SOMEBODY’S CHILDREN
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I. INTRODUCTION

In 1994, Speaker of the House Newt Gingrich threatened to take the children
of welfare mothers and put them in orphanages as part of congressional welfare
reform.1 The idea didn’t sell well. For one thing, it evoked images of Oliver
Twist—Time magazine’s cover story the next week was, “The Storm Over
Orphanages,” as commentators and politicians rushed in to condemn Gingrich as
heartless.2 Liberals were appalled; this seemed to symbolize exactly why they
opposed his “Contract with America,” with which the orphanage proposal was
articulated.3 For another, it was expensive: analysis by the Child Welfare League
of America suggested that while the average cost of keeping a child with her
mother on Aid to Families with Dependent Children (AFDC) in 1994 was $2,644 a
year, with a foster family it would be $4,800 and in residential group care,$36,500.4 No one on the Republican side of the aisle came to Gingrich’s defense.
Were Republicans serious about orphanages? “If they were, they have buttoned

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to Laura Kessler, Martha Ertman, Jennifer Nye, the participants in the New Frontiers in
Family Law conference, and the editors of the Utah Law Review for helpful comments on
this piece, and the Tanner Humanities Center at the University of Utah and the Eisenberg
Institute for Historical Study at the University of Michigan for the opportunity to research
and write it.

1 See David Van Biema et al., The Storm over Orphanages, TIME, December 12,
1994, at 58, 58.
2 See id.; Gingirch’s Orphanage Plan Ripped; ‘Anti-family placement,’ Two Senators
Call It, ST. LOUIS POST-DISPATCH, Dec. 9, 1994, at 17.D.
3 See Mary McGrory, Orphanage Idea Has Many Parents, WASH. POST, Dec. 13,
1994, at A2; GOP Welfare Plan Would Take Cash From Unwed Mothers to Aid Adoptions,
4 See Van Biema, supra note 1, at 58–59.
their lips. This thing has been mercilessly crucified,” an unnamed House staffer told *Time*. “I would not be surprised if they strike the provision from the bill, because it’s given us so much grief.”

Yet in 1996, a modified form of Gingrich’s vision became law when two bills (originally one but subsequently split) were enacted into law. One, the Personal Responsibility and Work Opportunity Reconciliation Act, eliminated AFDC (“welfare”)—the program that since the New Deal had kept children out of orphanages by giving their mothers the support to raise them at home. The second was the Small Business Job Protection Act of 1996, which contained the Inter-Ethnic Placement Provisions (IEP, amending the Multi-Ethnic Placement Act, hence known as MEPA-IEP). It was designed to make it easier to place foster kids in adoptive homes. The IEP addressed what was widely regarded as an obstacle to moving children from foster care into adoptive homes—“racial matching” policies that, many contended, kept children of color from the most readily available adoptive homes: those with white parents. Another provision of the same bill included a tax credit of $5,000 to $6,000 for adopting families. These measures were followed in 1997 by the Adoption and Safe Families Act (ASFA) which, among other things, provided state child welfare systems with bonuses for placing children into adoptions and time limits to terminate parental rights.

Taken together, these adoption reform measures set out to restructure foster care by providing an enhancement of one exit strategy for children in foster care: adoption. But these federal measures also simultaneously transformed the financial incentives that previously encouraged states to keep families together by eliminating the safety net for children whose mothers had previously been eligible for AFDC. As a result of the federal measures, many single mothers wound up unable to support their children or find care for their children while they worked in

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5 *Id.* at 58.
6 *Id.*
7 For the long version of the legislative history, see SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 136–46 (2001).
10 See *Patton, supra* note 7, at 138.
11 *Id.* at 139.
12 *Id.* at 138.
the absence of federal payments to families. The adoption components were enacted with the full-throated support of liberals.

What happened? How did liberals go from attacking Gingrich’s suggestion to support? The answer lies in the redefinition of the elimination of AFDC and the enactment of MEPA-IEP and ASFA from an assault on the preservation of families to a “racial equality” measure. In 1994, as Congress was debating MEPA, the earlier incarnation of the IEP, Harvard law professor and influential child-policy advocate Elizabeth Bartholet, in a letter to the New York Times, described the problem in this way: “this legislation . . . was originally developed in recognition of the fact that child welfare workers throughout the country are holding children of color in foster and institutional care for years at a time rather than placing them in permanent adoptive homes, solely because of their reluctance to place children transracially.”

Well, no. Bartholet’s argument seems to have lost track here of the fact that MEPA-IEP was originally part of the welfare reform bill. The goal of the legislation, as formulated in relation to the Contract with America, bandied about in the press, and discussed in conservative think tanks, was to take children away from single mothers.

Conservatives argued that only the muscular parenting of fathers could fit them for the rough-and-tumble of life and employment in the formal sector, and single mothers, as we have heard since at least the thirties, create weak-willed and pathological children (able only to exist in the kinder, gentler world of gangs and guns). There was a concerted effort to pin all social problems on single

17 See supra notes 7–9 and accompanying text.
mothers. In an editorial in the *Washington Post* in 1993, Richard Cohen called crime “a clear consequence of illegitimacy,”21 while in the *Wall Street Journal*, Charles Murray railed against the “Coming White Underclass”—those trashy white women who were having out-of-wedlock births; children they would raise in poverty who would turn out badly.22 The Contract with America promised to “discourage illegitimacy.”23 Ironically, Bartholet is a single mother, and a defender of the diversity of family structure in the face of conservative criticism.24 Clearly, demonizing single mothers was not her goal, nor for the most part, that of other liberal champions of MEPA-IEP. While conservatives fought a battle fraught with controversy to eliminate AFDC (albeit an ultimately successful one), MEPA-IEP enjoyed far broader support, precisely because it changed the subject and nature of the debate, focusing not on the evils of welfare mothers or the need to take their children away, but rather on children who discursively were always already in foster care, and “languishing” or “waiting.”25 Although this was a bit of a rhetorical sleight of hand—children got into foster care somehow—it was extraordinarily useful to the conservative policy agenda. It became such a commonplace that these children were just lingering about, seeking adoptive parents but prevented from doing so by wrong-headed policies, that an influential book in the debate was titled *Nobody’s Children.*26

In 1935, the New Deal envisioned an alternative to the private orphanage system for children whose families were too poor to care for them—Aid to Dependent Children (ADC), which enabled mothers to care for their children at home rather than dropping them at an orphanage so they could take a job. Very

21 Id.
22 See Murray, supra note 18.
25 This language is endemic to the conversation. Consider Kim Ford-Mazrui, who uses the term three times in two sentences: “Because black children represent a disproportionately high number of children in need of homes, they wait up to twice as long for permanent homes as white children wait. . . . An insufficient number of Black families are available for these waiting Black children.” Kim Forde-Mazrui, Note, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 937 (1994) (citations omitted) (emphasis added). The next sentence speaks of “delays in the placement of Black children.” *Id.* (emphasis added). At no point does she consider that another name for this “waiting” might be the period in which birth parents, usually mothers, are scrambling to get their children back. Once the conversation is defined in terms of waiting or delay, the illegitimacy of the claims of birth parents on their own children has already been presumed. See id.
few of these orphanages ever served black children, except for those run by African American churches or individuals. Black children without parental care were likely to wind up in the juvenile justice system instead, sometimes on chain gangs or under the gun of an overseer working alongside sharecroppers on plantation land. At least at first, ADC served very few black children. Southern white lawmakers did not want to see black women out of the work force—where their labor was needed cleaning houses or cropping—and found a variety of ways of preventing black children from receiving ADC. In time, though, administrative changes from above and pressure from below began to equalize the likelihood that poor black women and poor white women would receive ADC. As one might have predicted, this drove some southern white politicians to distraction; if the federal government was going to require that black children receive support from the public fisc, then their mothers were going to pay.

