

RACE SEPARATISM IN THE FAMILY: MORE ON THE TRANSRACIAL ADOPTION DEBATE

ELIZABETH BARTHOLET*

Some twenty-five years ago a trial court in Virginia upheld the state ban on interracial marriage, reasoning that God created different races and, accordingly, that it was natural to maintain racial purity, and unnatural to engage in racial mixing.¹ At that time, many other state laws banned both interracial marriage and transracial adoption. In *Loving v. Virginia*,² the United States Supreme Court struck down the Virginia antimiscegenation law, reversing the trial court's decision and holding that it was unconstitutional for states to mandate racial separatism in the family.

Later, in *Palmore v. Sidoti*,³ the Court ruled that it was unconstitutional to transfer custody of a white child from mother to father solely because the mother was living with a black man. While the Court acknowledged that it might not be in the child's best interests to live in a transracial family, it held that the equal protection doctrine prevented consideration of the race of a potential parent in making custody decisions.

In the 1960s and 1970s, the courts in this country outlawed formal state bans on transracial adoption, finding them similarly inconsistent with the equal protection doctrine. There has been a similar development in South Africa today, where the ban on transracial adoption has just recently been lifted as part of the move to abolish apartheid. But in the United States a strange thing happened in 1972. The National Black Social Workers Association (NABSW) issued a statement calling for a new ban on transracial adoption. Actually, this development was not so strange since, at that time, the black power movement was at the height of its popularity, and there were calls for various forms of black separatism.

The NABSW statement had an immediate impact on the foster care system. The child welfare establishment, which had moved cautiously in the

* Professor of Law, Harvard Law School.

This comment is a slightly revised version of a talk given by Professor Bartholet at Duke Law School on April 9, 1994, as part of a panel on transracial adoption at the *Journal's* Conference, *Defining Family: Adoption Law & Policy*. Minor editorial changes have been made to the text, but in all cases, every effort was made to retain the original voice of the speaker. Other discussions of the author's views on these issues, together with documentation and sources, are contained in ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION & THE POLITICS OF PARENTING* 86-117 (1993), and Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991).

1. *Loving v. Virginia*, 388 U.S. 1, 3 (1967) (quoting from trial judge's unpublished opinion).

2. 388 U.S. 1 (1967).

3. 466 U.S. 429 (1984).

'60s and early '70s to open up transracial adoption as a means of placing some of the black children languishing in foster care, acquiesced to the demands of the NABSW. The NABSW's position, maintained to this date, has been a key factor in producing the adoption policies we have today.

Pursuant to these policies, public adoption agencies throughout the nation make race a primary factor in child placement. The agencies routinely separate children and prospective parents into racial categories, assign children to racially-matched parents, and hold children for whom there is no racial match available rather than place them with waiting parents of another race. Extensive affirmative action efforts have been made over the past two decades to recruit black parents to adopt the overwhelming number of black children waiting for homes. The state and federal governments have provided financial subsidies to encourage these adoptions. Agencies have radically revised parental fitness criteria for black adopters to permit more to qualify, and have mounted advertising campaigns to reach out to the black community. These efforts, however, have not produced enough black adoptive parents for all of the waiting black children. Nonetheless, public adoption agencies refuse to consider transracial placement except as a last resort. Some agencies refuse under any conditions to place children across racial lines.

What is the difference between the old and the new cry for racial purity in the family, the old and the new insistence on race barriers in adoption? The difference, of course, is the added voice of some members of the black community, particularly the voice of the NABSW's leadership. In my view, this is not enough of a difference. The new barriers to transracial adoption seem to me just as wrong as those that existed in our segregationist past.

Why are barriers to transracial adoption wrong? First, because of their impact. They hurt black children. I do not consider this issue worth much of our time because the evidence is so clear.⁴ While the opponents of transracial adoption have devoted most of their energy to arguing that their position serves the best interests of black children, I assume that these arguments are being made because they are thought to be the only arguments that are likely to meet any level of general acceptance among policy makers. But in the end these arguments must be rejected as frivolous.

