

**MOVING TOWARD A FIRST-BEST WORLD:  
MINNESOTA'S POSITION ON MULTIETHNIC  
ADOPTIONS**

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I. INTRODUCTION

The best world allows a child to grow to adulthood with biological parents, or at least one parent, who love the child unconditionally and who have resources to support the child. A second-best world allows the child to permanently and completely become part of an extended family that loves him or her and has the resources for supporting and meeting the child's needs. Hopefully this process costs little in terms of time or emotional or physical harm to the child. In traditional third-party adoptions, the child permanently moves and becomes part of (hopefully, at low cost) a family that will love him or her and has the resources for supporting and meeting the child's needs. With multiethnic adoptions, opponents suggest that despite good intentions, the child's needs as a person of color are not likely to be met. They

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suggest that waiting for an adoptive family of the same race or a permanent foster placement with a relative or other member of the same cultural group better meets these needs. In addition, some opponents of multiethnic adoption suggest that the needs of the cultural group (and its very survival) should be taken into account in placement decisions.

Minnesota has favored racial matching as best meeting a child's needs even before this became a progressive stance to take. Increasingly, Minnesota's position seems to contradict federal legislation that requires states and their agents to ignore race in favor of swifter permanent placement of children. The federal stance can be analogized to child custody rules on dissolution that place the child's best interests above fairness to parents.

This paper takes no position on whether multiethnic, or transracial, adoptions are the best solution for children of color whose birth parents cannot care for them. Instead, it explores possible reasons for Minnesota's rather defiant position. On first glance, Minnesota seems a more progressive jurisdiction. Since opposing multiethnic adoption is currently part of the progressive agenda, any other attitude would be surprising. However, there may be other, more complex, answers to the question. Minnesota is not only uniquely progressive, but it is also demographically distinctive. In particular, the ratio of African-Americans to Native Americans (for whom tribal membership of parents already takes children out of the state child placement system) is lower than in several of its neighboring states, and the number of African-Americans is simply smaller. Further, while Minnesota's legislation may seem to promote an agenda that furthers some interest groups, the slow movement out of foster care suggests that children's needs may not be met. If funding to support fragile families or adoptions by people of color does not accompany the stated agenda, children may never acquire permanent, loving homes and be very far from the first-best world.

Minnesota's programs for Native Americans, and in particular its unique Native American foster care program, suggest that for this important minority, the desire to preserve cultures extends below the surface. Whether this treatment will extend to other groups without such deep historical connections to the state presents another question that this paper will address.

Another part of this paper will present an empirical look at some of the theoretical problems already described. First, the

actual numbers of Minnesota children in foster care, minority children in foster care, adoptive placements and transracial placements will be presented. From a demand-side perspective, white adoptive parents may be finding children from other states or countries. The paper will present the number and rates of Minnesota foreign adoptions compared to intrastate adoptions and compared to rates from other states.

A very long-running empirical debate in academic journals considers the outcomes for adoptees. Though some argue that positive (numerical) findings cannot measure the difficulties faced by those transracially adopted (so that some of the most recent literature on both sides is narrative), it is at least interesting to see whether there are measurable differences and what these might be. Accordingly, this paper will also consider whether depression (measured by the CES depression scale) differs for African-Americans who are adopted transracially. This population will be compared to African-Americans in general as well as same-race adoptees and foster children, using data from The National Survey of Adolescent Health.

## II. A BRIEF HISTORICAL REVIEW OF MULTICULTURAL ADOPTION

We can only dream, through children's eyes, of a perfect world. In this world, we might see things governed by the collective wisdom of Martin Luther King,<sup>1</sup> Martha Minow,<sup>2</sup> Berry Brazelton,<sup>3</sup> Selma Fraiburg,<sup>4</sup> and John Bowlby.<sup>5</sup> Of course we would see them

1. For example, in his speech delivered in Washington, D.C., August 28, 1963, Dr. King said:

I have a dream that one day the state of Alabama, whose governor's lips are presently dripping with the words of interposition and nullification, will be transformed into a situation where little black boys and black girls will be able to join hands with little white boys and white girls and walk together as sisters and brothers.

*available at* <http://web66.coled.umn.edu/new/MLK/MLK.html> (last visited Oct. 4, 2001). *See, e.g.*, Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990) (applying King's philosophy to law).

2. I think especially of MARTHA MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW* (1990).

3. *See, e.g.*, T. BERRY BRAZELTON, M.D., *AFFECTIVE DEVELOPMENT IN INFANCY* (1986); *INFANTS AND MOTHERS: DIFFERENCES IN DEVELOPMENT* (1969); and *TODDLERS AND PARENTS: A DECLARATION OF INDEPENDENCE* (1974).

4. SELMA FRAIBURG, *THE MAGIC YEARS; UNDERSTANDING AND HANDLING THE PROBLEMS OF EARLY CHILDHOOD* (1959).

5. JOHN BOWLBY, *ATTACHMENT AND LOSS* (1969-80) (3 vols.); and *CHILD CARE*

through a lens of toys, fast food and staying out late. But removing that filter, we would be left with the need to feel secure, wanted and attached to loving adults.<sup>6</sup> We would want to have enough material things to not be in want, and we would want these things provided by our parents, who would still have enough time to play with us, to read to us, to attend our school and extracurricular activities. We would want parents we could be proud of and who love each other, so that, at least sometimes, we could see ourselves as the expression of that love. Not only would we want these things in our family, but once we reached school age we would like to see them extended into the outside world. We would like to feel valued and competent ourselves and also proud of the way others view our families and, particularly, our parents.

Of course, this world is not the real world. The world in which we live suffers from poverty, racism, divorce and violence. A substantial number of us will not grow to adulthood in married, two-parent families.<sup>7</sup> One fifth of Americans,<sup>8</sup> and many more elsewhere, do not have enough to eat, enough heat, adequate clothing or needed medical care. Some children are abused by the

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AND THE GROWTH OF LOVE (1953).

6. See, e.g., Barbara Bennett Woodhouse, "Are You My Mother?": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 109 (1995).

7. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES, Family Groups with Children Under 18 Years Old by Race and Hispanic Origin: 1980 to 1999, 56 No. 64 (120th ed., 2000) (showing that for children under 18, 25,640 out of 37,168 households (in thousands) or 68.9% lived in two-parent homes in 1995) [hereinafter STATISTICAL ABSTRACT]. For two-parent *married* homes, the number was 56% in 1996. Mark Skertic, *The Traditional Family Bounce Back*, CHI. SUN-TIMES, April 13, 2001, at 1; see also Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUDIES 29, 35, 38tbl.6 (2000) (stating on the average, for all U.S. children born between 1990 and 1994, 71% of their childhood will be spent living with married parents. If they were born to unmarried [single or cohabiting] parents, the percentage drops to less than 50% of their minority). The estimate was that only 40% would live their entire minority in two-parent families. Jonathan Rauch, *The Widening Marriage Gap: America's New Class Divide*, NAT'L J., May 19, 2001.

8. STATISTICAL ABSTRACT, *supra* note 6, 475 No. 755. According to abstract No. 755, Children Below Poverty Level By Race and Hispanic Origin: 1970 to 1998, 18.3% of American children under 18 and 36.4% of Black children were living below poverty level. For a family of three in 1998, the official poverty threshold was \$13,003. *Id.* at 476 No. 756. Like Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 487 n.1 (1991), I have chosen to capitalize the word "Black" because it describes a cultural group as well as a race.

people they trust most,<sup>9</sup> and some parents abuse each other.<sup>10</sup> We also live in a world where some are advantaged and some disadvantaged merely because of the color of their skin.

Because of the world's imperfections, some children will not grow up with even one parent who loves them. The challenge is to identify the best alternative situations for such children—the second best world—and to write and enforce laws that will channel them into these situations. Children's dependence<sup>11</sup> and their need for security<sup>12</sup> and continuity<sup>13</sup> complicate this process because they require us to make decisions with some speed as well as with accuracy. Despite their resilience, leaving children in dangerous situations or uprooting them both cause harm.<sup>14</sup> Adoption has long stood as mainstream America's solution, one that also satisfies the desires of infertile couples.<sup>15</sup>

When out-of-wedlock childbirth was both less preventable and less acceptable, the supply of adoptable infants met the demand of would-be parents.<sup>16</sup> The match was not perfect—some older or disabled children grew up in orphanages—but it was good enough.

9. Robin Fretwell Wilson, *Children At Risk: The Sexual Exploitation Of Female Children After Divorce*, 86 CORNELL L. REV. 251, 254 (2001).

10. See, e.g., DEMIE KURZ, FOR RICHER, FOR POORER: MOTHERS CONFRONT DIVORCE 44 (1995) (suggesting that nearly half of the women she studied whose marriages dissolved had experienced physical violence). For a report calculating the percentage of family violence in which women were the victims, see Jeffrey Fagan & Angela Browne, *Violence Between Spouses and Intimates: Physical Aggression Between Women and Men in Intimate Relationships*, in 3 UNDERSTANDING AND PREVENTING VIOLENCE 115 (Albert J. Reiss, Jr. & Jeffrey A. Roth, eds., 1994).

11. See Woodhouse, *supra* note 6, at 117; Barbara Bennett Woodhouse, "Out of Children's Needs, Children's Rights": *The Child's Voice in Defining the Family*, 8 BYU J. PUB. L. 321, 327 (1994).

12. See JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 17 (1974) (introducing the concept of psychological parents and stressing the need for security).

13. Elizabeth Bartholet, *Where Do Black Children Belong?: The Politics of Race-Matching in Adoption*, 139 U. PA. L. REV. 1163, 1192 (1991) (making the point that "there is very general agreement among today's child welfare professionals that stable parent-child relationships should not be disrupted and that appropriate foster families should be given priority consideration for the adoption of children with whom they have formed such relationships").

14. See Margaret F. Brinig, *Choosing the Lesser Evil: A Comment on Besharov*, VA. J. SOC. POL'Y & L. (forthcoming 2001).

15. Adoption in general is discussed in Twila L. Perry, *Transracial And International Adoption: Mothers, Hierarchy, Race, And Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 109-10 (1998).

16. See, e.g., MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 46-57 (2000) (discussing the "market for babies").

But after oral contraception and legalized abortion, the world changed.<sup>17</sup> Though the demand grew, with increased infertility, the supply shrank. Once a couple ruled out infertility treatments and surrogacy, they moved to what historically would have been “hard to place” children.<sup>18</sup> Some of these were older children whose parents’ rights were involuntarily terminated or who had siblings and wanted to be adopted together.<sup>19</sup> Many of the healthy infants were children of color.<sup>20</sup> From roughly 1960 until 1972, children of color were increasingly adopted by white parents.<sup>21</sup> In 1972, the National Association of Black Social Workers (NABSW) strongly condemned transracial adoption.<sup>22</sup> The NABSW maintained that

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17. Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U. PUB. INT. L.J. 409, 443 (1997) (discussing the history of the transracial adoption movement).

18. See SANDRA PATTON, BIRTHMARKS: TRANSRACIAL ADOPTION IN CONTEMPORARY AMERICA 33-35 (2000). See also, Dorothy Roberts, *The Genetic Tie*, 62 U. CHI. L. REV. 209, 266-67 (1995) (maintaining that the interest in adopting children of color may stem from a desire to add excitement to white lives). Transracial “adoptions permit white families to embrace Black children without eliminating the structures that preserve white supremacy.” (In this instance, supremacy means maintaining white babies exclusively for white parents.) *Id.* at 267.

19. Most parents, given a choice, prefer children with no known mental or physical disabilities.

20. See Howe, *supra* note 17, at 423. Howe argues that the lawyers handling transracial adoptions wished to insure a steady supply of adoptable children. Howe also asserts that transracial adoption serves more to “meet the demands of white adoptive applicants than . . . the permanency needs of African-American children by working in partnership with the African-American community.” *Id.* at 432.

21. African-American parents also adopt. Some agencies may have favored white prospective adoptive parents because they offered better financial security or larger homes. Two parent, married homes have always been preferred to other arrangements. See ELIZABETH BARTHOLET, NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 133 (1999) (arguing that this preference makes sense).

American Indian adoptions are governed by federal legislation. The Indian Child Welfare Act (ICWA) gives preference to relatives, tribal members, and other Indian parents over others. 25 U.S.C.A. §§ 1901-1963 (1994).

22. They did so in an unpublished policy paper. See SANDRA PATTON, *supra* note 18, at 3, (quoting the text of the NABSW policy paper); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 517-18 (1984); see generally Leslie Doty Hollingsworth, *Symbolic Interactionism, African-American Families, and the Transracial Adoption Controversy*, 44 SOC. WORK 443 (1999) (quoting Position Paper: Preserving African American Families, National Association of Black Social Workers (1994)).

In its current position, it places priority on family preservation and reunification with birth families, alternative care by biological relatives, and adoption by same-race nonrelatives, recognizing the importance of

Black children have special needs that cannot be met by white parents. They also criticized transracial adoption as a form of cultural genocide.<sup>23</sup> Instead, they suggested waiting for adoptive parents whose race matched, providing more services to birth families,<sup>24</sup> or placing children permanently with relatives in foster situations. The future needs of the Black community<sup>25</sup> as well as the self-identity of the adoptee require that each Black child be raised by parents who had themselves experienced racism.<sup>26</sup>

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providing permanent homes for all children. Transracial adoption is seen as a last resort. Children should not be removed from their birth families when economic resource limitations or institutional barriers are the sources of the problem.

*Id.*

23. Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, 1 L & SOC'Y REV. 265, 280-305 (1978).

24. See, e.g., Perry, *supra* note 15, at 142; Hollingsworth, *supra* note 22.

Child maltreatment and especially child neglect are frequent reasons for the removal of children from their birth families and for their placement in foster care or adoptive homes. African-American families are represented disproportionately in the rates of poverty and the statistics of single-female parenthood. It is therefore simplistic to limit examination to the results rather than the causes of the phenomena that bring African-American children into the foster care system.

*Id.*

25. Roberts, *supra* note 18, at 214. "[H]owever important the biological bond is as a basis for family relationships, it need not be the exclusive bond. In fact, blood ties are less significant to the definition of family in the Black community than they traditionally have been for white America." *Id.* at 214. She notes that "[t]he distinction between cultural and genetic unity is reflected in Black opposition to transracial adoption." *Id.* at 233.

A Black parent's essential contribution to his or her children is not passing down genetic information but sharing lessons needed to survive in a racist society. Black parents transmit to their children their own cultural identity and teach them to defy racist stereotypes and practices, teaching their children to live in two cultures, both Black and white.

*Id.*

26. For a discussion of the needed survival skills, see PATTON, *supra* note 18, at 13 (discussing Black authors); GAIL STEINBERG & BETH HALL, *INSIDE TRANSRACIAL ADOPTION* (2000) (suggesting the particular problems found with each major ethnic group and some resources); SHARON E. RUSH, *LOVING ACROSS THE COLOR LINE* (2000) (providing an account of a law professor and civil rights attorney who adopted a biracial child). She also states:

[m]y experiences convince me that transracial adoptions should be last resorts. Until society makes it easier for Blacks to adopt, the foster care problem for Black children will persist and transracial adoptions will offer a better alternative. Thus, White parents have a special duty to cross the color line into their children's world rather than make their children assimilate into White society.

With this began the multiethnic adoption debate. It continues in the academic literature even after thirty years and has spawned considerable empirical work. Over the last ten years, Congress has effectively forbidden disallowance of transracial adoption and, on a related front, has mandated that children's safety, rather than family reunification, be the primary goal of the child welfare system.

Meanwhile, despite changing national policy, Minnesota's position has remained the same. While amending state statutes in order to continue receiving federal benefits, Minnesota has consistently valued the preservation of both biological family and heritage. At the outset, Minnesota promulgated the Indian Child Welfare Act (ICWA),<sup>27</sup> adopted the ALI/ABA rules protecting biological parents from all but the most necessary welfare agency intrusion, and, beginning in 1983, established the Minnesota Family Heritage program.<sup>28</sup> Amendments to these statutes have allowed the state to remain in compliance with the changing federal policy, but the text itself reveals reluctance to veer from the state's course. Minnesota cases decided under the ICWA,<sup>29</sup> the

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*Id.* at 93. She goes on to write, "I cannot say I have accepted racism, but the woman was right; learning how to cope with racism is part and parcel of being Black or loving a Black person." *Id.* at 117. The conclusion of her book discusses "transformative love": "Transformative love is a unique kind of love because it has an opportunity to arise in relationships where there is an institutional power imbalance between the people in the relationship." *Id.* at 170. See also Perry, *supra* note 15, at 104-05 (discussing that the question of "survival skills" requires that "focus must be placed on the question of what it means for white women to raise white children in a racist society." ).