The critical part of this fight began in 1960, with the “Louisiana Incident.” At the height of the struggle over school desegregation (think George Wallace and “segregation forever”), governor Jimmie Davis of Louisiana answered a federal order to desegregate the schools in New Orleans by cutting 23,000 illegitimate children—95 percent of whom were black—from the ADC rolls, hoping to force their families to move elsewhere. Davis claimed that the children cut from ADC were “illegitimate” or had siblings that were, and Louisiana was purging the rolls under its “suitable home” rule. If a woman had begotten a “bastard” child while receiving public benefits, officials argued, it amounted to welfare fraud, since it


31 Solinger, supra note 29, at 192.

32 Id.
proved that her children had a “substitute father” who was responsible for their support, and she was no longer eligible for ADC.33

This was not the first time that southern politicians had used arguments about welfare or illegitimacy as political tools in their fight against the civil rights movement; in the period between 1957 and 1967, the city of Birmingham, Alabama, decreased its expenditures on welfare from $31,000 to a mere $12,000 a year.34 In Mississippi from 1958 to 1964, the legislature debated bills on sterilization and illegitimacy each year, making bearing or begetting an illegitimate child a felony, punishable by sterilization or three years in the state penitentiary.35 Some said the legislation was the work of the Citizens’ Councils, organized to uphold white supremacy.36 In floor debate on the 1964 bill, one state legislator argued that “[w]hen the cutting starts, [Negroes will] head for Chicago.”37 Civil rights leader Fannie Lou Hamer said often in her speeches that unwanted and even secret sterilizations were common for black women who went into the hospital for some other reason in her home in Sunflower County; some called the operations “Mississippi appendectomies.”38

Although Louisiana was not the first state to reply to a desegregation order by attacking ADC, this time the federal government responded. The head of the

33 See M. Elaine Burgess & Daniel O. Price, An American Dependency Challenge, in WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY 191, 195 (Gwendolyn Mink & Rickie Solinger eds., 2003); SOLINGER, supra note 29, at 53 (describing a raid to “ferret out welfare chiselers” in which a man was found “hiding under blankets” in the apartment of a black female welfare recipient).
37 STUDENT NONVIOLENT COORDINATING COMMITTEE, GENOCIDE IN MISSISSIPPI 4 (c. 1965).
Department of Health, Education, and Welfare (HEW), Arthur Flemming, answered Governor Davis by enacting what came to be called the Flemming Rule: states could not deny aid to needy children with rules restricting eligibility to suitable homes—unless state officials and social workers removed the children from these purportedly unsuitable homes. Flemming presumed this would prove too expensive to states, and southern officials would stop these shenanigans. Instead, HEW inadvertently gave them license to engage in the wholesale terrorizing of single black mothers. The following year, Congress made the Flemming Rule law—but in a way that was sympathetic to the goals of southern politicians, by authorizing funds for a program it called ADC-foster care, which provided federal funds to states to place children in out-of-home care. Foster care exploded; 150,000 children were placed in out-of-home care in 1961 alone. So many black children entered the child welfare system in the next decade that “some observers began to describe this decade as the ‘browning’ of child welfare in America . . . .”

Another factor in the expansion of the child welfare system in this era was the discovery, in medical literature, of “battered child syndrome.” Between 1963 and 1967, all fifty states passed laws mandating that authorities (doctors, teachers, and

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40 See Babb, supra note 39, at 52 (1999) (“After the Flemming Rule was instituted, when AFDC investigators entered the applicant’s home and found it to be unsuitable, state intervention was mandatory.”); Lawrence-Webb, supra note 39, at 12–18 (“The new law incorporated aspects of the Flemming Rule with . . . federal financial help to states in the removal of children from unsuitable home conditions . . . .”).


43 See C. Henry Kempe et al., The Battered-Child Syndrome, 181 JAMA 17, 17 (1962) (stating battered-child syndrome is “a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent”).
so forth) who suspected child abuse report it. 44 At first, this affected a small and circumscribed group of children and families; one analyst in 1976 estimated that probably less than 10 percent of child welfare cases involved child abuse as opposed to child neglect. 45 In the late sixties and early seventies, however, the political momentum of concern about child abuse spurred states to authorize social workers to remove children from what they suspected to be abusive or neglectful families. 46 In the context of the social movements of the period and the War on Poverty, impoverished communities, particularly communities of racial minorities, that had rarely seen social workers before were suddenly flooded with them. At the same time, state and federal governments became progressively more interventionist to protect children from harm in their homes. 47 Increasingly, legal systems and casework tilted away from protecting the due process rights of the family and toward child protection. 48 Operating in a context where civil rights struggles were being fought out over the terrain of pregnancy and children, officials created a situation ripe for abuse.

Attacks on single mothers were not limited to the South, or to those who would have identified themselves as racial conservatives. In 1965, the uneasy relationship between the civil rights movement and the federal government reached


46 See KATHLEEN MALLEY-MORRISON & DENISE A. HINES, FAMILY VIOLENCE IN A CULTURAL PERSPECTIVE: DEFINING, UNDERSTANDING AND COMBATING ABUSE 222 (2004) (“CAPTA also gave states the power to remove children from homes if the child was deemed to be danger.” (citations omitted)); SEALANDER, supra note 44, at 65 (noting some states’ requirements of reporting suspected child abuse and granting social workers immunity from civil or criminal lawsuits).

47 In 1974, Congress authorized massive funding in the Child Abuse Prevention and Treatment Act to investigate child abuse and separate children in families where social workers believed there was abuse. See BARBARA J. NELSON, MAKING AN ISSUE OF CHILD ABUSE: POLITICAL AGENDA SETTING FOR SOCIAL PROBLEMS 116 (1984) (“[Congress] authorized $85 million to be spent during the next four years” in the 1974 bill.); SEALANDER, supra note 44, at 68 (“Amended several times, CAPTA was the centerpiece of federal efforts to exercise leadership.”).

48 ROSEMARY A. CHALK ET AL., VIOLENCE IN FAMILIES: ASSESSING PREVENTION AND TREATMENT PROGRAMS 164 (1999) (“The disadvantages of the juvenile court system include the removal of the child rather than the offender from the home; the lack of due process protections for those accused of abuse comparable to criminal court procedures”).
a crossroads. With the passage of the 1965 Voting Rights Act, there was a credible position that the goals of the civil rights movement had been met—formal legal equality had been accomplished. Others, of course, looked at the concentration of African Americans in ghettos, low-paying jobs, and communities that still didn’t even have high schools, never mind a route to higher education, and said that the work—of, say, building an interracial movement to end poverty—had only just begun.49 In this context, the White House and the Department of Labor attempted to get out ahead of this issue, turning, as Southern officials had, to the question of black single mothers and their unfortunate children. First in a speech at Howard University,50 then in the Department of Labor Report, The Negro Family: The Case for National Action (subsequently known as the Moynihan Report, for its author, sociologist and later Democratic Senator Daniel Patrick Moynihan), the Johnson administration laid out an argument that the source of black poverty and unemployment was child rearing and family practices.51 In its much-protested formulation, the Moynihan Report characterized the black family as a “tangle of pathology,”52 characterized by single mothers, a black “matriarchy”53 that emasculated sons, making them unfit for the competition for jobs.54

This history of how the child welfare system came to work the way it does, and how Black children came to be over-represented in it, was given short shrift in the debate over MEPA-IEP, which insisted that it was all about adoption policy, and race matching. In Bartholet’s writing, as in many legal scholars’, there is a single villain in the story we tell about African-American children’s disproportionate presence in foster care: the National Association of Black Social Workers or NABSW, and the group’s influential 1972 statement opposing transracial adoption.55 In this article, I argue that we need to hear the analysis of

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49 For a unique vision, see Richard A. Cloward & Frances Fox Piven, The Weight of the Poor: A Strategy to End Poverty, NATION, May 2, 1966 (setting a blueprint for the welfare rights movement).
50 President Lyndon B. Johnson, Commencement Address at Howard University: To Fulfill These Rights (June 4, 1965), available at http://www.lbjlib.utexas.edu/Johnson/archives.hom/speeches.hom/650604.asp (“[U]nless we work to strengthen the family, to create conditions under which most parents will stay together—all the rest: schools, and playgrounds, and public assistance, and private concern, will never be enough to cut completely the circle of despair and deprivation.”).
52 Id. at 29.
53 Id. at 30.
55 Id. at 124.
the NABSW in its historical context to understand what happened in this 1994–1996 policy debate, and why liberals largely missed what conservatives were doing.

