

Introduction

Helping build families one miracle at a time.

– Adoption Network Website

Providing families for children in need is unquestionably a worthy goal. Adoption conjures soft-focus images of abandoned and vulnerable innocents welcomed into families who can love and nurture them. People who choose to engage in stranger adoptions – adoptions that do not involve kin or stepparents – are typically motivated both by a desire to become parents and by a wish to do good in the world. The families thus created are, in fact, miraculous, and these families often work hard not only to provide for a found and chosen child but to give back to the communities from which the child originated.

The uplifting story of family creation enabled by adoption, however, tows a darker story of marginalization and loss in its wake. Historically, adoption in the United States was not simply about providing care for needy children; it was also explicitly driven by the desire to move children from unsuitable to suitable families. Charles Loring Brace, founder of the Children’s Aid Society of New York, argued, for example, that placing poor and immigrant children with American farm families via orphan trains provided “the cheapest and most efficacious way of dealing with the ‘Dangerous Classes’ of large cities, . . . draw[ing destitute youth] . . . under the influence of the moral and fortunate classes, [enabling them to] grow up as useful producers and members of society, able and inclined to aid it in its progress.”¹ Similar motives were evident in the federal government’s Indian Adoption Project² in the

¹ Charles Loring Brace, *The Dangerous Classes of New York, and Twenty Years’ Work Among Them* (New York: Wynkoop and Hallenbeck, 1872): i–ii.

² The Indian Adoption Project operated from 1958 to 1967 and was administered by the Child Welfare League of America under a contract with the Bureau of Indian Affairs in the U.S.

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mid-twentieth century, and as recently as 1994, former U.S. House of Representatives Speaker Newt Gingrich argued for the reinstitution of orphanages as a way of ending the welfare dependency of poor women.³

However, even when the separation of children from their biological families and communities is not propelled explicitly by efforts to control so-called deviant families, adoption entails a loss for communities and families separated from children. Whether by design or happenstance, the children of disadvantaged communities are more likely than children of privileged communities to find themselves tangled in adoption and foster care arenas, with the result that the loss of children is borne disproportionately by such communities. Marginalized communities view this loss of children with alarm and sometimes despair. As a result, claiming – or reclaiming – such children is freighted with significance as those communities strive for equality, recognition, and respect.

Another current in the darker story of adoption concerns the universe of adoptable children. The adoption wars are fought over relatively few children: healthy infants are a highly prized item – some might say a commodity – in the context of stranger adoptions, where the focus tends to be on adopting the youngest, and thus presumptively least traumatized, child. As the number of white infants available for adoption has declined over the last few decades, more prospective parents have become interested in adopting infants and very young children across racial, ethnic, and national boundaries. However, the vast majority of vulnerable children, both domestically and internationally, stand on the sidelines; they are older, children of color, belong to sibling groups that should not be separated, or have intellectual, emotional, or physical problems that make them difficult to place.

This is the yin and yang of adoption and foster care. A child who gains a family through adoption, whether as an infant or older child, has also lost a family, a history, and a community. A community that opens its arms to a child finds its counterpart in a community that has lost or failed that child. An adopted child is shadowed by legions of children who have been left behind.

The fact that adoption entails gains and losses for individuals, families, and communities means that adoption is a volatile political issue, particularly when adoption and foster care placements cross racial, cultural, and national boundaries. It is, as one commentator has noted, a “crucible” issue into which a lengthy history of subordination and deprivation has been compressed and

Department of the Interior and the U.S. Children’s Bureau. www.adopting.org/uni/frame.php?url=http://www.uoregon.edu/~adoption/topics/IAP.html.

³ Jason DeParle, “Abolishment of Welfare: An Idea Becomes a Cause,” *The New York Times* (April 22, 1994).

submerged.⁴ To be sure, the number of children adopted both domestically and internationally is small in real terms and most of the communities from which they are removed do not face extinction as the result of the practice – although this claim has more potency in connection with the history of some indigenous communities. At the same time, the intrusion of the privileged into the intimate spaces of poor and marginalized communities cuts to the bone.

Some might argue that in adoption, the only interest that carries moral weight is the interest of the child and that adult members of a community of origin do not sustain a cognizable loss when children are placed outside of that community. There is truth in that assertion; as discussed in later chapters, some communities have stronger claims than others. But all communities place a value on “their” children, and communities that have long suffered from social and political disadvantage are quite understandably resentful when children appear to become commodities to be picked over by others. Whether their future survival as a community is placed at risk by the removal of such children may be debatable, but appreciating the symbolic impact of the loss is critical to understanding how such communities view their place in the world.

