical injustices inflicted upon such nonpersons in adoption history. In June 2022, the Irish Dáil passed the “Birth Information and Tracing Act 2022,” which “provides a full and clear right of access to birth certificates, birth and early life information for all persons who were adopted, boarded out, the subject of an illegal birth registration or who otherwise have questions in relation to their origins.” In July 2022, the government of the United Kingdom issued a parliamentary report on “The Violation of Family Life: Adoption of Children of Unmarried Women 1949–1976.” Arguing that “the evidence from mothers and from adopted people vividly demonstrates the struggles that individuals continue to face every day in living with these brutal and cruel processes” (36), the report calls for “an apology by the Government and an official recognition that what happened to these mothers was dreadful and wrong” (38). In its cynically transactional embrace of adoption, the Dobbs decision smugly ignores the vexed history of adoption and personhood rights.

In his majority opinion, Justice Samuel Alito regularly cites and defers enthusiastically to English common law, in which abortion was a criminal offense: “the
great common law authorities—Bracton, Coke, Hale, and Blackstone—all wrote that a post-quickening abortion was a crime" (3). Alito’s go-to authority is Sir William Blackstone—whom he cites nearly a dozen times—who compiled the landmark Commentaries on the Laws of England, published in four volumes from 1765 to 1770. In the Dobbs decision, Alito’s fondness for Blackstone smuggles the English jurist onboard as a Founding Father: “writing near the time of the adoption of our Constitution, William Blackstone explained that abortion of a ‘quick’ child was ‘by the ancient law homicide or manslaughter’” (17). For Dobbs, it would be tidy if Blackstone had also tagged adoption as a pat solution to the crime of abortion. But here’s the rub: in the body of common law that Alito cites to cinch his project to criminalize abortion, adoption does not exist.

In Book I, Chapter the Sixteenth, “Of Parent and Child,” the term adopt appears nowhere in Blackstone, in spite of the ad hoc practices of de facto adoption in his culture. Establishment culture in England long refused to acknowledge adoption, until the belated passage of the “Adoption of Children Act” in 1926. In the UK Parliament in 1889, the Earl of Meath introduced an “Adoption of Children Bill” in the House of Lords. The Bill went nowhere, withdrawn in the face of immediate and forceful arguments that it was “contrary to the laws and institutions of this country.” As declared by the Lord Chancellor, “The Bill seeks to alter the whole law of England with reference to the right of parental control, one of the cardinal principles of our law.” In the alarmed words of Lord Fitzgerald, “Adoption is wholly unknown to the law of England.” Almost obsessively, Blackstone instead has much to say about “bastards” in terms of the blood-based patrimonial property system and inheritance law. Blackstone opens the chapter “Of Parent and Child” with this sentence: “Children are of two sorts; legitimate, and spurious, or bastards.”

Nonmarital births—in Blackstone’s terms, “illegitimate issue”—now constitute forty percent of births in the US. The Dobbs decision promises to increase this number of children shadowed historically by what Blackstone stigmatizes as spuriousness. In the wake of Dobbs, anti-abortion activists now fixate on ever-shrinking microcosms of fetal personhood, oblivious to the forms of nonpersonhood awaiting too many Dobbs babies over their lifetimes. Heller-Roazen defines one chapter of the long history of the nonperson as the “diminished individual” (9): “In every community, society, and assembly, nonpersons are lesser ones” (7) who inhabit “a speaking body from which full personhood is missing: a nonperson conceived not by vanishing, but by lessening” (79). Legal and social systems produce “an individual distinguished by the fact of being unfit for representation as a complete person” (81), such as adoptees barred from their birth records. As a spin-off of its primary attack on women, Dobbs will too often inflict collateral damage on adoptees.

The most alarmed responses to the Dobbs ruling point to the concurring opinion of Justice Clarence Thomas, which slaps targets on the back of same-sex mar-
riage law and contraception rights. What else might be rolled back? Adoption itself? It is deeply ironic that the Dobbs decision, happy to snatch adoption to cover its attack on women’s freedom, stakes claims in legal history that could simultaneously challenge modern adoption law. Such a prospect may be tempting to many in the world of adoption who hold principled opposition to the adoption industrial complex, but an alliance with the supporters of Dobbs in pursuit of a better world in which adoption is not necessary is more likely to yield a dystopian world of ever-more-broken adoption policy. Such a possibility lurks in the warm embrace of common law precedent in Dobbs. Whereas the Dobbs decision fakes a friendly hug with adoption—“a woman who puts her newborn up for adoption today has little reason to fear that the baby will not find a suitable home”—it buries within its common law code a virus that could threaten forms of modern de jure adoption, however imperfectly such imperfect systems of adoptive care struggle to help women and children. Depending on the whims of rogue state legislatures and the accidents of residency, a woman denied the right to choose abortion may yet have reason to fear that she might also be denied the right to choose adoption and its fraught pathways of personhood.

Notes

1. For one among many readily available state-based maps of post-Roe adoption restrictions, see the page maintained by The Guardian (Witherspoon, et al.).
2. For state-based maps of support (or lack thereof) for women and children, see National Women’s Law Center.
3. For state-based maps of adoptee birth records access, see Adoptee Rights Law Center.
5. For brevity, I don’t discuss here definitions of fetal viability and eighteenth-century quickness.”
6. Similar legislation was not adopted in Scotland until 1930, and in Ireland until 1953.
7. Opposition to de facto adoption as the equivalent of child abandonment guides Emma Woodhouse’s sister Isabella Knightley in Jane Austen’s Emma in 1816: “There is something so shocking in a child’s being taken away from his parents and his natural home!” (104). Her language was echoed by the novelist Lorrie Moore, an adoptive mother, in an interview in The New York Times in March 2020. To the prompt, “What’s the most interesting thing you learned from a book recently?,” Moore offered this reply: “That Jane Austen’s mother allowed Jane’s young brother to accompany a strange couple who were about to embark on their honeymoon and who had taken a fancy to him. Later Mrs. Austen allowed the couple to adopt him. Is this not shocking?” Regardless of adoption politics, Moore gives a garbled account of the de facto kinship adoption of Austen’s older brother Edward.
8. Bastards are infamously “sons of nobody”; in Blackstone’s words, “he can inherit nothing, being looked upon as the son of nobody; and sometimes called filius nullius.” Emma Woodhouse refers to this passage in Austen’s Emma when she debates Knight-
ley about Harriet Smith’s status: “As to the circumstances of her birth, though in a legal sense she may be called Nobody, it will not hold in common sense” (65).

9. See the data on nonmarital births at the Centers for Disease Control and Prevention, National Center for Health Statistics.

10. See the legal website Balls and Strikes.

11. In Absentees, Heller-Roazen’s arguments about “the diminished individual” appear in his middle section (of three) on “Lessenings” (75–143): “In exploring the conditions of the missing person, the diminished civil subject, and the dead, this book aims to bring into focus nonpersons of the last and most disquieting variety. Absentees in ways both restricted and extended, they are persons who, in different settings, yet each time anew, fail to be, demanding of our attention” (10).

Works Cited


