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Disposable Mothers, Deployable Children

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DISPOSABLE MOTHERS, DEPLOYABLE CHILDREN

RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION*. New York: Pantheon Books, 2003. 688 pp.

*Reviewed by Annette R. Appell**

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INTRODUCTION

The dominant discourse about poverty and racism has changed significantly in the past decade to reflect a view that poverty, problems attendant to poverty, and racial affiliation are matters of individual choice that have individualized solutions. In this discourse, poverty, homelessness, child neglect, and economically blighted and isolated communities reflect personal pathology; White supremacy is a relic and all race distinctions are bad. These beliefs are manifested in federal legislation that limits welfare benefits, promotes adoption of poor children, and removes barriers to transracial adoption. A common denominator of this legislation is the notion that poor (Black) families are pathological so they should be discouraged from having children and the children that they do have would be better off with other parents.

Randall Kennedy's *Interracial Intimacies*¹ is an example of this approach. The book cloaks itself in the vestments of racial liberty while

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promoting individualized blame and solutions for racial oppression. The book, ambitious in scope, if not depth, makes a vivid case for the arbitrariness and destructiveness of racial classifications through the tales of interracial couples, families, and the social and legal responses to them.² For Kennedy, intimate interracial relations are sites of civil rights and racial justice, private yet publicly opposed. Kennedy seeks to demonstrate through stories of barriers to interracial adult relationships, the rejection of Black children from White communities, and challenges to Black or interracial parenting of White children, that race should never matter in intimate relationships, and further that the government should promote adoption of children of color by White parents. Although the stories stand on their own as striking examples of the absurdity and contingency of racial assignment, the rather thin and thinly developed unifying theory, that removing barriers to interracial intimacy promotes racial justice, masks important distinctions between personal choice and socio-material conditions affecting that choice, relationships between adults and between adults and children, and, finally, what it means to be White and Black in the United States.

Kennedy's vision of racial justice is one in which individuals may choose freely with whom to be intimate, including the intimacy of raising children. He aspires to a world in which racial distinctions do not exist, and he acknowledges that legal barriers to adult interracial intimacies, much of the book's focus, have been abolished.³ Kennedy asserts those barriers remain in child rearing, most notably in the adoption field.⁴ Yet his promotion of race neutrality in this field seems to promote White assimilationist goals, rather than racial justice, because he views White adoption of Black foster children as the solution to Black family dysfunction.⁵ Kennedy does not appreciate, or seem to care, that his "solution" devalues Black families. He fails to differentiate between the reason for barriers to adult interracial relationships (the maintenance of White supremacy) and the reason for self-imposed separatism of nondominant cultural, religious, and racial groups (to preserve their identities against the hegemony of the dominant culture). Moreover, he does not take sufficient account of the experiences of the children for whom he proposes

1. RANDALL KENNEDY, *INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION* (2003).

2. With the exception of a chapter on the Indian Child Welfare Act, Kennedy confines his discussion almost exclusively to Black and White "races." I do not take issue with the narrow scope because there certainly is very much material on the subject. A different book that was more interested in the complexity of race and the context of interracial intimacies would have sacrificed the volume and specificity of Black-White relationships reviewed in *Interracial Intimacies*, but would perhaps be richer. See, e.g., RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE & ROMANCE* (2001).

3. KENNEDY, *supra* note 1, at 35.

4. *Id.*

5. See *infra* text accompanying notes 76–77.

the solution. While Kennedy seems to ignore larger social structures in which his individualized solution sits, his solution threatens diversity and promotes homogenization in the context of intimate relations between parents and children where culture is created and reproduced. Thus, what first appears a rather noncontroversial book about free choice in intimate relationships actually embraces social policies that promote the permanent removal of poor Black children from their families and adoption of these same children by White parents.

This book review addresses the meaning of purported race neutrality in the context of child rearing and other intimate relationships⁶ and the analytic weakness, particularly in the family context, of Kennedy's overall disregard of child development, gender, and class. In Section I, I describe Kennedy's book and methodology to afford a sense of his approach to, and organization of, the subject. In Section II, I respond to Kennedy's methodology, premises, and arguments by placing intimacy in the contexts of youth, race, class, and gender. I address and critique his assumption that the private family law paradigm of adult choice and parental decision-making apply to family law systems like slavery and child welfare, which are characterized by coercive state intervention into intimate adult choices relating to marriage and child rearing. I show that Kennedy's similar failure to consider the differences in autonomy of adults and children causes him to overlook the special experiences of adoptees that frequently connect them to multiple families, races, and culture in ways that matter for adoptees' growth and identity formation. I turn next to an exploration of how consideration of children's interests and experiences would inform Kennedy's approach to transracial adoption. I then show how the failure to view foster children and their families in their own context leads to Kennedy's adult-centered approach to transracial adoption. Finally, I trace how Kennedy's promotion of transracial adoption as a solution to foster care matches conservative, and approaches White-supremacist, ideas and policies (such as recent welfare and child welfare reforms) designed to provide barriers to child rearing by poor Black parents and promote child rearing by White middle-class families.

6. I do not take on race neutrality as a general matter. There is already a rich literature that criticizes race neutrality. For a recent, succinct critique of race neutrality, see Part I of Justice Ginsburg's dissenting opinion in *Gratz v. Bollinger*, 123 S. Ct. 2411, 2442–45 (2003) (Ginsburg, J., dissenting). See also, e.g., HAWLEY FOGG-DAVIS, *THE ETHICS OF TRANS-RACIAL ADOPTION* (2002); Richard Delgado, *Rodrigo's Tenth Chronicle: Merit and Affirmative Action*, 83 GEO. L.J. 1711 (1995); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind,"* 44 STAN. L. REV. 1 (1991); Cheryl I. Harris, *Equal Treatment and the Reproduction of Inequality*, 69 FORDHAM L. REV. 1753 (2001); Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); Dorothy E. Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209 (1995); Jennifer M. Russell, *The Race/Class Conundrum and the Pursuit of Individualism in the Making of Social Policy*, 46 HASTINGS L.J. 1353 (1995).

I. KENNEDY'S CASE FOR ACHIEVING RACIAL
JUSTICE THROUGH INTERRACIAL INTIMACY

Interracial Intimacies is really two books in structure and substance. The first part attends to adult relationships from slavery through modern times.⁷ The second part addresses parent-child relationships.⁸ *Interracial Intimacies* is also two books in terms of approach. The primary approach is a presentation of a series of topically and chronologically arranged vignettes that illustrate adult interracial relationships and social and legal responses to them, with some commentary. The other approach is prescriptive, assessing and recommending social policy, chiefly around transracial adoption. I present, in the following subsections, a summary of the book mirroring its structure rather than providing a more analytic or thematic approach; I choose this course so the reader can obtain a sense of the book's methodology.

A. *The Opening Paradigm*

The book opens with the narrative of the familiar, rich, and ironic story of Jacqueline Henley.⁹ It is a compelling story of forbidden interracial adult intimacy, the arbitrary assignment of race to biracial children, and barriers to parenting across racial lines. Kennedy uses it as a paradigm for the wrongs of racial assignment to, and distribution of, children.

Jacqueline was a biracial girl born in New Orleans in 1950 to a poor White woman who became terminally ill shortly after Jacqueline's birth.¹⁰ Jacqueline was legally White, but dark-skinned and, as a result, spent much of her childhood caught between rigid racial categories that kept her from living in the then relatively separate Black or White worlds. Jacqueline's appearance made it difficult to remain with her White aunt, but because her birth certificate identified her as White, she could not, despite her appearance, be adopted by her Black foster parents. Although her foster parents sought to change her birth certificate to identify her as Black, the county clerk, Jacqueline's guardian ad litem, and, ultimately, a judge refused to allow the modification because it was in Jacqueline's best interests to maintain the privilege of White racial status.¹¹ Eventually, Jacqueline was shipped to Chicago to be adopted by a prominent Black

7. See KENNEDY, *supra* note 1, at 3-366.

8. See *id.* at 367-521.

9. Although familiar, Kennedy enriches our knowledge of the story with interviews of the people involved and quotes from the original record. *Id.* at 3-12, 37-38.

10. *Id.* at 3.

11. *Id.* at 5-12.

family and her foster parents traveled to Oregon where they adopted a biracial Korean-Black boy.¹²

Jacqueline's adoption journey vividly illustrates the contingency of race and the destructiveness of legally defined and imposed racial classifications that thwart the private ordering of families: in this case, the choice of adults to adopt a child—and, perhaps, the marriage of Jacqueline's White mother and Black father. Jacqueline's story is also an example of the interference of racial classifications with the placement of a literally motherless child, first with a loving White aunt, and second with a loving Black foster family. Kennedy appears to view Jacqueline's story as paradigmatic of harmful race-based barriers to intimate ordering.

Yet by the end of the book the contents of the paradigm have switched markedly: the orphans¹³ are Black foster children (many of whom actually have parents), the thwarted adoptive parents are White adults who seek to adopt Black children, and the protectors of the best interests of the child are misguided social workers who believe Black children belong with Black parents so to honor Black experience and culture. While Jacqueline's story shares some of the formalistic racial barriers relating to adoption of foster children today, it has little in common with the dynamics of the current transracial adoption debate. For, while legal and social barriers kept Jacqueline from remaining with her Black foster parents, current law and policy promote both coercive separation of children from their Black parents and placement with White foster and adoptive parents.¹⁴ The predominant threat to racial justice today is not that Black families cannot adopt White (or biracial) children but that the State removes Black (or biracial) children from their Black parents and places them with White families.¹⁵ Ironically, like the county clerk, judge, and guardian ad litem in Jacqueline's story, Kennedy also seems to aspire to White racial privilege for Black foster children.

B. *Adult Relationships*

The adult relationships part of the book has two different organizational structures: the first provides a chronological overview of adult interracial relationships during slavery, Reconstruction, the Civil Rights Movement, and up to the present; and, the second provides a series of thematic views, highlighting the negative aspects of these intimacies such as sexual coercion, lynching, and racial passing.¹⁶ Both the chronological

12. *Id.* at 37–38.

13. Later in the book, Kennedy refers to Black foster children as “parentless.” See, e.g., *infra* text accompanying notes 72 and 92.

14. See *infra* text accompanying notes 130, 134–45.

15. See *infra* text accompanying notes 146–50.

16. See KENNEDY, *supra* note 1, at 41–366.

and thematic portions present interracial relationships through stories, lawsuits, and popular media.¹⁷ These stories are informative, extremely moving, and sometimes ugly. Here, Kennedy seems most concerned with making a case for dismantling any treatment that subordinates Black individual choice to White and Black community interests or norms.¹⁸

According to Kennedy, during slavery, interracial coupling was commonplace and more tolerated than the heightened de jure White supremacy of the times would suggest.¹⁹ These relationships, often “consensual,” occurred between White men and free or enslaved Black women, and free or enslaved Black men and White women.²⁰ The offspring of many of these unions formed much of the free Black community.²¹ The free Black community was mainly composed of free-born or later-freed adult children of White women and Black men, or masters and enslaved women, respectively.²²

During Reconstruction, interracial intimacies occurred, but were less tolerated and probably less frequent than during slavery.²³ Interracial intimacies continued to be sparse during the first half of the twentieth century.²⁴ After World War II, interracial taboos loosened as Blacks migrated from the South to the North, Black veterans returned home, and Hitler’s fascism caused some uneasy examination of our own history of race relations.²⁵ The Civil Rights Movement created shared space and purpose for Blacks and Whites and created opportunity for, and approval of, interracial intimacy.²⁶ Kennedy marks 1967 as a pivotal year for widespread acceptance of interracial intimacy because of the release of the film *Guess Who’s Coming to Dinner?*, the Supreme Court’s decision in *Loving v. Virginia*²⁷ which held anti-miscegenation laws are unconstitutional, and the *Time* cover story of the interracial marriage of Guy Smith and Peggy Rusk.²⁸ Following this watershed year, there was much greater acceptance of inter-

17. The relationships presented are primarily, though not exclusively, Black-White and heterosexual.

18. Kennedy seems to be fighting against an unnamed enemy—Black community condemnation of interracial intimacy, *see id.* at 331–32, although much of this portion of the book is aimed at dominant culture’s historic disapprobation. That the enemy is Black becomes clear in the parent–child relationships portion when he criticizes the National Association of Black Social Workers (NABSW) and other proponents of race matching and cultural competence in transracial adoption. *See id.* at 393–98.

19. *Id.* at 66–69.

20. *Id.*

21. *Id.*

22. *Id.* at 66.

23. *Id.* at 70–85.

24. *Id.* at 85–92.

25. *Id.* at 98–100.

26. *Id.* at 100–04.

27. 388 U.S. 1 (1967).

28. KENNEDY, *supra* note 1, at 104–08.

racial intimacy mixed, however, with some opposition from Blacks who resisted assimilation.²⁹ Ultimately, interracial intimacy gave birth to multi-racial movements and amalgamation as a method to achieve racial justice.³⁰

After this chronological overview, Kennedy examines some of the negative sides of interracial intimacies, including sexual coercion, demonization of Black male sexuality, and anti-miscegenation laws. He also examines racial passing, which he views as subversively positive. Kennedy begins this thematic portion with a series of narratives of relationships between slave masters and slave women. Kennedy notes the inherent coercion of master and female slave coupling and rape, as well as Black male slaves' inability to protect their wives, lovers, sisters, and mothers during slavery.³¹ He argues these dynamics continue to cast a symbolic shadow on White male/Black female relationships.³² He next turns to the demonization of Black male sexuality and to Black male sexual coercion, Kennedy's sometime euphemism for rape,³³ of White (and Black) women.³⁴ He concludes that such Black male sexual coercion—the very fact that some Black men have the power to rape White women—illustrates that Black men have the requisite power to be racist and exercise racism.³⁵

Kennedy also addresses anti-miscegenation laws, including the enforcement of the laws,³⁶ the campaign against them, and the United States Supreme Court's outlaw of them in *Loving v. Virginia*.³⁷ Kennedy notes the NAACP's strategic decision not to contest anti-miscegenation laws earlier in the civil rights litigation movement because interracial intimacy was so intimate and, therefore, threatening.³⁸ It is not clear what, if any, new

29. *Id.* at 109–23.

30. *Id.* at 157.

31. *See id.* at 163–80. Kennedy does not mention how mothers felt about being unable to protect their daughters. *See id.* at 167 (noting that in failing “to criminalize sexual coercions of bondswomen, the slave regime not only increased female slaves’ vulnerability to sexual assault but also put enslaved men in a terrible bind” of being unable to protect their womenfolk).

32. *Id.* at 180–82.