27. 25 U.S.C. §§ 1901-1963 (1994), see *infra* note 79.

28. Act of June 6, 1983, ch. 278, 1983 Minn. Laws 1192 (codified as amended in scattered sections of MINN. STAT. §§ 257, 259, 260).

29. See, e.g., *In re Custody of S.E.G.*, 521 N.W.2d 357, 358 (Minn. 1994):

At issue is whether the placement preferences provision of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1915 (1994), provides a 'good cause' exception for 'extraordinary emotional needs' based on a child's need for permanence in the form of adoption; also at issue is whether the record in this case supports the trial court's findings that these children had extraordinary emotional needs and that there was an 'unavailability of suitable families for placement' after a diligent search. We hold, while good cause may include a child's need for stability, this is not equivalent to a need to be adopted. We also hold that, in this case, the record failed to support the trial court's findings that these children have extraordinary emotional needs.

*Id.* at 358. See also, *In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000) (finding that the tribe's judgment that a child being placed for adoption is an Indian Child is conclusive on that issue, so that foster parents were unable to avoid

Family Preservation Act<sup>30</sup> and *In re D*<sup>31</sup> reveal that the judiciary has been part of this legislative “contract.”<sup>32</sup>

Nearly everyone agrees that, as a last resort, multiethnic placement may solve problems for children of color whose birth parents cannot care for them.<sup>33</sup> The question is whether

placement under ICWA).

30. MINN. STAT. §§ 256F et seq. (1998). See, e.g., *In re Welfare of D.F. and C.F.*, No. C0-97-461, 1997 WL 407799, at \*3 (Minn. Ct. App. 1997) (finding that clear and convincing evidence supported termination of appellant’s parental rights pursuant to MINN. STAT. § 260.221, subd. 1(b)(1), (2), (4), (5), (8) (1996)). MINN. STAT. § 260.221 was repealed in 1999. Act of May 7, 1999, ch. 139, art. 4, § 3, 1999 Minn. Laws 691, 692.

To measure the adequacy of services, it is necessary to learn whether the services go beyond mere matters of form, such as the scheduling of appointments, or whether they include genuine help to see that all things are done that might conceivably improve the circumstances of the parent and the relationship of the parent with the child. The best interests of the child are not served by delay that precludes the child’s establishment of parental bonds with either the natural or the adoptive parents for the foreseeable future.

*In re Welfare of D.F. and C.F.*, 1997 WL 407799 at \*3 (citation omitted); see also, *In re Welfare of J.M., J.M., and M.M.*, 574 N.W.2d 717 (Minn. 1998) (affirming termination of parental rights despite the fact that the children involved had not been found “adoptable” and had not been placed in long-term foster care).

The permanency statute explicitly establishes that transfer of legal custody to a relative or termination of parental rights and adoption are the preferred permanency options for children who cannot return home. Minn.Stat. § 260.191, subd. 3b(a)(3). A child may not be placed in long-term foster care unless the court finds that neither an award of physical and legal custody to a relative nor termination of parental rights and adoption is in the child’s best interests.

*Id.* at. 721.

31. *In re Welfare of D.L.*, (“Baby D”), 479 N.W.2d 408 (Minn. Ct. App. 1991).

32. The standards for termination under ICWA, 25 U.S.C. § 1912(f), requiring “beyond a reasonable doubt” are more stringent even than those under the Family Preservation Act’s “clear and convincing” standard. Esther Wattenberg et al., *When the Rehabilitation Ideal Fails: A Study of Parental Rights Termination*, 80 Child Welfare 405, 408, 426 n.1 (2001). The “clear and convincing” requirement was at MINN. STAT. § 260.112(3), superceded by 2001 Minn. Sess. Law. Ch. 178 (S.F. 1394), now found at MINN. STAT. § 260C.317 (Supp. 2001). William M. Landes & Richard A. Posner, *The Independent Judiciary in an Interest-Group Perspective*, 18 J. L. & ECON. 875 (1975) (proposing a “contract” between judges and legislators).

33. For example, Twila Perry, a leading legal academic who has taken up the NABSW position, at least in part, maintains:

I am not opposed to transracial or international adoption. Many women experience a powerful desire to become mothers. Not all women can conceive children biologically, and not all women choose to. It is also probably true that some women who place their children for adoption do not, in any sense, see their choice as dictated by

multiethnic placement should be given a much higher priority,<sup>34</sup>

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anything other than their own free will. It must be remembered that adoption is an institution with ancient roots, and I suspect that even in a more humane and egalitarian society than the one that we now have, there would still be women who would choose to surrender their children. Finally, for some children, transracial or international adoption may be the option that is in their best interests at the particular time.

Perry, *supra* note 15, at 107-08. Yet even she is not an absolutist: "To the extent that the NABSW would support keeping a child in an institution when a permanent home is available, or would support removal of a child from a home where she has formed strong bonds with her caretakers to place her in a home with adults of the same race, the position of that organization is too extreme." Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 113 (1990).

The worst option, by all accounts, is "temporary" foster care with multiple care providers that lasts throughout the child's minority. For accounts of foster care's problems, see BRINIG, *supra* note 16, at 49-57 (discussing the law and economics of foster care in terms of a principal/agent model); CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 1004-1006 (second ed. 2000) (discussing the Adoption and Safe Families Act) and 1099-19 (discussing of the case of *Smith v. OFFER*); JUNE THOBURN ET AL., PERMANENT FAMILY PLACEMENT FOR CHILDREN OF MINORITY ETHNIC ORIGIN (2000) (stating that "temporary, and often repeated, placements are least beneficial to children of color, against whom the deck is often already stacked."). For one account of the innovative Casey program, see DAVID FANSHIEL ET AL., FOSTER CHILDREN IN A LIFE COURSE PERSPECTIVE 77 & Figure 5.2, 94 (1990) (describing the outcomes of this expensive program and explaining that those who were less troubled while entering care did better with their substitute caretakers); BARTHOLET, *supra* note 21, at 81 (1999) (stating "If left in foster or institutional care, studies indicate that most of them will do better than children who are returned to their parents but less well than children who are adopted, or children in the general population."). Bartholet also states:

The advantages of foster care over the homes of origin would clearly be more dramatic if foster care were better designed to give foster children certainty and predictability in their lives, as opposed to the current system in which so many children drift without any understanding of their future, and are subject to repeated attempts to reunify them with deeply troubled birth parents. Adoption studies consistently show that the earlier children are placed in adoptive homes the better they will do.

*Id.* at 97.

34. This may be the position, with some qualifications, of Barbara Woodhouse:

I would argue that, as trustees, we must structure adoption and foster care policies that preserve children's long term access to their cultural and racial legacies to the greatest extent possible, even as we recognize and protect their short term needs for security and nurture. We must be blind to group interests at times, because children are blind in their attachments. To deprive a child of her "Mommy" or "Daddy" because of color, ethnicity or political jurisdiction, violates the child's right to protection of her intimate relationships. On the other hand, we need

or, as the federal legislation now suggests, whether racial differences should simply be ignored. The answer hinges in part on the alternatives—better public support of struggling families before separation (ignoring already disrupted families),<sup>35</sup> recruitment of more adoptive parents of color, or (the current most popular suggestion) kinship care. In 1998, at least 11 percent of the Minnesota children entering the child welfare system did so because of family difficulties or financial hardship.<sup>36</sup>

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to be color and community conscious because our children grow up in a pluralist and sometimes a racist society in which group identities do matter and, many would argue, should matter as an element of group pride and a healthy sense of belonging. A mandate that race and ethnicity may play no role at all in adoptive placement, while seeming to provide a shield against discrimination, actually discriminates against the child who is placed for adoption. Such a law ignores the impact on the child of race and ethnicity and deprives the child of a potentially valuable legacy.

Woodhouse, *supra* note 6, at 127.

35. It seems at this point, given the Adoption and Safe Families Act, Pub. L. No. 105-89, 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. §§ 671, 675, 473A, 1320a-9, 629a) (1994 & Supp. V 1995-2000), and cases like *In re Welfare of J.M.*, 574 N.W.2d 717 (Minn. 1998) (holding that the permanency statute's restrictions on long term foster care for children under 12 do not conflict with the requirement that the children's best interests are paramount, that the termination statute does not require assessment of a child's adoptability, and that clear and convincing evidence supported the juvenile court's decision to terminate parental rights where the court heard extensive testimony by a child protection worker and a guardian ad litem that termination was in the best interests of the child), as though the pendulum has swung far from the IJA/ABA position (Institute of Judicial Administration-ABA Juvenile Justice Standards § 1.1 (1981)) of cementing these families through due process protection, though a number of Supreme Court cases do add significant protections for birth parents. See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a State may not, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment, condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay preparation fees); *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding that before a State may sever completely and irrevocably the rights of parents in their natural child, due process requires that the State support its allegations by clear and convincing evidence); *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18 (1981) (holding that the parent's interest in the accuracy and justice of the decision to terminate parental status is an extremely important one, and an indigent parent is therefore entitled to the assistance of appointed counsel in parental termination proceedings).

36. DEPARTMENT OF HUMAN SERVICES, STATE OF MINNESOTA: FOSTER CARE AND OUT-OF HOME PLACEMENT IN MINNESOTA, available at <http://www.dhs.state.mn.us/Childint/Programs/Fostercare/Default.htm> (last visited July 30, 2001) (hereinafter Foster Care Fact Sheet). Another forty-five percent did so for a variety of other parent-related reasons such as abuse and neglect, parents' death, illness, disability, incarceration, and substance abuse. *Id.*

Minnesota, to some extent, invests in all three alternatives.<sup>37</sup> Its TANF payments and services are among the country's most generous.<sup>38</sup> An entire office, which maintains a website, recruits African-American, Asian and American Indian adoptive parents. A growing percentage of Minnesota children live in kinship care, while kinship care providers receive payments and services more generous than those in many other states.<sup>39</sup> (Significantly, the School of Social Work has even studied kinship care in Minnesota).<sup>40</sup>

The question for this paper is why this state has taken the less traveled and more expensive road.<sup>41</sup> A quick answer might be that

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37. It also provides an unusually large amount of post-adoption support. Minnesota Adoption Support and Preservation establishes an adoption information clearinghouse, foster care and adoptive respite network, as well as a training service for adoptive parents and professionals. DEPARTMENT OF HUMAN RESOURCES, STATE OF MINNESOTA, *available at* <http://www.dhs.state.mn.us/Newsroom/Facts/Adoptionhome.htm> (last visited July 30, 2001) (hereinafter Adoption Fact Sheet).

38. Kinship care providers must receive the same subsidies they would as unrelated foster parents under *Miller v. Youakim*, 440 U.S. 125 (1979). This covers families that are IV-E eligible, meaning that the placed child is eligible for AFDC before placement, was removed from the home by judicial action or placed voluntarily with an agreement between the parents, and the agency and the foster care home meets foster home licensing standards and can be licensed. Minn. Instructional Bulletin 94-68F (1994).

39. Payments to foster parents ranged between \$15 and \$19 per day, with additional subsidies to care for children's special needs. The total cost to the state in 1998 exceeded \$80 million. Foster Care Fact Sheet, *supra* note 36.

40. SANDRA BEEMEN, ET AL., KINSHIP FOSTER CARE IN MINNESOTA: A STUDY OF THREE COUNTIES, FINAL REPORT TO THE MINNESOTA DEPARTMENT OF HUMAN SERVICES (Center for Advanced Studies in Child Welfare, University of Minnesota School of Social Work, 1996).

41. KATHLEEN WELTY, NORTH AMERICAN COUNCIL ON ADOPTABLE CHILDREN, ACHIEVING PERMANENCY FOR EVERY CHILD: A GUIDE FOR LIMITING THE USE OF LONG-TERM FOSTER CARE AS A PERMANENT PLAN (1997) *available at* [http://www.nacac.org/exec\\_summaries/long\\_term\\_foster\\_care.html](http://www.nacac.org/exec_summaries/long_term_foster_care.html) (last visited Oct. 4, 2001) (noting that "[l]ong-term foster care is by far the most costly permanency planning option. Studies show that placing more children into adoptive or guardianship homes rather than with long-term foster families saves money, even when those placements are subsidized." *See also*, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, EXECUTIVE SUMMARY, A PLACE TO CALL HOME: ADOPTION AND GUARDIANSHIP FOR CHILDREN IN FOSTER CARE (2001), *available at* <http://www.nesl.org/programs/pubs/bkjstr2.htm> (last visited Aug. 23, 2001).

Foster care is costly in social as well as in fiscal terms. Child welfare experts generally agree that prolonged stays in foster care and frequent moves from one foster home to another are not conducive to a child's healthy development. Children who grow up in foster care often exhibit emotional and behavioral problems that contribute to expensive social problems such as school failure, teen pregnancy,

it is simply the politically expedient path. Opposing multiethnic adoption and strengthening diverse cultural identities certainly fits within the current progressive agenda,<sup>42</sup> and Minnesota voters have long displayed their progressive leanings.<sup>43</sup> (Table 1) In fact, it was

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homelessness, unemployment, criminal activity, incarceration and welfare dependency. In addition to these indirect costs, states and the federal government spend approximately \$7 billion on out-of-home placement every year, which exceeds the amount spent on all other child welfare services combined, including child abuse prevention, child protection, family support and adoption services.

*Id.*

42. Opponents of transracial adoption include a number of law professors. *See, e.g.*, Roberts, *supra* note 18; Twila Perry, *The Transracial Adoption Controversy: An Analysis Of Discourse And Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33, 39 (1993-94) (stating “I do not unequivocally oppose transracial adoption, but I strongly support the placement of Black children with Black adoptive parents whenever feasible. I also strongly support efforts to recruit more Black adoptive families.”); Gilbert A. Holmes, *The Extended Family System In The Black Community: A Child-Centered Model For Adoption Policy*, 68 TEMP. L. REV. 1649 (1995); Howe, *supra* note 17.

43. *See, e.g.*, CARL H. CHRISLOCK, *THE PROGRESSIVE ERA IN MINNESOTA, 1899-1918* (1971) (providing a detailed study of the successes and shortcomings of the progressive movement in Minnesota); AGNES M. LARSON, *JOHN A. JOHNSON: AN UNCOMMON AMERICAN* (1969) (documenting the life story of Johnson, one of the first Scandinavians to win high office in Minnesota, who as governor pressed for progressive reforms); JOHN EARL HAYNES, *DUBIOUS ALLIANCE: THE MAKING OF MINNESOTA’S DFL PARTY* (1984) (providing a study of the links between the Farmer-Labor party and the various labor groups in Minnesota, and the influence of socialist and communist thought on the Farmer-Labor movement prior to its merger with the Minnesota Democratic party); FRANK P. ZEIDLER, *SOCIALIST PARTY OF WISCONSIN, HISTORY OF THE SOCIALIST PARTY* (1991), at <http://www.execpc.com/~spwis/pages/sphistory.html> (last visited Oct. 8, 2001) (stating “[i]n the Midwest and plains states there were movements related to Populism and movements like the Nonpartisan League of North Dakota and Farmer-Labor movement of Minnesota which had strong planks and programs of a socialist nature.”).

Minnesota adoption agencies led the way in experimenting with transracial adoption in the early 1960s. DAWN DAY, *THE ADOPTION OF BLACK CHILDREN* 94 (1979) (reporting Parents to Adopt Minority Children and the Open Door Society of Minnesota were among the first coordinated groups of families of transracial adoptees); RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 29 (1977); LUCILLE G. GROW & DEBORAH SHAPIRO, *BLACK CHILDREN—WHITE PARENTS* 9 (1974) (focusing on Minnesota transracial adoptions. Studies of IQ differences between transracially and intraracially adopted Minnesota children have figured heavily in the “nature-nurture” debate). *See, e.g.*, Richard A. Weinberg et al., *The Minnesota Transracial Adoption Study: A Follow-Up of IQ Test Performance at Adolescence*, 16 INTELLIGENCE 117, 117 (1992) (stating “[i]n general, the results support the original findings: being reared in the culture of the tests and the culture of the schools benefits all children’s IQ scores and school achievements.”).

the only state to vote for the Democrat Walter Mondale, who opposed Ronald Reagan in 1984, only a year after passage of the Minority Child Heritage Protection (Preservation) Act.<sup>44</sup>

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44. The current law is dispersed in the Minnesota Statutes: MINN. STAT. §§ 257.01, .025, .065, .0725, .075, 259.29, .53, .57, .77, 260B.163, .193, 260C.193, .201, .205, .212, .215 and .325 (2000). The law has been amended in major ways three times.