II. LIMITING THE DEBATE AND THE HISTORICAL CONTEXT OF THE NABSW STATEMENT

The NABSW in 1972 understood the issue in exactly the terms that conservatives did in 1994–96: that transracial adoption was about taking away the children of impoverished, black single mothers.56 Advocates of transracial adoption, then and now, tend to see the NABSW statement as being about race in a narrow, individual sense—as a question about the capacity of individual white parents to love and raise an individual black child.57 For this reason, outcome studies, particularly those by Rita Simon and her collaborators that have found little or no psychological harm to black children from being raised in white families have been influential in this policy debate.58

But the NABSW and its supporters have consistently argued that this misses the point of the statement, which they say was about keeping black families together in the first place. So when opponent of race matching Randall Kennedy writes that the reason such policies need to be abolished is that “at any given moment, hundreds of thousands of dependent children are bereft of parental protection, guidance, nurturance, and love,” and “[a] disproportionately large

56 Id. at 127.
57 Id. at 127–28.
58 Actually, all studies have found a range of outcomes. But those that have been the most positive have been the most significant to the debate, which skews our understanding of the social science, and hence, presumably, of reality. See, e.g., DAWN DAY, THE ADOPTION OF BLACK CHILDREN: COUNTERACTING INSTITUTIONAL DISCRIMINATION (1979); WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, CHosen CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS (1983); LUCILLE J. GROW & DEBORAH SHAPIRO, TRANSRACIAL ADOPTION TODAY: VIEWS OF ADOPTIVE PARENTS AND SOCIAL WORKERS (1975); LUCILLE J. GROW & DEBORAH SHAPIRO, BLACK CHILDREN–WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION (1974); JOYCE A. LADNER, MIXED FAMILIES: ADOPtING ACROSS RACIAL BOUNDARIES (1977); SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA (2000); RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION ACROSS BORDERS: SERVING THE CHILDREN IN TRANSRACIAL AND INTERCOUNTRY ADOPTIONS (2000); RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE, AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE (1992); RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTION: A FOLLOW-UP (1981); RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTION (1977); William Feigelman, Adjustments of Transracially and Inracially Adopted Young Adults, 17 CHILD & ADOLESCENT SOC. WORK J. 165 (2000).
percentage of parentless children are black,” he is articulating the same reasons that motivated the NABSW to release its statement in the first place. This is intriguing, to say the least. The logic of the NABSW position is lost, though, without a rich and textured sense of the historical context in which it was articulated, one that included a (then) recent and abrupt expansion of the foster care system that was coterminous with the expansion of white families’ adoption of children of color. Members and supporters of the NABSW believed that when social workers and caseworkers thought African American children could eventually be placed in white families, they were much more likely to remove them from their birth families. The NABSW’s critique of the functioning of the foster care system deserves to be understood in all its nuance, for it continues to be a useful analysis.

A. Limiting the Debate

For the last half century, the idea of adoption across racial lines has occupied a place in the U.S. national imaginary that has far outstripped its significance as an actual practice. It seems to capture all of the things we worry about—vulnerable children, drugs, questions of love and race, irresponsible parenting, the danger of losing one’s children, law, and policy. Legal scholar Twila Perry has made the insightful point that issues of race and adoption pit two views of race against each other, both of which have considerable purchase in the national public discourse—“colorblind individualism” versus “color and community consciousness.” So as we tack into these hugely emotionally compelling waters, it is helpful to take stock of what this debate is not about, despite the prevalence of claims that suggest something different.

It is not about whether white parents can adopt children of color in the United States. Recent debates about so-called race-matching policies, crystallized in MEPA-IEP, addressed public adoption agencies, which is to say, adoption from foster care. This represents only about 20 percent of children adopted in the United States. Only about three-quarters even of public agencies ever had policies preferring race matching, and such policies never had the force of law. Private

59 Randall Kennedy, Interracial Intimacies: Sex, Marriage, Identity, and Adoption 402 (2003).
60 See Bartholet, supra note 26, at 123–24.
61 See infra notes 121–124 and accompanying text.
64 Tom Gilles & Joe Kroll, Barriers to Same Race Placement 17, 21 (1991) (citing between 76–82% of state agencies have race matching policies).
agencies, unless for some reason they receive public funds, are unaffected by MEPA-IEP, and were always far less likely to have had race-matching policies.65

When we discuss children in foster care, we are not for the most part talking about abused children; abuse is only alleged in a minority of cases (in 2003, 30 percent).66 Most are removed for reasons of “neglect,” which some argue includes simple poverty.67 Neglect certainly includes controversial categories like homelessness, domestic violence, or chronic illness.68

We are also not talking about children harmed by crack. As I have noted elsewhere, the consensus of the medical literature by the decade after 2000 was that crack has no effect on the outcome of a pregnancy—the “crack baby” scare of the nineties was largely fabricated.69 Even fetal alcohol syndrome, far more

65 Id. at 17 (citing that only 30% of private agencies have race matching policies).
68 See, e.g., Nina Bernstein, Family Law Collides with Immigration and Welfare Rules, N.Y. TIMES, Nov. 20, 2000, at B1 (stating that New York authorities found neglect and placed the child in foster care because the mother's chronic illness required frequent hospital visits).
common and scientifically sturdy, turns out to be difficult to diagnose and quite rare, at less than two births per ten thousand in the United States in 1979 (roughly the same rate as cleft palate) and occurring primarily to mothers who have other problems as well—poor baseline health or nutrition in particular.70 One group, Native American children, were particularly identified with the problem in the popular press, principally as a result of the best-selling book by Michael Dorris, The Broken Cord.71 Native American children in particular were overdiagnosed with fetal alcohol syndrome; a 1993 genetic study on reservations in Arizona found that between half and two-thirds of the children diagnosed with fetal alcohol syndrome didn’t have it, suffering instead from Down syndrome or some other developmental problem.72

I make these points because the conversation about foster care and adoption so often proceeds from just-so stories, stories that begin with crack babies or horribly abused children.73 In fact, I cannot think of another area of academic or

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research for engineering the crisis. See Gideon Koren et al., Bias Against the Null Hypotheses: The Reproductive Hazards of Cocaine, 334 LANCET 1440, 1441 (1989). This study found the likelihood that an abstract would be accepted for the annual meeting of the Society of Pediatric Research was significantly affected by whether it did or did not find adverse pregnancy outcomes to be associated with cocaine. Id. Studies that found no effect had an 11% acceptance rate (1 out of 9), while those that found effects had a 57% acceptance rate (28 out of 49). Id. Negative studies tended to be better designed; more likely to have a control group, and more likely to compare polydrug exposure with and without cocaine. Id.


71 See, e.g., Mike Snider, Painful Legacy of Fetal Alcohol Syndrome, USA TODAY, Feb. 3, 1992, at D4 (highlighting Dorris’ book and its impact of educating the public about fetal alcohol syndrome). There was massive press coverage of Native people and fetal alcohol syndrome that followed from the success of that book; NBC, for example, did a week-long series in 1989 entitled Incident at Pine Ridge.


73 For example, Elizabeth Bartholet begins NOBODY’S CHILDREN with two imaginary stories that are meant to illustrate how the current foster care system work and how to fix it. BARTHOLET, supra note 26, at 8–22. Barbara Woodhouse’s often subtle and sensitive arguments about substitute care and transracial adoption nevertheless do their work through a narrative strategy embodied in their titles. See, e.g., Barbara Bennett Woodhouse, "Are You My Mother?: Conceptualizing Children’s Identity Rights in Transracial Adoptions, 2
legal research where the discussion so often veers into imaginary stories, of simplified and homogenized claims about what is happening with the very diverse families and children in foster care. There are at least three reasons for this. First, few commentators have much first-hand experience of foster care “on the ground,” at the level where children are taken or not taken, where families in distress do not have recourse to the freedom money buys—to send a child to a private psychiatric hospital, (boarding) school, or rehabilitation facilities, where the behavior problems that bring impoverished children and youth to the attention of authorities can be managed by psychiatrists and social workers who have little inclination to take one’s children away (especially since the parents are paying the bill). By the same token, parents in trouble can check themselves into drug or alcohol treatment or anger management treatment, or, if things get really bad, can find a friend or relative that has the resources to take one’s children for a while. There are two responses to family distress from those outside—one therapeutic, the other punitive—and which one you get depends profoundly on income.

Second, discourse about other people’s parenting, usually mothering, falls rather easily into the moralistic and judgmental. Everybody, and I am no exception, has a friend, relative, or colleague whose parenting drives us crazy and who is, we are certain, clearly messing up her kid’s life. Whether we think this rush to judgment forgivable or reprehensible in private life, this impulse cannot be allowed to run public policy about how to balance parental rights and the best interest of the child. If we are ungenerous to those we care about in relation to children whom we imagine as innocent and infinitely malleable, our public conversation is even more hostile about the mothering of strangers and race/class/sexual identity “others.”