33. Oddly, Kennedy uses the phrase “sexual coercion” and sometimes “sexual exploitation” rather than “rape.” *See id.* at 162–213. Although he does mention the “rape” of a slave at least once. *Id.* at 172. Kennedy also refers to at least one master’s sexual relations with slaves as “sexual dalliances.” *Id.* at 165. It seems odd to neutralize the “sexual relations” between slave and master during a period of de jure White male supremacy that produced the most extreme power imbalance and terror. Perhaps he chooses these vague, soft terms because the hedonistic experiences of the women are difficult to ascertain or perhaps he hopes to minimize the symbolism of rape that serves as a barrier to present day interracial intimacy between White men and Black women. *See id.* at 162, 167, 180.

34. *Id.* at 183–213.

35. *Id.* at 207–13.

36. *Id.* at 214–43.

37. *Id.* at 244–80.

38. *Id.* at 257.

ground Kennedy covers, but his description provides an interesting history.

The thematic portion of the book concludes with a discussion of racial passing³⁹—the conscious attempt of a “Black” person⁴⁰ to conceal or fail to disclose Black ancestry.⁴¹ It is, perhaps, an unarticulated bridge to the parent-child portion of the book because passing relates to the product of interracial adult intimacies—offspring who can “pass” as White or Black, and because passing, like transracial adoption, symbolizes to him a break with both White- and Black-imposed racial orthodoxies. These chapters are mostly descriptive, presenting a series of fictional and nonfictional stories about racial passing. Although Kennedy recognizes how racial passing has reinforced “racial lines of exclusion,”⁴² he, like others, also views passing as “a challenge to racist regimes.”⁴³ Passing today, Kennedy notes, could be construed to include all forms of interracial intimacy—interracial marriage, transracial adoption, and identifying as multiracial.⁴⁴ A “liberal individualist,” Kennedy supports these types of passing⁴⁵ and opposes identity politics and racial distinctions drawn by Whites and Blacks.⁴⁶ Instead, he “yearns for a society in which race has become obsolete as a significant social marker.”⁴⁷

Although Kennedy seeks racial equality or justice through interracial intimacies, he does not explain how such intimate relationships will move us there. Social theory has long assumed that intermarriages are markers of assimilation and greater racial equality,⁴⁸ but Kennedy does not cite any studies establishing either that connection or how interracial coupling creates racial equality. Studies do show that interracial marriage is more prevalent in geographic and economic areas where racial divisions are not as pronounced⁴⁹ and that interracial couples may have more toler-

39. See *id.* at 281–366.

40. Under White supremacy, this refers to someone who had any Black ancestry. *Id.* at 284. Despite this definition, Kennedy does discuss Whites passing as Blacks. See *id.* at 333–38.

41. *Id.* at 285.

42. *Id.* at 318.

43. *Id.* at 319.

44. *Id.* at 331.

45. *Id.* at 332.

46. *Id.* at 331–33.

47. *Id.* at 332.

48. See Yanick St. Jean, *Let People Speak for Themselves: Interracial Unions and the General Social Survey*, 28 J. BLACK STUD. 398, 398–99 (1998); Sheryline A. Zebroski, *Black-White Intermarriages: The Racial and Gender Dynamics of Support and Opposition*, 30 J. BLACK STUD., 123, 123 (1999).

49. See Matthijs Kalmijn, *Trends in Black/White Intermarriage*, 72 SOC. FORCES 119, 141 (1993); see also M. Belinda Tucker & Claudia Mitchell-Kernan, *New Trends in Black American Interracial Marriage: The Social Structural Context*, 52 J. MARRIAGE & FAM. 209, 209 (1990) (interracial marriage rates vary greatly by region, are substantially higher in the

ant friends and neighbors.⁵⁰ Thus, it may be that tolerance begets interracial intimacy, rather than that interracial intimacy produces tolerance. Moreover, interracial couples experience race differently, in part, than intraracial couples.⁵¹ Although more aware of race than they may have been before the marriage,⁵² interracial couples “speak of their own colorblindness and share experiences that . . . have positively contributed to their choice of mate.”⁵³ These are areas Kennedy did not explore, but could inform his theory regarding the relationship between interracial intimacy, eradication of racial assignment, and racial justice.

C. Parent-Child Relationships

The second part of the book is about interracial parent-child relationships. It is different in tone and organization from the first part in that Kennedy clearly has a present and future-oriented agenda—the removal of any barriers to transracial adoption. This part of the book is more topical and less chronological although it presents the material, much like in the first part of the book, through a series of anecdotes derived from case law, Congressional testimony, memoirs, and other narratives. Although Kennedy addresses the use of race in private custody disputes, his primary focus and concern appear to be limitations on transracial adoption. For Kennedy, such limitations interfere with interracial intimacy and perpetuate racial stereotyping and “permanent racial identity”⁵⁴ just as internal and external social, legal, and cultural forces do in adult intimate relationships.

Kennedy begins this portion of the book by recalling Jacqueline Henley and the designation of right and wrong races to parent children.⁵⁵ This designation reminds him of the problematization of interracial

West, and are most prevalent in more racially tolerant areas). Most intermarriage occurs among the middle-class and poor Blacks remain isolated economically and geographically from Whites. Kalmijn, *supra*, at 142.

50. See also Zebroski, *supra* note 48, at 124 (“There may even be a tendency on the part of interracial couples to actively seek supportive social situations and avoid those that are not, in order to live ordinary lives . . .”). Indeed, interracial couples report horrible, disapproving comments from family, friends, and strangers. See, e.g., St. Jean, *supra* note 48, at 405–06, 408–09.

51. Miriam R. Hill & Volker Thomas, *Strategies for Racial Identity Development: Narratives of Black and White Women in Interracial Partner Relationships*, 49 FAM. REL. 193 (2000). Moreover, in some ways, it appears that interracial couples become raced. They are not just a couple, but an interracial couple, who may be guarded when in public. See *id.* at 196–98; St. Jean, *supra* note 48, at 404–12 (both reporting interracial couples experiencing racist comments and constraints at work, with families, and in public).

52. St. Jean, *supra* note 48, at 409–11.

53. *Id.* at 409.

54. KENNEDY, *supra* note 1, at 367.

55. *Id.*

parenting manifested both when White women, impregnated by Black slaves, killed their babies to destroy the evidence of interracial sex and the legal assignment of color and slave status to biracial children born to female slaves.⁵⁶ For Kennedy, these extreme examples of racial assignment and boundaries are echoed in modern custodial and adoptive race matching.⁵⁷

With this introduction, Kennedy launches an examination of “blocked interracial parenting”⁵⁸ in which community norms, individual choice, or judges use race to dictate custody. To reveal the arbitrariness of these racial assignments, Kennedy presents a series of stories of biracial children who were classified as White or Black depending on how the community identified them at any given time.⁵⁹ Kennedy then shares several stories illustrating utilization of race in custody determinations regarding children in divorces.⁶⁰ All of these stories exhibit the social construction of race, specifically White supremacy, in which biracial children are assigned to the Black race and White children are removed from interracial couples. Kennedy concludes this portion with a discussion of *Palmore v. Sidoti*,⁶¹ in which the United States Supreme Court outlawed the use of race in custody decisions.⁶² Although Kennedy views *Palmore* as a positive decision that outlaws both benign and hostile motive racial discrimination in custody determinations,⁶³ he is troubled by the Court’s failure to explore the positive aspects of transracial custody.⁶⁴

Kennedy then turns his attention for the rest of the chapter, and the book, to transracial adoption. This discussion begins with a somewhat chronological rehearsal of approaches to transracial adoption, including statutory prohibitions to transracial adoption in Louisiana and Texas and criminal sanctions for placing White children with Black families in South

56. *Id.* at 367–68.

57. *See id.* at 367 (introducing the interracial parent-child relationship portion of the book by recalling infanticide and racial assignment during the slavery era). Race matching refers to social and political philosophies that promote placing adoptive children with adoptive parents of the same race. The phrase appears to be neutral, but presently it refers to social, psychological, and political theory that holds children of color should be placed with parents of color.

58. *Id.* at 368, 370.

59. *Id.* at 368–72. For example, in the first decade of the twentieth century, one child was passed around from Black to White to Black homes every time her race was questioned. *Id.* at 368. In the 1940s, a biracial boy was placed with a Black family after living for his first few years with his White mother and her White husband until she could no longer conceal his race (and her adultery) from the neighbors and her husband; but the little boy faced problems in his new home for being too light skinned and eventually became involved in a life of crime and homicide. *Id.* at 368–70.

60. *Id.* at 372–86.

61. 466 U.S. 429 (1984).

62. *Id.* at 380–86.

63. *Id.* at 386.

64. *Id.* at 383–84.

Carolina.⁶⁵ He also describes one case in which a judge denied the adoption of a White child by his Black stepfather because such an adoption would legally and socially disadvantage the White child who would, by virtue of the adoption, become Black.⁶⁶

Kennedy acknowledges, however, that the more dominant issue in transracial adoption is the placing of Black children with White parents. This is the bridge to his primary agenda, the abolition of race matching in the adoption of children of color. Kennedy identifies and problematizes two approaches to race matching, strong race matching and moderate race matching. Strong race matching advocates “are willing to wait indefinitely, if need be, to ensure that a [B]lack child is raised by a [B]lack adult.”⁶⁷ For Kennedy, the 1972 National Association of Black Social Workers (NABSW) statement against placing Black children with White families,⁶⁸ exemplifies the strong race matching preference. He characterizes the two arguments in favor of strong race matching as the promotion of what is best for Blacks as a group and what is best for individual Black children.⁶⁹ Moderate race matching, on the other hand, permits transracial adoption but only after substantial efforts to find same-race placements have failed.⁷⁰

Kennedy’s thesis is that all race matching is destructive and interferes with the adoption of Black children; or, put more positively, transracial adoption is both good for children and for race relations.⁷¹ His thesis is directed at, and he believes, supported by the needs of, Black foster children. To him, as well as his colleague Elizabeth Bartholet, foster children are nobody’s children—they are “parentless.”⁷² Kennedy notes the disproportionate percentage of Black children in foster care⁷³ and simply attributes it, without support, to parental fault caused by “a long and bitter history of slavery, segregation, and racially selective neglect and mistreatment” and the private preferences of adoptive parents who prefer White children.⁷⁴

With these matters asserted, Kennedy presents his arguments supporting transracial adoption of foster children. Transracial adoption has

65. *Id.* at 386–401.

66. *Id.* at 390–92.

67. *Id.* at 398.

68. *Id.* at 393.

69. *Id.* at 395.

70. *Id.* at 399.

71. *Id.* at 402.

72. *Id.* at 402; see ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* (1999). For an analysis and critique of this book, see Martin Guggenheim, *Somebody’s Children: Sustaining the Family’s Place in Child Welfare Policy*, 113 HARV. L. REV. 1716 (2000).

73. His term is “parentless children.” KENNEDY, *supra* note 1, at 402.

74. *Id.* at 402–03.

been studied and debated for decades and Kennedy offers little new. For Kennedy, transracial adoption is the primary solution to foster care, which in turn is the solution to caring for the children of the hundreds of thousands of Black parents so unfit that they are not “parents.”⁷⁵ His basic positive argument is that since there are more Black foster children than prospective Black adoptive parents, it is not possible to race match.⁷⁶ Thus, race matching “likely contributes to” the large percentage of Black children languishing in foster care by both delaying permanent placement for Black children and discouraging White people from coming forward to adopt Black foster children.⁷⁷

Kennedy presents a race neutral equal protection argument that race matching is discriminatory and cannot meet heightened scrutiny.⁷⁸ In this context, he assesses and refutes arguments in favor of race matching.⁷⁹ These arguments, according to Kennedy, are that: Black adults are better able to parent Black children because they have experienced racial discrimination;⁸⁰ Black parents can teach Black children survival skills in a racist world;⁸¹ and, transracial adoption is bad for Blacks as a group because it suggests that they cannot care for their own.⁸² Kennedy’s answers to those arguments are: White people have experienced prejudice and if they have not, then they can learn about it and their stand against racism will be more powerful because they are White;⁸³ Blacks’ experience of

75. See *id.* at 402, 406, 496. Apparently, Kennedy is unfamiliar with or unsympathetic to the vast literature regarding causes of the disproportionate entry into and slow exit from foster care of Black children and other children of color, most notably Indian. See *infra* text accompanying notes 134–143. Kennedy is also skeptical about the parenting ability of Black foster and adoptive parents. He bemoans “political pressures” to recruit more Black foster and adoptive parents that have led to inferior foster and adoptive homes “that are little better and sometimes worse than their homes of origin.” KENNEDY, *supra* note 1, at 406 (citing newspaper stories about bad foster parents).

76. *Id.* at 403. Others claim there are sufficient Black families willing and able to adopt. E.g., Cynthia G. Hawkins-León & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U. L. REV. 1227, 1260 (2002).

77. KENNEDY, *supra* note 1, at 404. Kennedy cites a student note for this proposition but offers no page citation. *Id.* at 404 n.7, citing Amanda T. Perez, Note, *Transracial Adoption and the Federal Adoption Subsidy*, 17 YALE L. & POL’Y REV. 201 (1998). The lack of a pinpoint citation is understandable since nowhere does the note establish what effect, if any, race matching has on the large numbers of Black children in foster care. The note does, however, contain several assertions regarding disproportionate numbers of Black children in foster care, the willingness of 68,000 White parents to consider adopting transracially, and some social workers’ preferences for race matching. *Id.* at 204–06, 205 n.17.

78. KENNEDY, *supra* note 1, at 406–07.

79. *Id.* at 406–11.

80. *Id.* at 407–09.

81. *Id.* at 409.

82. *Id.* at 410.

83. *Id.* at 407–09.

victimization does not necessarily make them better teachers of survival skills; on the contrary, many Blacks can internalize racism and teach their children "Negrophobic attitudes,"⁸⁴ and, it is politically important to have responsibility for Black children shared by all races, but even if not, the needs of individual children should not be subordinate to political needs of the group.⁸⁵

Kennedy also takes on the notion of cultural competency assessment and training, a social work practice designed to ensure that adoptive parents, particularly in transracial adoptions, can understand, and respond to, the differences between their own cultural experiences and those of their adoptive child.⁸⁶ He argues that cultural competency is too imprecise and presumes both homogeneity within the Black community and cultural competence of all Blacks.⁸⁷ On the contrary, Kennedy asserts that "there is no proper authoritative criterion for grading the racial appropriateness of parenting—only the very real specter of an imposition of orthodoxies . . ."⁸⁸ It is no surprise then that Kennedy supports the Removal of Barriers to Interethnic Adoption Act (IAA),⁸⁹ a federal law that prohibits any consideration of race by adoption agencies receiving federal funds.⁹⁰

After presenting his arguments in favor of transracial adoption, Kennedy returns to the style that dominated the portion of the book about adult interracial intimacies, a collection of selected personal stories, primarily narratives.⁹¹ His theme is that White transracial adoptive parents

84. *Id.* at 409.