The first part of the Act was enacted in reaction to the case of “Baby D,” *In re Welfare of D.L.*, *supra* note 31, an adoption case where the African-American maternal grandparents, who had custody of “D’s” sisters and who had visited “D” frequently despite their living in Virginia, prevailed over white foster parents who had cared for “D” for all but a few days of her two years. The Minnesota Court of Appeals found the “sole consideration” language unconstitutional because it violated the Fourteenth Amendment, but nonetheless preferred the grandparents because of the longstanding Minnesota preference for family members. 479 N.W.2d 408, 412-15 (Minn. Ct. App. 1991). The Supreme Court of Minnesota, affirming, found it unnecessary to decide the constitutional issue because

a strong preference for family placement is well established in Minnesota law. The touchstone of our analysis, as always, is the best interests of the child, and consistent with that principle, we hold today that adoptive placement with relatives is presumptively in a child’s best interests, unless good cause to the contrary or detriment to the child are shown.

486 N.W.2d 375, 377 (Minn. 1992). For a recent discussion of Baby D, see Steven L. Belton, *‘Baby D’ Adoption Case Wasn’t a Contest Between Races*, MPLS. STAR TRIB., July 14, 2001, at 21A. Belton maintained in another commentary that, as someone who “conceived and lobbied passage of the Minnesota Heritage Preservation Act,” the revised law “is not intended to break up the monopoly power whites hold over the adoption of white children. Rather, the law is supposed to eliminate a primary obstacle to getting a black child that white people face when there are not enough white children for them to adopt or because the cost of adopting a ‘healthy white infant’ has become prohibitively high for all except those whose net worth is—well, rosy.” Steven L. Belton, *No More Race-Based Adoption: Barriers To Transracial Placements Will Fall Unequally After Jan. 1*, MPLS. STAR TRIB., Dec. 13, 1996, at 37A.

Minnesota’s Minority Child Heritage Protection Act was criticized in Timonth P. Glynn, *The Role of Race in Adoption Proceedings: A Constitutional Critique of the Minnesota Preference Statute*, 77 MINN. L. REV. 925 (1993) (noting that Arkansas law also provided for race matching). However, Arkansas law has since been amended to provide “The court shall not deny a petition for adoption on the basis of race, color or national origin of the adoptive parent or the child involved” (ARK. CODE ANN. § 9-9-102 (Michie 1998)). *Id.*; see also Bartholet, *supra* note 13, at 1189, nn. 66-68. Bartholet also includes California, CAL. CIV. CODE § 276 (repealed by Stats.1990, c. 1581 (A.B.548), § 8, operative July 1, 1991); New York, N.Y. COMP. CODES R. & REGS., tit. 18 § 421.18 (d)(2)(1999) (now amended to read that in placement, the agency should give “consideration of the physical and emotional needs of the child in relation to the characteristics, capacities, strengths and weaknesses of the adoptive parent(s). When making placement decisions, an authorized agency may consider the cultural, ethnic or racial background of the child and the capacity of the adoptive parent to meet the needs of the child with such a background as one of a number of factors used to determine best interests. Race, color or national origin of the child or the adoptive parent may be

However, there are other less straightforward answers to this question. Minnesota is not only progressive; it is also demographically distinctive. In particular, the ratio of African Americans to Native Americans (for whom ICWA already takes

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considered only where it can be demonstrated to relate to the specific needs of an individual child . . ."); and Massachusetts, MASS. REGS. CODE tit. 110, § 7.101 (1)(d) (1998) (now amended to read only, "[t]he child's individual needs including those related to his/her physical, mental, and emotional well-being and the capacity of the prospective foster or pre-adoptive parents to meet those needs") as providing for race matching. However, later the same regulation provides: "[i]f placement is not made with relatives or members of the child's extended family, the child's service plan shall indicate in writing: (a) which relatives or extended family members were given consideration; and (b) the reason(s) why said persons were rejected by the Department." *Id.*

Amendments to the Minnesota legislation deleted several references to "minority" 1992 Minn. Laws, ch. 557, §§ 4-7, made race or ethnic heritage no longer the sole consideration in the placement of children, and set time limitations on compliance with placement procedures. 1993 Minn. Laws, ch. 291. It remains, however, because of its preference for family friends as well as relatives, the most race-conscious of the statutes.

After Congress passed the Multiethnic Placement Act, P.L. 103-382, § 551, 108 Stat. 4056 (1994), proposed by Sen. Howard Metzenbaum which set federal limits upon race-based placement decisions, Minnesota amended the Minority Child Heritage Protection Act of 1996. 1996 Minn. Laws, ch. 416) *See* Woodhouse, *supra* note 6, at 120 (discussing the debate surrounding the introduction of the Multiethnic Placement Act). Congress later amended the Multiethnic Placement Act, strengthening the prohibitions against racial matching. Pub.L. 103-382, Title V, § 553, Oct. 20, 1994, 108 Stat. 4056. Professor Joan Hollinger of the American Bar Association Center on Children and the Law published *A Guide to The Multiethnic Placement Act of 1994 As Amended by the Interethnic Adoption Provisions of 1996*, (1998), at <http://www.acf.dhhs.gov/programs/cb/publications/mepa94/index.htm> (updated Jan. 17, 2001). To remain in compliance, Minnesota amended its statute again in 1997. 1997 Minn. Laws, ch. 86. Possible loss of funding was also apparently an issue, according to Rita J. Simon, *Transracial Adoptions: Does the Law Matter?* AM. EXPERIMENT Q. 85, 90 (Fall 1999) (quoting a Minnesota attorney as saying, "a racial preference statute was changed to eliminate race as a preference factor in where a child was placed. This resulted directly from the federal requirement that if a state had a racial preference, the state would lose welfare money from the feds."). Minnesota amended its statute again in L. 1997, ch. 86. The most recent amendments replace "heritage" or "background" considerations for child placement with "the child's best interests." 1996 Minn. Laws, ch. 139. Compliance with the federal act is surveyed in Simon, *supra*, through interviews with attorneys, state and DC directors, public agencies and private agencies. According to Simon's survey, 116 Minnesota adoptions between 1995 and 1999 were across racial lines. *Id.* at 91.

The interest groups aligning to oppose Sen. Metzenbaum's proposal and then to weaken it were the Children's Defense Fund, the North American Council on Adoptable Children, Adoptive Families of America and "a large number of other public and private organizations." BARTHOLET, *supra* note 21, at 130.

children with tribal connections out of the state child-placement system) is lower than in several of its neighboring states, and the number of African Americans is simply smaller (see table 4). Further, while the legislation itself seems to promote an agenda that furthers some interest groups, social workers may have different attitudes, influencing their adherence to the law.<sup>45</sup> Finally, legislation without appropriations accomplishes nothing for the families involved. If government does not fund the alternatives, by supporting families at risk or making substantial and ongoing payments to financially challenged minority adoptive parents, children may never acquire permanent, loving homes and be very far from the first-best world. We examine each alternative answer to the puzzle of Minnesota's stance on multiethnic adoption in turn.

### III. DEMOGRAPHY, OR A POLITICAL WIN WITH VERY LITTLE COST

Minnesota was first settled, as devotees of Garrison Keillor know well,<sup>46</sup> by northern Europeans of German and Scandinavian descent. The Swedes, Norwegians, Danes and Finns, in particular, brought with them a taste for socialist politics, and they still form a comparatively large part of the population. (Table 2) Unlike its neighbors to the east and south, Minnesota did not attract the automobile manufacturing industry, and with it, the Great Migration of African-Americans. Instead, northern Minnesota developed its iron ore mines and shipping, both of which used northern European immigrants. Four of the counties that make up part of the Minneapolis-St. Paul metropolitan region are home to an overwhelming proportion of the state's African-Americans. The

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45. People in the United States divide about evenly between those who approve of transracial adoption and those who do not. R.S. Bausch & R.T. Serpe, *Negative Outcomes Of Interethnic Adoption Of Mexican-American Children*, 42 SOC. WORK 136-43 (1997); see generally Leslie Doty Hollingsworth, *Sociodemographic Influences in the Prediction of Attitudes Toward Transracial Adoption*, 81 FAMS. IN SOC'Y: THE J. OF CONTEMP. HUM. SERVICES 92 (2000) (showing that overall 71% of the 916 nationally representative sample believed race should not be a factor). Even among African-American females, who had the lowest approval rate, more than half approved (57%). *Id.* However, African-American men had the highest approval rating (85%). *Id.* People with a Republican party affiliation were more likely to approve of transracial adoption, as were people under age sixty-four. *Id.*

46. GARRISON KEILLOR, *LAKE WOBEGON DAYS* (1985), and in his long-running "Prairie Home Companion" show on National Public Radio, wrote and talked about a fictional town in western Minnesota settled mainly by Norwegians and Germans.

same four counties account for nearly 57 percent of Minnesota's manufacturing employment. (Table 3) The counties' manufacturers produce health-care equipment, print materials and publications, fabricated metal products, and computer components.<sup>47</sup> Nearly two-thirds (or 1064/1553) of the children under state guardianship<sup>48</sup> live in the Twin Cities metropolitan area as do about three-quarters of the children already freed for adoption and in need of adoptive homes (604/840).<sup>49</sup> The relatively low absolute number of African-Americans ensures that recruiting of Black adoptive parents will not cost as much as in other states, despite Black over-representation in foster care. (Table 4)

The discipline of public choice studies the intersection of economics and political science.<sup>50</sup> Legislators and other public servants are viewed as rational, self-interested decisionmakers.<sup>51</sup> They will try to do what is necessary to satisfy their own interests, including their political agendas, while doing what is necessary to

47. Manufactures Narrative for Minnesota, *available at* [http://govinfo.library.orst.edu/cgi-bin/econnarr?M\\_01-state.mns](http://govinfo.library.orst.edu/cgi-bin/econnarr?M_01-state.mns).

48. Foster Care Fact Sheet, *supra* note 36 (using the seven counties of the SMSA).

49. *See* Adoption Fact Sheet, *supra* note 37.

50. Jack High introduces the subject as "A Tale of Two Disciplines." JACK HIGH, *REGULATION* (1991). Relatively technical introductions to public choice are DENNIS MUELLER'S *PUBLIC CHOICE II* (1989) (discussing voting rules, logrolling, and, in Chapter 13, the theory of "rent seeking" from legislators) and JAMES BUCHANAN AND GORDON TULLOCK'S *THE CALCULUS OF CONSENT* (1962). A group of readings and commentaries written for law students is MAXWELL STEARN'S *PUBLIC CHOICE AND PUBLIC LAW: READINGS AND COMMENTARY* (1997). *See also* Peter H. Aranson, Ernest Gellhorn & Glen O. Robinson, *A Theory of Legislative Delegation*, 68 *CORNELL L. REV.* 1, 47-51 (1982).

Budget maximizing, jurisdictional expansion, and output maximizing in their various manifestations may increase private payoffs to agency personnel. These payoffs take the form of prestige or job satisfaction, if not the form of higher salaries or greater perquisites. The beneficiaries of regulation may provide additional payoffs through political support of the agency's mission. Agencies thus enjoy positive incentives to seek out new regulatory avenues for allocating private goods to those whom they serve and to develop new clients.

*Id.* at 51.

51. *See* RICHARD McCORMICK & ROBERT TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST GROUP THEORY OF GOVERNMENT* (1981) (generally discussing the legislator as a self-interested decisionmaker); *see also* F. H. Buckley & Margaret F. Brinig, *Welfare Magnets: The Race for the Top*, 5 *SUP. CT. ECON. REV.* 141, 169-71 (1997) (showing that the size of the state's AFDC payment was related to the number of welfare workers employed, a measure of the strength of the interest group).

stay in office, increase their budgets or staffs, or gain political power.<sup>52</sup> If a legislator needs to satisfy a powerful interest group in order to remain incumbent, he or she will do so at the smallest personal cost.<sup>53</sup> For example, it costs less to propose (sponsor) legislation than to see it through to enactment.<sup>54</sup> Further, it costs the legislator (let alone the taxpayers) much less to pass legislation that satisfies a group's agenda than to pass legislation that also requires funding.<sup>55</sup> One explanation for Minnesota's insistence on racial matching could have been this kind of political expediency. Lobbying by the state's Black Social Workers or Black community leaders could have triggered the series of statutes and grudging amendments that make up the Family Heritage and Preservation Act. So long as the legislation did not require funding—for example, to make payments to people of color to adopt minority children so as not to disadvantage them<sup>56</sup> or to provide resources to

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52. See generally Sam Peltzman, *Constituent Interest and Congressional Voting*, 17 J. L. & ECON. 181 (1984) (describing the choice made by a hypothetical legislator as to how much to answer constituents as opposed to the interest groups who will deliver perquisites and perhaps contribute to political campaigns). For an application to regulation, see Asghar Zardkoohi, *On the Political Participation of the Firm in the Election Process*, 51 SOUTHERN ECON. J. 804 (1985) (showing empirically that the amount of campaign contributions a firm makes is positively and significantly related to the percentages of federal and state government outputs purchased by the firm's industry, and whether or not industry-specific regulation was applicable to it).

53. See generally Barry Weingast, et al., *The Political Economy of Benefits and Costs: A Neoclassical Approach to Distributive Politics*, 89 J. POL. ECON. 641 (1981) (describing how programs that impose net social costs can nevertheless be agreed upon through political exchange).

54. Margaret F. Brinig et al., *The Regulation of Lobbyists*, 77 PUB. CHOICE 377 (1993).

55. For articles dealing with the tendency of legislators to support legislation that actually corresponds to their own ideology, see KEITH T. POOLE & HOWARD ROSENTHAL, *CONGRESS: A POLITICAL- ECONOMIC HISTORY OF ROLL CALL VOTING* (1997) (showing predictive power of ideology); Keith T. Poole & Howard Rosenthal, *A Spatial Model for Legislative Roll Call Analysis*, 79 AM. J. POL. SCI. 357 (1985) (same). See generally Joseph P. Kalt & Mark A. Zupan, *The Apparent Ideological Behavior of Legislators: Testing for Principal-Agent Slack in Political Institutions*, 33 J.L. & ECON. 103 (1990).

56. NATIONAL COUNCIL FOR ADOPTION, *ADOPTION FACTBOOK III* 127 (1999) (hereinafter *ADOPTION FACTBOOK III*). Such payments are made to parents adopting "special needs" children. They are about the equivalent of a year's foster care reimbursement. Minnesota is only one of three states that does not classify race as "special needs." *Id.* The others are Colorado and Montana, both of which, like Minnesota, have over ninety-two percent white populations. BUREAU OF THE CENSUS, *STATE AND METROPOLITAN AREA DATA BOOK, 1997-98*, A-5.

It might be that allowing the children to remain in foster care increased the funding for the social work establishment. See Perry, *supra* note 15, at 85

foster parents who might not be sure they wanted to adopt<sup>57</sup>—the public choice explanation might explain at least a part of the story<sup>58</sup> of why Minnesota has followed an agenda of racial matching.

Another low-cost strategy to accomplish racial matching goals would be for legislators to both understand and strike a bargain with the social workers actually involved in adoption. If the legislators thoroughly understood the motivations of the rank-and-file workers who place children, they might know that despite the state's official agenda, these professionals would place children in a less race-conscious fashion.<sup>59</sup>

These two possible public choice explanations can be explored empirically. A test of the first hypothesis would look at who sponsored and testified as to the bills, how many lobbyists represented the Black Social Workers or other African-American groups in the legislature, what size budgets were granted, what new programs were established employing new state workers, such as Minnesota's "Children of Color Outreach" program,<sup>60</sup> and how

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(stating "[a] second reason why some Black children stayed in foster care for such long periods was the financial structure of foster care agencies. It was sometimes more advantageous, from a funding perspective, for agencies to keep children in foster care than to release them for adoption").