In addition, marginalized communities are acutely aware of how adoption can be used by a privileged community to domesticate difference: children of different races and cultures become exotic specimens on display, even when the idea of such a display is repugnant to the families who adopt them. A *New Yorker* cartoon captured this concern in 1997, depicting a well-to-do white woman at a party exclaiming, “We’re so excited, I’m hoping for a Chinese girl, but Peter’s heart is set on a Native American boy.”⁵ It is understandable, therefore, that marginalized communities in these circumstances often suspect advantaged communities of applauding transracial, transcultural, and transnational placements as no more than a ploy to secure children for their own members. Thus, while the primary focus in adoption and foster care placements should be on serving the best interests of the child, considering the child in isolation from the communities from which the child originates is frequently viewed by less well-off communities as an expression of callous indifference to the structural conditions that place such children at risk in the first instance.

To create equitable systems of care for vulnerable children, it is critical to understand that marginalized communities experience the loss of children keenly and to account for those concerns in the legal and policy regimes

⁴ Janet Farrell Smith, “Analyzing Ethical Conflict in the Transracial Adoption Debate: Three Conflicts Involving Community,” *Hypatia* 11 (1996): 1–33, 2.

⁵ William Hamilton, *The New Yorker*, July 7, 1997, 31.

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governing both domestic and international adoption and foster care. This communally aware position does not mean that adoption and foster care should not cross racial, cultural, or national boundaries. It does mean, however, that the goal of placing every child with a traditional nuclear family must not automatically trump all other forms of care, even for some young children. A communally aware position means, for example, that there must be some retreat from the position that the best option in caring for vulnerable children always entails placing a child through adoption into a “real” family of his or her own. Rather, there must be a range of options available, such as creating small group homes with stable caregivers that allow some children, where appropriate, to remain in the communities into which they have been born or have grown up, or making better use of guardianship options rather than adoption to avoid the total alienation from a child’s origins that occurs in formal adoption proceedings. These types of communally aware options are too often dismissed out of hand by adoption proponents because of their institutional overtones.

Being attentive to the concerns of marginalized communities, moreover, does not mean that every community should always be given exclusive or even primary authority to place “its” children. Many children “belong” to more than one racial, ethnic, or cultural group, or have ties to communities that are exceedingly weak. Efforts to draw rigid boundaries of belonging that grant irrevocable authority to one group to determine who belongs only generates ill will, creating endless jurisdictional disputes that produce racial, ethnic, or cultural winners and losers, while children’s interests fall by the wayside. Indeed, the concept of belonging – especially cultural belonging – can dissolve into incoherence when talking about children because culture is acquired, not innate. To talk about a child’s culture or community of origin – when that child has been moved among families, communities, and nations – and to use that concept to set fixed jurisdictional boundaries creates as many problems as it resolves.

Communities that seek to revitalize themselves by reclaiming children whose connections are highly attenuated must be willing to seek an accommodation with competing communities. Moreover, disadvantaged communities must be realistic about their own abilities to cope with large numbers of vulnerable children. Although the precarious position of many children in such communities can typically be traced to a series of historic injustices, not every injustice is easily or immediately remediable, and providing immediate care for vulnerable children is a problem of such magnitude in many communities that it may be difficult, if not impossible, for marginalized communities to respond adequately in the moment. At the same time, privileged communities

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must not jump to the conclusion that the best solution is always to remove children through adoption or foster care, and make more than illusory efforts to alleviate the problems that lead to large numbers of abandoned and needy children in the first place. Providing support for families and in-place care is a critical part of the equation.

This kind of compromise and accommodation is largely absent from the political contests over adoption currently being waged on both the domestic and international fronts. The factions in the adoption debates can be roughly divided between groups that advocate for relatively unlimited access to adoption for children in need and those who view adoption or placement outside of a community's boundaries as an option of the last resort. Although this discussion refers to the former as *adoption proponents* and the latter as *adoption opponents*, positions of the various actors are located along a spectrum rather than a single, unambiguous axis.