85. *Id.* at 410–11. Kennedy also likens race matching to racial profiling by police, employer preferences for White employees based on assumptions of superior qualifications of Whites, and other generalizations about race, such as White communities are prejudiced against Blacks. *Id.* at 412–15. Later, in an apparent effort to distinguish himself from the similarities between opposition to race matching and to affirmative action, he distinguishes the two practices because affirmative action is a remedy for past discrimination whereas race matching has no sufficient grounds for racial distinction. *Id.* at 427–28. He would, nevertheless, support "dismantling affirmative action [if it] must be part of the price of effectively doing away with race matching." *Id.* at 428.

86. *See infra* text accompanying notes 181–90 (defining and discussing cultural competence).

87. KENNEDY, *supra* note 1, at 444–46. Ironically, Kennedy wants proof that Black parents are better able to parent Black children, *id.* at 407–10, but he criticizes such assessment of White parents, *id.* at 416–17.

88. *Id.* at 446.

89. Passed as Section 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903–04 (1996) (codified at 42 U.S.C. §§ 671, 674, 1996b (2000)).

90. KENNEDY, *supra* note 1, at 418–33; *see also* text accompanying notes 215–21. Kennedy believes it should be extended to private adoptions and adoption agencies as well. KENNEDY, *supra* note 1, at 433–34, but that adoptive parents *should* be able to choose the race of their adoptive child as a matter of private personal choice, much like marriage, *id.* at 435–36.

91. *Id.* at 447–79.

are an “ostracized” minority considered by themselves and society to be inferior to Black parents for rearing “parentless [B]lack children.”⁹² Kennedy begins the discussion with a positive history of transracial adoption, a phenomenon that began slowly in the 1940s but picked up during the 1960s and early 1970s as a part of the Civil Rights Movement and then fell out of favor when the NABSW issued its position paper.⁹³ He then turns to an examination of three memoirs by White transracial adoptive parents.⁹⁴ From these memoirs, he draws the lesson that White adoptive parents have a false consciousness that overstates racism, undervalues their own parenting abilities, and inflates the goodness of Black people.⁹⁵ Another lesson one could draw is that transracial adoptive parenting is challenging, rewarding, and transformative, particularly around race consciousness.

Kennedy also rehearses select voices of transracial adoptees, as told through newspaper, book, and journal accounts.⁹⁶ The adoptee narratives exhibit the richness and complexity of identity for adoptees, the loyalty toward, and love of, their adoptive parents, and the longing for connection to their heritage. Although he acknowledges the importance of these voices, he claims that transracial adoptees are pawns in the transracial adoption battles.⁹⁷ While he notes that most of these adoptees feel there should not be a ban on interracial adoptions, he admits that a “substantial number” believe same race placements are preferable to transracial placements.⁹⁸ Kennedy then actually dismisses the adoptee narratives *because* they conflict and there is, therefore, no true authority.⁹⁹ Kennedy does not, apparently, want to essentialize transracial adoptees.

Kennedy’s final chapter,¹⁰⁰ which appears to be an add-on, critiques the 1978 Indian Child Welfare Act (ICWA), the federal statute that favors custodial and adoptive placements of Indian children with Indians and provides special procedural protections for Indian children, parents and Indian custodians of Indian children, and Indian tribes.¹⁰¹ Here, he presents a slightly less myopic view of the plight of Indian children and families than the one he presents regarding Black children and families.

92. *Id.* at 447, 448, 451. Apparently without irony, Kennedy seeks to refute the “myths of [W]hite parental inferiority.” *Id.* at 447.

93. *Id.* at 450–53.

94. *Id.* at 453–68.

95. *Id.* at 463–66. Kennedy nevertheless criticizes these parents for failing to take on the NABSW and spread the word of the benefits of transracial adoption. *Id.* at 465–68.

96. *Id.* at 468–78.

97. *Id.* at 468–69.

98. *Id.* at 469.

99. *Id.* at 469, 476–77.

100. *Id.* at 480–518.

101. 25 U.S.C. §§ 1901–1963 (2000).

According to Kennedy, the ICWA harms “needy” Indian children and unfairly stigmatizes non-Indians adoptive parents.¹⁰²

To Kennedy, however, the ICWA is not all bad. Its grant of authority to Indian tribes over foster care and adoption decisions was positive because it helped politically engage tribes and values Indian culture.¹⁰³ Kennedy also appears to approve of the ICWA’s remedial purpose.¹⁰⁴ At the same time, the ICWA is bad because it permits “bad decisions by judges” and was based on inaccurate data that pointed to discriminatory official conduct regarding Indian families and “junk social science”¹⁰⁵ holding that Indian children suffer psychological damage when adopted by non-Indians.¹⁰⁶ The remainder of the chapter critiques the legislative research on which the ICWA was based,¹⁰⁷ junk science used to support the ICWA,¹⁰⁸ and incoherence of the ideology of cultural preservation.¹⁰⁹ Kennedy also expresses approval of the existing Indian family doctrine that courts have developed to limit the scope of the ICWA.¹¹⁰ Kennedy concludes this discussion with a call for Congressional review of the ICWA.¹¹¹

102. KENNEDY, *supra* note 1, at 480.

103. *Id.* at 487–88. Kennedy does not clarify how there can be Indian culture when there is no such thing as Black culture.

104. *Id.* at 488.

105. *Id.*

106. *Id.*

107. *Id.* at 491–99. Kennedy suggests that he reviewed all of the legislative history, including the testimony and data presented in hearings on earlier versions of the bill that would become ICWA. *Id.* at 597 n.30. Nevertheless, he addresses most of his critique to the House report accompanying ICWA or other materials not part of the extensive record. *E.g., id.*, at 492–93, 494, 495. Kennedy neglected to mention the record’s extensive quantitative data, based largely on state government records, regarding out-of-home placement of Indian children. *See On Problems that American Indian Families Face in Raising Their Children and How these Problems are Affected by Federal Action or Inaction, 1974: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 93rd Cong. 40, 72–94 (1974) [hereinafter *1974 Hearings*]; *Indian Child Welfare Act of 1977: Hearing on S. 124 Before the U.S. Senate Select Comm. on Indian Affairs*, 95th Cong. 537–603 (1977). Nor did Kennedy note the testimony of psychiatry professors Drs. Carl Mindell and Alan Gurwitt based on what appear to be qualitative studies of Indian children and reservations. *1974 Hearings, supra*, at 54–64. Moreover, Kennedy does not explain how the methodologies of these or other reported research were flawed and he does not identify scientific methodologies he supports and why.

108. KENNEDY, *supra* note 1, at 499–504. According to Kennedy, the real problem was not discrimination against Indian families, as the legislative history suggests, but instead the pathology of Indian families and the underlying conditions of Indian life, such as poverty, disease, and dysfunction. *Id.* at 498–99.

109. *Id.* at 512–15.

110. *Id.* at 510–11.

111. *Id.* at 516–18.

D. Kennedy's Conclusions

Kennedy's Afterword¹¹² brings us back to Jacqueline Henley with the curious assertion that the "United States is a far different place from—a considerably *better* place than—the country into which Jacqueline Henley was born."¹¹³ Kennedy does not indicate exactly how it is better. Presumably, he means that overt racism and constraints running along color lines are subdued and that families are able to engage in private ordering now that miscegenation is no longer illegal, parents of biracial children can maintain their ties with their children, and there is greater acceptance of transracial adoption. These changes bring us closer to his vision of "a racially egalitarian society in which individuals may enjoy their freedoms without racial constraint."¹¹⁴ To promote this individualized racial freedom, Kennedy suggests three tasks to improve race relations in the sphere of intimate association: 1) improve the material conditions of the poor who are disproportionately of color so that they will have more choices in selecting friends, partners, and spouses; 2) forbid the government from engaging in routine race matching; and 3) on an individual level, refuse "to embrace unthinkingly inherited habits and . . . [instead] put into action humane ideals."¹¹⁵

II. INTIMACY IN CONTEXT

Kennedy's tales of interracial intimacy, particularly on the adult-adult level, are moving and at times deep. His book shows repeatedly that adult interracial sexual relationships fundamentally challenge White supremacy on multiple levels because of their intimacy.¹¹⁶ These relationships at once cut to the core of racial separatism, challenge Whiteness (indeed the concept of race), and reflect the value creation and propagation that rightly places intimate relationships into a highly protected sphere. Kennedy's insight regarding the importance of viewing intimate relationships as sites of racial meaning is a good one. The notion that our romantic desires and other intimate orderings are capable of both creating and reinforcing racial difference and breaking down racial distinctions and hatred brings home,

112. See *id.* at 519–21.

113. *Id.* at 520.

114. *Id.* at 519.

115. *Id.* at 520–21.

116. Examples include the Civil Rights Movement's delay of challenging anti-miscegenation laws because interracial intimacy was more threatening than integrated education and the right to vote; early responses to biracial offspring in which parents killed or communities ostracized biracial children, and; the use of segregation and other rules to keep Black men away from White women. See also Roberts, *supra* note 6, at 223–38 (exploring the role of White supremacy in legal rules relating to miscegenation and parentage).

so to speak, racial justice, and highlights the political implications of our personal lives (and personal implications of our political lives). Kennedy makes a good case for this idea, particularly in the first portion of his book.

Unfortunately, Kennedy's attempt to tie together the various strands and stories of the book is unsuccessful. The book's muddy approach to the topic—the combination of narrative, what appears to be a form of cultural studies, and policy analysis—does not coalesce because the descriptive nature of most of the book fails to provide the grounding for legal or policy analysis. Kennedy seeks to use these stories to support social policy that has drastic implications for hundreds of thousands of Black and Indian families but does not mine the significant body of theoretical and empirical research in multiple disciplines relating to the complicated and nuanced worlds of foster care and adoption.¹¹⁷ A more systematic and analytic approach to such heavily-studied areas as adoption and child welfare would provide a much more legitimate base for the policies Kennedy advocates, if social science does indeed support these policies. In turn, though, the policy arguments disrupt the power of the stories themselves. Had the book rehearsed the history of interracial intimacy through the use of narratives, it would have been an interesting and informative read, raising questions regarding further research, examining the effects of interracial intimacy on race, and providing lessons for, or comparisons to, interracial intimacies in other racial pairings. Similarly, a book designed to expose interracial parenting and other relationships more fully could have explored a wider range of, and more perspectives on, such relationships, including the experiences of nannies¹¹⁸ and the birth parents of transracially adopted children and foster children.

Moreover, Kennedy's approach is surprisingly narrow and shallow in that he views only race, to the near total exclusion of class and gender.¹¹⁹ In this way, and through his race-neutral approach, he fails to appreciate or communicate other social and governmental forces and material conditions that contribute to racial injustice, produce different experiences,

117. See *infra* text accompanying notes 128–30, 134–47, 155–70, 180–90, 196–206.

118. Domestic work, including caring for children, has been primarily performed by women of color for more privileged women. See Dorothy E. Roberts, *Racism and Patriarchy in the Meaning of Motherhood*, in *MOTHERS IN LAW: FEMINIST THEORY AND THE LEGAL REGULATION OF MOTHERHOOD* 224, 235 (Martha Albertson Fineman & Isabel Karpin eds., 1995).

119. Even in the context of adult interracial intimacies, there is much literature regarding gender differences. E.g., Hill & Thomas, *supra* note 51; Margaret M. Porter & Arline L. Bronzafit, *Do the Future Plans of Educated Black Women Include Black Mates?*, 64 *J. NEGRO EDUC.* 162 (1995); Zebroski, *supra* note 48. Kennedy also addresses primarily Black and White heterosexual relations, rather than other interracial heterosexual and same-sex intimacies. Carving out several races or forms of sexuality may not be inherently problematic, but addressing only race and not gender or class essentializes race as something experienced without regard to gender or class.

and contextualize the very notion of choice. The book treats the subjects of the stories it tells as atomistic individuals who (a) make choices; and (b) whose choices are constrained only by legal mandate or public and internalized disapprobation. This treatment may fit adult relationships in the private family law paradigm, but using this model for all family relations obscures the deep complexity of intimate associations and the historical and current barriers to such associations, particularly for poor women of color and their children. These mothers and children are at great risk of being subject to the public family law paradigm, one that is marked by the state's coercive control over, and intervention into, the family.

Further, Kennedy's importation of the theme that adult interracial intimacies produce positive political effects into the realm of parent-child relations is problematic. It is true that the parent-child relationship is an important political and personal site because parents create and transmit values through their children, including those surrounding race. Nevertheless, Kennedy's desire to eradicate racism through transracial adoption is not private, neutral, or politically progressive, particularly because Kennedy's primary interest in the parent-child relationship is the adoption of Black children by White parents. In contrast to the voluntariness of most adult-adult relationships, in the adoption context, such intimate orderings frequently arise out of coercion, not freedom. Kennedy's portrayal of adoption as a solution for parentless children masks the coercive forces and institutional racism that are attendant to the removal of children from their families of origin in the first place. Moreover, this coercive removal supplants the creation of non-dominant family values with dominant (White) families, thus creating and maintaining dominant values while destroying the opportunity to maintain alternative values. In this way, Kennedy's promotion of White transracial adoption of Black and Indian children as a solution for racial injustice, like earlier iterations of this "solution,"¹²⁰ has eugenic connotations and masks the underlying racial injustice.

Indeed, one of the analytic weaknesses of the book is its failure to appreciate that racial assignment plays out differently in adult-adult (horizontal) relationships and in adult-child (vertical) relationships. Although both types of relationships are susceptible to state interference (although as Kennedy notes, external limitations on horizontal relationships are largely gone), the same personal choice does not exist in the two types of relationships; whereas the horizontal involves voluntary relationships, the

120. See, e.g., Julie Berebitsky, *Rescue a Child and Save the Nation: The Social Construction of Adoption in the Delineator, 1907-1911*, in *ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES* 124, 128 (E. Wayne Carp ed., 2002) (describing an adoption campaign urging native born, middle-class women, in an era of declining native-born, middle-class birth rates and resulting fears of "race suicide," to adopt and transform the children of immigrants from southern and eastern Europe).

vertical involves children who generally cannot lawfully or developmentally choose the relationships.¹²¹ Moreover, in consensual adult relationships, adults choose with whom to be intimate, whereas the distribution of children involves additional considerations beyond choice. Kennedy's disregard of this distinction has both experiential and political implications.