57. This seems to be the goal of MINN. STAT. § 256.01, subd. 8 (2000), which allows the DHS to contract with licensed child-placing agencies to provide adoption services. See generally *The African-American Adoption Program, About Us*, at <http://www.aaappa.org/aboutaaappa.htm> (stating "[t]he Minnesota Department of Human Services, Ramsey County Social Services and Hennepin County Children and Family Services, created a partnership to fund and support the State's first full service non-profit adoption agency designed to move children of color from the foster care system to permanent families. The African American Adoption and Permanency Planning Agency, Inc. ("AAAPPA"), opened its doors January, 1998 in Saint Paul.").

58. BARTHOLET, *supra* note 21, at 133 (arguing along the same reasoning, but reaching a different conclusion—she claims that social workers continue to practice racial matching despite the Multiethnic Placement Act). Bartholet also claims that kinship care tends to promote the same goals, as did racial matching. *Id.* at 137.

59. In fact, even when the state was most race conscious in adoption, some black children were placed with white families; for example in 1989, of forty-one black and Hispanic children adopted by third parties, persons of a different race adopted twenty-four. See Glynn, *supra* note 44, at 944.

60. See, e.g., *The African American Adoption Program*, *supra* note 57, at 1; Department of Human Services, State Of Minnesota, Fact Sheets: Children Of Color Outreach, at <http://www.dhs.state.mn.us/Childint/Programs/Childofcolor/Default.htm> (stating that, to help children of color, the program, among other things, "[d]evelops and promotes culturally competent services that strengthen families and communities" and "[i]mplements and promotes policies that meet the educational, social, economic, and health needs of children of color

much was paid as stipends to foster parents<sup>61</sup> and for adoption subsidies.<sup>62</sup> A test of the second public choice hypothesis would look at the number of intra-racial as opposed to interracial placements before and after the passage of the acts (perhaps by county), as well as the racial composition of the social workers making the placements (again, by county), and perhaps the organization membership of the social workers. (For example, some African-American social workers have decided not to join the NASBW because they take a more moderate position on multiracial adoption.)<sup>63</sup> Testing this hypothesis is complicated by the concurrent congressional mandate and incentive program<sup>64</sup> to

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and their families”).

61. See Center for Advanced Studies in Child Welfare, School of Social Work, University of Minnesota, Kinship Care, Practice Notes No. 3, at 2 (April, 1998) available at [http://ssw.chc.umn.edu/cascw/Practice%20Notes/practice\\_notes3.htm](http://ssw.chc.umn.edu/cascw/Practice%20Notes/practice_notes3.htm) [hereinafter Practice Notes]. A child-only grant from MFIP-S (Minnesota Family Investment Plan, formerly AFDC), which does not require an order of custody, gives \$351/month. A child with health problems or severe physical or mental impairment receiving SSI (Supplemental Security Income) receives \$494/month. A licensed foster care provider (relative or not), received \$430-550/month based on the child's age and could receive more based upon difficulty of care. An adoption assistance grant is available when the child has “special needs” and is also available to “a relative who, through a court order, will have physical custody of the child.” *Id.*

62. See North American Council on Adoptable Children, *Minnesota State Subsidy Profile*, at <http://www.nacac.org/stateprofiles/minnesota.html>. Adoption subsidies are only paid for children with “special needs,” which is defined in Minnesota to include members of sibling groups, documented physical, mental, emotional or behavioral disabilities, or a high risk of developing physical, mental, emotional or behavioral disabilities.” The supplemental maintenance, based on severity of the child's disability, ranges from \$150 per month (for children requiring a structured environment with supervision by an adult caregiver”) to \$500 (for children who require “total and entire care and have no self-help capacity or ability to perform basic life sustaining tasks”), in addition to basic assistance, based on the child's age, that runs from \$247 to \$337 a month. *Id.*

63. RITA J. SIMON & RHONDA M. ROORDA, IN THEIR OWN VOICES: TRANSRACIAL ADOPTEEES TELL THEIR STORIES 383 (2000) (the respondent, “Kimberly,” was herself a biracial child adopted by a white family). Patton notes that she interviewed four African American female social workers, one of whom was not a member of the NASBW. Patton, *supra* note 18, at 148. See also Rudolph Alexander, Jr., & Carla M. Curtis, *A Review of Empirical Research Involving the Transracial Adoption of African American Children*, 22 J. BLACK PSYCHOLOGY 223, 233 (1996) (stating “[f]or instance, an African-American social worker, who ironically refused to join NABSW because of its racial views, zealously enforced Massachusetts state policy that allowed any African-American family that passed a criminal history check to be eligible to adopt”).

64. See Proclamation 7048, November 3, 1997 (William J. Clinton) (announcing initiatives to double the number of adoptions from foster care by

speed up adoptions (Adoption and Safe Families Act).<sup>65</sup> To the extent that the goal of preserving biological families (even when biological parents are troubled or request more chances for rehabilitation) differs from opposition to multiracial adoption (with kinship care that may or may not involve termination of parental rights), there is no problem.<sup>66</sup> However, in the United States, race, indigency, and foster care are linked.<sup>67</sup> (Table 5) Some of the opposition to kinship care stems from safety concerns—that the care provider will allow the unfit, or even abusive, parent to have contact with the child. Another way to look

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2002, and stressing department policies that would advance that goal). Congress provided for adoption incentive payments in the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, §201, 111 Stat. 2115 (1998).

65. One press account noted that the law presented “a clear shift from parental rights to a child’s right to a family in a state that for years bent over backward to reunite abused and neglected children with their parents—sometimes at the expense of the children”. Jean Hopfensperger, *Law Puts Child’s Right to Stability First*, MPLS. STAR TRIB., August 23, 1999, at 1B Some indications of the extent to which Minnesota supported parental rights can be found in *In re Welfare of the C. Children*, 348 N.W.2d 94, 99 (Minn. Ct. App. 1984) and *In re Welfare of C.A.W.*, 579 N.W.2d 494, 498 (Minn. Ct. App. 1998) (noting that MINN. STAT. § 260.011 (2)(c) (1996) was nearly identical to the Institute of Judicial Administration-ABA Juvenile Justice Standards, § 1.1 (1981)). The legislation was repealed by Laws 1999, c. 139, art. 4 § 3. See MINN. STAT. § 260C.001, subd. 3 (2000). For a discussion of the pendulum shifts in child welfare policy generally, see SCHNIEDER & BRINIG, *supra* note 33, at 1001. In Minnesota, “[f]amilial preservation has been recognized as the primary goal of child welfare services, with intensive home-based services serving as the vehicle for the delivery of reunification services.” Wattenberg et al., *supra* note 32, at 406. Elizabeth Bartholet might call this “biologism.” BARTHOLET, *supra* note 13, at 1172. Bartholet says the statute was the culmination of a “permanency movement” whose goals “were to ensure that, to the degree possible, children were either kept in their birth families or moved promptly to adoptive families, so that they would be able to enjoy the benefits of continual, committed parenting,” and argues for adoption as the presumptive placement for all children who could not live with their parents of origin. *Id.* at 1173.

66. See generally Charlene Ingram, *Kinship Care: From Last Resort to First Choice*, 75 CHILD WELFARE 550-66 (1996) (stating that “[k]inship care should be defined from a family preservation perspective. The family preservation perspective recognizes the strength of families, the positive influence of family bonds on the growth and development of children, and the preservation of culture.”). When surveyed, Black women opposed transracial adoption the most; Black men liked it the least. See Bausch & Serpe, *supra* note 45, at 4.

67. See Hopfensperger, *supra* note 65 (stating that “the new law is deeply entangled in issues of race. About 48% of the children who move through Minnesota’s foster care system each year are black; about 35% are white, according to the human services department. Blacks who are critical of the law say it disproportionately targets the most vulnerable members of their community and holds them to impossible standards.”).

at this data is to look at the lengths of time in foster care, see Table 8. (Tables 6, 7, 8)

Nationwide, fifty percent of the children who exited foster care between October 1, 1998 and March 31, 1999 did so in less than one year.<sup>68</sup> During fiscal 1999, 43% of the 46,000 children who were adopted from public foster care were Black non-Hispanic.<sup>69</sup> Sixty-four percent of these 46,000 children were adopted by foster parents, and another sixteen percent were adopted by other relatives.<sup>70</sup> In Minnesota, 21.8% of the foster-care (called out-of-home care) children were Black, though Blacks comprise only 4.1% of the general population. American Indians made up 11.1% of the children in foster care, and 1.8% of the population, while whites made up 58.8% of the foster care population, but 87.2% of the general population.<sup>71</sup> (Table 9)

However, while there have been adoptions from foster care, and the number is growing, other considerations show that the children involved seem to be paying a price for adherence to family preservation policies. (Tables 8, 9, 10) Since a higher percentage of black children were adopted than were staying in foster care, arguably agency workers were not holding back children because of racial considerations. However, the length of time Minnesota children remain in foster care is much higher than in the surrounding states and the rate of foster care children adopted is far slower. (Tables 7, 8)

Despite the fact that a policy strongly favoring intraracial adoption would not seem difficult to implement, given the relatively low number of non-white children available for adoption anyway, Minnesota's rule apparently did have effects. In other words, social workers, in addition to legislators, were taking concerns about multiethnic adoption seriously.<sup>72</sup> White adoptive

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68. U.S. Department Of Health And Human Services, Administration For Children And Families, Administration On Children, Youth And Families, Children's Bureau, *The AFCARS Report 3* at <http://www.Acf.Dhhs.gov/Programs/Cb> (Current estimates as of October 2000).

69. *Id.*

70. *Id.*

71. Department Of Human Resources, State Of Minnesota, Fact Sheets: 1998 Children in Out-Of-Home Care Report: 3. Race or Heritage of Children in Care (1994-1998), at <http://www.dhs.state.mn.us/Childint/Research/Outofhome98/Indicator3.Htm>.

72. BARTHOLET, *supra* note 13, at 1195. She indicates that they may have been under considerable pressure to do so:

Rules requiring social workers to provide documentation of their

parents have reacted by getting children internationally at a much higher rate than in other states.<sup>73</sup> Therefore, Minnesota showed one of the lowest rates of movement out of foster care (prior to the federal incentive program), and, even through 1997, one of the lower rates of adoption among its neighboring states.<sup>74</sup> (Table 9) The insistence, through the Adoption 2000 Incentive Program, on quick removal from birth parents contradicts longtime Minnesota policy.<sup>75</sup> Minnesota, at least as of late 1998, was not in compliance with the AFCARS standards.<sup>76</sup>

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minority family recruitment efforts before transracial placements will be permitted place the social worker who contemplates making such a placement in the position of doing additional work and incurring the other costs involved in making an exception to the general rule. Such a social worker also risks invoking the wrath of the NABSW and other vocal critics of transracial adoption. The overburdened and underpaid adoption worker has every incentive to avoid the multiple troubles promised by transracial placement.

*Id.*

73. Jean Hopfensperger, *International Adoption: The Long Journey Home*, MPLS. STAR-TRIB., December 28, 1996, at E1 (saying more orphans from abroad than families in any other states). About twice as many Minnesota adoptions are intercountry (35.3%), as compared to the national average (17.2%). ADOPTION FACTBOOK III, *supra* note 56, at 37 and Table 5. This is the highest of any state except Connecticut (40.4). Two other states over 30 are New Jersey 31.8, and Hawaii, 31.9.

74. ADOPTION FACTBOOK III, *supra* note 56, at 71. The rate of adoption in 1997 for Michigan was 6.25/10,000; Minnesota 4.13/10,000 and Wisconsin 4.76/10,000. *Id.*

75. Hopfensperger, *supra* note 65 (noting, “[i]t’s a dramatic shift in a state that for years bent over backward to reunite abused and neglected children with their parents—sometimes at the expense of children”). Child Placement Act, ch. 178 Art. 1 §4 (2001) (codified as amended at MINN. STAT. § 260.12 (1997)). Under concurrency planning, two tracks are pursued simultaneously—reunion and permanent home, preferably with relatives. The older tracking system was for union and adoption, requiring placement with families that agree to help the biological parent reunify with their children but also pledge to adopt the children if the parent doesn’t meet the timelines. There is a six months timeline before termination of parental rights for children under eight and their siblings. For children abandoned as infants, who spent fifteen of the previous twenty-two last months in foster care, or who have been exposed to “egregious harm,” or whose parents have lost parental rights to other children, courts can proceed directly to adoption. About forty-eight percent of children who Minnesota’s foster care system each year are black, compared to thirty-five percent who are white. The statute contains much language such as “culturally appropriate.” *Id.*

76. The most recent compliance report available on the Department website, Status On States’ Conformity With AFCARS Standards, is dated March 31, 2000. The following tables list states that have been determined to be in substantial compliance with the AFCARS standards for both the foster care and adoption files for the designated time period. It does not include Minnesota, but lists thirty-

Minnesota's heritage and history are intimately [c]onected to its Native American population. Reflections of this influence can be seen in place names throughout the state, including the state name itself, which comes from Dakota Sioux word for sky-tinted water.<sup>77</sup> Much more important, the state seems to be the only one with a flourishing Native-American Foster Care Program.<sup>78</sup> The greater concentration of American Indian children has meant that sensitivity to cultural issues is already in place.<sup>79</sup> (Table 4)

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three other states, including Illinois and Iowa (but not Wisconsin or Michigan). Status on States, *Conformity with AFCARS Standards*, at <http://www.acf.dhhs.gov/programs/cb/dis/afcars/conformity.html>.

77. All About Minnesota, North Star, Minnesota Government Information and Services, at <http://www.state.mn.us/aam>.

78. Jason Begay, *Foster Program Pairs American Indians: Goal Is To Retain Culture And Values*, DULUTH NEWS-TRIB., August 2, 1999, at 1A (noting that "[t]he Fond du Lac Foster Care Licensing and Placement Agency is the only agency in the nation that focuses on placing Indian children who live outside of their reservations with Indian foster homes."). Because it was administered by the tribe, the foster parents were not licensed in the usual way (and, according to the woman interviewed in the article, might not have qualified as traditional foster parents).

'We never would have become licensed by the county,' said Gawboy, 46, whose husband is a member of the Bois Fort Band of Ojibwe. 'We don't have to explain (to the Fond du Lac program) why we live the way we do, why we smudge the house down with sage or why we go to Canada for a powwow,' she said. 'They get it because they are a part of the culture we live in.'

*Id.*

79. While African-Americans can point to the separation of families that frequently occurred because of slavery, American Indians have the more recent experiences of Indian boarding schools designed to remove children from the "uncivilized" reservation and fit them for mainstreaming into American society. PEGGY COOPER DAVIS, *NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES* 81-166 (1997) ROBERT BENSEN, ED., *CHILDREN OF THE DRAGONFLY: NATIVE AMERICAN VOICES ON CHILD CUSTODY AND EDUCATION* (2001). The Indian Child Welfare Act requires that decisions involving custody and adoption of children who are members of Indian tribes, or whose parents are members, be heard by Indian tribunals. Further, the Act gives priority first to the child's extended family, second to members of the child's tribe, and third to other Indians. 25 U.S.C. § 1915(a) (1994).

Minnesota was among the original states calling for the ICWA and continues to be sensitive to these concerns. See Minnesota Department of Human Services, Minnesota Tribal Agreement on Indian Child Welfare 108-09 (stating "[p]rior to 1978, Indian children were being placed in foster care at a nationwide rate 10-20 times that for non-Indian children. These children often lost all connections with their families, extended families, tribes, and cultural heritage."). See also Bensen, *supra* note 79 (stating that Indian boarding schools are designed to remove children from the "uncivilized" reservation and fit them for mainstreaming into American society); Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 50 (1989) (discussing that Congress enacted ICWA because

Heightened sensitivity, however, may not translate well from one group to another.