Third, generalizations about foster care are ridiculously hard to make because there is not a foster care system in the United States, but diverse systems in 50 states, 8 U.S. territories and possessions, 562 federally recognized Indian tribes, and the District of Columbia. Until recently there was not even a national reporting system that tracked the number of children in these diverse foster care systems; even now, state-level tracking systems are sufficiently different that getting relevant data is challenging. Caseworkers often have considerable latitude in determining what happens to children, so the kinds of things that may be recorded as policy (like “we don’t take children for reasons of poverty”) may or may not be

DUKE J., GENDER L. & POL’Y 107 (1995); Barbara Bennett Woodhouse, Hatching the Egg: A Child-Centered Perspective on Parents; Rights, 14 CARDOZO L. REV. 1747 (1993). Randall Kennedy writes a page and a half about the why foster parents are, on the whole, less desirable than adoptive parents without a footnote that documents anything except some general demographic characteristics. See KENNEDY, supra note 59, at 405–06.

74 See Richard P. Barth, Fred Wulczyn, & Tom Crea, From Anticipation to Evidence: Research on the Adoption and Safe Families Act, 12 VA. J. SOC. POL’Y & L. 371, 379 (2005) (discussing the inadequacies with the current foster care tracking systems).
enacted when a caseworker walks into somebody’s house. Transparency is not a virtue embraced by child welfare systems, and the confidentiality promised to foster children can equally cloak malfeasance by the adults in the system, who include a complex mix of mental health providers, group home staff and administrators, lawyers, judges, foster parents, social workers, and child protective service caseworkers.

Instead, I would argue that the questions we need to be asking are, why are children of color being taken from their families in such numbers, and why are they so much less likely than white children to be reunited? Legal scholar Dorothy Roberts, in *Shattered Bonds: The Color of Child Welfare*, argues that invidious, if often unconscious, bias permeates the child protective system. Similarly situated children and birth parents are treated very differently, she shows, at every level of the system. Black parents are presented with impossible reunification plans, accused of things they did not do, and denied access to their children. Her empathy and sense that the situation is unconscionable is palpable:

“One hundred years from now today’s child welfare system will surely be condemned as a racist institution—one that compounded the effects of discrimination on Black families by taking children from their parents, allowing them to languish in a damaging foster care system or to be adopted by more privileged people. School children will marvel that so many scholars and politicians defended this devastation of Black families in the name of protecting Black children.”

Between 1986 and 1992, the size of the child welfare system(s) nearly doubled, from 276,000 in 1986 to 450,000 in 1992, largely as a result of the “crack babies” scare—despite the lack of compelling medical evidence that cocaine causes fetal harm. These kids were disproportionately children of color,

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75 See Dept. of Children & Family Servs. v. Interest of J.C., 847 So. 2d 487, 488–90 (Fla. Dist. Ct. App. 2002) (holding that the removal of a child without good cause was inappropriate).
76 See ROBERTS, supra note 67, at 13–14.
77 Id. at 20–23.
78 Id. at 20, 23–25.
79 ROBERTS, supra note 67, at ix–x.
81 See, e.g., RICHARD P. KUSSEROW, U.S. DEP’T OF HEALTH AND HUMAN SERVICES, CRACK BABIES: A NATIONAL EPIDEMIC 4–6 (1991) (emphasizing an increasing burden on the foster care system, primarily due to crack babies).
and so the proportion of white children in the foster care system became progressively smaller.\textsuperscript{83} The debate about MEPA-IEP was in significant part about how to stabilize this huge new burden on state budgets, especially since children were being taken at birth. If their mothers were being designated as singularly unfit, with little chance of getting their children back, adoption represented an important alternative to an eighteen to twenty-one year commitment by states to these children’s support.\textsuperscript{84}

The NABSW, responding to a similarly abrupt expansion in the size of the child welfare system in the 1970s, and the number of black children in it in particular, sought to shut down transracial adoption, as it was their belief that the availability of this kind of exit strategy from foster care made it easier for caseworkers to remove black children from their families.\textsuperscript{85} In the 1990s, in contrast, Congress and liberal advocates sought to expand transracial adoption.\textsuperscript{86} By 2003, the number of children in the foster care system stood at 520,000;\textsuperscript{87} 35 percent of these children were African American, more than twice their proportion in the U.S. population as a whole.\textsuperscript{88}


\textsuperscript{84} Paltrow, supra note 82, at 3. Mothers of so-called crack babies, it hardly needs saying, were being vigorously demonized; some of them went to jail for testing positive for cocaine, still bleeding from labor. See Dorothy E. Roberts, Unshackling Black Motherhood, 95 Mich. L. Rev. 938, 941–44 (1997). The sense that there is a question about whether it is ever appropriate for a cocaine-using mother to get her children back was conveyed in the 1995 film Losing Isaiah. LOSING ISAIAH (Paramount Pictures 1995).

\textsuperscript{85} National Association of Black Social Workers, NABSW’s Position on Trans-Racial Adoption, 5 Black Caucus 9, 9–10 (1973) [hereinafter NABSW Paper].


\textsuperscript{88} Id. at 2; see also Jesse McKinnon, U.S. Census Bureau, The Black Population: 2000, at 1 (2001), available at http://www.census.gov/prod/2001pubs/c2kbr01-5.pdf (explaining that the 2000 U.S. census found that 12.9 percent reported Black or African American). Native children (i.e. American Indian and Alaska Native, or “AI/AN”) were also represented in the foster care system at double their frequency in the population. AFCARS Report, supra note 87, at 2 (showing that two percent of children in foster care in 2003 were American Indian and Alaska Native); see also Stella U. Ogunwole, U.S. Census Bureau, The American Indian and Alaska Native Population: 2000, at 1 (2002), available at http://www.census.gov /prod/2002pubs/c2kbr01-15.pdf (explaining
In a special issue of the *Duke Journal of Law and Policy*, Elizabeth Bartholet lamented the fact that feminists seem ambivalent about adoption. 89 There is a reason for this. Full orphans, especially among young children, are exceedingly rare; most of the time, adoption involves taking somebody’s child. 90 In my view, there are times when that is the best decision possible. But a woman losing a child, and a child losing a mother, is hardly a cause for feminist celebration. Furthermore, as I will argue in the next section, the NABSW was (and is) a feminist group, one organized, among other things to defend single mothers. It did and does deserve feminist respect and attention.

**B. Historical Context of the NABSW Statement**

In her 1991 article, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, Elizabeth Bartholet sets the NABSW statement in a context that many other white adoptive parents do, in relation to her own decisions to adopt—in her case, two children from Peru, one of whom appeared, visually, indigenous. 91 She states:

I had to decide whether I wanted a child who was a racial look-alike or not. I had to think about whether it would be racist to look for a same-race child or racist to look for a child of another race, as I was learning that the black social workers’ organization opposed transracial adoption, calling it a form of racial genocide. 92

For Bartholet and others, the NABSW statement of 1972 was a commentary on the inadequacy of white parents’ abilities in relationship to African American children. 93 In her 1993 book, *Family Bonds*, Bartholet makes the NABSW statement both the origin point and the site of continued resistance to placing black children with white families:

The 1960s represented a period of relative openness to transracial adoption. Agencies began to place waiting black children with white parents when black parents were apparently unavailable. But in 1972 an

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90 *C.f.* LORI CARANGELO, *STATISTICS OF ADOPTION* (2005), http://www.amfor.net/statistics.html (noting an orphanage in California in which “[f]ew kids . . . were full orphans; most ha[d] a surviving parent who couldn’t care for them . . .”).
92 *Id.* at 1169–70.
93 *Id.* at 1179–80.
organization called the National Association of Black Social Workers (NABSW) issued a proclamation opposing transracial adoption . . . Leaders of the NABSW pledged to put a stop to transracial adoption.

Speaking in 1993, she continued, “[t]here appear to be many adoption workers who either are sympathetic with the NABSW’s position or feel intimidated by its advocates . . .” Or, as Margaret Howard put it in a 1984 article, “In 1972 the National Association of Black Social Workers (‘NABSW’) condemned transracial adoption in terms so militant that transracial adoption fell by 39 percent in a single year.”