On an experiential level, race matters. As I will show below, adoptees have complex identities based on belonging to both their families of origin and adoption. They do not enter adoption as blank slates with no history; nor does their race, despite its cultural contingency, fully follow that of their adoptive parents. Transracial adoptees are often seen in opposition to their place so that they carry their identity of origin in their adoptive home, neighborhood, community, or country and carry their identity of adoption outside their adoptive home, neighborhood, community, or country. The elimination of legal barriers to transracial stepparent adoption can honor the family ties of adoptees, but the promotion of interracial adoption for foster children is often built on erasing those ties.

The distribution of children is a deeply political matter because of the fundamental and important role of family in creating and maintaining values.¹²² That is, families play the structural role in our political system of caring for and raising children through the inculcation of private values and loyalties. Parents, as moral actors who define and create value, reproduce their values in and through rearing children in intimate associations and diverse settings that prepare children for life as democratic citizens.¹²³ State intervention into the distribution of certain children (here Black) thus has political and moral consequences.

In the remainder of this book review, I hope to illustrate some of the richness and complexity of interracial intimacies when race, class, gender, and the uniqueness of youth are considered, rather than neutralized or ignored. I attend primarily to such considerations in the context of transracial adoption where the experiences of adoptees are particularly informative. Bringing these parts to the foreground should help illustrate how Kennedy's shallow treatment of interracial intimacy ultimately comports with an unfortunately longstanding and pervasive agenda to control poor Black women and their children.¹²⁴ A deeper inquiry reveals that

121. Annette R. Appell, *Virtual Mothers and the Meaning of Parenthood*, 34 U. MICH. J.L. REFORM 683, 699–703 (2001) [hereinafter Appell, *Virtual Mothers and the Meaning of Parenthood*]. I take this terminology from Professor Katharine Baker who, in another context, has distinguished intimate adult relationships as “horizontal” and adult-child relationships as “vertical.” Katharine K. Baker, *Property Rules Meet Feminist Needs: Respecting Autonomy By Valuing Connection*, 59 OHIO ST. L.J. 1523, 1523 (1998).

122. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 705–13.

123. *Id.* at 707–09, 784–85.

124. Like Kennedy, I address most of my remarks to Black women and children, but other people of color may have similar experiences.

Kennedy misapplies his critique of barriers to interracial marriage and custody to transracial adoption of foster children because the former is about protecting intimate relationships while the latter arises out of interference with such relationships.

A. Justice and Individual Choice

Kennedy's individualized approach to racial justice relies heavily on choice, something the privileged can exercise, often at the expense of the less privileged who are, in this case, Black parents and children.¹²⁵ His support of transracial adoption as an example of individual choice is problematic for three primary reasons: (1) the child welfare system, unlike the more private family law system governing marriage, divorce, and child custody, is coercive for parents as well as children; (2) in the coercive child welfare system, non-dominant families,¹²⁶ particularly Black and Indian, are disproportionately affected in part *because* of their race; and (3) foster care and adoption involve children who cannot choose for themselves for developmental and legal reasons.

Kennedy bases his story of interracial intimacies in the private family law tradition that primarily involves working- and middle-class free families in which adults choose their mates and make decisions on behalf of their children. When the family dissolves, a court may make those previously private decisions but the universe of choices is generally about how the child and the property will be divided between the parents. Adoption, in this private system, involves stepparent and relative adoptions and adoption of children "voluntarily" relinquished by their parents.¹²⁷

There are at least two other more public family law traditions in which the state makes, or permits others to make, fundamental choices about marriage and child rearing.¹²⁸ One, of course, involves the laws of slavery. Under those laws, enslaved adults were not free to marry and they

125. For Kennedy, White prospective adoptive parents are the less privileged. See, e.g., KENNEDY, *supra* note 1, at 398 ("Fear of ostracism, feelings of guilt, and a sense of self-doubt are among the emotions that inhibit a wide array of people—especially [W]hites—from forcefully responding to [B]lack critics of interracial adoption.").

126. By "non-dominant" I mean families, norms, races, and practices that diverge from White, middle-class, nuclear family and other norms that provide the measure of families, race, and culture. See Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 780–81.

127. The voluntariness of parental relinquishment, which is beyond the scope of this book review, is highly contested. See, e.g., RICKIE SOLINGER, *BEGGARS AND CHOOSERS* (2001).

128. I use the term "public" to denote the public interference with family ordering, through legislative, administrative, and judicial means, that, in particular, mandates removal of children from their families of origin. I recognize that the more private family law is also public in that law defines family, and judges may be involved with property and custody decisions.

did not have the right to custody or control of their children: children born to women slaves belonged to the master; and children born to free women, fathered by enslaved men, belonged to the mother.¹²⁹ The other public family law tradition involves the child welfare system, with its roots both in the English and American poor laws for mainly European-American children, and post-Reconstruction-Era laws for Black children. In the modern child welfare system and its antecedent systems, third parties (generally the state) remove children from their parents to be placed with “better” families or in “better” environments.¹³⁰

Interracial Intimacies does not distinguish between the private system and the more public systems. Viewing interracial intimacies through this more public family law reveals a different story about justice and individual choice than *Interracial Intimacies* presents. Using his chosen lens, Kennedy seriously overestimates the amount of choice Black women had over their own bodies during slavery and over the maintenance of their families both historically and presently. Although it is possible that some female slaves had a modicum of choice and even took pleasure in, or resulting from, their sexual relationships with masters, Kennedy barely problematizes these relationships (at least for female slaves), characterizing them as coercive and only occasionally as “rape.”¹³¹ It is difficult to imagine how much choice female slaves had when they were not legal persons and had few, if any, options with respect to acceding to sexual requests, demands, or brute force. On the contrary, masters used rape “as a weapon of terror and control.”¹³² Moreover, enslaved mothers existed in a precarious state in which they had little control over the physical, and had no

129. See Roberts, *supra* note 6, at 253 (noting an unmarried woman was the parent of the child to whom she gave birth; men were fathers only through marriage).

130. For a brief discussion of these distinctions between family law systems and citation to fuller discussions, see Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 771–72. Public family law systems also embrace needs based welfare for mothers with dependant children in which the state monitors intimate choices regarding adult relationships and child rearing. *Id.* at 769–70. *But cf.* Adrienne D. Davis, *The Private Law of Race and Sex: An Antebellum Perspective*, 51 STAN. L. REV. 221 (1999) (arguing that the private law of intestate succession and testamentary transfers played a role in maintaining racial hierarchy during slavery).

131. See *supra* note 33 and accompanying text.

132. Bonnie Thornton Dill, *Fictive Kin, Paper Sons, and Compadrazgo: Women of Color and the Struggle for Family Survival*, in WOMEN OF COLOR IN U.S. SOCIETY 149, 150–51 (Maxine Baca Zinn & Bonnie Thornton Dill eds., 1994). Kennedy does note that rape was used “as a weapon of terror aimed at intimidating or punishing [B]lacks” during Reconstruction and wartime. KENNEDY, *supra* note 1, at 178. Nevertheless, even during slavery, Black-White adult intimacies occurred on more casual, less coercive social levels, particularly between Black slaves and White servants. See, e.g., IRA BERLIN, MANY THOUSANDS GONE: THE FIRST TWO CENTURIES OF SLAVERY IN NORTH AMERICA 44–45 (1998) (noting expansive interracial intimacies between free Blacks and Whites and between Black slaves and White servants in seventeenth century Chesapeake).

legal, custody of their children and were subject to external control and intervention in intimate family matters.¹³³

This surveillance and disruption of Black families continues today, albeit in less harsh forms, in both welfare and child welfare interventions.¹³⁴ Black children are removed from their families at twice the rate of White children¹³⁵ and are represented in the foster care rolls about three-and-one-half times more than they are in the general population.¹³⁶ The reasons for this disparity are contested, particularly as to whether causes relate to racism or poverty.¹³⁷ Even if one is more likely to attribute racial disparity to the individual pathologies of Black mothers and families, as Kennedy does,¹³⁸ empirical evidence indicates that child welfare professionals view Black families as less viable, less resourceful, and, consequently, in need of coercive state intervention.¹³⁹ Since assessment of the existence and severity of child abuse and neglect is subjective, this view of Black families increases their likelihood of being disrupted.¹⁴⁰ Moreover, poverty is often confused with neglect, the predominant reason for protective intervention. Since Blacks are disproportionately poor, their families are more vulnerable to being labeled as neglectful.¹⁴¹ Further increasing this race-based vulnerability is the fact that poor families are both more visible to public agencies and

133. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 768. Bonnie Thornton Dill provides a much less rosy and more complex picture of female slaves' reproductive labor, as marked by "surveillance, assault, and ambivalence" due to the enslaved family's role in socializing children into the slave system and the family as a place for autonomy and creativity, all the while subject to the master's coercive interference. Dill, *supra* note 132, at 151.

134. See Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 769–79 (describing conditions of needs-based social security benefits and child welfare intervention).

135. See Dorothy E. Roberts, *Child Welfare and Civil Rights*, 2003 U. ILL. L. REV. 171, 172 (2003).

136. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 772. White children, in contrast, are represented in foster care about half as much as they are in the general population. *Id.*

137. *Id.* at 772–75. Of course, untangling racism from poverty is difficult. See Michael B. Katz, *Reframing the Underclass Debate*, in A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS 59 (Louis Kushnick & James Jennings eds., 1999).

138. Daniel Patrick Moynihan, Charles Murray, and William Pierce have done the same. See *infra* text accompanying notes 223–30, 253–54.

139. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 773–75.

140. *Id.* at 773 n.383.

141. *Id.* at 772–73; Ruth G. McRoy et al., *Achieving Same-Race Adoptive Placements for African American Children: Culturally Sensitive Practice Approaches*, 76 CHILD WELFARE 85, 87 (1997) [hereinafter McRoy et al., *Achieving Same-Race Adoptive Placements for African American Children*]. Child welfare experts estimate that most children in foster care could have remained home, given appropriate assistance. See Guggenheim, *supra* note 72, at 1716, 1724–32 (rehearsing studies). Only ten percent of child welfare cases involve serious abuse. *Id.* at 1724–25.

more anonymous to their service providers, so they are more vulnerable to state surveillance and intervention.¹⁴²

Moreover, child welfare services, before or after placement, are frequently not designed to meet the material needs of families of any race.¹⁴³ Once Black families are involved in the child welfare system, they are less likely to receive the assistance they need to fix whatever it is that brought them to the attention of the authorities in the first place. Black families are less likely to be offered preventive services; instead, their children are more often placed in substitute care, even when they have the same characteristics as White children not placed in substitute care.¹⁴⁴ Black families also receive fewer services once their children are in care. In other words, their case workers have less frequent contact with, offer fewer services to, and arrange fewer family visits between, Black parents and children in care.¹⁴⁵

Under any nuanced accounting, these mothers do not choose the social and material conditions of their lives or to lose their children to the state, and perhaps then to adoption. Nor do their children, generally, choose to be placed in foster care, and perhaps then adopted. Children do not have the power to determine their race or their parents. Adults make those choices—whether those adults are birth parents, adoptive parents or, in Kennedy's featured community, state child welfare bureaucrats. Kennedy professes concern regarding the fate of these children in foster care, lamenting their use as pawns of the NABSW, as if the children, given a choice, would uniformly choose to be adopted transracially. This appeal

142. Annette R. Appell, *Protecting Children or Punishing Mothers: Gender, Race, and Class in the Child Protection System [An Essay]*, 48 S.C. L. REV. 577 (1997); see also Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 773 nn.383–86 (rehearsing studies showing that professionals are less likely to report children to child protection authorities when professionals have a social relationship with the family and that race and socioeconomic status unconsciously affect child abuse and neglect reporting).

143. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 775–77.

144. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES xi–xiii (1997), available at <http://www.acf.hhs.gov/programs/cb/publications/97natstudy/natstudy.htm> (final report presenting findings of 1994 study; see also Issue Paper on Foster Care and Adoption, Foster Care Dynamics in Urban and Non-Urban Counties 22 (Feb. 2002), available at <http://aspe.hhs.gov/hsp/fostercare-issues02/dynamics/index.htm> (last visited Jan. 6, 2003) (“the likelihood of placement among African Americans has been 3 to 4 times greater, although the differences grew smaller over the course of the decade”); McRoy et al., *Achieving Same-Race Adoptive Placements for African American Children*, *supra* note 141, at 87 (“In one state, one in 20 African American infants born in one year were placed in out-of-home care, compared with one in 100 Caucasian infants . . .”). Note that Hispanic children were also more likely to be placed in out-of-home care. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILDREN'S BUREAU, *supra*, at xi–xiii.

145. McRoy et al., *Achieving Same-Race Adoptive Placements for African American Children*, *supra* note 141, at 87.

to the children's interests masks the adult role in assigning children to families and the complexity of children's experiences of substitute care. Individual children will ultimately decide—as teenagers and adults—whether adults made good choices for them. But whether or not they think they grew up in the correct family, whatever that is, will not necessarily suppress their experience or interest in their birth heritage.¹⁴⁶

Kennedy's discussion of transracial adoption is firmly placed on the backs of families that have been coercively disrupted by the state. Although transracial adoption may be a choice on the part of the adoptive parents, the children available for adoption have been coercively removed and kept from their families and communities. This reveals a fundamental irony in Kennedy's atomized approach to racial justice: particularly in the context of transracial adoptions, the very fact that there are so many Black children available for adoption is the product, arguably, of racial injustice.¹⁴⁷

Kennedy's solution—transracial adoption—for foster children particularly and to promote racial justice more generally would be quaint if it did not carry eugenic undertones in the context of American race relations and poverty. The promotion of coercive sterilization and birth control for Black women, caps on the number of children in poor families, disproportionate percentage of Black children in foster care, and the powerful legacy of buying, breeding, and selling of Black slaves make such a solution suspect.¹⁴⁸ Moreover, advocating such an individualistic, status quo solution to the problem of caring for children of “dysfunctional” Black families disregards the complex relationships between poverty and race¹⁴⁹ and assumes that racial justice is a matter of individual will.

For Kennedy, interracial intimacies are desirable and the ideological critique of, or legal interference with, the formation or preservation of those relationships are bad. But this is too simple. It is one thing to pro-

146. See PETER L. BENSON ET AL., *GROWING UP ADOPTED: A PORTRAIT OF ADOLESCENTS AND THEIR FAMILIES* 26 (1994) (finding that sixty-five percent of adopted adolescents would like to meet their birth parents); DAVID M. BRODZINSKY ET AL., *BEING ADOPTED* (1992) (exploring the importance of birth relations to identity formation of adoptees).