#### IV. THE SUBSTITUTE—KINSHIP FOSTER CARE

Opponents of transracial adoption propose kinship care as a substitute preferable to adoption of Black children by white parents.<sup>80</sup> By kinship care they mean permanent placement with extended family members who usually will not adopt the child.<sup>81</sup>

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of concerns going beyond the wishes of individual parents, finding the removal of Indian children from their cultural setting seriously impacts on long term tribal survival and has a damaging social and psychological impact on many individual children). Minnesota not only was among the original states calling for the ICWA, but also passed the Minnesota Indian Family Preservation Act (MIFRA), MINN. STAT. §§ 260.751-260.835, in 1985, and continues to be sensitive to these concerns. *See, e.g., In re Welfare of S.N.R.*, 617 N.W.2d 77 (Minn. Ct. App. 2000) (concluding tribe's judgment that a child being placed for adoption is an Indian Child is conclusive on that issue, so that foster parents were unable to avoid placement under ICWA); *In re Custody of S.E.G.*, 521 N.W.2d 357, 358 (Minn. 1994) (stating "[a]t issue is whether the placement preferences provision of the Indian Child Welfare Act (ICWA), 25 U.S.C. § 1915 (1988), provides a 'good cause' exception for 'extraordinary emotional needs' based on a child's need for permanence in the form of adoption; also at issue is whether the record in this case supports the trial court's findings that these children had extraordinary emotional needs and that there was an 'unavailability of suitable families for placement' after a diligent search. We hold, while good cause may include a child's need for stability, this is not equivalent to a need to be adopted. We also hold that, in this case, the record failed to support the trial court's findings that these children have extraordinary emotional needs."). The MIFPA provides in section 5 that "best interests of the Indian child" means implementation of the policies and placement preferences set forth in the ICWA. Meeting the best interests of the Indian child requires recognition of the importance of maintaining connections with family, siblings, extended family, the tribe, and the child's cultural heritage, and requires knowledge and understanding of the damage caused by loss of identity for Indian children. *In re Custody of S.E.G.* 521 N.W.2d at 362 (citing 25 U.S.C. § 1902 (1994)).

80. 42 U.S.C. § 1320a-9 was amended in 1997 to give States the authority to conduct demonstration projects, including kinship care projects under 42 U.S.C. § 5113. Adoption and Safe Families Act of 1997, 42 U.S.C. § 671(a)(15) (Supp. V. 1995-2000) provides that "in determining reasonable efforts [toward family preservation and reunification] to be made with respect to a child, as described in this paragraph, and in making such reasonable efforts, the child's health and safety shall be the paramount concern." Family reunification services were authorized under 42 U.S.C. § 629a(a)(7) (Supp. V. 1995-2000) only for the fifteen-month period that begins on the date the child enters foster care.

81. For a good general description, see Ingram, *supra* note 66. Ingram defines kinship care as "the full-time nurturing and protection of children who must be separated from their parents by relatives, members of their tribes or clans, godparents, stepparents, or other adults who have a kinship bond with a child." *Id.* U.S. Department Of Health And Human Services, Children's Bureau, PART I,

Advocates of kinship placement suggest that it more closely resembles traditional African-American patterns of caregiving when parents are unable to take care of their children.<sup>82</sup> In most cases, kin caregivers are grandmothers; sometimes they are aunts or other relatives of the child.<sup>83</sup> They differ from unrelated foster parents

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RESEARCH REVIEW at vi (1999) (hereinafter RESEARCH REVIEW), indicates that in 1997, approximately 20,000 children, or twenty-nine percent of all foster children, were in public kinship care.

Children in kinship care are also less likely to reunify with their birthparents than those in foster family care. Jill D. Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, 8 THE FUTURE OF CHILDREN: PROTECTING CHILDREN FROM ABUSE AND NEGLECT 72, 81 (1998) (citing studies). African American children in kinship homes supported by a foster care subsidy remain in care approximately twice as long as all other children. *Id.* at 82..

82. See Practice Notes 3, *supra* note 61, at 5 (citing Faith Johnson Bonecutter & James P. Gleeson, *Achieving Permanency for Children in Kinship Foster Care: A Training Manual* (listing strengths of African American families: "strong respect for elders and a tradition of caring for elders and children; high value placed on children as gifts from God and the continuity of Black people; high value placed on education and willingness to sacrifice to educate the younger generation; work/achievement orientation as a pro-social behavior and a way to uplift self and others; extended family relationships that provide its members with a source of connection attachment, validation, worth, recognition, respect, and legitimacy; elasticity of boundaries and flexibility of roles that allows the family to meet the needs of its members, particularly under conditions of hardship; expresses the value orientation of community, kinship obligation, and male-female equality; value placed on 'mutual aid', a reciprocal effort made by family members to pool resources necessary to sustain and move a family forward; a tradition of self-help and practice of cooperation and sharing.")). The Manual describes similar values held by Native Americans, coming from B.J. Burgess, *Parenting in the Native American Community*, in PARENTING IN A MULTI-CULTURAL SOCIETY 63, 66 (Mario D. Fantini & René Cárdenas eds., 1980):

Children—from birth—are regarded as important units of the family and heirs to its concerns and belongings. Children are considered . . . by Native Americans . . . as more important than material possessions; Songs and lullabies sung to children by the parent and grandparents carry messages of hope and aspiration, the appreciation of beauty, sharing, and physical strength (so as to be of service to each others); Families engage only in those social activities which include their children; if the children cannot go, no one goes . . . . Respectfulness is taught by example as well as by precept . . . . Respect is paid to a large number of worthy objects . . . parents, grandparents, members of the extended family, elderly people, various totem animals and objects, and various abstractions such as natural beauty and nature, dignity, and modesty.

Practice Notes, *supra* note 61, at 6.

83. Ingram, *supra* note 66. Ingram notes that ninety-three percent of the kinship caregivers are female. Almost half the children were placed with a grandmother; many of the others were with an aunt. See generally Howard Dubowitz & Susan Feigelman, *A Profile of Kinship Care*, 72 CHILD WELFARE 153-70

because they frequently have ongoing relationships with the child.<sup>84</sup> Kin caregivers tend to be older than many other foster parents,<sup>85</sup> less wealthy,<sup>86</sup> and more likely to hold employment outside the home.<sup>87</sup> They are predominantly African-American,<sup>88</sup> though kinship care is also used by families of other races in Minnesota.<sup>89</sup> Normally they do not usually expect to become foster parents, so, in Minnesota and elsewhere, they tend to have less training than do unrelated foster parents,<sup>90</sup> and they less often seek the services provided by human resources.<sup>91</sup> The United States Supreme Court mandated that kin caregivers be eligible to receive welfare payments, just as are unrelated foster parents,<sup>92</sup> on behalf of the children in their care. Unlike unrelated foster parents, however, they are to be considered families for purposes of child removal and must be given hearings and due process protection.<sup>93</sup>

Minnesota studied kinship care even before the federal suggestion to do so.<sup>94</sup> Though, as its authors point out, the study (of three counties, including Hennepin, Anoka and Blue Earth Counties) has some drawbacks, Minnesota families, social workers

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(1993). In Hennepin County, kinship care providers were predominantly female, regardless of racial group, and most often were grandparents or aunts/uncles. BEEMAN, ET AL., *supra* note 40, at iii (1996).

84. BEEMAN ET AL., *supra* note 40, at x; Research Review, *supra* note 81, at 41.

85. Ariel Sokol, The Urban Institute, *Kinship Care: An Explanation*, at <http://www.amherst.edu/~aesokol/kinship.htm> (last visited Oct. 8, 2001); Berrick, *supra* note 81, at 78 & Table 2; SUSAN J. WELLS & JEAN M. AGATHEN, CHILD AND FAM. RES. CENTER, SCH. OF SOC. WORK: U. Ill. At Urbana-Champaign, *Evaluating the Quality of Kinship Foster Care: Final Report* 45 (1999).

86. RESEARCH REVIEW, *supra* note 81, at 37.

87. Berrick, *supra* note 81, at 78 & Table 2.

88. In Philadelphia, eighty-eight percent of the children in kinship care are African-American. Ingram, *supra* note 66, at 5.

89. BEEMAN, ET AL., *supra* note 40, at iii (stating that “[t]he majority of children in both types of care were children of color, although the proportion was slightly higher in kinship foster care in Hennepin County.” However, in Hennepin County 18.4% of the American Indian children (175) were placed in kinship care while 17.4% of the white children (166) were in kinship care situations; while 98.3% of the 58 kinship placements in Anoka County were white.” *Id.*

90. WELLS & AGATHEN, *supra* note 85, at 39.

91. *Id.*, at 5. BEEMAN ET AL., *supra* note 40, at vi; RESEARCH REVIEW, *supra* note 81, at vii.

92. *Miller v. Youakim*, 440 U.S. 125, 145 (1979).

93. *Rivera v. Marcus*, 696 F.2d 1016, 1028 (2d Cir. 1982)

94. Adoption and Safe Families Act of 1997, Pub. L. No. 105-89 §201, 111 Stat. 2115 (1997) (codified as amended at 42 U.S.C. §§ 1320a-9, 5113 (West Supp. 2001)). BEEMAN, ET AL., *supra* note 40.

and judges seem to be considering kinship care a viable option in a significant number of cases.<sup>95</sup> Though we know from the Minnesota and other studies that children in kinship care are less likely to be adopted than other children,<sup>96</sup> that they move less often,<sup>97</sup> and that they do not seem to do any worse by most measures than other children in foster care,<sup>98</sup> no study to date has

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95. *Id.* During 1994, about one-third of the children placed in Hennepin County were in kinship placements, while in Anoka about 10 were, and none were in Blue Earth County.

96. Ingram, *supra* note 66, at 6. Ingram notes a study done by J.L. Thornton, *Permanency Planning for Children in Kinship Foster Homes*, 70 CHILD WELFARE 593 (1991), suggesting that seventy percent of the care providers surveyed said they would not adopt the child because they “already were a family.” See also WELLS & AGATHEN, *supra* note 85, at 48. “Kinship foster parents were much more likely than nonkin to say that they would be willing to adopt the foster child.” BEEMAN, ET AL., *supra* note 40, at vii. Those who were not interested in adoption either said they could not afford to adopt or that adoption was unnecessary “because the child was already family.” *Id.* For a description of such feelings in both his own extended family and in his law practice, see Holmes, *supra* note 42, at 1649. Holmes discusses the Black approach to child-rearing by extended families. *Id.* at 1659-67. He argues for continuation of such practices as meeting a child-centered approach. *Id.* at 1670-71 (stating that “[t]he African-based, Black extended family system provides an experienced model for a child-center complex family structure that promotes the interests of children over competing individual and societal concerns”). *Id.* at 1685.

97. See generally Howard Dubowitz, *Kinship Care: Suggestions for Future Research*, 73 CHILD WELFARE 553 (1994).

98. An early (and continuing) concern stems from studies that suggest an intergenerational cycle of family violence and question the ability of relatives who had influence over abusive or neglectful parents. Ingram, *supra* note 66; Dubowitz & Feigelman, *supra* note 83 (studying kinship caregivers in Baltimore, Maryland). Dubowitz and Feigelman also suggest that “boundaries and responsibilities might be difficult to negotiate within families. For example, it might be awkward for a grandmother to restrain her adult daughter from assuming responsibility for her child, even if this places the child at serious risk.” *Id.* However, non-kin foster parents were twice as likely as licensed kinship foster parents to have confirmed report of maltreatment. Berrick, *supra* note 81, at 79 (stating that “[w]hile the data is recent and researchers are unsure about its veracity, studies indicate that there are no significant differences in education and behavioral performance between relative and non-relative placed children. However . . . a greater higher percentage of traditional foster care children have more serious mental health problems than do those children placed in kinship care”). Sokol, *supra* note 85. In Minnesota, “[t]he most common reason for removal among kinship cases in Hennepin County was parental substance abuse, followed by child neglect.” BEEMAN ET AL., *supra* note 40, at iii; see Berrick, *supra* note 81, at 73 (concluding “that despite their relatively disadvantaged status in terms of age and income, kin caregivers typically offer children a safe and nurturing environment”). A majority of professionals felt that “children placed in kinship foster homes seem to demonstrate a stronger sense of belonging in the foster family than do children who are in nonkinship foster homes.” BEEMAN, ET AL., *supra* note 40, at 82, Table

compared the results of kinship care with those of adoption (whether by a same-race third person or transracially). Because kinship care costs the state money (since kinship providers, who are less wealthy on average than are adoptive parents, frequently receive subsidies), if the overall concern is individual child welfare, it would seem important to make the attempt.

In other words, are kin caregivers accurate when they say “we are family anyway,”<sup>99</sup> and then refuse to adopt?<sup>100</sup> Because kin caregivers tend not to be as wealthy<sup>101</sup> as adoptive parents (of whatever race), we would also need to factor out any difference poverty might make from differences caused by adoption.<sup>102</sup> “Foster

5-23. The percentage increased to more than 80 percent for respondents of color. “Children in kinship care appear to have significantly higher well-being than children in non-kin foster care.” RESEARCH REVIEW, *supra* note 81, at 38. [Note the selection bias problem: they come in without histories of abuse, behavioral problems or mental illness.]

99. Berrick, *supra* note 81, at 82 (citing studies) (stating that “[o]pinions vary widely about whether it is sufficient for children to attain informal permanence, but legal impermanence, with kin caregivers”). *Id.* Lisa Doty Hollingsworth, *Promoting Same-Race Adoption for Children of Color*, 43 SOC. WORK 104 (1998) (noting, “[b]ecause adoption has been interpreted by African-Americans as an informal process many African-Americans are resistant to formally adopting the kin who are in their care”).

100. See generally Kathleen S. Marquis & Richard A. Detweiler, *Does Adoption Mean Different?: An Attributional Analysis*, 48 J. PERS. & SOC. PSYCH. 1054 (1985) (concluding that performance of adopted children is better than children of single parents).

101. Neglect is the most common reason for removal of a child into kinship care, with two-thirds of the children placed in kinship care because of neglect or abandonment without having been abused. Dubowitz & Feigelman, *supra* note 83 (observing that “[f]ewer than half the caregivers had completed high school and more than half were not employed; this probably reflects the low-income, inner-city publication involved with the Department of Social Services. Although these families may have been lacking financial resources, it is striking how willing they were to take care of the children”). *Id.*

102. In other words, we might be confounding two variables. For another example, children of single mothers were found to do much worse by many measures than those living in two parents families. But much of the difference can be eliminated when poverty is taken into account. See, e.g., SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT: WHAT HURTS? WHAT HELPS?* (1994); Sara McLanahan & Karen Booth, *Mother-Only Families: Problems, Prospects and Politics*, 51 J. MARR. & FAM. 557 (1989) (examining aspects of mother-only families, finding high economic insecurity in mother-only families because of low earnings, lack of child support and meager public benefits, and arguing that struggle of mother-only families reflects societal struggles around changes in women’s roles, relationship between state and family, and class and racial inequality). See generally National Center for Children in Poverty, *Young Children in Poverty: A Statistical Update* (June 17, 1999) (stating that in 1997, children under age six living with single mothers were five times as likely to be poor (56 percent)

parents are the biggest group of parents who adopt wards of the state.”<sup>103</sup>

On a cautionary note, were kinship care and adoption results to be studied here, because of the unique characteristics of Minnesota, particularly its relatively small minority population, it would be important for other jurisdictions not to extrapolate from the experience in this state.<sup>104</sup> In other words, it may not be valid to

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as were those living with both parents (11 percent) and 57 percent of the poor children under age six lived with single mothers).