In contrast, Leora Neal, executive director of the NABSW chapter in New York City wrote in 1996:

The resolution was not based on racial hatred or bigotry, nor was it an attack on White parents. The resolution was not based on any belief that White families could not love Black children, nor did we want African-American children to languish in foster care rather than be placed in White adoptive homes.

Our resolution, and the position paper that followed, was directed at the child welfare system that has systematically separated Black children from their birth families. Child welfare workers have historically undertaken little effort to rehabilitate African-American parents, to work with extended families, or to reunite children in foster care with their families.

In a 1994 position paper, Preserving Families of African Ancestry, the NABSW suggested that the 1972 statement had been widely misread, “Many thought that the organization’s position focused exclusively on transracial adoption. Yet, this was one component of the position statement, which instead emphasized the importance of and barriers to preserving families of African ancestry.” In these contrasting accounts, questions related to white families were effectively an afterthought; the goal of the statement was to keep black families together.

94 BARTHOLET, supra note 26, at 94–95.
95 Id. at 97.
99 See id.
Who’s right? Should we understand the NABSW statement as primarily an attack on white parents’ skills, or an effort to keep black families together? The plainest reading of the statement is that it is a set of criticisms of white families. It reads, in part:

The National Association of Black Social Workers has taken a vehement stand against the placement of Black children in white homes for any reason . . . .

. . . In our society, the developmental needs of Black children are significantly different from those of white children. Black children [in Black families] are taught, from an early age, highly sophisticated coping techniques to deal with racist practices perpetrated by individuals and institutions . . . . Only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child’s survival in a racist society . . . .

. . . We fully recognize the phenomenon of trans-racial adoption as an expedient for white folk, not as an altruistic humane concern for Black children. The supply of white children for adoption has all but vanished and adoption agencies, having always catered to middle class whites, developed an answer to their desire for parenthood by motivating them to consider Black children.100

This is strong language, and white parents raising children of color could surely be forgiven for believing that they were being criticized, and in harsh terms.

Yet if that point seems obvious, I want to lay out the counterargument here. A statement like this one—and perhaps only a statement like this one—could keep black families together. The statement is equally about black family preservation; it also reads: “We affirm the inviolable position of black children in black families where they belong.”101 In 1972, black parents, mothers in particular, were losing their children in ways that were political and discriminatory. It was so self-evident to most observers that black or mixed-race children would be better off with white parents—for reasons of economic advantage, schools, housing, and the supposed “tangle of pathology” that the Department of Labor and even President Johnson had identified as haunting the black family102—that in order to get any traction in an uphill argument that supported black families, the NABSW was constrained to identify defects in white families.103 If that seems hard to believe or remember, an analogy might be helpful here: it is quite similar to the argument, much more

100 NABSW Paper, supra note 85, at 9.
101 See id., at 9–10.
102 Moynihan, supra note 54, at 1–7.
103 See NABSW Paper, supra note 100, at 9–10.
current, that any impoverished, Third World child without running water or a chance for adequate schooling would self-evidently be better off with loving parents in the United States. It was not enough for the NABSW to show that African-American parents were entitled—legally and morally—to raise their own children. Just as the NAACP had in the recent past successfully argued that black children were psychologically and educationally harmed by segregated schools—in the Brown case—\textsuperscript{104} the NABSW had to show a psychological benefit to black children to being raised in their own communities.\textsuperscript{105}

Although we rarely remember it this way, one of the battlegrounds of black social justice movements in the 1950s, sixties, and seventies was found in issues of reproduction and family.\textsuperscript{106} Sterilization—and laws mandating sterilization particularly of black women—as well as taking black single mothers’ children away were tactics in the war against rebellious black people in the South.\textsuperscript{107} Southern white officials got a lot of traction for their opposition to the civil rights movement out of criticizing, and even breaking up, black families—by labeling some children as illegitimate, and some mothers as immoral, keeping an “unsuitable home.” In fact, this is how the contemporary foster care system was born.\textsuperscript{108}

The NABSW emerged out of this milieu as the only voice at the national level willing to defend black single mothers. Civil rights leaders like Bayard Rustin and James Farmer criticized black single mothers;\textsuperscript{109} Martin Luther King Jr. endorsed the view that part of what was wrong in the black community was the poor child-rearing of single mothers.\textsuperscript{110} Many black single mothers shared a common trajectory in the fifties and early sixties—from sharecropping to factory work in defense plants to jobs lost to returning soldiers and its sequels: poverty, domestic violence, and divorce.\textsuperscript{111} Immoral women with their broken homes were an embarrassment to the respectable black middle class embodied by civil rights leadership. They were trying to show the nation and the world that black Americans were deserving of all the benefits of citizenship: voting, respect, equal access to education and public accommodations. White politicians who made an

\textsuperscript{105} See NABSW Paper, supra note 100, at 9–10.
\textsuperscript{106} Moynihan, supra note 54, at 21–25.
\textsuperscript{109} See Annelise Orleck, Storming Caesar’s Palace: How Black Mothers Fought Their Own War on Poverty 86 (2005); Rainwater & Yancey, supra note 99, at 422–24.
\textsuperscript{110} See Rainwater & Yancey, supra note 100, at 403–04, 407.
\textsuperscript{111} See Orleck, supra note 109, at 9, 70–82.
issue of single mothers who had sex with men they were not married to were trying to embarrass church-going civil rights people by making a different class and caste of black people the public face of African-Americans. Although the civil rights movement was always class-diverse—including former sharecroppers as well as middle-class teachers, preachers, and social workers—the working poor, including poor black single mothers, were rarely defended by that movement.112

Founders of the NABSW first tried to respond to the growing prominence of issues of family and race at the policy level in the National Conference on Social Welfare (NCSW). However, black social workers were not members of the national organization’s policy groups, and some felt they were being systematically excluded.113 In 1968, black social workers walked out of the NCSW annual meeting in frustration, pledging to strengthen the loose-knit, regionally based Association of Black Social Workers into a national organization that could offer an antiracist perspective on the issues of the day.114 The NABSW, initially the National Conference of Black Social Workers, held its first national meeting the next year, in 1969, at Bright Hope Baptist Church, a place characterized by the New York Times as “the heart of North Philadelphia’s slums.”115 The location was symbolic; this was to be an organization sympathetic to the struggles of working-class black people, including single mothers. Speakers at that first conference, themed “The Black Family” called for a “Black Renaissance”—black community economic development and antiracist education that would combat invidious stereotypes and self-loathing within the African-American community.116 The group explicitly renounced the politics of respectability that had made the civil rights movement reject single mothers, instead embracing the strengths of the black family, “in all its variety of structures and forms.”117 At that first conference, Dr. Alvin Pouissant decried the Moynihan Report,118 punitive ADC “suitable home” rules, and the legal labeling of some children as “illegitimate.”119 (“Suitable

112 See, e.g., KELLEY, supra note 34, at 82–83 (noting the unwillingness of certain wealthy black leaders to address the problems facing single mothers).
114 Id.
116 Id.
118 Johnson, supra note 115. It should be noted that a version of the Moynihan Report was vetted by Dr. Martin Luther King. See RAINWATER & YANCEY, supra note 99, at 188, 402–09. Civil rights leaders Bayard Rustin and James Farmer also criticized single mothers. See ORLECK, supra note 109, at 86 (stating that Rustin and Farmer “worried aloud that that economically and socially independent black mothers were eroding black men’s sense of self-worth”).
119 See Johnson, supra note 105.
"home" rules were enforced by case workers who showed up in the middle of the night and trying to "catch" recipients with a sexual partner—if they had one, they would lose their benefits. In subsequent years, conference participants joined with the National Welfare Rights Organization (NWRO) to call for an end to social workers’ condescension toward black mothers who received AFDC. They marched with the NWRO to demand access to credit in department stores to allow impoverished mothers to keep their children appropriately clothed. The NABSW also expressed disgust with the practice of paying foster parents substantially more than what it paid welfare recipients to raise the same children. It called for increasing housing options for single mothers. At its fourth annual conference, it issued a statement calling for the right of grandparents to foster their grandchildren, and another denouncing both coercive use of birth control and barriers to birth control use. In short, it was an organization willing to speak forthrightly about sexuality and unembarrassed about defending black single mothers who were in straits that some felt made African Americans as a group look bad.