147. See, e.g., ANDREW BILLINGSLEY & JEANNE M. GIOVANNONI, *CHILDREN OF THE STORM: BLACK CHILDREN AND AMERICAN CHILD WELFARE* (1972); DOROTHY ROBERTS, *SHATTERED BONDS: THE COLOR OF CHILD WELFARE* (2002); Martin Guggenheim, *The Foster Care Dilemma and What to Do About It: Is the Problem That Too Many Children Are Not Being Adopted Out of Foster Care or That Too Many Children Are Entering Foster Care?*, 2 U. PA. J. CONST. L. 141 (1999).

148. See SOLINGER, *supra* note 127, at 181–224 (describing how motherhood is a class privilege in the United States); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 419–20 n.48 (1997) (comparing transracial adoption to the commodification of child slaves).

149. For recent treatments of the issue, see, for example, *A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS* (Louis Kushnick & James Jennings eds., 1999).

mote personal choice regarding intimate partners and children; it is another to assume that it does not matter that the state has interfered with private ordering of disproportionately large numbers of certain groups, for example Blacks and Indians. In other words, viewing transracial adoption as the solution both interferes with the attempts of non-dominant families and their communities to maintain their own, and therefore, their cultures, and impermissibly involves the state in making fundamental choices better left to individuals.¹⁵⁰

B. *Individuals, Groups, and Identity*

Just as Kennedy's view of individual choice is colored by his use of just one family law paradigm, the private one, his view of adoption is cramped because he fails to include the perspective of adoptees. As a result, he does not appreciate the psychological and social importance of biological relations and heritage for adoptees. He thus dismisses the significance of race and cultural competence in the transracial adoptive family.

My aim here is not to join the rich debate regarding whether transracial adoption is good or bad.¹⁵¹ This debate, like most issues surrounding children and families, presents a question that is not universally resolvable because the answer is based on one's ideas about race, racism, and where Black children belong.¹⁵² Proponents of transracial adoption often point to the best interests of the child and studies of transracial adoptees to

150. See Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 779–87 (discussing the role of child rearing in the creation and preservation of values, particularly in the context of coercive intervention into nondominant families).

151. There is a tremendous amount of empirical and theoretical literature in law and the social sciences regarding the benefits and detriments of transracial adoption. *E.g.*, FOGG-DAVIS, *supra* note 6; IN THE BEST INTERESTS OF THE CHILD: CULTURE, IDENTITY AND TRANSRACIAL ADOPTION (Ivor Gaber & Jane Aldridge eds., 1994); RUTH G. McROY & LOUIS A. ZURCHER, JR., TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS (1983); SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA (2000); RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD (2d ed. 2002); R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L.J. 875 (1998); Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201 (1997–98); Hawkins-León & Bradley, *supra* note 76; Howe, *supra* note 148; Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990–91); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993–94) [hereinafter Perry, *The Transracial Adoption Controversy*]. Kennedy cites many of these works. See KENNEDY, *supra* note 1, at 584 n.1.

152. To mirror Kennedy, I refer primarily to White adoption of Black children. Much of the analysis surrounding transracial adoption applies to White adoption of children of other races including, international adoption.

illustrate that such adoptees do just fine overall.¹⁵³ Opponents, besides critiquing the studies, raise structural concerns about transracial adoption based on its exploitative origins and, because most unrelated interracial adoptions involve White adoptive parents and children of color, its compromise of children's identity formation and the culture of the child's group.¹⁵⁴ I do not intend to review these arguments or the studies here but instead, to situate Kennedy's approach to transracial adoption in generally accepted principles about adoption.

Kennedy undervalues the complexity of identity for adoptees through his attempt to annihilate racial categories and cultural expectations. Yet there is a great deal of rich empirical and theoretical research that helps explain the importance of an adoptees' birth ties—including race.¹⁵⁵ The notion that adoptees are blank slates reborn upon adoption is woefully dated. More enlightened, current understanding regards adoptees as forever parts of their birth *and* adoptive families.¹⁵⁶ One psychologist describes the importance of birth connections as “a deeply felt psychological and emotional need, a need for roots, for existential continuity, and for a sense of completeness.”¹⁵⁷ Child welfare and mental health professionals regard birth connections as very important to identity formation in adoptees.¹⁵⁸ Knowledge about the birth family helps the

153. E.g., SIMON & ALTSTEIN, *supra* note 151; McRoy et al., *Achieving Same-Race Adoptive Placements for African American Children*, *supra* note 141. Most of the studies have been criticized for being Eurocentric, confined to only a narrow set of behavioral, cognitive, and emotional outcomes and containing methodological limitations. See Shelley M. Park & Cheryl Evans Green, *Is Transracial Adoption in the Best Interests of Ethnic Minority Children?: Questions Concerning Legal and Scientific Interpretations of a Child's Best Interests*, 3(4) ADOPTION Q. 5, 13–19 (2000); Jeffrey J. Haugaard, *Research and Policy on Transracial Adoption: Comments on Park and Green*, 3(4) ADOPTION Q. 35, 35 (2000).

154. E.g., Howe, *supra* note 148; Perry, *The Transracial Adoption Controversy*, *supra* note 151.

155. For particularly thoughtful explorations of race and transracial adoption, see FOGG-DAVIS, *supra* note 6 and PATTON, *supra* note 151. See also Barbara Yngvesson, *Placing the “Gift Child” in Transnational Adoption*, 36 LAW & SOC'Y REV. 227, 239 (2002) (arguing it is the adoptive child's preexisting ties to a family, a history, a culture, not just their potential for the future that distinguishes prospective adoptees from mere commodities).

156. E.g., BRODZINSKY ET AL., *supra* note 146, at 12–14; MIRIAM REITZ & KENNETH W. WATSON, *ADOPTION AND THE FAMILY SYSTEM* (1992); H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964).

157. Fernando Colon, *Family Ties and Child Placement*, 17 FAM. PROCESS 289, 302 (1978); see also PATTON, *supra* note 151, at 1 (quoting a transracial adoptee: “to have a family tree . . . I had an idea of roots, that you had to be able to trace it biologically”). Although not all adoptees may feel a need to connect with their birth history—their family, cultural, race, or geographic origins, the vast majority of adoptees have such interest. BENSON ET AL., *supra* note 146, at 26.

158. See BRODZINSKY ET AL., *supra* note 146, at 58–59, 63–64, 99–101; ALFRED KADUSHIN, *CHILD WELFARE SERVICES* 494 (3d ed. 1980); Marianne Berry, *Stress and Coping Among Older Child Adoptive Families*, 1 SOC. WORK & SOC. SCI. REV. 71, 74 (1989–90); David M. Brodzinsky, *A Stress and Coping Model of Adoption Adjustment*, in *THE PSYCHOL-*

adoptee form his or her image of self. It is this scientific knowledge regarding the importance of identity, in part, that supports professionals' calls for continuity for adoptees and acquisition and retention of information relating to the child and his or her roots.¹⁵⁹

Moreover, the Black foster children that Kennedy wants White people to adopt are not infants. They are older, on average six years old,¹⁶⁰ and are likely to have lived with their birth families and continued to have visited them while in foster care.¹⁶¹ The idea that these children may be excised from their pasts and their pasts excised from their future is naive. On the contrary, foster children have persistent psychic ties to their parents.¹⁶² They frequently express a continuing desire to visit their biological parents and, in some cases, a desire to resume living with them.¹⁶³ In fact, foster children may experience termination of parental rights and adoption as unreasonable and unnatural.¹⁶⁴ It is not surprising then that a large portion of adopted foster children maintain contact with their relatives or prior caregivers.¹⁶⁵

Birth connections seem to be significant from a sociological perspective as well. People feel connected to their origin, their kin, and

OGY OF ADOPTION 3, 7 (David M. Brodzinsky & Marshall D. Schechter eds., 1990); Colon, *supra* note 157; Harold D. Grotevant, *Coming to Terms with Adoption: The Construction of Identity from Adolescence into Adulthood*, 1 ADOPTION Q. 3 (1997); Carl Schoenberg, *On Adoption and Identity*, 53 CHILD WELFARE 549 (1974).

159. Indeed, international law reflects these values. See Nancy Heimerle, *International Law and Identity Rights for Adopted Children*, 7(2) ADOPTION Q. (forthcoming 2003).

160. See U.S. DEP'T OF HEALTH & HUMAN SERVS., ADMIN. FOR CHILDREN & FAMILIES, THE AFCARS REPORT: PRELIMINARY ESTIMATES AS OF APRIL 2001(5) (2001), available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/apr2001.htm> (last visited Apr. 5, 2004) [hereinafter AFCARS REPORT] (reporting that the mean age of children of all races at the time of adoption is 6.9 years).

161. See Annette R. Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1011-12 (1995) [hereinafter Appell, *Blending Families Through Adoption*] (describing foster children's contacts and connections with their families of origin).

162. *Id.* at 1014-16.

163. MICHAEL S. WALD ET AL., PROTECTING ABUSED AND NEGLECTED CHILDREN 137-41 (1988).

164. Robert Borgman, *The Consequences of Open and Closed Adoption for Older Children*, 61 CHILD WELFARE 217, 223-24 (1982); see also Robert Borgman, *Antecedents and Consequences of Parental Rights Termination for Abused and Neglected Children*, 60 CHILD WELFARE 391, 397-98 (1981) (describing foster children's enduring connections to siblings and other relatives); Malcolm Bush & Harold Goldman, *The Psychological Parenting and Permanency Principles in Child Welfare: A Reappraisal and Critique*, 52(2) AM. J. ORTHOPSYCHIATRY 223, 232 (1982) (describing foster children who opposed severing ties with their biological families).

165. See KATHERINE A. NELSON, ON THE FRONTIER OF ADOPTION: A STUDY OF SPECIAL-NEEDS ADOPTIVE FAMILIES 103 (1985) (reporting that foster-adoptees in forty-one percent of families studied maintained contact with previous caretakers, including birth relatives, after adoption).

previous generations. These connections help define us.¹⁶⁶ The importance of biological connection reaches beyond individual parentage to the cultures from which the parents (and their parents) came.¹⁶⁷ In the context of transracial adoption, it means that the adoptee will be in a culture that is most likely different from the adoptee's culture of origin and the difference will be difficult to mask.¹⁶⁸ Indeed, transracially adopted children retain their race even, or perhaps especially, after adoption.¹⁶⁹ Their sense of identity is particularly complex and contingent upon location. Thus, a Black transracially adopted adoptee may be Black when with his or her White parents but White when with certain other Blacks.¹⁷⁰ Viewing transracial adoption solely through the lens of the adoptive family, as Kennedy does, can obscure the facts that the adoptee is a member of at least one other family—the birth family—and that both the adoptee and birth parents suffer a loss upon adoption.¹⁷¹

Although not involving transracial adoption, the experience of racial difference is vividly displayed in the story of June Cross that Kennedy provides as an example of “blocked interracial parenting.”¹⁷² Cross is a biracial woman whose White mother, Norma Greve, placed her with a Black couple early in Cross's childhood. Whenever Cross visited Greve and her White actor husband, Larry Storch, they passed Cross off as their

166. For thoughtful discussions of identity in adoption, see Barry Richards, *What is Identity?*, in *IN THE BEST INTERESTS OF THE CHILD: CULTURE, IDENTITY AND TRANSRACIAL ADOPTION* 77–88 (Ivor Gaber & Jane Aldridge eds., 1994). See also Cynthia B. Cohen, *Parents Anonymous*, in *NEW WAYS OF MAKING BABIES* 88, 92 (Cynthia B. Cohen ed., 1996); Yngvesson, *supra* note 155.

167. See PATTON, *supra* note 151, at 1–25.

168. Both the transracial adoptee and others will most likely see the physical differences between the adoptee and adoptive parents, so the fact that the child is adopted will be more accessible. See generally McROY & ZURCHER, *supra* note 151, at 127, 131 (comparing inracial and transracial adoption of Black children).

169. See Yngvesson, *supra* note 155, at 237 (arguing that in adoption “the child moves, but ‘Chineseness,’ ‘American Indianness,’ ‘Koreanness,’ or ‘Colombianness’ remains the same (or rather, these qualities are enhanced and constituted anew as immutable in this movement)”).

170. See also McROY & ZURCHER, *supra* note 151, at 139 (“transracial adoptees’ [W]hite peers viewed them as being different from their stereotypes of other Blacks”); PATTON, *supra* note 151, at 13–14; Yngvesson, *supra* note 155, at 238–40, 248–52 (describing experiences of transnationally adopted children whose identities shift depending on whether they are in their country of origin or adoption; for example, one Korean adoptee noted she felt Korean in Sweden and Swedish in Korea).

171. Many adoptive families recognize these complexities. See Appell, *Blending Families Through Adoption*, *supra* note 161, at 998–1000, 1018–19; see also MARY LYNDON SHANLEY, *MAKING BABIES, MAKING FAMILIES: WHAT MATTERS MOST IN AN AGE OF REPRODUCTIVE TECHNOLOGIES, SURROGACY, ADOPTION, AND SAME-SEX AND UNWED PARENTS* ix–x, 38–39 (2001) (adoptive mother expressing the complexity of adoption for adoptees); Barbara Bennett Woodhouse, “*Are You My Mother?*”: *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 *DUKE J. GENDER L. & POL'Y* 107, 116–20 (1995) (same).

172. KENNEDY, *supra* note 1, at 370–71.

adopted daughter.¹⁷³ Kennedy reports Cross's painful childhood memory of a shared bubble bath with her mother when Cross was seven or eight years old. During the bath, Greve remarked that if Cross had not "'gotten darker as [she] grew older,'" Greve could have kept her.¹⁷⁴ For Cross, "'[t]hat moment is frozen in time: my mother's bamboo-colored skin, my toffee-colored hand; her straight auburn hair, my tight [B]lack curls . . .'"¹⁷⁵ Although Kennedy seems to have included the anecdote to show the injustice of Greve's self-serving internalization of social prohibitions against interracial intimacy,¹⁷⁶ the story also illustrates the concreteness of difference and identity. Transracial adoptees experience those moments of difference sometimes as moments of loss—of separation from the birth mother and of incomplete identity with the adoptive parent.¹⁷⁷

C. *A More Child-Centered Vision of Transracial Adoption*

Adoptees' experiences of loss and difference do not mean intraracial or interracial adoption or biracial parenting are bad. Instead, these experiences reveal that adoptees are not blank slates and that they experience their histories or cultures of origin on some level. These experiences should be acknowledged, not disregarded. Nevertheless, I do share Kennedy's post-modern, anti-essentialist doubts about training and assessing pre-adoptive parents and assumptions that any Black parents will be better than White parents. In light of our inability to predict the future, to know who are the best parents, and to determine what or who is Black, such prognostication is tricky. We may have ideas generally about what environments are best for children and who can best parent, but these ideas are indefinite, not universal, and of limited predictive value given how easily circumstances can change due to illness, accident, divorce, joblessness, or other unforeseen occurrences.¹⁷⁸

This is not to say, however, that we cannot assess or evaluate at all. Indeed, given the complexity of identity development especially for adoptees, it seems obvious that adoptive parents should be prepared for adoption so that they can better understand the child's developmental

173. *Id.* at 371.