103. Jean Hopfensperger, *Program Offers Aid in Adoption of Foster Kids*, MPLS. STAR. TRIB., Jan. 11, 1998, at 1B. Hopfensperger noted that the Supported Adoptions Program received \$600,000 for three years from U.S. Department of Health and Human Services to run a camp for foster children about to be adopted, creation of adoption “rituals,” and to give therapy for attachment disorders. *Id.* In 1997, 130 foster children were adopted in Hennepin County, up from fifty in 1993. *Id.* About forty percent of Minnesota’s foster children live there. *Id.* About 310 foster children were adopted statewide in 1996, while 1150 were adoptable (parental rights had been terminated). *Id.*

104. An example of this problem of extrapolating Minnesota results to other states comes from the work on family violence reported by Lawrence Sherman and others based on a very well-conceived study done in Minneapolis. Lawrence W. Sherman & Richard A. Bert, *The Specific Deterrent Effects of Arrest for Domestic Assault*, 49 AM. SOC. REV. 261 (1984). Sherman’s early work showed that the publicity of mandatory arrest of domestic abusers resulted in a lower recidivism rate than did more traditional approaches to domestic abuse complaints made to law enforcement officers. Lawrence W. Sherman & Ellen G. Cohn, *The Impact of Research on Legal Policy: The Minnesota Domestic Violence Experiment*, 23 L. & SOC’Y. REV. 117 (1989). More traditional responses might be separation of the spouses for a cooling off period, a lecture by the police officer, or the issuance of a restraining order. *See, e.g.*, CAL. FAM. CODE §§ 6200 et seq. (West 1994); SCHNEIDER & BRINIG, *supra* note 33, at 228-47. The single most frequent reform these days, based on Sherman’s study, is mandatory arrest. *See, e.g.*, Evan Stark, *Mandatory Arrests of Batterers: A Reply to Its Critics*, DO ARRESTS AND RESTRAINING ORDERS WORK?, 115, 141-45 (Eve S. Buzawa & Carl G. Buzawa eds., 1996) (criticizing arguments that mandatory arrest policies “disempower” battered women); Dennis P. Saccuzzo, *How Should the Police Respond to Domestic Violence: A Therapeutic Jurisprudence Analysis of Mandatory Arrest*, 39 SANTA CLARA L. REV. 765, 787 (1999) (concluding that a “therapeutic jurisprudence” may be more effective punishment); Marion Wanless, *Mandatory Arrest: A Step Toward Eradicating Domestic Violence, But Is It Enough?* 1996 U. ILL. L. REV. 533, 568 (1996) (recommending mandatory arrest as a step to end domestic violence). For a statutory example, *see* IOWA CODE §§ 236.12, 708.2A, 907.3 (2001). The problem is that when money and court permission was obtained to replicate the study in six other cities, the results were quite different and in some cases completely opposite. Lawrence W. Sherman et al., *Crime, Punishment and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOC. REV. 680 (1992). As Sherman himself reported, the original conclusion works in homogeneous populations and in those where the bulk of the offenders are employed (i.e., have reputations to maintain). *See* Lawrence W. Sherman et al., *The Variable Effects of Arrest on Criminal Careers: The Milwaukee Domestic Violence Experiment*, 83 J. CRIM. L. & CRIMINOLOGY 137, 168

look at Minnesota for predictive value in other states.

## V. THE TRANSRACIAL ADOPTION DEBATE

A speech given in 1972 polarized two views on multiethnic adoption that until then had been quite uniform among people of goodwill. The liberal community until that time supported transracial adoption as part of a “color-blind” agenda<sup>105</sup> that would forever dismantle segregation<sup>106</sup> and racism.<sup>107</sup> Since then,

(1992). When the domestic abuse offender has less stake in community or employer reputation, mandatory arrest may cause more rather than less recidivism. Lawrence Sherman, *Should Police Officers Be Required to Arrest Abusive Husbands?* 8 HEALTH 32, (1994). The follow-up studies have been largely ignored, apparently, by state legislatures working on domestic violence laws. The more pressing the problem, the less likely policymakers will be to wait until they have enough evidence to make critical decisions.

105. See Valerie Phillips Hermann, *Transracial Adoption: “Child-Saving” Or “Child-Snatching,”* 13 NAT’L BLACK L. J. 147, 161 (1993) (relating a story about a father explaining differences and essential similarities to his Black child using brown and white eggs (citing Janet Lifshin, *Good Eggs, All*, 39 INTERRACE (May/June 1992))). But see Perry, *supra* note 42, at 38. Perry calls this the “liberal colorblind individualism” and contrasts it with “color and community consciousness” of Black legal scholars. Perry says that while a “white woman wishing to adopt a Black child may feel that mothering is a colorblind activity, . . . most Black women feel that a unique part of their experience of mothering is to transmit the experience of coping as a Black woman in this society to their daughters.” *Id.* at 63.

However, some parents who have adopted transracially disagree:

Race matters. We believe that holding fast to the stance that love can and should be colorblind (of course it should!) ignores the more complex reality of institutional, societal and internalized racism and so is seriously misguided and potentially damaging to children. When parents are raising a child of a race different from their own, the parent’s lack of experience with the race or ethnic background of the child’s birth heritage creates challenges for all members of the family. When those parents are white and lack first-hand experiences with racial bias and stereotyping directed towards them, their learning curve to understand and anticipate their children’s life experience is likely to be a long one.

STEINBERG & HALL, *supra* note 26, at 9; see also PATTON, *supra* note 18, at 22 (stating “[a] ‘color-blind’ view of race denies both the existence of systemic racism and the salience of racial and cultural difference in a racially stratified society, while claiming the moral high ground of racial ‘neutrality.’”) Patton explains how much the Multiethnic Placement Act related to the Parental Responsibility Act that ended AFDC. *Id.* at 22-24.

106. Bartholet, *supra* note 13, at 1176-81 (discussing early and mid-twentieth century practices of racial matching to maintain white racial purity).

107. See SIMON & ALSTEIN, *supra* note 43, at 11 (stating that adoptions of biracial or black infants are less expensive than white infants); SIMON & ROORDA, *supra* note 63, at 232-33, 260-61 (telling vignettes of the Dutch-American families

interracial marriages (and biracial children)<sup>108</sup> have continued to become more common, and many well-meaning people have continued to provide needy children with good homes, regardless of their skin color.<sup>109</sup> However, many progressive-leaning African-Americans have held views at odds with this policy. Led by social worker William Merritt<sup>110</sup> and the National Association of Black Social Workers,<sup>111</sup> the alternative view maintains that transracial adoption is neither good nor benign. Although some of these dissenters claim to have nothing against transracial adoption,<sup>112</sup> they maintain that remaining in the Black community, whether with birth families, with extended families, or with friends, provides

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raising black or biracial children).

108. Teresa M. Cooney & M. Elise Radina, *Adjustment Problems in Adolescence: Are Multiracial Children at Risk?* 70 AM. J. ORTHOPSYCHIATRY 433, 433 (2000) (noting that U.S. census data for 1997 showed that about six percent of married partners were of different races, while approximately 100,000 multiracial children were born each year in the 1990s). Cooney and Radina used the National Longitudinal Study of Adolescent Health to show that there were few differences between multiracial adolescents and minority children in general. *Id.* at 435.

109. JOYCE LADNER, MIXED FAMILIES 50 (1977).

110. Perry, *supra* note 42, at 46; LADNER, *supra* note 109, at 74-77. Ladner documented that the earliest case of a transracial adoption involving a Black child and white adopted parents was in 1948 in Minneapolis. *Id.* at 56.

111. The NASBW stated:

Black children should be placed only with Black families whether in foster care or for adoption. Black children belong physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in White homes are cut off from healthy development of themselves as Black people.

*Id.* at 75. See also James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 502 (1988) (noting the NABSW's position against transracial adoption contributed significantly to the decline of the practice).

112. Perry, *supra* note 15, at 163-64. Perry notes:

Adoption is an important institution. It provides an opportunity for people to experience the joys and challenges of parenthood. More importantly, it provides the opportunity for children to have homes who otherwise might not have them. A feminist analysis should support adoption as an institution, but at the same time should be willing to question the justice of a world which often results in the transfer of children of the least advantaged women to the most advantaged. There must be some commitment to eradicating the racism, economic exploitation and patriarchy that is often a factor that affects a woman's ability or choice to raise her own children.

*Id.*

greater benefits to the child involved. Should termination of the original family be needed, they would prefer adoption by Black parents, even those of more modest means,<sup>113</sup> to adoption by other couples.<sup>114</sup> They stress the need for the Black child to become aware of his or her own identity as a Black person<sup>115</sup> and to acquire skills necessary to cope in a world filled with racism.<sup>116</sup> They suggest investing first in resources to aid fragile families,<sup>117</sup> in other words,

113. See Hermann, *supra* note 105, at 157-59.

114. See Howard, *supra* note 22, at 533 (suggesting that intraracial adoptions are the least detrimental alternative for Black children).

115. See Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 945-50 (1994) (discussing the questions of "racial identity" and Black culture").

116. Perry calls this transmission "survival skills." Perry, *supra* note 42, at 64 (referring to "complex skills for dealing with the subtle racism in our society"). In addition, some have pointed to the possibility of cultural genocide for African-Americans, as the children adopted by white parents "become white." See Bartholet, *supra* note 13, at 1220 (quoting the NABSW: "[i]t is their (White people's) aim to raise Black children with White minds . . . . We are on the right side of the transracial adoption issue. Our children are our future."); Howe, *supra* note 17, at 471 (stating, "[w]hat some scholars and policy makers seem to miss in their advocacy of TRA is that it is a form of 'cultural genocide'."). See also Hermann, *supra* note 105, at 160 (stating, "[M]ost supporters of the NABSW viewed transracial adoption as a conspiracy to destroy the Black race."). Hermann suggests that the Black social worker community is divided on this issue since otherwise many Black children would spend much of their childhood in foster care, and "a White home is better than no home." *Id.* (quoting Bartholet, *supra* note 21, at 77). Hermann herself suggests that "when there are enough Black families volunteering to adopt all homeless Black children, there will no longer be a need for White adoptive parents to do so. We should strive to find the best possible home for Black foster children, not just a Black home." *Id.* at 164; see also David L. Wheeler, *Black Children, White Parents: the Difficult Issue of Transracial Adoption*, THE CHRON. OF HIGHER EDUC. at A9 (Sept. 15, 1993) (quoting Anita Allen as saying "the empirical research Professor Bartholet cited does not invalidate the concerns of black nationalists who argue that the adoption of black children by white parents erodes the economic, political, and cultural bases of black social life . . . . Black nationalism demands more of children of African-American descent . . . than that they look black, feel subjectively happy, do well in school, and find success in the workplace. Blacks reared by whites will, some fear, learn to think 'white' and to prefer the companionship of whites."); see also U.N.: *Convention on the Rights of the Child*, art. 20, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (1989) (stating, "3. Such [temporary or permanent] care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.").

117. See, e.g., Samella B. Abdullah, *Transracial Adoption is Not the Solution to America's Problems of Child Welfare*, 22 J. BLACK PSYCHOL. 254, 255 (1996) (stating that "[w]omen who are overburdened emotionally, socially, and economically could use the assistance of the government. The assistance could be in the form

in family preservation (also the goal in Minnesota). Second, they advocate recruitment and support of more Black adoptive parents,<sup>118</sup> including those who might not fit the standard profile of an adoptive parent held by child welfare professionals or judges. Third, they tout encouraging kinship care providers who will provide loving care and continuity for Black children.

The political debate turned into a battle of empirical studies beginning in the 1990s with the publication of Rita Simon and Howard Altstein's well-known study.<sup>119</sup> Literally dozens of empirical studies since then have compared Black children adopted by white parents to those raised by single mothers, foster parents and unrelated Black adoptive families.<sup>120</sup> Most recently, some opponents

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of financial assistance, skills training, employment assistance, or open and adequate housing.”).

118. Minnesota has in fact done this since the very beginning. See LADNER, *supra* note 110, at 60 (discussing Parents to Adopt Minority Youngsters, formed in 1957). Blacks already adopt at twice the rate (4% versus 2%) than white families do. STEINBERG & HALL, *supra* note 26, at 140.

119. SIMON & ALTSTEIN, *supra* note 43, at 9. Follow-up studies include RITA SIMON & HOWARD ALTSTEIN, ADOPTION, RACE AND IDENTITY, FROM INFANCY THROUGH ADOLESCENCE 1-2 (1992). The studies are criticized in Alexander & Curtis, *supra* note 63, at 231-32 (criticizing studies for lack of control groups, use of cross-tabulation and correlation rather than multivariate regressions, sampling methods).

120. The studies are not confined to the United States, either. See, e.g., Christopher Bagley, *Transracial Adoption in Britain: A Follow-up Study, with Policy Considerations*, 72 CHILD WELFARE 285, 287 (1993) (noting that although the outcomes for the transracially adopted group are likely to be different in identity terms from Afro-Caribbean children brought up in same-race families, there is not evidence that an intercultural identity leads to unfavorable adjustment.); Charles O'Brian, *Transracial Adoption in Hong Kong*, 73 CHILD WELFARE 319, 328 (1994) (concluding that case studies favor use of transracial adoption when same-race parents cannot be recruited). In fact, minority children placed for adoption have neither the right nor the need to develop a distinct ethnic identity or awareness of cultural heritage. That is not to suggest that there is anything wrong with parents' efforts to encourage these things in their children. Rather, it is to argue that the promotion of ethnic identity and cultural heritage is not the *only* reasonable way to bring up a minority child.” In Britain the social policy question continues to be debated as well. See generally Ivor Gaber, *A Child Needs Parents, Of Any Race*, 127 NEW STATESMAN 22 (1996), available (stating, “[j]ournalists wanted to know if we were for or against transracial adoption. To their chagrin and confusion, we were neither. We argued that race and ethnicity are important in considering a child's future, but that sometimes, the best available placement is not going to be a perfect ethnic match.”). Gaber also reports that “[a]s far as the mainly white social work establishment was concerned, black was good, white was bad. Any social worker who recommended a transracial placement to an adoption panel was likely to be criticized for failing to search far enough for an ethnic match, or, worse, to be accused of implicit or explicit racism. This led to both tragedy and farce.” *Id.*

have maintained that the critical factors of what might be called racial preparedness cannot be gauged through positive empirical studies.<sup>121</sup> Instead, these papers suggest narrative histories and the most recent book length publications have featured this kind of qualitative empiricism.<sup>122</sup> In Minnesota, too, there have been outspoken opponents of transracial adoption. For example, Peggy Brown was a member of the Hennepin County task force that helped design heritage policies.<sup>123</sup> Walter Perkins, supervisor of the African-American Adoption Project in Ramsey County spoke out against changes required by the new legislation that might further weaken Black family structure.<sup>124</sup>

## VI. SOME EMPIRICAL OBSERVATIONS

I've done a brief look, using The National Longitudinal Study of Adolescent Health,<sup>125</sup> at depression in adoptive and foster

121. See, e.g., PATTON, *supra* note 18, at 5 (stating, “[T]he NABSW and other critics are concerned about the transmission of culture within a racially stratified social structure, and their questions are not addressed by positivist research approaches.”). She specifically criticizes the work of Simon and Alstein and Elizabeth Bartholet. *Id.* at 142-43. See also Hollingsworth, *supra* note 22 (stating, “[t]heory building and empirical falsification continue to be the standards that are used by scholars to examine research questions. This work should be conducted from an African-centered ideological perspective. It also should be phenomenological, so that the lived experiences of African American children in families may be examined”); Sharon-ann Gopaul-McNicol, *Critique of ‘A Review of the Research on Transracial Adoption,’* 22 J. BLACK PSYCHOL. 270, 271 (1996) (stating, “[i]t is the preponderance of the data; not the data itself, because as the authors pointed out, there are many flaws in the research studies. Chances are research by mainly African American researchers who are against the Multiethnic Placement Act would never catch up to their White counterparts who are in factor of this act. That is because there are more White researchers to begin with, and besides, they tend to publish in a more empirical database manner, which is considered ‘true empirical research.’”)

122. Compare PATTON, *supra* note 18 (a skeptic); with SIMON & ROORDA, *supra* note 63 (more positive).

123. Jean Hopfensperger, *Adoption Comes Full Circle: Returning to Colorblind Adoptions*, MPLS. STAR TRIB., Dec. 2, 1996, at 1A.

124. *Id.*

125. Richard Udry & Peter Bearman, *The National Longitudinal Study of Adolescent Health from the Carolina Population Center*, University of North Carolina 1994-95, available at <http://www.cpc.unc.edu/projects/addhealth/datasets.html> (last visited Oct. 4, 2001). The description, found on their website, reads as follows:

Add Health is a school-based study of the health-related behaviors of adolescents in grades 7-12. It has been designed to explore the causes of these behaviors, with an emphasis on the influence of social context.

children among all races of children and for all mothers and white mothers only. We, for I have been working with sociologist Steven Nock, tried to hold constant the other factors that were likely to influence depression: income, gender, parents' marital status and mother's education. The bottom line is that neither race nor poverty seems to affect adolescent depression as much as does being a foster child as opposed to being either a biological or an adopted child. The evidence is at least suggestive that racial differences between mothers and adopted kids do seem to matter with respect to depression.<sup>126</sup> Adoption, per se, seems relatively unimportant in depression. Adopted children, and particularly those who don't "match" their parents, may just feel that they are different. While children enjoy feeling special and loved, they don't like difference, especially from their parents.<sup>127</sup> Race matters more than adoption, but Black adopted kids are no more depressed than adopted kids of other races simply because of their adoption. For all children and all mothers, household income matters a little and the mother's education matters more. Gender

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That is, Add Health postulates that families, friends, schools and communities play roles in the lives of adolescents that may encourage healthy choices of activities or may lead to unhealthy, self-destructive behaviors. Data to support or refute this theory were collected in surveys of students, parents, and school administrators.