In 1972, at its fourth national meeting, the NABSW also issued the statement for which the group is best remembered, calling transracial adoption a "form of genocide." It argued that ethnic pride had long been denied black people, and it was principally through the family that this kind of social self-esteem could be built. As a result, it suggested, "black children belong physically, psychologically, and culturally in black families," because black families could better meet the different developmental needs of black children, including primarily "highly sophisticated coping techniques to deal with racist practices perpetrated by individuals and institutions." Families that were being broken up had offered good and important resources to their children. The group also denounced the process by which black families were rendered ineligible to adopt,

121 See Francis X. Clines, Group Will Seek Militants’ Fund, N.Y. Times, May 28, 1969, at 32; Gerald Fraser, Black Social Workers Assail Agencies, N.Y. Times, November 7, 1971, at 72.
122 Clines, supra note 121.
124 Id.
125 See C. Gerald Fraser, Blacks Condemn Mixed Adoptions, N.Y. Times, Apr. 10, 1972, at 27.
127 See id.
128 Id.
contending that it was a myth that blacks wouldn’t adopt, and insisting that it was primarily the shortage of white children that made black or mixed-race children of interest to white adopters. The statement denounced as disingenuous the redefinition of children with one white parent as “bi-racial,” “black-white,” or “inter-racial,” when for the previous two centuries such children had always been understood “by immutable law and social custom” as African American; in doing so, the statement argued, agencies were “emphasizing the whiteness as the adoptable quality.” They were also uneasy about the ways black children became a project, rather than a family member like others. In this profoundly segregated time and place, they noted, white parents had to seek assistance to figure out how to deal with black children’s hair, to learn black culture, to “try to become black.” Authors of the statement noted the frequency with which white families had to sever all ties with their own parents in order to parent a black or mixed-race child, suggesting that it weakened the family and left scars on the parents that affected the child.

Finally, the statement commented on the crisis of a black (boy’s) adolescence in an all-white community and school—given the prevalence of a “but would you want your daughter to marry one” sentiment in white communities, who was he supposed to date? By insisting that African American families were not the “tangle of pathology” of the Moynihan report, but a good and healthy resource for black children—and, indeed, offered certain nonreplicable resources for black children in learning to deal with white racism—the NABSW produced a “best interests of the child” rationale to insist that child welfare workers should place children there. Despite what were presumably good intentions by majority white agencies in the 1960s, and sometimes heroic efforts by black and Puerto Rican social workers, black families seeking to adopt were being rejected in overwhelming numbers for their supposed deficiencies—neighborhood, age, and income prime among them.

In this context, the NABSW sought to make arguments for the affirmative virtues that black families brought to the practice of rearing black children. The heart of the NABSW position was a broadly historical argument, that until one recognized the economic, political, and historical forces separating black children from their families, one could not produce a coherent black child welfare system,

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130 Id.
131 Id. at 10.
132 Id.
133 Id.
134 See id.
135 See, e.g., RUTH G. MCROY, ZENA OGLESBY, & HELEN GRAPE, Achieving Same-Race Adoptive Placements for African American Children: Culturally Sensitive Practice Approaches, in SERVING AFRICAN AMERICAN CHILDREN, supra note 42, at 89–90.
never mind argue that an essential component of it ought to be white adoption of black children.

1. The Importance of Scarcity

The NABSW statement on transnational adoption was promulgated at workshops on the black family in response to a concern that transracial adoption was “a growing threat to the preservation of the black family.” Why was adoption the problem? The answer was scarcity. In the aftermath of the Flemming rule and the funding of ADC foster care, the system seemed to be expanding limitlessly in its capacity to absorb black children. Many suspected that the politics of loathing of black mothers in general and of fighting against racial justice claims on the terrain of the black family were contributing to the sudden but extensive entry of black children into foster care and adoption. Black social workers, trained and steeped in the case report literature, were thinking of cases like the following from the late fifties, written up in a federal report.

Mary E. had three illegitimate children before she came north to live with her mother and stepfather. When she had two more, her stepfather threw her out of the house. The one room she could afford was crowded enough for an adult and five children; it was also cluttered with unwashed clothes, soiled dishes, and hills of dirt. The neighbors reported that her children roamed the streets while she entertained a man at late drinking parties.

When Mary applied for ADC, the agency worker thought the home situation was almost hopeless. But she knew the difficulty of finding foster homes for Negroes. She began helping the mother to clean up her room, and to exercise more adequate control over her children. At first, progress was slow—the family didn’t even see the dirt. But the mother and her teenage daughter were unusually eager to learn, and to improve their condition. The worker made weekly assignments for housecleaning, laundry, and similar chores, and Mary met the challenge. The oldest son, living in the next town, was contacted. He checked on the children almost daily and eventually, they were always in the house after dark. They got to school on time, with faces washed, hair combed, and clothing clean. If “suitable home” policies had been strictly applied, the

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136 See Fraser, supra note 124, at 27.
family would have been broken up. With ADC money and services, they stayed together and actually moved toward becoming a responsible family.137

There are many things to notice in this narrative, and the genre to which it belongs. Its elements include the helpless and hopeless subject of casework and the heroic caseworker, who, applying principles of good social work, firmness and compassion, completely transforms the situation by acting upon the apparently unpromising raw material of her clients. We might also note that what brought Mary E. to the attention of authorities was not concern by teachers or neighbors about the state of her children or her housekeeping, but the egregious mistake of applying for ADC. But this case also suggests a pre-Flemming, pre-transracial adoption status quo that provided good reason to oppose black children being adopted and fostered in white homes: when there were not homes available, caseworkers kept black families together. The only thing that saved Mary from having her children taken away by the state was “the difficulty of finding foster homes for Negroes.”138

The 1972 NABSW position on interracial adoption worked to restore some of the difficulty of pulling black children from their homes by trying to nudge social workers in general back in the direction of that pre-1961 problem of the lack of foster (and adoptive) placements for black children, in hopes of encouraging caseworkers to stop separating black children from their mothers. In a 1987 article in Ebony, the president of the NABSW explained the statement in exactly that way, “Our position is that the African-American family should be maintained and its integrity preserved. We see the lateral transfer of Black children to White families as contradictory to our preservation efforts.”139 The group failed. By the mideighties, the number of black children in foster care had skyrocketed.140

137 Bureau of Public Assistance, Illegitimacy and Its Impact on the Aid to Dependent Children Program, in WELFARE: A DOCUMENTARY HISTORY OF POLITICS AND POLICY, supra note 33, at 190 (Gwendolyn Mink & Rickie Solinger eds., 2003).
138 Id. at 189.
139 Walter Leavy, Should Whites Adopt Black Children, EBONY, September 1987, at 78.
140 Dorthy Roberts, Under-Intervention versus Over-Intervention, 3 CARDOZO PUB. L., POL’Y & ETHICS J. 371, 373 (2005) (noting the “huge increase both in the numbers of black children in the system and in the number of children in foster care during the 1980s”).
III. WHY THE INDIAN CHILD WELFARE ACT IS NOT LIKE THE NABSW STATEMENT

A different historical misunderstanding governed another debate related to MEPA-IEP, this one involving Native American children. In 1996, members of Congress tried to overturn a number of provisions of the Indian Child Welfare Act (ICWA) by arguing that like the policies that flowed from the NABSW statement, it constituted race discrimination. In part, commentators based their critique on a historical account that specifically linked the campaign for ICWA to the NABSW statement. For example, in her 1991 article, Bartholet justified linking the two, explaining:

A parallel development [to African American children] occurred with respect to the adoptive placement of Native American children. Indian children were first placed in significant numbers in non-Indian homes in the period from the late 1950s through the 1960s. Certain Native American leaders took a public position against these placements in 1972, the same year the NABSW issued its historic statement against trans-racial adoption. Several years later Congress passed the Indian Child Welfare Act of 1978 which mandates a powerful preference for placing Indian children with Indians as opposed to non-Indians. In recent years several states have passed laws modeled on the Indian Child Welfare Act, mandating a same-race preference in adoptive placement.

While the effort to overturn ICWA failed, many commentators continue to claim that ICWA constitutes illegal—or at the very least unwarranted—racial discrimination.