Adoption proponents are typically a diverse group, consisting of persons who have adopted or are seeking to adopt a child, many of the public and private agencies that provide adoptive or child welfare services, and others who believe that adoptive families provide children with their best life chances. Proponents are quick to point out that many studies suggest that children adopted across racial and cultural boundaries develop without significant difficulties attributable to racial or cultural difference and, while not naïve about asserting that “love is enough,” they argue that the benefits accruing to children by virtue of permanency far outweigh any trauma that children might experience as the result of movement through adoption or foster care. Adoption proponents rarely acknowledge that *communities* whose children are transferred may experience the transfer of children as a tangible injury. Moreover, as a group, adoption proponents have tended to dismiss concerns about trafficking and baby-selling or have treated such scandals as isolated incidents, despite mounting evidence that such practices are widespread and that the concerns are legitimate. They often view efforts to slow the rate of transnational transfers through laws or policies that give communities some degree of control over the placement process as nothing more than misguided nationalist games using children as pawns.

Genuinely concerned about the trauma that can ensue when children are placed in institutions, drift aimlessly through inadequate foster care systems, or are simply left to seek their own way on the streets, proponents seek to speed the process by which children at risk become available for adoption, and bridle at both domestic and international regulatory schemes that appear to impede the process, including the Hague Convention on Intercountry Adoption, discussed in Chapter 5. Domestically, proponents express frustration with social

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policies stressing across-the-board goals of family reunification, which in many cases keep children shuffling back and forth between incompetent or abusive families and an equally problematic state child welfare system. Internationally, proponents argue that calls for community-based care make little sense in impoverished communities overwhelmed by vulnerable children. They point out that placing orphaned or abandoned children in informal or kinship care systems often re-victimizes them and may even threaten their very survival.

Adoption opponents are an equally diverse group: some of the most strident critics are mothers who felt compelled to surrender children because of social stigma or economic necessity and are now challenging the system, as well as adoptees who were adopted when the practice was shrouded in secrecy and families were advised not to be open about the process.⁶ Of concern in this book, however, are communities and organizations that argue that the practice exploits poor parents, mothers in particular, and historically marginalized communities. These opponents argue that adoption is an exceedingly limited fix to the problem of caring for vulnerable children – a fix that allows the privileged to camouflage their appropriation of the youngest and most adoptable of children behind a veil of compassion while ignoring the conditions of inequality that create vulnerability in the first place. These critics argue, in particular, that transracial, transcultural, and transnational adoption and foster care placements stigmatize whole communities as unfit to care for children and thwart efforts to create community-based care systems that would ultimately redound to the benefit of both children and the communities themselves. Rather than providing families for children in need, they argue, adoption today has become a market system of boutique baby-shopping focused on providing children for elites who feel entitled to select children to parent.

The conflicting philosophies that underlie these two positions can be illustrated by examining two pieces of federal legislation in the United States: the Multiethnic Placement Act of 1994, as amended by the Interethnic Placement Provisions of 1996 (MEPA-IEP)⁷ and the Indian Child Welfare Act of

⁶ One of the most difficult issues in analyzing the effects of adoption on children and communities lies in the fact that practices have changed dramatically over the past sixty years. Adoption rules during 1950s and 1960s, when the practice was often a family secret, vary considerably from practices today, where open adoption permitting continued contact with families and communities can do much to help a child navigate his or her identity across racial and cultural boundaries. Similarly, parents who adopted transnationally and transracially in the late 1960s assuming that issues of race and ethnicity would be easily overcome are often among the first today to recognize that such placements raise unique issues for both parents and children.

⁷ Multiethnic Placement Act of 1994, Pub. L. No. 103–382, sec. 551, 108 Stat. 3518, 4056 (codified as amended at 42 U.S.C. secs. 1996b, 5115a (2006)), *repealed in part by* Small Business Job Protections Act of 1996, Pub. L. No. 104–188, sec. 1808(d), 110 Stat. 1755, 1904 (codified at 42 U.S.C. sec. 1996b (2006)).

1978 (ICWA),⁸ both of which continue to generate bitter disputes. MEPA-IEP prohibits race-matching⁹ in adoptive and foster care placements for non-American Indian children except in compelling circumstances. The Act and its amendments were passed in response to what adoption advocates argued was an unconscionable reluctance on the part of public and private placement agencies to place children transracially, either because of formal policies or because of social workers' discomfort with such placements. MEPA-IEP has generated pointed criticism, largely from the African American community, for undercutting the cohesiveness of minority communities to the detriment of both those communities and the children placed outside of them. Critics also argue that the law removes any incentive for agencies to actively solicit potential adoptive and foster care families from minority communities.