The Add Health study was funded by the National Institute of Child Health and Human Development (NICHD) and 17 other federal agencies. Fieldwork was conducted by the National Opinion Research Center of the University of Chicago.

A description of the research design can be found at <http://www.cpc.unc.edu/projects/addhealth/resdesign/index.htm> (last visited Sept. 19, 2001). The URL for the study is <http://www.cpc.unc.edu/projects/addhealth/datasets.html> (last visited Sept. 10, 2001). Again, the regression analysis was done by Steven L. Nock, Department of Sociology, University of Virginia.

126. *Id.* This result, a very large coefficient for additional depression, but a coefficient that was not statistically significant, should suggest additional study. There were only four Black children adopted by white mothers in the Add health study. However, it does suggest that this work is critical and that adolescence is the time to measure the success of transracial adoption from the child's perspective. Bartholet suggested that self-esteem may work the same way as does depression. Bartholet, *supra* note 13, at 1213. She quoted studies showing "no differences in overall self-esteem between the sampled transracially and intracially adopted children. Furthermore, the level of self-esteem of the adoptees was as high as that reported among individuals in the general population." *Id.*

127. A number of the accounts I read recounted incidents in which the adopted child asked the adoptive parent why he or she had different hair, eyes, or skin color. Many times these small children would say, "I wish I looked like you." *See, e.g.,* STEINBERG & HALL, *supra* note 26; RUSH, *supra* note 26.

matters more (girls are far more likely to be depressed) and may interact with adoptive status. Perhaps most interesting when we consider kinship care as the most likely alternative to transracial adoption, foster kids are more depressed than are adopted kids and by about half a standard deviation. Black and biracial foster children are significantly<sup>128</sup> more likely to be depressed than other adolescents and by a very large margin (in the case of Black children, nearly a standard deviation; in the case of biracial children, more than a standard deviation).<sup>129</sup>

## VII. CONCLUSIONS

One of the puzzles I have encountered frequently in researching this paper is the disparity between the treatment of American Indians and other racial and ethnic groups when it comes to adoption. My previous instinct was to admit the obvious differences as necessitated because of tribes' status as sovereign nations. I have also learned that it may be worth distinguishing on a policy level between American Indians and Blacks because

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128. For American Indian and Asian foster children, the coefficient was large, but, as with the transracial adoption question, the results were not statistically significant.

129. What might explain this difference? It may be because adolescents, who confront the "outside world" more than do infants, certainly, have experienced racism themselves. *Cf.* *Holt v. Chenault*, 722 S.W.2d 897, 898 (Ky. 1987) (holding that though the trial court should not have considered societal hostility towards her white mother's interracial remarriage, the "child's emotional reaction to her mother's marital circumstances may enter into deciding what is in the best interests of the child."). Alternatively, it may be because their adoptive parents haven't dealt with their struggles appropriately. *See, e.g.,* Forde-Mazrui, *supra* note 115, at 948-49 (stating, "[c]oncededly, teaching their children Black culture may not be an easy task for all white parents. Many white parents may be unable or unwilling to meet the challenge. The neighborhood or community in which white parents live may lack opportunities for the child to celebrate Black culture or to interact with other Black people."); Robert Joseph Taylor & Michael C. Thornton, *Child Welfare and Transracial Adoption*, 22 J. BLACK PSYCHOL. 282, 284 (1996) (stating, "[t]he task of socializing Black children involves at least two dimensions. In addition to routine socialization experiences and practices (e.g., moral behavior, self-care, and independence), parents also must provide Black children with a set of skills and knowledge to counter the impact of racial prejudice and discrimination and develop a healthy sense of self as a person of color."). Nor have the agencies apparently done much to educate such parents, at least as of 1993. *See, e.g.,* Carl A. Kallgren & Pamela J. Caudill, *Current Transracial Adoption Practices: Racial Dissonance or Racial Awareness*, 72 PSYCHOL. REP. 551, 556 (1993) (stating, "[a] majority of agencies studied did not provide adequate resources or support systems for transracially adoptive parents.").

American Indian culture is “an endangered species.”<sup>130</sup>

Perhaps the most obvious conclusion I can draw from my look at the transracial adoption question is that more study should be done on transracial adoption’s effects upon adolescents. Perhaps more crucially, more should be done with looking at kinship care. It is important not only to know who does it, but also what are the child-based outcomes. It is also important to know how these children fare, during and after minority, not only in comparison to other foster children, something that has been studied, but compared to the alternative, adoption.

The Adoption Incentive program will probably promote transracial adoption, though, as far as I could gather, this has not happened in Minnesota yet. (Some cynics imply that transracial adoption is part of its design.)<sup>131</sup> But regardless of whether transracial adoption is promoted, it may well be important not to give disincentives for kin caretakers to adopt and it seems that that is what Minnesota is doing at the moment.<sup>132</sup> In the same vein, it

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130. Robert B. Porter, II, *Decolonizing Policy Analysis Relating to the Indigenous Nations*, YALE HUM. RTS. & DEV. L.J. (forthcoming 2002). See also Howard, *supra* note 22, at 532-33 (distinguishing between the issues of extinction for Blacks and Native-Americans).

131. See, e.g., Steven L. Belton, *No More Race-Based Adoption: Barriers To Transracial Placements Will Fall Unequally After Jan. 1*, MPLS. STAR TRIB., Dec. 13, 1996, at 37A.

You see, the new law is not intended to break up the monopoly power whites hold over the adoption of white children. Rather, the law is supposed to eliminate a primary obstacle to getting a black child that white people face when there are not enough white children for them to adopt or because the cost of adopting a “healthy white infant” has become prohibitively high for all except those whose net worth is—well, rosy.

*Id.*

132. By this I mean that for the majority of kin foster parents (and proportionately more than for “stranger” foster parents), there are no “special needs” other than race that would suggest payment of adoption subsidies. For non-kin, adopting a child with whom the parent already has formed bonds will more often incur no financial penalty. For the disproportionately less affluent kin caretaker, most adoptions come at a very high price. The AFCARS Report noted that 88% of the children adopted received an adoption subsidy, while 16% of the children adopted had been relatives (while “[r]elatives who were also foster parents were counted as relatives.”). The AFCARS Report 3, *supra* note 68. This suggestion seems to agree with Thornton & Taylor’s statement that “[s]ubsidized adoptions are another means that would help agencies increase the pool of eligible black parents.” Thornton and Taylor, *supra* note 129, at 288. See also National Conference of State Legislatures, *supra* note 41.

Although most children adopted out of foster care are adopted by

may be important for welfare workers to relax (or be sensitive to differences) as they encounter kinship-foster-parents who may not fit the usual standards for adoptive parents.<sup>133</sup>

I have argued elsewhere that “a piece of paper” does make a difference,<sup>134</sup> at least in the context of marriage.<sup>135</sup> Cohabitation, even when it is a marriage substitute, is not the same as marriage. I argued that the difference comes from a lack of trust that the relationship will continue, and therefore a quality of exchange instead of unconditional love.<sup>136</sup> One of the interesting customs I discovered while reading Steinberg and Hall’s book on transracial adoption,<sup>137</sup> was that adopted children may celebrate a special day other than their birthdays to “commemorate . . . their entrustment of their precious child to you.”<sup>138</sup> Children who live in permanent, kinship-care arrangements, no matter how loved by their caretakers, never get a sense through such ritual that a a new bond

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their foster parents, some foster families that are caring for children with exceptional care needs face a reduction in financial assistance if they choose to adopt. Many foster families cannot afford the cost of changing from foster care to adoption. Studies show that adoption subsidies positively affect the rates of special needs adoptions. Adoption subsidies are cost-effective, primarily because of savings in administrative costs associated with foster care and court review of foster care cases. Between 1983 and 1987, state and federal governments saved \$1.6 billion in administrative costs alone on the 40,700 children adopted out of foster care during that period.

*Id.*

133. Veronica Stevenson-Moudamane, *Parenting Across the Color Line*, 3 BLACK ISSUES BOOK REV. 78 (2001). See also Taylor & Thornton, *supra* note 129, at 288 (stating that [a]gencies may have to reevaluate their guidelines for perspective parents to fit the current socioeconomic reality of Black adults. Single-parent adoptions should receive greater attention as a means of reducing the number of Black children in the child welfare system.”).

134. There is certainly some evidence that “a piece of paper” makes a difference in adoptions as well, considering these were non-kin adoptions, and clearly adopted children are in a more stable situation than many foster children. RICHARD P. BARTH & MARIANNE BERRY, *ADOPTION AND DISRUPTION: RATES, RISKS AND RESPONSES* 23-41 (1988) (collecting evidence that children do better in adoption than in foster care).

135. Margaret F. Brinig, *Domestic Partnerships: Missing the Target*, J. L. & FAM. STUD. (forthcoming 2001); Margaret F. Brinig & Steven L. Nock, *Norms, Trust, Autonomy and Community*, CAN. J. FAM. L. (forthcoming 2002).

136. See Andrew Children, *Toward a New Home Socioeconomics of Union Formation*, THE TIES THAT BIND, PERSPECTIVES ON MARRIAGE AND COHABITATION 236, 136-37 (Linda Waite, ed., 2000); Steven L. Nock, *Commitment and Dependency in Marriage and Cohabitation*, 57 J. MARRIAGE & FAM. 503 (1995).

137. STEINBERG & HALL, *supra* note 26, at 126-27.

138. *Id.* at 126 (discussing Adoption Day rituals).

has formed between them and their caretakers.<sup>139</sup> They remain different from any biological children that may live in the same household. They have no legitimate sense of closure, especially since, unlike families with final adoptions, social services will continue to be involved in their lives.<sup>140</sup>

Twila Perry writes that her “color and community consciousness perspective” is “fundamentally communitarian.”<sup>141</sup> However, so is a perspective that recognizes that the individual family needs social legitimacy in order to survive. And children may well need a sense of truly belonging<sup>142</sup> to someone in order to thrive.<sup>143</sup>

Alternatively, Minnesota has allowed permanent guardianship so that the state can use federal foster care funds to develop subsidies for kinship legal guardians.<sup>144</sup> However, I would argue

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139. For a discussion on long-term foster parenting where the foster parents become fully involved with the child in their care, refer to GOLDSTEIN ET AL., *supra* note 12, at 14-15. As the child responds to their emotional involvement and feels truly wanted, her foster parents become her psychological parents as well. Though they may be precluded from officially adopting her, they have become her parents as if by ‘common law adoption’—a status that, we argue, deserves legal recognition. *Id.*

140. Brinig & Nock, *supra* note 12 (discussing what the continued involvement means in the context of noncustodial fathers). This does not mean that there could be no contact with birth relatives; Minnesota already allows continued involvement where the parties agree upon post-adoption contact and failures in post-adoption contact will not invalidate the adoption or any relinquishments. MINN. STAT. § 259.58 (Supp. 1997).

141. Perry, *supra* note 33, at 29 J. FAM. L. 116-118. The author also explains that “black children raised by white parents may fail to identify with the Black community and will, accordingly, be lost as a resource to that community. Since Blacks as a group are embattled, the loss of children threatens the entire group, not just the individuals.” *Id.*

142. The President’s Initiative on Adoption and Foster Care - Guidelines for Public Policy and State Legislation Governing Permanence for Children, Adoption 2002 (1999), at [www.acf.dhhs.gov/programs/adopt02/02adpt2.htm](http://www.acf.dhhs.gov/programs/adopt02/02adpt2.htm). The Introduction section explains that the emphasis on legally secure permanent placement is meant to provide the child psychological stability and a sense of belonging. *Id.*

143. See, e.g., Bruce C. Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 39-41 (1991).

144. MINN. STAT. § 260.191 (3b)(a)(1) (Supp. 1997). See also Berrick, *supra* note 81, at 83. In 1994-1998, forty-two children, or .4% of the total in out-of-home care, left the child welfare system through placement with a legal guardian, compared to 478 (or 4.9%) who had finalized adoptions. See Minn. Dep’t of Human Srvs., 1998 Children in Out of Home Care Report: 12. Reasons for Child’s Exit from Care (1994-1998), at <http://www.dhs.state.mn.us/childint/Research/outofhome98/indicator12.htm>. (last visited September 29, 2001).

The Adoption and Safe Families Act, 42 U.S.C. § 675(7), defines legal

that even more useful, given the apparent empirical differences between adoption and foster care, would be a subsidy for adoptions by minority kinship care providers.<sup>145</sup> In addition, guardianship

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guardianship as “a judicially created relationship between child and caretaker which is intended to be permanent and self-sustaining as evidenced by the transfer to the caretaker of the following parental rights with respect to the child: protection, education, care and control of the person, custody of the person, and decision making.” The term ‘legal guardian’ means the caretaker in such a relationship.” 42 U.S.C. § 675(7) (Supp. 1999). Nonetheless, the Report to the Department of Health and Human Services, entitled *Adoption 2002: The President’s Initiative on Adoption and Foster Care*, suggests that “alternatives to adoption discussed here, such as permanent guardianship, should be used only when adoption has been thoroughly explored and found inappropriate for the needs of a particular child.” *Adoption 2002: The President’s Initiative on Adoption and Foster Care*, at [www.acf.dhhs.gov/programs/cb/publications/adopt02/02final.htm](http://www.acf.dhhs.gov/programs/cb/publications/adopt02/02final.htm). The Report indicates that guardianship falls third after safe reunification with the biological parents and adoption. *Id.* Protection still exists for the children, however as the decree of permanent guardianship does not terminate parental rights, and therefore does not affect a child’s inheritance rights or rights to other government benefits. *Id.* Further, should the permanent guardianship be terminated, the parents and extended family members retain their legal relationship with the child. *Id.*

The *status* of the child and parent are not affected. For a book length discussion of status, see MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993) (examining status). For my views on why status might differ from other solutions in the context of Canada’s grants of many benefits, but not marital status, to same-sex couples, see Margaret F. Brinig, *Domestic Partnership: Missing the Target*, UTAH J. L. & FAM. REL. (forthcoming 2001).

145. Race is a consideration for adoption assistance permitted by 42 U.S.C. § 673(c)(2)(A) (1994), which provides in part:

(c) Children with special needs

For purposes of this section, a child shall not be considered a child with special needs unless—

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

may not be viable financially over the long-run. The National Council on State Legislatures suggests that it is unlikely that the federal government will continue to grant matching funds for guardianship programs.<sup>146</sup>

Minnesota, Colorado and Montana are the only three states not defining race as a factor sufficient to justify “special needs” treatment.<sup>147</sup> Changing the definition would remove any barriers to adoption caused by poverty.<sup>148</sup> Unlike recognition of a contract

Note that disability was not initially included as an eligibility factor under Minnesota law. See Minn. Laws ch. 85, art. 3, sec. 52, subd. 4 (1997). But this language is now included in Minnesota’s statutory eligibility criteria. Minnesota Family Investment Program-Statewide, Work First Program Pilot Projects, Assistance Program Changes Eligibility Conditions, (codified as amended at MINN. STAT. §259.67(3)(b) (West Supp. 2001).

(3) The child has been a ward of the commissioner or a Minnesota-licensed child-placing agency.

(b) For purposes of this subdivision, the characteristics or circumstances that may be considered in determining whether a child is a child with special needs under United States Code, title 42, chapter 7, subchapter IV, part E, or meets the requirements of paragraph (a), clause (1), are the following:

(1) The child is a member of a sibling group to be placed as one unit in which at least one sibling is older than 15 months of age or is described in clause (2) or (3).

(2) The child has documented physical, mental, emotional, or behavioral disabilities.

(3) The child has a high risk of developing physical, mental, emotional, or behavioral disabilities.

(c) When a child’s eligibility for adoption assistance is based upon the high risk of developing physical, mental, emotional, or behavioral disabilities, payments shall not be made under the adoption assistance agreement unless and until the potential disability manifests itself as documented by an appropriate health care professional.