This claim rests on a misunderstanding of both the historical and legal basis of ICWA. The historical claim that the campaign for ICWA began in 1972 by nationalist Native people derives from the work of psychologist Rita Simon and

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142 Id.
143 Bartholet, supra note 26, at 1181–82.
has been widely repeated, even by historians. It is, however, wrong. The campaign for ICWA began in 1968—before NABSW was even founded—by a multiracial group, the American Association on Indian Affairs (AAIA), which was seeking an end to what they saw as attacks by the Federal Bureau of Indian Affairs on tribes’ sovereignty, specifically termination policy, which sought to end the legal existence of tribes. Termination policy converted reservations into land that could be bought and sold (and, some argued, exploited for its uranium and other natural resources). Ideologically, termination was a policy that sought the full assimilation of Native people into the legal, cultural, and geographical space of the United States—eliminating them as distinct nations.

The opening salvo in what became the campaign for ICWA was a press conference at the Overseas Press Club in 1968. At it, William Byler, the (Anglo) executive director of the AAIA and a delegation from the Devil’s Lake Sioux, of North Dakota protested the removal of the tribes’ children by ADC caseworkers employed by the state. It was the position of the tribal chairman that tribal courts, not the state, had exclusive jurisdiction over children on the reservation, a position that had been upheld in a ruling by the North Dakota Supreme Court—a ruling that had been ignored by caseworkers, who felt that because they administered ADC, they could determine what constituted a suitable home. Byler said:

[N]othing exceeds the cruelty [to children] of being unjustly and unnecessarily removed from their families...Today in this Indian community a welfare worker is looked on as a symbol of fear rather than of hope. . . . The Devil’s Lake Sioux people and American Indian tribes have been unjustly deprived of their lands and their livelihood, and now they are being dispossessed of their children. . . . [C]ounty welfare workers frequently evaluate the suitability of an Indian child’s home on the basis of economic or social standards unrelated to the child’s physical


See, e.g., BARBARA MELOSH, STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION (2002) (discussing origins of the campaign for ICWA); Bartholet, supra note 26 at 1181–82 (discussing origins of the ICWA campaign).


or emotional well-being and that Indian children are removed from the custody of their parents or Indian foster family for placement in non-Indian homes without sufficient cause and without due process of law.151

The AAIA had become involved when the tribal chairman contacted them about an incident with an ADC caseworker where she had literally tried to pull a three-year-old from the arms of his grandmother on the reservation, and without any color of law sought to place him with a white couple in Fargo.152 Even the lawyer from the AAIA was stunned to learn that despite the North Dakota Supreme Court ruling granting exclusive jurisdiction over child welfare to the tribal court, state ADC workers had removed 25 percent of the children from the reservation.153

In subsequent policy fights, Byler and the AAIA specifically contested the characterization of placements of Native American children with white families as “transracial,” arguing that the issue had to do with Native American children’s political status, or citizenship, as members of tribes, bands, and nations. The issue, according to the AAIA, was not race at all, but jurisdiction, which followed from tribal membership—and hence was more akin to questions of what state a case of termination of parental rights and adoption could be heard in than any question related to race. In the 1978 hearings on the bill in the House of Representatives, the Justice Department and members of Congress raised this very point, but were persuaded that ICWA was about political status, not race.154 In fact, the way ICWA was written—over the objection of many tribes, whose representatives felt it excluded many children who were self-evidently Indian—ensured that it was not

152 Id. at 2.
153 Bertham Hirsch, Keynote Address at UCLA Faculty Center Symposium: The Indian Child Welfare Act the Next Ten Years: Indian Homes for Indian Children (August 22, 1990). It’s not only in the distant past that caseworkers ignore court orders. In one horrific and highly publicized case in Southern Arizona, CPS workers, in defiance of a judge’s divorce order awarding sole custody to the mother with no visits for the father, due to domestic violence, placed the children with the father after a complaint was filed by the father. John Brodesky & Daniel Scarpinato, Files Document CPS Efforts, Failures, ARIZ. DAILY STAR, Aug. 1, 2007, at B2. CPS’s investigation criticized the mother’s housekeeping—finding her trailer “slightly disheveled”—and cited a worker’s concern that she was using drugs, a charge she denied. Id. The one time she was tested for drugs, the results indicated she was clean, and she was told that the complaint had been found unsubstantiated. Id. Nevertheless, the police, CPS, and her ex-husband refused to return the children. Id. The body of one of her children was found in a storage facility; the other was never found, and her ex-husband was charged with their murders. Id.
about race. Many children who might be readily identified as “racially” Indian are not covered by ICWA. For example, Native American children from Canada or Mexico are not covered by ICWA. In the United States there are 562 federally recognized Indian tribes, but by one researcher’s count, nearly 200 unrecognized or terminated tribes. Children from these groups, who might be descended “racially” only from Indian ancestors, are not covered by ICWA. Further, a child might have four grandparents who are enrolled members of federally recognized American Indian tribes, and be a “full-blood” Indian, but not covered by ICWA, lacking a sufficient blood quantum (say, one-half) to be eligible for membership in any particular tribe. Or, likewise, a child whose mother is an enrolled member of a tribe that counts membership through the paternal line, and a father from a tribe that counts membership as descending through the maternal line would not be eligible for enrollment, and hence not covered by ICWA. ICWA strictly limits itself to status (enrollment or eligibility for enrollment), not (racial) Indian-ness.

The heart of the legal question in ICWA was sovereignty, not race. The federal government made treaties with tribes as sovereign nations, exchanging Native American lands for certain concessions by the U.S. government, made in perpetuity. A century or two after many of these treaties, in 1831, a Supreme Court case, *Cherokee Nation v. Georgia*, upheld the right of tribes to be treated as nations, “distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil,” (albeit domestic dependent nations). As Felix Cohen wrote in his important treatise, *Federal Indian Law*, for the Department of the Interior:

> Perhaps the most basic principles of all Indian law, supported by a host of decisions . . . is the principle that those powers which are lawfully vested in an Indian tribe are not, in general delegated powers granted by express acts of Congress, but rather inherent powers of a limited sovereignty which has never been extinguished. Each Indian tribe begins its relationship with the Federal Government as a sovereign power, recognized as such in treaty and legislation. The powers of sovereignty

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158 See id.
159 See 25 U.S.C. § 1903(4) (basing classification as an “Indian Child” on eligibility for membership in an Indian tribe). *But see Cohen’s Handbook of Federal Indian Law* § 11.02[2] (2005) (noting instances where “membership” has been found to include children technically ineligible or whose eligibility is uncertain).
160 *Cherokee Nation v. Georgia*, 30 U.S. 1, 15–16 (1831).
162 *Cherokee Nation*, 30 U.S. at 2.
have been limited from time to time by special treaties and laws designed
to take from the Indian tribes control of matters which, in the judgment
of Congress, then, must be examined to determine the limitations of
tribal sovereignty rather than to determine its sources or its positive
content. What is not expressly limited remains within the domain of
tribal sovereignty. 163

To construe Native peoples as a “racial” group is to miss this fundamental
principle of Indian law: Native people are members of nations within the
boundaries of the United States. Whatever the degree to which the federal
government does or does not recognize the sovereignty of those nations, trying to
turn Indian peoples into a “race” as a matter of law is to try to fit the square peg of
Native sovereignty issues into the round hole of the black-white racial paradigm. It
has no basis in law. Indeed, in 1974, in Morton v. Mancari, the Supreme Court
ruled that Native peoples in the United States should be treated as members of
political rather than racial groups, and specifically that the equal protection clause
that prohibited racial preferences—in this case in personnel matters in federal
employment—did not apply in Indian matters, allowing the BIA to maintain its
preference for employing qualified Native people. 164

Finally, however the federal government may attempt to renegotiate the
sovereignty of Indian nations, states as such lack the authority to do so because
Native nations made their treaties with the federal government. Because child
welfare, like all family law, is primarily a state issue, jurisdiction has to revert to
tribes as a simple matter of logic—federal courts have no jurisdiction with respect
to child welfare, and states have no authority in Indian matters. Even before
ICWA, this is how federal courts held. In Fisher, for example, the Federal District
Court of Montana found that adoptions had to go through tribal courts. 165

Media coverage of a number of highly publicized cases in the nineties
suggested that ICWA was a barrier to specific adoptions because of race. In the
Rost twins case, a couple in southern California adopted twin girls at birth. 166 The
birth father concealed that he was, and more importantly the twins were, eligible
for enrollment in the Pomo tribe. 167 Four months later, at the request of the girls’
paternal grandmother, the tribe asked for the order of adoption to be vacated,
saying it had not conformed with ICWA. 168 In another case, two parents, both
enrolled members of the Mississippi Band of Choctaw Indians, went off the