ICWA, on the other hand, represents what might be called a culturally or community sensitive approach. Broadly speaking, ICWA grants tribal courts exclusive jurisdiction over the adoptive and foster care placement of children who are, or are eligible to become, members of an American Indian tribe and presumptive jurisdiction over other categories of children. Indeed, construing ICWA in a 1989 decision, *Mississippi Band of Choctaws v. Holyfield*,¹⁰ which has been widely lauded by indigenous communities, the U.S. Supreme Court recognized that tribes have a distinct *communal* interest in the placement of Indian children. Other provisions of the Act require state courts placing Indian children to comply with preferences that require such children to be placed with kin or in other Indian families before considering non-Indian families. ICWA has been praised by supporters not only because it allows Indian children to grow up Indian, but redresses, in part, the efforts to erase native populations that occurred openly until at least the mid-1970s. Critics argue that it grants tribes unfettered authority to reach out and disrupt adoptive and foster care placements based on connections to a tribe or community that may be no more than a whisper.

ICWA, of course, is rooted in the unique political history of Indian tribes in the United States and rests on considerations of sovereignty unique to tribal status. In fact, scholars who have argued that non-Indian minority communities should be granted authority akin to that granted to tribes have earned sharp rebukes from American Indian scholars who scoff at the idea that African American communities, for example, should be granted exclusive authority to

⁸ Indian Child Welfare Act of 1978, Pub. L. No. 95–608 (codified at 25 U.S.C. secs. 1901–1963 (2006)).

⁹ In the adoption context, race, ethnicity, and culture are often used as proxies for one another, although such a conflation raises its own problems, discussed *infra*.

¹⁰ *Mississippi Band of Choctaws v. Holyfield*, 490 U.S. 30 (1989).

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place African American children, as discussed in Chapter 4. On a more general level, ICWA has drawn fire from adoption proponents, who argue that it dooms children to live in tribal communities where alcohol and substance abuse problems are epidemic, effectively extinguishing such children's life chances.

Similar controversies pervade the transnational adoption arena, where a host of declarations and conventions endorse a variety of human rights protecting individual, family, cultural, and national identity with the potential to affect adoption practices. Many nongovernmental organizations (NGOs) concerned with the plight of large numbers of vulnerable children, as well as sending nations (those whose children regularly find their way into the transnational adoption arena), talk about transnational placement as an option of the last resort, as opposed to adoption service providers and potential adoptive parents who worry that increased regulation of the adoption process and a focus on community-based care will constrict and eventually eliminate access to adoptable children. Sending countries, as well, are now taking steps to privilege domestic over transnational adoption, both to counter the impression that "their" children are available for export and to create opportunities for potential adoptive families in their own communities. The success of such efforts varies, of course, as many sending nations face overwhelming obstacles that make providing for vulnerable children a Herculean task.

In receiving countries, however, the pressure to eliminate considerations of race or ethnicity in making transnational adoptive placements has increased. In the United States, as noted, MEPA-IEP specifically forbids the consideration of such factors except under special circumstances; supporters of MEPA-IEP have argued strenuously that such a race or ethnicity blind approach is constitutionally required under the Equal Protection Clause of the U.S. Constitution. Other receiving countries have expressed similar concerns. In an interesting twist, Italy's highest court recently issued a high profile decision endorsing only racially and culturally neutral approaches to adoption. The decision rejected the adoption application of a family who sought a child only of "European" descent, holding that adoption applications from families who designate a racial, cultural, or ethnic preference for a child must be dismissed and observing that families specifying such preferences may be assumed to be bigoted and thus unsuitable to adopt at all.¹¹ The case has generated interest as nations, NGOs, and child welfare professionals have begun to grapple with the consequences, including worries about placing children with families who

¹¹ Bock, Erin, "Italy high court rules adoptive couples cannot request children based on race, ethnicity," *Jurist*, June 3, 2010, <http://jurist.org/paperchase/2010/06/italy-high-court-rules-adoptive-couples-cannot-request-children-based-on-race-ethnicity.php>.

may not be prepared to deal with the issues raised by parenting a child who obviously differs in race or ethnicity from his or her adoptive parents.¹²