174. *Id.* at 371 n.*.

175. *Id.*

176. For example, Kennedy asserts that placing Cross out and portraying her as an adoptive, rather than birth, child "were choices that Norma Greve made." *Id.* Kennedy is technically correct, but one wonders how much "choice" Greve had as a single White mother of a biracial daughter in the 1950s after fleeing with Cross from Cross's abusive father.

177. See BRODZINSKY ET AL., *supra* note 146, at 58–59, 63–64, 99–101 (describing transracial adoptee awareness of difference from adoptive parents and communities).

178. See Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995).

needs related to adoption.¹⁷⁹ Adoption creates a different kind of family that is itself culturally different from birth families.¹⁸⁰ Scientific consensus holds that this difference should be acknowledged, that a child's curiosity about his or her origin and adoption should be fostered, not stifled.¹⁸¹ It seems irresponsible to let parents and children enter into and live in this unique type of family under the pretense that it is just like a birth family.¹⁸² Indeed, the Child Welfare League of America (CWLA), the standard bearer for child welfare and adoption practice, recommends that adoption and child welfare agencies assess potential adopters to determine if they will be able to meet these unique needs of an adoptive child.¹⁸³ Training is particularly helpful for prospective adoptive parents of foster children.¹⁸⁴

When adoptive parents prepare to receive a child of another race, some additional evaluation and preparation, depending on the child and adoptive parents, is important particularly because the transracial adoptive parents are most likely to be members of the dominant race—White—while their adopted children will be of a non-dominant race. It is no wonder then that adoption professionals and scholars seem to think that there is something to the notion of cultural

179. See BRODZINSKY ET AL., *supra* note 146 (explaining developmental needs and experiences of adopted children).

180. See, e.g., REITZ & WATSON, *supra* note 156 (describing a view of, and approach to, adoption families as a unique type of family system).

181. Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution: The Case for Opening Closed Records*, 2 U. PA. J. CONST. L. 150, 175–77 (1999).

182. Of course it would be good if all parents came to parenting with special knowledge of child needs and development, but adoptive families remain a non-dominant family form (since most people have experienced the birth family) so the special features of adoptive families are not necessarily part of every day experience. It is estimated, however, “that 58% of Americans know someone who has been adopted, has adopted a child or has relinquished a child for adoption.” The Evan B. Donaldson Adoption Institute, *Overview of Adoption in the United States*, at <http://www.adoptioninstitute.org/FactOverview.html> (last visited Apr. 5, 2004).

183. CHILD WELFARE LEAGUE OF AMERICA, CWLA STANDARDS OF EXCELLENCE FOR ADOPTION SERVICES 5–7, §§ 1.14, 1.15, 1.22, 4.3, 4.4, 4.15, 5.2 (rev. ed. 2000).

184. *Id.* at §§ 4.14, 4.15, 4.22; see also Bibhuti K. Sar, *Preparation for Adoptive Parenthood with a Special-Needs Child: Role of Agency Preparation Tasks*, 3(4) ADOPTION Q. 63, 63–65 (rehearsing types of preparation and studies of effect of preparation on adoptions). Transracial adoptive parents too seem to agree. See, e.g., Maria Vidal de Haymes & Shirley Simon, *Trans-racial Adoption: Families Identify Issues and Needed Support Services*, 82 CHILD WELFARE 251, 266–69 (2003) (rehearsing transracial adoptive parents' wishes and suggestions for better pre-adoptive training regarding raising a child of a different (non-dominant) race).

competence, assessment, and training,¹⁸⁵ even if there is not clear agreement as to precisely what that cultural competence would entail.¹⁸⁶

In any event, cultural competence is not the caricature that Kennedy suggests. For transracial adoptive parents, it has been defined as “the transformation of a particular set of attitudes, knowledge, and skills into the ability to meet the children’s unique racial and cultural needs.”¹⁸⁷ It encompasses racial awareness, multicultural planning, and survival skills. Racial awareness refers to understanding the construction and implications of one’s own and one’s child’s race. This awareness should assist transracial adoptive parents to recognize how their own cultural background influences the way they think and experience the world, including an awareness of their own racial prejudice, how their child’s race may affect their treatment, and the value of their child’s culture.¹⁸⁸ Multicultural planning refers to the importance of exposing the child to his or her culture, members of that culture, and same culture role models.¹⁸⁹ Finally, survival skills refer to the ability and willingness to work with the child to help him or her recognize, understand, and respond to racism as well as the development of support systems for the parents in understanding and coping with racism directed at the child.¹⁹⁰

Cultural competence thus recognizes the construction of race in our culture and how it affects individuals. This view makes clear that when transracial adoptive parents come from a privileged race they will not necessarily know what it is like not to have such privileged status.¹⁹¹ Given the importance of birth relations to most adoptees, imagine how it would be to live with transracial adoptive parents who are insensitive to insults regarding the child’s race or, worse, who despise or disrespect their child’s racial heritage.

Moreover, although Kennedy aptly raises questions about the essentialist notions regarding race that are embedded in the transracial adoption dialogue, he undervalues the lived experience of racial privilege and subordination. In other words, Kennedy fails to acknowledge that people and institutions essentialize race in that they engage stereotypes

185. See M. Elizabeth Vonk, *Cultural Competence for Transracial Adoptive Parents*, 46 Soc. WORK 246, 246 (2001) (noting that supporters and critics of transracial adoption “strongly recommend that (TRA) [transracial adoptee] parents need to acquire the attitudes, skills, and knowledge that enable them to help their children develop positive racial identities and survival skills for life in a racist society”).

186. *Id.* at 247 (“[T]here is no agreement or guide as to exactly which attitudes, skills, and knowledge are needed by this group of parents to enhance their cultural competence.”)

187. M. Elizabeth Vonk & Ruth Angaran, *A Pilot Study of Training Adoptive Parents for Cultural Competence*, 4(4) ADOPTION Q. 5, 8 (2001) (citation omitted).

188. Vonk, *supra* note 185, at 249–50.

189. *Id.* at 251.

190. *Id.*; see also PATTON, *supra* note 151, at 62–98 (describing experiences regarding racial identity of transracial adoptees raised by culturally sensitive and race blind families).

191. Vonk, *supra* note 185, at 250.

and assumptions, often unconscious, when viewing Blacks and Whites. Relatedly, Kennedy does not acknowledge that Blacks experience this prejudice, this sense of being different from the dominant norm, despite their middle- or upper-middle-class backgrounds.¹⁹²

To presume, as Kennedy does, that White transracial adoptive parents will be conscious of their own privilege and what it means to live in a White world as a person of color is naive. To presume that it is not important that parents understand their child's uniqueness, especially when that child is an adoptee, reveals a lack of insight about parenting and adoption. Indeed, some of the goals of cultural competency assessment and training may be generalizable to parenting any Black child. Thus, teaching a child not to internalize racism and how to cope with racism may be lessons all parents of children of color should learn.¹⁹³ Teaching an adoptee about his or her heritage may not be a universal value, particularly for someone like Kennedy who wishes to erase racial distinctions and who is skeptical about the meaning or existence of Black culture.¹⁹⁴ Nevertheless, the thought of how transracial adoptive parents who lack an elementary understanding of the operation of race in our culture will respond to their child's experiences of racism, or who tolerate racial slurs, is chilling.

D. Adult-Centered Vision of Transracial Adoption

Kennedy's approach to, and arguments regarding, the foster care problem belie his purported concern for children. The book omits discussion about their stories, their narratives,¹⁹⁵ and the considerable scientific literature regarding their developmental needs. This lack of concern for children is also reflected in Kennedy's disinterest in supporting these children in their communities. Instead, the book dehumanizes children by failing to acknowledge that they have parents and disrespects their communities, as if children are objects, somehow separate and fungible. Like the NABSW he criticizes, Kennedy's agenda relates to the socialization of children, but unlike the NABSW, Kennedy wants these

192. FOGG-DAVIS, *supra* note 6, at 14–33; PATTON, *supra* note 151, at 92.

193. Similarly, raising White children to be aware of their privilege and externalization of that privilege is a valuable step toward a goal of racial equality.

194. See KENNEDY, *supra* note 1, at 444–46.

195. Even when he does include narratives of adult transracial adoptees, he discounts those with which he does not agree. *Id.* at 17. Yet, he displays great concern for White prospective adoptive parents and their entitlement to Black children. See, e.g., *id.* at 446 n.* (“The groveling posture that some candidates for adoptive parenthood assume in order to win approval from child-welfare officials whom they perceive to be skeptical of their ability to raise children of a different race or religion or culture from their own is a heartrending spectacle.”).

“parentless” children to grow up in communities different from the children’s origin.

Also indicative of an adult, rather than child-centered, agenda is the absence of evidence that transracial adoption will even begin to solve the problem of placing foster children in permanent homes or even that there is significant resistance to transracial adoption now. Kennedy provides no data to support his claim that transracial adoption will solve the foster care problem. This is not surprising because no such data exist. Instead, what data there are show insufficient transracial demand for adoption of Black foster children.¹⁹⁶ Part of this demand problem may be race-based,¹⁹⁷ but it also relates to the overwhelming number of prospective adoptive parents who desire to adopt young children and children free from disabilities.¹⁹⁸ The bulk of the tens of thousands of Black foster children purportedly in need of adoptive homes are older and have various emotional or other disabilities.¹⁹⁹ The demand for adoption of children of any race decreases as the children age.²⁰⁰

Moreover, prior to the enactment of federal laws mandating termination of parental rights and adoption of foster children,²⁰¹ approximately thirty percent of foster children (over 100,000) were placed with relatives.²⁰² These children, though technically under state supervision or in foster care, are in what are statistically considered to be stable, healthy

196. Mark E. Courtney, *The Politics and Realities of Transracial Adoption*, 76 CHILD WELFARE 749 (1997).

197. *Id.* at 755–58 (rehearsing studies and other data showing that White prospective adoptive parents prefer to and do seek White, international, or other children of color, but noting that some of the studies are over twenty years old); Devon Brooks et al., *Preferred Characteristics of Children in Need of Adoption: Is there a Demand for Available Foster Children?*, 76 SOC. SERV. REV. 575, 584–86 (2002) (study of adoptive parents showing they are less enthusiastic about adopting Black children than children of other races). It appears that public and child welfare professional opinion has become more accepting of transracial adoption since the 1970s. Judy Fenster, *Transracial Adoption in Black and White: A Survey of Social Worker Attitudes*, 5(4) ADOPTION Q. 33, 38–40 (2002).

198. Courtney, *supra* note 196, at 755.

199. *See id.*; Hawkins-León & Bradley, *supra* note 76, at 1262. In 2000, there were 64,000 children in foster care without legal parents. AFCARS Report, *supra* note 160. The previous year, 46,000 children were adopted. *Id.* Forty-three percent of those children were Black; thirty-nine percent were White. *Id.*

200. Brooks et al., *supra* note 197, at 586; Courtney, *supra* note 196, at 755, 758–79. The vast majority of prospective adoptive parents seek infants who are free from disability. Brooks et al., *supra* note 197, at 586.

201. *See infra* text accompanying notes 248–50.

202. Courtney, *supra* note 196, at 760. Additionally, in New York and California, over forty percent of dependant children were placed with relatives; and, in Illinois, over fifty-nine percent of dependant children were placed with relatives. James P. Gleeson, *Kinship Care as a Child Welfare Service: The Policy Debate in an Era of Welfare Reform*, 75 CHILD WELFARE 419, 420 (1996); *see also* Susan L. Brooks, *Kinship and Adoption*, 5(3) ADOPTION Q. 55 (2002) (discussing prevalence of kinship care within and outside of the foster care system).

placements.²⁰³ These children are not in need of adoptive homes, and if they were to be adopted, many would be adopted by their kin.²⁰⁴ Yet formal adoption is traditionally counter to Black culture which for generations has relied upon kinship care and informal adoption to raise children whose birth parents are unable to provide the quality of home or care that kin can.²⁰⁵ State experiments promoting subsidized relative guardianship, rather than foster care in which the state has legal custody, have been uniformly successful in providing children with continuity, stability, and a greater sense of belonging.²⁰⁶ Yet, when revamping the federal child welfare laws to achieve permanency for children in 1997, Congress chose to privilege adoption and not to institutionalize these successful kinship programs.²⁰⁷ Instead, strangers receive more assistance to care for

203. Brooks, *supra* note 202, at 58, 63; Courtney, *supra* note 196, at 760–61.

204. See Brooks, *supra* note 202, at 63 (“Relatives now adopt 60 percent of the foster children in Illinois who are adopted out of foster care.”); Mark F. Testa et al., *Permanency Planning Options for Children in Formal Kinship Care*, 75 CHILD WELFARE 451, 453 (1996) (reporting on study finding that a sizeable fraction of relative foster parents were willing to adopt their relative foster children).

205. Brooks, *supra* note 202, at 57; Gilbert A. Holmes, *The Extended Family System in the Black Community: A Child-Centered Model for Adoption Policy*, 68 TEMPLE L. REV. 1649, 1659–67 (1995). This is not to say that Blacks do not formally adopt. Nevertheless, adoption and child welfare agencies have traditionally used White, middle-class norms for adoptive parents, thus creating barriers to prospective adoptive parents who do not fit those norms. Hawkins-León & Bradley, *supra* note 76, at 1260–61; Sandra Patton-Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC’Y REV. 813, 822 (2002).

206. Brooks, *supra* note 202, at 58; Mark F. Testa, *Subsidized Guardianship: Testing an Idea Whose Time has Finally Come*, 26 SOC. WORK RES. 145, 146, 155–56 (2002); see also Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 463–64 (2002) (finding that for Black children kinship care resembles living with birth parents); Gleeson, *supra* note 202, at 430 (“Placements with relatives have been less likely to disrupt and tend to last longer than nonrelative placements. These placements have also resulted in lower rates of adoption and lower ‘return home’ rates; however, they also result in lower reentry rates after reunification than observed for nonrelative foster care placements.”) (citation omitted).