163 FELIX S. COHEN, U. S. DEP’T OF THE INTERIOR, HANDBOOK OF FEDERAL INDIAN
LAW 122 (1941).
166 Eric Schmitt, Adoption Bill Facing Battle over Measure on Indians, N.Y. TIMES,
167 Id.
168 Id.
reservation to have twins and, after their birth, consented to adoption.\(^{169}\) Again the adoption was declared invalid because the case should have been heard in tribal court.\(^{170}\) These cases, which critics charged involved an abuse of racial classifications by parents and tribes to disrupt adoptions,\(^{171}\) motivated some to back amendments to ICWA. But the appropriate analogy would not be to race or questions about the NABSW, but to a birth parent who crossed state lines for an adoption. State jurisdiction questions come up all the time, and adoptions are complicated immensely by them—birth mothers might be trying to thwart a biological father who opposed an adoption, or might travel to a state that allows adopters to be generous in their reimbursement of expenses for a mother, which another state might consider “buying” a baby.\(^{172}\) And this was how the U.S. Supreme Court ruled in the Holyfield case in 1989, again finding that it was a question of jurisdiction and sovereignty, not race.\(^{173}\) Just as an adoption involving a child whose parents resided in Florida should not be heard in Louisiana, a child who was an enrolled member of a Sioux tribe (or eligible for enrollment) would have a hearing in a Sioux court, not, say, a South Dakota court.

While ICWA deserves more extensive treatment than I give it here, my point is simply that it derives from a different history and rests on a legal theory that is not about race. While these points can be debated on their merits, it is misleading to incorporate them into a discussion of race and the NABSW statement. Although those who sought to overturn what was perceived to be public adoption agency policy—race matching—sought to roll a challenge of ICWA into its challenge to race matching with respect to African American children, these matters have to be separated.

### IV. Conclusion

There is not much evidence that the size and racial demographics of the foster care population were greatly affected by race-matching policies in adoption. The most reliable predictor, of course, would be the numbers and demographics of

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\(^{170}\) Id. at 53–54.

\(^{171}\) See Barbara Ann Atwood, “Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court,” 51 Emory L.J. 587, 591 (2002) (“[S]ome scholars question the view that tribal power trumps parental choice in, for example, voluntary adoptions of children domiciled on a reservation.”).

\(^{172}\) The Jessica DeBoers case is an example. In re Baby Girl Clausen, 501 N.W.2d 193 (Mich. Ct. App. 1993). In the case, a child was ordered removed from the foster parents who wanted to adopt her in response to questions of jurisdiction. Id. at 198. The mother had tried to evade the father’s wishes, placed the child for adoption, then regretted the decision within weeks. Id. at 194; Isabel Wilkerson, Michigan Couple Is Ordered to Return Girl, 2, to Biological Parents, N.Y. TIMES, Mar. 31, 1993, at A17.

\(^{173}\) Holyfield, 490 U.S. at 53.
children entering foster care. Second best would be the success at efforts at family reunification, since most children who leave the foster care system leave it when they reunite with their families.\footnote{See \textit{Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report: Preliminary FY 2006 Estimates as of January 2008,} at 4 (2008). (illustrating on a chart that fifty five percent of children leave foster care to reunite with their families).} Black children are far less likely than white children to be returned to their families.\footnote{\textit{Chapin Hall Ctr. for Children, Foster Care Dynamics 2000–2005,} at 42 (2007).}

The evidence that the demographics of foster care had much of anything to do with transracial adoption, basically, amounts to the following: A 1990 House report found that the length of time children spent in foster care varied by race, with black children spending a longer time in foster care.\footnote{See Select Comm. on Children, Youth, and Families, \textit{supra} note 174 at 39.} Bartholet's 1991 article cited personal interviews with adoption advocacy organizations and child welfare workers in a handful of states, predominantly in the Northeast, as well as California.\footnote{See Bartholet, \textit{supra} note 26, at 1183 n.50.} Whatever the significance of states like New York, Connecticut, Massachusetts, and California, however, it was misleading to make them stand for the nation as a whole. At no time did all states have race-matching policies for children from foster care, and adoption only accounts for 17 percent of even the exits from foster care.\footnote{\textit{Children's Bureau, U.S. Dep't of Health & Human Servs., The AFCARS Report: Preliminary FY 2006 Estimates as of January 2008,} at 4 (2008).}

The reason there were so many black children in foster care, and the reason they stayed longer, had little to do with adoption. It had to do with how many black children entered the foster care system in the late eighties and early nineties, and the fact that they were being returned to their mothers (and fathers, but usually mothers) at considerably lower rates. Did they need to be removed from their families? There is no baseline, logical number of children that need to be in foster care. The considerable variation over the last half-century of the number of black children in foster care suggests the extent to which it is a matter of policy. As I have suggested, there were almost no black children in foster care before 1961, but the authorization of unlimited federal funds for foster care sent 150,000 children into care in 1961.\footnote{See \textit{supra} notes and accompanying text 123-131.} Similarly, before the 1950s, there were almost no Native American children in foster care.\footnote{See Bartholet, \textit{supra} note 26, at 1181–82.} Rules that scrutinized whether a mother kept a “suitable home” that sent so many black and Native children to foster and adoptive homes in the fifties and sixties were finally determined to be out of bounds, but I wonder if a few decades from now we will find the current wave of concern over...
substance abuse just as suspect as “suitable home” rules. Perhaps we really are, again, just criminalizing the ways impoverished people get by. Alcohol use, for example, is far more common among white women than among black or Native American women.\(^{182}\) Perhaps that accounts for why mothers who drink don’t elicit moral horror and the almost unchecked power of the state to take their children away.

This article has been interested in how and why liberals, and even feminists like Elizabeth Bartholet, joined the campaign against “illegitimacy” waged by neoconservatives in the 1990s as part of the effort to get rid of federal entitlements that supported single mothers. As we have seen, the 1996 Interethnic Placement Act was redefined to separate it from the previous controversy over Gingrich’s remarks about orphanages, and even, ultimately, from the measure to end AFDC. It was called, instead, as legal scholar Joan Heifetz Hollinger defines it, a “law aimed at removing the barriers to permanency for the hundreds of thousands of children who are in the child protective system, and especially, for the African American and other minority children MEPA makes it clear that children in state custody are not exempt from the antidiscrimination principles embodied in . . . Title VI of the 1964 Civil Rights Act.” In the 1970s, activists had worked to remind policy makers that those “barriers” were parental rights, deserving of protection from abuse by an overreaching state system. A great deal had changed in a handful of years.

Most concerning, though, was the way a liberal discourse of “color blindness” in adoption disabled what was, at least initially, sturdy opposition to policies designed to take children from their unworthy single mothers. To borrow from Twila Perry, color blindness met community and color consciousness and together they engaged in a lively and compelling debate. In the meantime, as with the Flemming rule a generation ago, liberal concern about black children met conservative willingness to provide significant funds to take them away—I am thinking here of the ways the 1996 Adoption Promotion and Stability Act, with its $6,000 tax break to families willing to adopt children of color or “special needs” children\(^{183}\) was like ADC-Foster Care. As a result, we have created the conditions under which the foster care system could stabilize at its new, massive size (about 500,000 children), with a population much less white than a few decades earlier—a new generation’s “browning of child welfare.”\(^{184}\) As Dorothy Roberts writes,

Scholars who deal with black children in the child welfare system tend to focus on social work practice—how children should be treated—rather than the politics of child protection—how political relationships

\(^{182}\) Armstrong, supra note 70 at 173.


\(^{184}\) See Brissett-Chapman, supra note 42, at 49 (discussing the effect of an increasing number of children of color in child protective reports).
affect which children become involved in the system. Child protection authorities are taking custody of black children at alarming rates, and in doing so, they are dismantling social networks that are critical to black community welfare.\textsuperscript{185}

Making the NABSW the villain of the story, making that group responsible for why black children were disproportionately in the child welfare system, misses that organization’s real and substantial contribution to this debate: it tried to call attention to the ways black single mothers are targeted by child protection systems, and tried to defend those mothers.

\textsuperscript{185} Roberts, \textit{Shattered}, vii.