Adoption and foster care placements that transfer children among communities with disparate resources and distinct cultures raise a number of issues relevant to broader debates about multiculturalism in political scholarship. The first set of issues relates to the nature of group claims to recognition and the preservation of cultural integrity. While some theorists argue for the recognition of group interests as third-generation solidarity rights, there is considerable debate over whether these types of group interests can ever be formulated as rights, a debate that is often carried out at a relatively abstract level. The claims of marginalized communities for the protection of cultural integrity in the adoption and foster care arena starkly illustrate some of the problems in this area: the boundaries of communities are notoriously difficult to fix, and the position of children, whose identities are malleable, raises genuine concerns about who ought to be allowed to designate membership and the process by which such membership decisions are made. Although understanding claims for cultural continuity as enforceable rights may be problematic, there are nonetheless significant justice concerns that warrant consideration because of the vulnerable position of such groups, which concerns are often elided in current debates over adoption and foster care.¹³

A second issue central to broader discussions of multiculturalism concerns the child him or herself. Liberal arguments about multiculturalism tend to center on the concerns of adult actors; claims for recognition typically issue from communities composed of adults whose identification with a particular community is not in doubt. When individuals or groups demand accommodation for religious practices or language differences, for example, rights can often be relatively easily formulated and enforced, even if they are staunchly

¹² This decision, interestingly, reflects the thought experiment articulated by Fogg-Davis in *The Ethics of Transracial Adoption*. In that book, Fogg-Davis reflects on how the adoption universe might be changed if all adoptive placements were race-blind, so that children and parents would be matched without considering the race of either, and explores how such a practice might affect the ways in which Americans consider race altogether. H. Fogg-Davis, *The Ethics of Transracial Adoption* (Ithaca, NY: Cornell University Press, 2002).

¹³ This book does not examine the claims of religious groups as distinct cultural communities. While in the history of adoption, religious matching was the norm, with separate charities dealing with, e.g., Protestant, Catholic, or Jewish children, that is no longer the case. E. Wayne Carp, *Adoption in America: Historical Perspectives* (Ann Arbor: University of Michigan Press, 2002). Today, when religion is raised as a concern in adoption or foster care proceedings, it is often a coded reference to ethnic difference: should a Muslim child be raised in a Protestant home? When a child is older and has grown up in a particular religion, it may serve the child's best interests to be placed in a foster or adoptive home of the same background to provide continuity for the child.

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opposed by those opposing “special” treatment for minorities. Moreover, adults who disagree with the values of a particular community often have exit rights, in law if not in fact.

Children, however, have no such rights of exit: where they are placed will largely determine the identities that they develop. Arguably, these children have been subjected to a forced exit from a particular community; they are, as Bergquist has noted, “involuntary immigrants,” even when such placements have been made to further their best interests.¹⁴ Compounding the analytical problems, in adoption and foster care across transracial and transnational boundaries, community and culture are often configured as flowing through the child him or herself. These expectations play out differently for different children. Some children feel genuinely stricken by the loss of the families and communities from whom they have been separated, regardless of the age at which they were adopted or the love they feel for their adoptive families. Others may resent the efforts of either their adoptive families or originating communities to forge connections, whether through culture camps, roots trips, or more sophisticated arrangements for exchange and reconnection.

The movement of children through transnational and transracial adoption also shifts, to some extent, the ways in which the development of children’s moral agency is understood, since moral agency, and the degree to which we can exercise that agency,

depends on the forms of life we inhabit, the niche we occupy in our particular society; the practices and institutions within the society that set the possibilities for the courses of action that are open to us; the material, cultural, and imaginary resources at our disposal; . . . [and] the shared moral understandings that render our actions intelligible to those around us.¹⁵

For children in adoption and foster care, it is difficult to chart the tangled interaction of the environmental factors that shape the child’s development from the imperatives that the child might feel to belong in one place or another or both. Children moved across traditional boundaries of belonging thus confound assumptions about parental authority to shape children’s identities and children’s own perceptions of how they develop those identities.

Concerns about moral agency run in another direction too. Disadvantaged communities often assert that children are their futures: the removal of children therefore impairs any possibility of cultural and communal continuity.

¹⁴ Kathleen Ja Sook Bergquist, “International Asian Adoption: In the Best Interest of the Child?” *Tex. Wesleyan Law Rev.* 10 (Spring, 2004): 343–349, 343.

¹⁵ Hilde Lindemann Nelson, *Damaged Identities, Narrative Repair* (Ithaca, NY: Cornell University Press, 2001): xi.