207. See 65 Fed. Reg. 4020, 4032–33 (Jan. 25, 2000). ASFA also prohibits states from having less formulaic standards for relative foster homes. *Id.* at 4032. Instead, relatives must meet the same standards as strangers, standards that are based on middle-class norms. See Randi Mandelbaum, *Trying to Fit Square Pegs into Round Holes: The Need For A New Funding Scheme for Kinship Caregivers*, 22 FORDHAM URB. L.J. 907, 922–23 (1995). Thus relatives who cannot meet those norms cannot receive the more generous foster care benefits; nor can relatives who assume legal responsibility for their dependent kin through guardianship. Thus, children in non-foster relative care will receive the more meager and restrictive Temporary Assistance to Needy Families grants, Medicaid, and food stamps. See U.S. DEP’T OF HEALTH & HUMAN SERVS. ET AL., REPORT TO THE CONGRESS ON KINSHIP FOSTER CARE (June 2000), available at <http://aspe.hhs.gov/hsp/kinr2c00/index.htm> (reporting on national kinship care provision). ASFA did make placement with relatives a permissible reason for the State not to seek termination of parental rights and adoption. 42 U.S.C. § 675(5)(E)(i) (2000). In one study, thirty percent of children exempted from mandatory termination of parental rights were with relatives. U.S. GEN. ACCOUNT. OFF., STATES’ EARLY

children than do kin.²⁰⁸ Kennedy does not promote kinship care as a solution for foster children. Nor does he mention these federal policies, let alone critique them for failing to meet the permanency needs of so many foster children.

Despite the fact that studies do not reveal a significant, if any, unmet demand for transracial adoption of Black foster children, but do show good placement alternatives to adoption for these children, Kennedy would have us believe that there are tens of thousands of prospective adoptive White parents who are prevented from adopting Black children by social workers and child welfare agencies. This conclusion is understandable, though unwarranted, if one looks only at the handful of stories of vocal White foster and prospective adoptive parents from whom Black children have been removed in hopes of finding a same race placement. That is precisely the reason social science should inform policy and advocacy.²⁰⁹ A handful of thwarted adoptive parents does not prove either that there is huge demand for these older foster children or widespread opposition to transracial adoption.²¹⁰

Kennedy's failure to consider the parents, relatives, or communities of these "parentless" children is symptomatic of viewing children in isolation, or as separate, atomistic beings. This perspective not only disconnects them from their families and communities, but it also obliterates their parents. This cleansing of the children from their heritage commodifies children so that they are much easier to transfer.²¹¹ Indeed,

EXPERIENCES IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT GAO/HEHS-00-1 13 (Dec. 1999).

208. Hawkins-León & Bradley, *supra* note 76, at 1281–84.

209. See Miriam Reitz, *Groundswell Change in Adoption Requires Anchoring by Research*, 16 CHILD & ADOLESCENT SOC. WORK J. 327 (1999) (exploring existing and needed research areas in adoption law and practice); see also Theodore J. Stein, *The Adoption and Safe Families Act: How Congress Overlooks Available Data and Ignores Systemic Obstacles in Its Pursuit of Political Goals*, 25 CHILD. & YOUTH SERV. REV. 669, 673–74, 678 (2003) (noting that Congress relied on newspaper accounts and other individual stories, rather than scientific data, when passing the Adoption and Safe Families Act of 1997, Pub. L. No. 105–89, 111 Stat. 2115 (1997)).

210. Indeed, many Black foster children are placed in White homes. See Leslie Doty Hollingsworth, *Promoting Same-Race Adoption for Children of Color*, 43 SOC. WORK 104 (1998) (citing study finding that only two thirds of Black foster children are placed in Black foster homes, most of which were likely kinship placements). A recent survey of over 300 social workers, most of whom do not practice in the foster care or adoption areas, revealed that Black social workers on average had slightly negative views while White workers had slightly positive views about transracial adoption; as a whole, neither group was strongly opposed or strongly in favor of transracial adoption. Fenster, *supra* note 197, at 33.

211. See PATTON, *supra* note 151, at 35–43 (discussing instances in which adoption agencies falsified non-identifying information regarding birth families to insure the children's adoptability); Berebitsky, *supra* note 120, at 130–31; cf. SOLINGER, *supra* note 127, at 26, 127 (noting that in international adoption, children are portrayed as orphans as a method to ease and enable transfer of children).

although Kennedy bemoans the plight of foster children, his approach to the problem, besides being narrow and ungrounded, is akin to the approach of those who want to make children more accessible for adults seeking to adopt.²¹² Kennedy's clear allegiance is to the "discriminated against" White prospective adoptive parents. He shares this allegiance with transracial adoption advocate Elizabeth Bartholet,²¹³ and a good many politicians²¹⁴ who want to transfer Black children from their families and communities to "better" families and communities.

For example, Kennedy embraces a federal law that forbids any consideration of race in placement and promotes the interests of prospective adoptive parents over children or their families of origin. The Removal of Barriers to Interethnic Adoption Act (IAA),²¹⁵ for which Kennedy lobbied,²¹⁶ forbids consideration of the child's or prospective adoptive parent's race in placement and adoption and does not include reference to the child's interests,²¹⁷ a step backwards in the adoption lexicon. Although identification and assessment of the child's interests can be highly subjective, the inclusion of that standard in state adoption laws more than a century ago helped transform adoption, at least symbolically, into a child-oriented process.²¹⁸ The IAA, codified in portions of the federal funding statute that governs public foster care and adoption—the Adoption Assistance and Child Welfare Act of 1980 (AACWA)²¹⁹—permits any aggrieved individual to bring a federal lawsuit against the offending entity.²²⁰ Thus,

212. See Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 727–32 (rehearsing those approaches, including the Uniform Adoption Act, §§ 2-408(e)–(f), 2-409(e)–(f), 9 U.L.A. 60–63 (1999), and the Adoption and Safe Families Act).

213. See BARTHOLET, *supra* note 72; Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

214. See *infra* text accompanying notes 237–51.

215. Passed as Section 1808 of the Small Business Job Protection Act of 1996., Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996) (codified at 42 U.S.C. §§ 671, 674, 1996b (2000)).

216. FOGG-DAVIS, *supra* note 6, at 10. Kennedy also worked with Clint Bolick (of the conservative Institute for Justice) and Harvard Law Professors Elizabeth Bartholet and Laurence Tribe in challenging race matching in adoption. *Id.* at 44.

217. Indeed, the IAA repealed its predecessor, the Multiethnic Placement Act, 42 U.S.C. § 5115a (1994), which permitted consideration of "cultural, ethnic, or racial background of the child and the capacity of the prospective foster or adoptive parents to meet the needs of a child of this background" in determining the best interests of the child. Multiethnic Placement Act of 1994, Pub. L. No. 103-382, § 553(a)(2), 108 Stat. 3518, 4056-57 (1994).

218. See Annette R. Appell, *Legal Intersections*, 3(3) ADOPTION Q. 85, 88 (2000).

219. Pub. L. No. 96-272, 94 Stat. 500 (codified in scattered sections of 42 U.S.C.).

220. 42 U.S.C. § 674(d)(3) (2000). This provision is in contrast to the unenforceability of other crucial aspects of the AACWA, particularly the provision that requires reasonable efforts to maintain children in their homes, return them home, or place them for adoption when that is the goal. See *Suter v. Artist M.*, 503 U.S. 347 (1992) (holding that the "reasonable efforts" requirement of the AACWA were not enforceable in a private

at least at the point of placement for adoption, the prospective parents' interests dominate all other considerations of the child's interests.²²¹

E. *Race Neutrality and the Non-Neutral Adoption Agenda*

What is particularly troubling about Kennedy's race neutral approach is that it aims at the parent-child relationship—the primary forum for creating and transmitting moral meaning. Kennedy's approach is not neutral both because race neutrality is not neutral and because Kennedy promotes only a one-way movement of children—from Black to White. He does not promote mutual exchange of Black and White children among White and Black families, although it is unlikely that he would oppose such exchange. His embrace of transracial adoption reflects a White assimilationist vision of society that specifically reinforces White middle-class hegemony through the adoption of non-assimilated Black children by White people.²²² The contours of his vision are further revealed in his discussion of transracial adoption as the solution to the problem of inadequate Black families and his choice to include sympathetic narratives of White prospective adoptive parents and exclude narratives of the Black parents who lost their children to the state.

Kennedy's description of these Black families and his solution to their problems fits a "conservative narrative" of race and class²²³ that characterizes poverty as a result of individual character flaws and poor mothers as deviant, lazy, immoral, Black, and illegitimately dependant on governmental resources.²²⁴ This narrative, like Kennedy's, is based on

cause of action). Thus, children and their parents cannot sue the state for failing to make efforts to keep the family together or to reunify the family if the State removes the child. However, thwarted adoptive parents and foster children can sue the State for taking account of race in making placement decisions.

221. See Hawkins-León & Bradley, *supra* note 76, at 1248. Nevertheless, an adoption court would have to, in theory, take the best interests of the child into consideration because most, if not all, adoption statutes use that as the ultimate standard for adoption.

222. See McROY & ZURCHER, *supra* note 151, at 126–33 (describing a number of Black transracial adoptees who identify more with White than Black people); PATTON, *supra* note 151, 62–98 (discussing the range and complexity of racial identities among Black transracial adoptees and that many feel they have little knowledge or experience of Black culture and some even identify as White). But see SIMON & ALTSTEIN, *supra* note 151, at 222 ("Black adoptees stressed their comfort with their Black identity and their awareness that they may speak, dress and have different tastes in music than inner-city Blacks—but that the Black experience is a varied one in this society, and they are not less Black than are children of the ghetto.").

223. See Bonnie Thornton Dill et al., *Race, Family Values, and Welfare Reform, in A NEW INTRODUCTION TO POVERTY: THE ROLE OF RACE, POWER, AND POLITICS* 263, 265–66 (Louis Kushnick & James Jennings eds., 1999).

224. *Id.*; see also PATTON, *supra* note 151, at 177.

assumptions “of Black family ‘pathology.’”²²⁵ Black families have long been labeled pathological largely, at least in more recent times, due to a matriarchal family system.²²⁶ Thus part of the concern about Black families is the actual or perceived lack of patriarchal control over women and children. Children raised without proper socialization are seen as the problem that creates and maintains the underclass.²²⁷ The Moynihan Report of 1965²²⁸ found that Black matriarchal families are pathological.²²⁹ Charles Murray also pegged the entire cause of Black inner city poverty to “illegitimacy”—Black single mothers who, according to Murray, have low IQs and are unable to properly socialize Black boys. Murray’s solution to this pathology, like that of Kennedy, is adoption.²³⁰

Although Kennedy does not adopt the same language about poor Black families as Moynihan and Murray, the book’s treatment of these families connotes the same ideas. First, Kennedy barely mentions these families. This failure to say anything about them beyond sweeping generalizations amounts to a similar dehumanization.²³¹ Second, his refusal to

225. Dill et al., *supra* note 223, at 266. This narrative about poor families is certainly not new. In the context of child welfare and adoption, the narrative is reflected in the notion of protecting society by transferring children from poor (often immigrant) families to proper Protestant middle-class families. See LEROY H. PELTON, FOR REASONS OF POVERTY: A CRITICAL ANALYSIS OF THE PUBLIC CHILD WELFARE SYSTEM IN THE UNITED STATES (1989) (describing long history of U.S. efforts to rescue poor children from their families); see also Patricia S. Hart, *A Nation’s Need for Adoption and Competing Realities*, in ADOPTION IN AMERICA: HISTORICAL PERSPECTIVES 140, 146 (E. Wayne Carp ed., 2002) (in the late 1800s and early 1900s, adoption was “proposed . . . as an inoculation against the creation of a permanent criminal or alien underclass”).

226. See Dill et al., *supra* note 223, at 272.

227. See *id.* at 277; Patton-Imani, *supra* note 205, at 826.

228. See U.S. DEP’T OF LABOR, OFFICE OF POLICY PLANNING AND RESEARCH, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION (1965).

229. Dill et al., *supra* note 223, at 272.

230. *Id.* at 277, 279–80 (discussing the infamous book by Charles Murray & Richard J. Herrnstein, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE (1994)).

231. For example, this is the extent of Kennedy’s regard for these families:

This pool of parentless children is a tragic consequence of the personal catastrophes and social failures that kill parents, or maim them, or otherwise render them unfit to carry out their parental responsibilities. Among the gravest threats in this regard are disease, murder, child abuse, abandonment, drug addiction, imprisonment, and poverty. A disproportionately large percentage of parentless children are [B]lack. This is not a statistical accident; rather, it stems from a long and bitter history of slavery, segregation, and racially selective neglect and mistreatment.

KENNEDY, *supra* note 1, at 402. Ironically, Kennedy bristles against claims that there is such a thing as “[B]lack culture,” *id.* at 444–46, or that Blacks are any better suited, by virtue of their Blackness, to understand and respond positively to racism yet he freely invokes sweeping generalizations about impoverished Black families, *id.* at 406.

acknowledge that there are parents in these families—that is, his repeated referral to “parentless children”—suggests that these families are illegitimate; and, the children are *filius nullius*,²³² the archaic notion that children born out of wedlock are the children of no one. The conservative narrative also views Black single parent families as illegitimate. Third, Kennedy’s solution is both individual and addressed only to the children. That is, his solution is to have the children adopted, not to help their families and communities of origin. Indeed, his goal appears to be the removal of poor Black children from their communities. This is evident in his failure to address kinship care and his suggestion that poor foster parents “are little better and sometimes *worse* than their homes of origin” because they are poor and come from violent, drug-saturated communities with poor schools.²³³

This conservative narrative was used to justify a range of federal needs-based welfare and child welfare reforms in the 1990s that undermined the health and integrity of poor families, who are disproportionately of color. These reforms, described below,²³⁴ limit support for the most vulnerable families and actively promote transfer of their children to more conventional families. This trend is directed at poor Black communities.²³⁵ Although race is not always mentioned explicitly in the discourse, as it is in the promotion of transracial adoption, poverty, the so-called underclass, single mothers, and welfare recipients are reflexively linked to Blacks.²³⁶

The first of these reforms was the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) that in 1996, replaced the Aid to Families with Dependant Children entitlement program with the time-limited block-grant Temporary Assistance for Needy Families program (TANF).²³⁷ With PRWORA, aid directed to individual poor families with children—never adequately funded to remove families from poverty²³⁸—became less assistive. PRWORA inserted time limitations for receipt of assistance, mandated mothers to work outside of the home, permitted states to establish family caps and imposed other conditions to receipt of aid.²³⁹ These and other PRWORA limitations will further limit

232. This is the Latin term for the child (son) of nobody.

233. KENNEDY, *supra* note 1, at 406.

234. See *infra* text accompanying notes 237–56.

235. Dill et al., *supra* note 223, at 277.

236. PATTON, *supra* note 151, at 177.

237. The Personal Responsibility and Work Opportunity Reconciliation Act, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (codified as amended in scattered sections of 42 U.S.C.).