MINN. STAT. § 259.67 (3)(6) (West. Supp. 2001).

146. NATIONAL COUNCIL ON STATE LEGISLATURES, *supra* note 41:

States are funding subsidized guardianship programs with state money, TANF funds and Title IV-E funds by means of federal waivers. State funds provide the greatest degree of flexibility. Title IV-E waivers allow use of federal foster care funds, but are limited in duration. Moreover, it does not appear that the federal government is inclined to grant any additional waivers that would be used solely or primarily to fund subsidized guardianships.

147. ADOPTION FACTBOOK III, *supra* note 56, at 127-28. In most states, hard-to-place or “special needs” children now include primarily minority and handicapped children. JAMES ROSENTHAL & VICTOR GROZE, SPECIAL NEEDS ADOPTION, A STUDY OF INTACT FAMILIES 127, 148 (1992).

148. Bartholet apparently would disagree with subsidies that would grant

between married adults or a cohabitation relationship, it would not encourage development of an exchange relationship,<sup>149</sup> since the funding would come from outside the family.

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adoptive placements for less wealthy Black families. Bartholot, *supra* note 13, at 1199-1200. Perhaps she would not be unsupportive if these families had also served as kin foster parents.

149. For a discussion of what turning a long relationship into one centered on exchange, see Margaret F. Brinig, *The Influence of Marvin v. Marvin on Housework During Marriage*, 76 NOTRE DAME L. REV. 101, 127-29 (2001).

## VIII. APPENDIX

**Table 1.** 1984 Election Results, Sorted by Percentage for Mondale.<sup>150</sup>

| Jurisdiction     | Votes for Reagan | Percentage | Votes for Mondale | Percentage |
|------------------|------------------|------------|-------------------|------------|
| Dist. of Col.    | 29,009           | 13.7       | 180,408           | 85.4       |
| <b>Minnesota</b> | 1,032,603        | 49.5       | 1,036,364         | 49.7       |
| Massachusetts    | 1,310,936        | 51.2       | 1,239,606         | 48.4       |
| Rhode Island     | 212,080          | 51.7       | 197,106           | 48.0       |
| Maryland         | 879,918          | 52.5       | 787,935           | 47.0       |
| Pennsylvania     | 2,584,323        | 53.3       | 2,228,131         | 46.0       |
| <b>Iowa</b>      | 703,088          | 53.3       | 605,620           | 45.9       |
| New York         | 3,664,763        | 53.8       | 3,119,609         | 45.8       |
| <b>Wisconsin</b> | 1,198,584        | 54.2       | 995,740           | 45.0       |
| West Virginia    | 405,483          | 55.1       | 328,125           | 44.6       |
| Hawaii           | 185,050          | 55.1       | 147,154           | 43.8       |
| Oregon           | 685,700          | 55.9       | 536,479           | 43.7       |
| <b>Illinois</b>  | 2,707,103        | 56.2       | 2,086,499         | 43.3       |
| Washington       | 1,051,670        | 55.8       | 807,352           | 42.9       |
| Tennessee        | 990,212          | 57.8       | 711,714           | 41.6       |
| California       | 5,467,009        | 57.5       | 3,922,519         | 41.3       |
| Vermont          | 135,865          | 57.9       | 95,730            | 40.8       |
| <b>Michigan</b>  | 2,251,571        | 59.2       | 1,529,638         | 40.2       |

**Table 2.** Ethnic Composition of Upper Midwestern States.<sup>151</sup>

| Jurisdiction     | Reporting   | German     | German % | Norwegian | Norwegian % | Swedish   | Swedish % | Danish    | Danish % | Finnish | Finnish % | Scandinavian |
|------------------|-------------|------------|----------|-----------|-------------|-----------|-----------|-----------|----------|---------|-----------|--------------|
| United States    | 222,608,247 | 68,257,867 | 0.31     | 3,877,549 | 1.74        | 4,170,291 | 1.87      | 1,437,744 | 0.65     | 658,870 | 0.00      | 4.56         |
| Illinois         | 10,468,067  | 3,919,337  | 0.37     | 146,310   | 1.40        | 344,464   | 3.29      | 56,672    | 0.54     | 20,636  | 0.00      | 5.23         |
| Iowa             | 2,545,071   | 1,859,050  | 0.73     | 158,420   | 6.22        | 108,995   | 4.28      | 80,990    | 3.18     | 2,401   | 0.00      | 13.69        |
| Michigan         | 8,467,137   | 2,941,126  |          | 62,073    | 0.01        | 170,786   | 0.02      | 46,113    | 0.01     | 109,357 | 0.01      | 4.59         |
| <b>Minnesota</b> | 4,136,320   | 2,464,297  | 0.60     | 763,501   | 18.46       | 491,490   | 11.88     | 68,161    | 1.65     | 103,603 | 0.03      | 31.99        |
| Wisconsin        | 4,636,066   | 3,448,682  | 0.74     | 397,621   | 8.58        | 125,969   | 2.72      | 56,318    | 1.21     | 35,118  | 0.01      | 12.51        |

150. INFORMATION PLEASE ALMANAC, 2000. 1984 election sorted by percentage for Mondale; only top 18 states include the Midwestern ones we will consider here.

151. Data from 1990 Census. Ancestry, USA Counties, 1998, States of Minnesota, Wisconsin, Iowa and Illinois, available at <http://govinfo.library.orst.edu/cgi-bin/usaco-stateis.html>.

**Table 3.** Racial Composition of Minnesota and Selected Metro Counties Including Percentage of State Ethnic Group Total.<sup>152</sup>

| County              | Total Population (Single race) | White   | Black  | Indian | Asian  | White % | Black % | Indian % | Asian % |
|---------------------|--------------------------------|---------|--------|--------|--------|---------|---------|----------|---------|
| Minnesota           | 4836737                        | 4400282 | 171731 | 54967  | 141968 | 90.98   | 3.55    | 1.14     | 2.94    |
| Anoka               | 293000                         | 279133  | 4756   | 2079   | 5038   | 95.27   | 1.62    | 0.71     | 1.72    |
| Dakota              | 349660                         | 325166  | 8091   | 1347   | 1285   | 92.99   | 2.31    | 0.39     | 0.37    |
| Hennepin            | 1087159                        | 898921  | 99943  | 11163  | 53555  | 82.69   | 9.19    | 1.03     | 4.93    |
| Ramsay              | 496222                         | 395406  | 38900  | 4221   | 44836  | 79.68   | 7.84    | 0.85     | 9.04    |
| Four Metro Counties | 2226041                        | 1898626 | 151690 | 18810  | 104714 | 85.29   | 6.81    | 0.84     | 4.70    |
|                     | Percent State Total            | 43.15   | 88.33  | 34.22  | 73.76  |         |         |          |         |

**Table 4.** Racial Composition of Upper Midwestern States, by thousands and percent.<sup>153</sup>

| Jurisdiction  | White 1996 | Black 1996 | Asian 1996 | Indian 1996 | White % | Black % | Asian % | Indian % | Ratio Indian/Black |
|---------------|------------|------------|------------|-------------|---------|---------|---------|----------|--------------------|
| United States | 219,749    | 33,503     | 9,743      | 2,288       | 82.8    | 12.6    | 3.7     | 0.9      | 0.068292392        |
| Illinois      | 9,640      | 1,807      | 374        | 26          | 81.4    | 15.3    | 3.2     | 0.2      | 0.014388489        |
| Iowa          | 2,754      | 55         | 34         | 8           | 96.6    | 1.9     | 1.2     | 0.3      | 0.145454545        |
| Minnesota     | 4,361      | 128        | 112        | 57          | 93.6    | 2.7     | 2.4     | 1.2      | 0.4453125          |
| Wisconsin     | 4,756      | 284        | 74         | 45          | 92.2    | 5.5     | 1.4     | 0.9      | 0.158450704        |

**Table 5.** Race of Children in Foster Care (United States, 1999).<sup>154</sup>

| Race of Child                | Percent of Total in Foster Care | Number |
|------------------------------|---------------------------------|--------|
| White Non-Hispanic           | 36                              | 203001 |
| Black Non-Hispanic           | 42                              | 239516 |
| Hispanic                     | 15                              | 84924  |
| Asian/PI Non-Hispanic        | 1                               | 6304   |
| Unknown, unable to determine | 4                               | 25346  |

152. Data from 1990 Census, Ancestry, USA Counties 1998, *available at* <http://govinfo.library.orst.edu/cgi-bin/usaco-states.html>.

153. Geographic Comparison Table, Race and Hispanic or Latino: 2000, U.S. Census Bureau, *available at* <http://factfinder.census.gov> (last visited Oct. 4, 2001).

154. AFCARS Report, *supra* note 44, at 2.

**Table 6.** Movement of Children from Foster Care to Adoption under Adoption Incentive Program.<sup>155</sup>

|              |        | NUMBER OF ADOPTIONS |        |        |                |        |        |                |        |              | ADOPTION INCENTIVE PROGRAM      |                       |       |  |
|--------------|--------|---------------------|--------|--------|----------------|--------|--------|----------------|--------|--------------|---------------------------------|-----------------------|-------|--|
|              |        | 1995 Adoptions      |        |        | 1996 Adoptions |        |        | 1997 Adoptions |        |              | Baselines for FY 1998 Adoptions |                       |       |  |
| State        | IV-E   | NOT                 | TOTAL  | IV-E   | NOT            | TOTAL  | IV-E   | NOT            | TOTAL  | IV-E Average | Total Average                   | FY 1997 Guardianships |       |  |
| Ill.         | 1,647  | 112                 | 1,759  | 1,148  | 998            | 2,146  | 1,615  | 1,080          | 2,695  |              | 1,470                           | 2,200                 | 350   |  |
| Iowa         | 179    | 48                  | 227    | 301    | 82             | 383    | 414    | 26             | 440    |              | 298                             | 350                   | 100   |  |
| Mich.        | 1,463  | 254                 | 1,717  | 1,695  | 255            | 1,950  | 1,744  | 303            | 2,047  |              | 1,634                           | 1,905                 | 0     |  |
| <b>Minn.</b> | 115    | 117                 | 232    | 184    | 55             | 239    | 228    | 74             | 302    |              | 176                             | 258                   | 60    |  |
| Wisc.        | 285    | 75                  | 360    | 421    | 90             | 511    | 432    | 98             | 530    |              | 379                             | 467                   | 0     |  |
|              |        |                     |        |        |                |        |        |                |        |              |                                 |                       |       |  |
| Total        | 18,887 | 6,806               | 25,693 | 20,604 | 7,157          | 27,761 | 22,824 | 8,206          | 31,030 |              |                                 |                       | 5,090 |  |

**Table 7.** Finalized Adoptions from Foster Care.<sup>156</sup>

|                  | Baseline Total | FY '98 Estimate | Number Change | Percent Change | Population | Ratio of Adoptions in 1998 to Population (*1000) |
|------------------|----------------|-----------------|---------------|----------------|------------|--|
| Illinois         | 2200           | 4656            | 2456          | 111.64         | 12045326   | .38  |
| Iowa             | 350            | 537             | 187           | 53.43          | 2862447    | .18  |
| Michigan         | 1905           | 2234            | 329           | 17.27          | 9817242    | .23  |
| <b>Minnesota</b> | 258            | 416             | 158           | 61.24          | 4725419    | .08  |
| Wisconsin        | 467            | 637             | 170           | 36.4           | 5223500    | .12  |

155. In Minnesota, parents adopted 634 children under state guardianship during 1999. Adoption Fact Sheet, *supra* note 37, at 2.

156. The first four columns (i.e., Baseline Total, FY '98 Estimate, Number Change, Percent Change) and the final column (i.e., Ratio of Adoptions in 1998 to Population (\*1000)) are taken from Adoption Factbook III, *supra* note 56, at 148. The fifth column (i.e., Population) was taken from USA Counties 1998, available at <http://govinfo.library.orst.edu/cgi-bin/usaco-list98?25-state.mns> (last visited Oct. 4, 2001).

**Table 8.** Length of Stay in Foster Care after Termination of Parental Rights.<sup>157</sup>

| State            | Table 8. Time Between TPR and Finalization (Midwestern States, 1997-98) |         |          |           |           |           |           |         |        | Total |      | Missing | Months Between TPR and Finalization |            |
|------------------|---|---------|----------|-----------|-----------|-----------|-----------|---------|--------|-------|------|---------|-------------------------------------|------------|
|                  | <1 mos  | 1-5 mos | 6-11 mos | 12-17 mos | 18-23 mos | 24-29 mos | 30-35 mos | 3-4 yrs | 5+ yrs | %     | N    | N       | Mean Mos                            | Median Mos |
|                  | %   | %       | %        | %         | %         | %         | %         | %       | %      |       |      |         |                                     |            |
| <b>Illinois</b>  | 1%  | 25%     | 41%      | 16%       | 8%        | 4%        | 2%        | 3%      | 1%     | 100%  | 3924 | 732     | 12.17                               | 8.92       |
| <b>Iowa</b>      | 0%  | 19%     | 27%      | 29%       | 13%       | 4%        | 3%        | 4%      | 1%     | 100%  | 512  | 5       | 14.80                               | 12.67      |
| <b>Michigan</b>  | 0%  | 10%     | 31%      | 25%       | 13%       | 9%        | 5%        | 5%      | 2%     | 100%  | 2254 |         | 17.23                               | 14.00      |
| <b>Minnesota</b> | 0%  | 6%      | 13%      | 15%       | 20%       | 14%       | 16%       | 12%     | 4%     | 100%  | 354  | 75      | 25.48                               | 22.70      |
| <b>Wisconsin</b> | 1%  | 43%     | 28%      | 16%       | 6%        | 3%        | 1%        | 1%      | 1%     | 100%  | 630  | 13      | 9.80                                | 7.31       |

**Table 9.** Race/Ethnicity of Public Agency Children Adopted (October 1, 1996-March 31, 1997).<sup>158</sup>

| State            | White Non-Hispanic | Black Non-Hispanic | Hispanic | Asian/PI Non-Hispanic | AI/AN Non-Hispanic | Unable to Determine | %    | N     | Missing N |
|------------------|--------------------|--------------------|----------|-----------------------|--------------------|---------------------|------|-------|-----------|
| Illinois*        | 28%                | 63%                | 7%       |                       |                    | 1%                  | 100% | 855   |           |
| Iowa             |                    |                    |          |                       |                    |                     |      |       |           |
| Michigan         |                    |                    |          |                       |                    |                     |      |       |           |
| <b>Minnesota</b> | 64%                | 26%                | 5%       | 1%                    | 5%                 |                     | 100% | 169   |           |
| Wisconsin        |                    |                    |          |                       |                    |                     |      |       |           |
| Reporting States | 47%                | 36%                | 12%      | 1%                    | 2%                 | 2%                  | 100% | 5,172 | 20        |

157. Department Of Human Services, Administration For Children And Families, Adoption And Foster Care Analysis And Reporting System, Table 04 Time Between Termination Of Parental Rights And Finalization, October 1, 1997 To September 30, 1998 (May, 2000) <http://www.acf.dhhs.gov/programs/cb/dis/tables/tpr98.htm>.

158. Department Of Human Services, Administration For Children And Families, Table No. 03 Race/Ethnicity Of Public Agency Children Adopted, October 1, 1996 To March 31, 1997 (January, 1999) *available at* <http://www.acf.dhhs.gov/programs/cb/dis/tables/repaa97a.htm> (Not all states reported).

**Table 10.** Total Number of Adoption Petitions Filed.<sup>159</sup>

| State            | 1988 | 1989 | 1990 | 1991 | 1992 | 1993 | 1994 | 1995 | 1996 | 1997 |
|------------------|------|------|------|------|------|------|------|------|------|------|
| Michigan         | 5304 | 5181 | 5294 | 5408 | 6092 | 5679 | 5069 | 5761 | 5584 | 6118 |
| <b>Minnesota</b> | 2388 | 2204 | 2034 | 2071 | 2238 | 1898 | 1768 | 1862 | 1879 | 1936 |
| Wisconsin        | 2140 | 2079 | 2071 | 1994 | 1871 | 1871 | 1938 | 1931 | 2458 | 2480 |

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159. Illinois & Iowa didn't supply. ADOPTION FACTBOOK III, *supra* note 56, at 71.