238. See Joel F. Handler, “Constructing the Political Spectacle”: *The Interpretation of Entitlements, Legalization, and Obligations in Social Welfare History*, 56 BROOK. L. REV. 899 (1990); Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995).

239. For a description of the TANF provisions, see Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229 (2000) and Morgan B. Ward Doran & Dorothy E.

the ability of poor mothers to obtain federal and state funding for poverty relief and childcare.²⁴⁰ This result is no accident. On the contrary, conservative equation of single parenthood with the cause of poverty, crime, drugs, and illiteracy was a driving force in the 1996 welfare reform.²⁴¹ The connection could not be clearer: reduce assistance for poor Black mothers to discourage them from giving birth.²⁴²

That same year, Congress enacted tax credits for adoptive parents²⁴³ and the IAA, thereby further promoting transracial adoption by outlawing consideration of race in child placement and providing a private remedy for prospective White adoptive parents who are not able to adopt a Black child.²⁴⁴ These laws were clearly connected to the ideology of welfare reform. Accompanying this legislation was a discourse regarding "Black family pathology and White 'family values.'"²⁴⁵ In fact, the IAA was initially part of the PRWORA in the section designed to reduce nonmarital births.²⁴⁶ The explicit connection between the IAA and PRWORA was to promote adoption by White middle-class families of the children poor mothers could not afford to raise once their benefits were terminated.²⁴⁷

The next year, in 1997, Congress changed federal child welfare policy to all but forsake its slender promotion of family preservation and reunification for abused and neglected children. Instead, the Adoption and Safe Families Act of 1997 (ASFA)²⁴⁸ establishes a strong presumption that

Roberts, *Welfare Reform and Families in the Child Welfare System*, 61 MD. L. REV. 386, 394–99 (2002).

240. Peggy Billings et al., *What Do We Know About the Relationship between Public Welfare and Child Welfare?*, 25 CHILD. & YOUTH SERVS. REV. 633, 643–47 (2003); Leroy H. Pelton, *Welfare Discrimination and Child Welfare*, 60 OHIO ST. L.J. 1479, 1481–82 (1999).

241. PATTON, *supra* note 151, at 159–65.

242. See *id.* at 163–64 (citing arguments that stopping state aid will discourage women from bearing children outside of marriage); Linda C. McClain, "Irresponsible" Reproduction, 47 HASTINGS L.J. 339, 403 (1996) (arguing that family caps send the "message that an important and legitimate way to end poverty is to end procreation by poor people").

243. Small Business Job Protection Act, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903–04 (1996) (codified at 42 U.S.C. §§ 671, 674, 1996b (2000)).

244. Small Business Job Protection Act § 1808; see *supra* text accompanying notes 219–21.

245. PATTON, *supra* note 151, at 143; see also *id.* at 140–44 (describing discussions regarding promotion of transracial adoption around this time). Patton also compares the cries of reverse discrimination from White adoptive parents and their supporters with the anti-affirmative action discourse. *Id.* at 143–44.

246. *Id.* at 161.

247. *Id.* at 164 (citing Charles Murray); see also *id.* at 166 (citing portions of the *The Bell Curve: Intelligence and Class Structure in American Life*, in which Richard J. Herrnstein and Charles Murray promote adoption as a way to improve the IQs of poor children and "one of the only affordable and successful ways known to improve the life chances of disadvantaged children appreciably").

248. Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified in scattered sections of 42 U.S.C.).

dependant children should be adopted if they cannot be returned to their parents within a little over a year.²⁴⁹ ASFA limited funding and time for family preservation and reunification while paying states bonuses for the adoption of children and providing additional funding for adoption promotion and preservation.²⁵⁰ ASFA did not provide funding or solutions for the well-known barriers to family preservation and reunification, such as poverty, homelessness, substance abuse, and child care; nor did ASFA address the underlying conditions that contribute to the designation of children as abused or neglected.²⁵¹

These significant changes in federal, and therefore state, policies regarding poor families are symptomatic of viewing poverty as a matter of personal failure or inadequacy, poor families as pathological, and poor children as detached, and entitled to assistance only when removed from their mothers and communities and placed with privileged families. Children's value thus depends upon with whom they live. Away from their communities of origin, the children's caregivers receive higher levels of assistance through foster care and adoption subsidy payments. These policies reveal that our political leaders are seeking individualized solutions to poverty and child maltreatment, hoping to hold single mothers accountable and to transfer the children from those mothers who do not measure up to mothers who do.²⁵² Moreover, these policies barely mask a devaluation of Black children and a desire to limit Black child bearing and rearing.

Through these policies, adoption has thus become a major weapon in the war on poverty. Recently deceased conservative lobbyist William Pierce, head of the National Council for Adoption, an organization Kennedy cites approvingly,²⁵³ made the connection, its scope and misogyny clear: "If we had an adoption system that worked in this country, we

249. See 42 U.S.C. § 675(5)(E) (requiring states to file or join in petitions to terminate parental rights of children in foster care for fifteen out of the most recent twenty-two months). For discussion regarding the impossibility for many parents to obtain needed services during this time period, see Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 774–77.

250. See 42 U.S.C. §§ 629a(a)(7)(A) (time-limited family reunification services), 629a(a)(8) (adoption promotion and support services), 673b (adoption incentive payments and technical assistance for terminating parental rights and for adoption) (2000). States may, and do, use these adoption promotion and incentive payments to hire additional staff to terminate parental rights. U.S. GEN. ACCOUNT. OFF., *FOSTER CARE: RECENT LEGISLATION HELPS STATES FOCUS ON FINDING PERMANENT HOMES FOR CHILDREN, BUT LONG-STANDING BARRIERS REMAIN* GAO-02-585 35 (June 2002).

251. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 772–77; Guggenheim, *supra* note 147; Dorothy E. Roberts, *Is There Justice in Children's Rights?: The Critique of Federal Family Preservation Policy*, 2 U. PA. J. CONST. L. 112 (1999). As noted above, ASFA did not bolster extended families. See *supra* notes 202–08 and accompanying text.

252. PATTON, *supra* note 151, at 23; SOLINGER, *supra* note 127, at 191.

253. KENNEDY, *supra* note 1, at 397 n.*.

would have hundreds of thousands of babies that would be placed with capable couples. They wouldn't be raised by young, poorly educated, unemployed young women."²⁵⁴ In this new war on poverty, Congress imposes family caps on assistance to needy families while entertaining funding and policies that support and promote adoption and infertility treatments for middle-class women²⁵⁵ and make it easier to terminate parental rights of poor women. These political actions present an especially chilling juxtaposition of value based on class and race.²⁵⁶

Interracial Intimacies fits neatly into this trend. The book presents the stories of a handful of Black children who are removed from White foster parents or who are purportedly kept from White parents, while failing to cast its view on the thousands of Black and other families whom the state has separated. Kennedy sympathizes with the White foster parents and would-be adoptive parents who face actual or perceived barriers to adopting Black children while he paints the parents of these children as so worthless that they are not even parents.

If one takes a more critical view of race, then the picture is not one of pathological families or parentless children, but of complex systems of racial and class hierarchies, promoted and maintained by our political and economic systems. Moreover, social scientists recognize that family structures have changed nationally and internationally such that the paradigmatic nuclear family with the male breadwinner and the stay at home wife/mother has declined due to diminishing wages and the labor market.²⁵⁷ Social scientists attribute changes in family to economic and class structure changes rather than individual or group characteristics.²⁵⁸ Our deep history of racism has effectively excluded Blacks from jobs, marginalized them in the labor force, and, with the decline of industrialization, cabined large numbers of them in inner cities.²⁵⁹ Although there are real correlations between race, single parent households, and poverty, the question of the direction of those correlatives distinguishes those who

254. SOLINGER, *supra* note 127, at 271 n.39 (1987 oral testimony by William Pierce before U.S. Congress).

255. *Id.* at 200–07.

256. Similarly, Black children's value depends on the race of their parents. That is, poor Black children are of little value when with their birth families. See McClain, *supra* note 242, at 403. These children do, however, become valuable when they are sought by White parents. Moreover, Black foster children carry with them (until they are adults) adoption subsidies that are higher than more restrictive TANF grants they would receive if they remained in their mother's care.

257. Dill et al., *supra* note 223, at 267–68.

258. *Id.* at 268.

259. Katz, *supra* note 137. The story is more complicated than this, of course, and includes, inter al., specific racialized policies by federal and state governments, including urban renewal, redlining, and selective governmental laissez-faire. *Id.*; see also Russell, *supra* note 6 (exploring the structural roles of race and class in social policy).

view White supremacy as part of the natural order and those who view White supremacy as part of the political order.

Kennedy's dismissive attitude regarding racial difference and cultural competence and embrace of IAA's ban of any consideration of race in adoptive placements is particularly troubling in a pluralistic liberal democracy in which disproportionate number of Black children are removed from their Black families and communities. McRoy and Zurcher's study of transracial adoptions of Black children revealed that Black children who were raised in predominantly White neighborhoods by adoptive parents who took a neutral view of their own child's race, and a negative view of other Black people's race, avoided Blacks and did not identify as Black.²⁶⁰ Although this phenomenon may reduce racial distinctions and is certainly one Kennedy promotes, achieving this result through coercive governmental removal of children from Black families and placement in White families amounts to social engineering on a level that is not consistent with basic liberal principles regarding the relationship between family, the State, and the propagation of moral value.²⁶¹

The parent-child relationship is a fundamentally important one in a democracy such as ours in which individuals, not the state, determine morality within a liberal framework. It is through our children that we create and maintain value.²⁶² Although our society has not evolved to the point of maximizing the conditions, and minimizing the barriers, for all families to thrive, it is inconsistent with long-standing divisions between state and family to call for large scale government-sponsored transfer of children from underprivileged communities to privileged ones. State placement of children based on competing norms regarding "the good life" offends fundamental constitutional principles, particularly since the addition of the Thirteenth and Fourteenth Amendments.²⁶³ It should be unthinkable for the state to try to improve society by enacting and executing policies that transfer Black children to White parents. It is one thing to assess, and disagree about, the best interests of individual children,

260. McROY & ZURCHER, *supra* note 151, at 139 ("Many of the transracial adoptive parents exhibited stereotypical role expectations and perceptions of [B]lacks . . . [and] were apprehensive about the adoptee's association with other Black children and about the family's living in a racially mixed neighborhood.")

261. Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 705-13, 782-86.

262. *Id.* at 705-13; *see also* Moore v. City of East Cleveland, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

263. *See* PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* (1997); Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121; *see also* Roberts v. United States Jaycees, 468 U.S. 609, 618-19 (1984) ("[C]ertain kinds of personal bonds have played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs; they thereby foster diversity and act as critical buffers between the individual and the power of the State.").

but it is quite another to advocate a broad, macro policy that poor Black children are best served when coercively removed from their parents²⁶⁴ and placed with White parents.

The demonization and devaluation of non-dominant mothers is not new.²⁶⁵ Since adoption joined our lexicon, it has been used as a weapon to control the sexuality of various groups of women²⁶⁶ and a tool to manage marginalized communities, such as immigrants,²⁶⁷ Indians,²⁶⁸ and now Blacks. At best, adoption is an important child welfare service for children whose parents truly cannot or will not raise them. At its most neutral, adoption offers a feel-good mechanism to avoid making any meaningful social change. At its worst, for radical conservatives like Murray, adoption is a tool for social engineering (“social eugenics”)²⁶⁹ designed to destroy the ability of Black women to bear and rear children.²⁷⁰ In any event, rather than providing the conditions for non-dominant communities to thrive economically and socially, the adoption solution amputates children from their families and communities and transplants them to families and communities that can provide more resources and more acceptable values.²⁷¹

CONCLUSION

The mantle of rescuing children is not new. This rescue theme has pervaded many approaches to the needs of poor children in this country and internationally. This theme views family problems and solutions as individualized and disconnects children from their families and communities rather than supporting the children in their communities. This perspective is inherently hegemonic because it works one way: from

264. I realize that not all transracial or other adoptions involve state action or coercion, in a legal sense, but many women who relinquish their children for adoption do so primarily because they lack financial means to raise the child on their own. See SOLINGER, *supra* note 127, for an insightful and comprehensive study of the relationship between class, race, and reproductive choice.

265. See PATTON, *supra* note 151, at 145–46; Appell, *Virtual Mothers and the Meaning of Parenthood*, *supra* note 121, at 766–71; Dill et al., *supra* note 223, at 278–80; Dorothy E. Roberts, *The Unrealized Power of Mother*, 5 COLUM. J. GENDER & L. 141 (1995).

266. See RICKIE SOLINGER, *WAKE UP LITTLE SUZIE* (2nd ed. 2000); SOLINGER, *supra* note 127.

267. See Berebitsky, *supra* note 120; Hart, *supra* note 225.

268. See Barbara Ann Atwood, *Flashpoints Under the Indian Child Welfare Act: Toward a New Understanding of State Court Resistance*, 51 EMORY L.J. 587, 602 (2002); Lorie M. Graham, “The Past Never Vanishes”: A Contextual Critique of the Existing Indian Family Doctrine, 23 AM. INDIAN L. REV. 1, 10–18 (1998).

269. PATTON, *supra* note 151, at 164.

270. See *id.* at 163–65 (rehearsing current calls to remove children from poor mothers and earlier eugenic movements aimed at poor women and immigrants).

271. *Id.* at 158–67.

dominant culture to non-dominant culture, destroying children's ties to their parents, communities, and culture, and replacing them with ties to those who embody or embrace more dominant norms.

One can blame personal weakness or pathology for the problems of poverty. This position views society as a place where the strong survive and the weak should not. Those who do not thrive sacrifice their children to better parents, thus breaking the cycle of personal pathology and poverty. Here, racial freedom is achieved through individual transformations of members of non-dominant cultures until those cultures expire. Alternatively, one can view the problem as a society that has developed and maintained huge geographic, economic, and racial barriers to social movement. This view values cultural diversity and recognizes that most people remain on whichever side of the barrier they are born. Those who cross those barriers, up or down, are the exception. One can further see those barriers as unfair, part of an unnecessary zero-sum game. This view aspires to a vision of racial justice that removes these barriers and creates the social, economic, and geographic conditions that permit all children to thrive in their communities so that the communities and multiple cultures can flourish and as adults, children will have unfettered choice. I choose this latter vision and approach to racial justice; Kennedy apparently chooses the former.