The evidence demonstrates overwhelmingly that transracial adoption works well for the children involved. Studies show that transracial adoptees flourish in every respect assessed by the social scientists, including measures of self-esteem and identity. Indeed, transracial adoptees do at least as well as children raised in same-race families. Moreover, the evidence demonstrates overwhelmingly that delays in and denials of permanent placement have devastating effects on children.

Opponents of transracial adoption have no good response to this evidence that race matching policies damage black children. Sometimes they rely on anecdotes indicating that in certain, individual cases a black child

4. For specifics on the negative impact that transracial adoption prohibitions have on black children, including documentation of evidence, see Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1201-26 (1991).

has apparently suffered a loss of racial identity or encountered other problems growing up with white parents. Anecdotes, however, can be cited on both sides of the debate. A "60 Minutes" program⁵ that aired a few years ago told the story of a black child who was taken from his white foster parents in order to prevent them from adopting him. He was killed shortly thereafter by the black adoptive parents with whom he had been placed in order to promote racial matching goals. The fact is that while anecdotes can be cited on both sides, the entire body of social science research evidence tells one consistent story—a story that provides not a shred of evidence supporting the claim that transracial adoption is problematic for children.

The opponents of transracial adoption also claim that not enough has been done to recruit black adopters. It is true that more could be done, but blacks are already adopting at the same rates as whites. This represents a significant accomplishment since black families are disproportionately at the bottom of the socio-economic ladder.⁶ The problem is not that black adults are not adopting, but that there are so many black children in need of homes. Roughly forty percent of children in foster care are categorized as black or African-American, and roughly half are categorized as children of color. Blacks would have to adopt at many times the rate of whites to provide homes for all of the waiting black children.

Opponents of transracial adoption also argue that we should not be removing so many black children from their biological families. They claim that if we did more to preserve these families, we would not need to worry about transracial adoption. But for years the child welfare establishment has made family preservation and reunification policy priorities. In fact, many are now questioning whether we have gone too far in this direction, preserving families at the cost of subjecting children to unconscionable abuse and neglect.

Finally, opponents of transracial adoption claim that whites would not be interested in adopting the black children who actually are in need of placement. They claim that whites are interested only in healthy black babies, rather than the older children and the children with disabilities who disproportionately populate the foster care system. But the fact is that when whites are asked whether they are interested in adopting older black children with significant disabilities they say yes in very significant numbers.⁷ Whites who express interest in such children are regularly turned away by public adoption agencies. It seems disingenuous in the extreme for the NABSW and its allies to argue adamantly for the preservation of barriers to transracial adoption on the ground that if those barriers were removed

5. *60 Minutes: Simple As Black & White* (CBS television broadcast, Oct. 25, 1992).

6. Those who volunteer for the kind of intentional parenting that adoption represents tend, as a group, to be relatively privileged in socio-economic terms.

7. See, e.g., JAMES BREAY, COMMONWEALTH OF MASS., WHO ARE THE WAITING CHILDREN? AN OVERVIEW OF THE ADOPTION SERVICES SYSTEM IN THE MASSACHUSETTS DEPARTMENT OF SOCIAL SERVICES 17, Table 3.3 (reporting that out of 308 approved, pre-adoptive white families in Massachusetts, 52 would consider adopting a minority race child, 101 would consider adopting a "special needs" child, and 141 would consider adopting a sibling group) (1994).

whites would not want to adopt the children anyway. Let us remove the barriers and see what happens.

In addition to their harmful impact on black children, I also think these barriers to transracial adoption are wrong because of their goal. I see race separatism in the family as the goal at the heart of these policies. If this were a valid goal, then some harm to the group of black children denied permanent homes would be justified. However, I do not see this goal as valid.

Most opponents of transracial adoption are reluctant today to speak the race separatist rhetoric that characterized the famous 1972 NABSW policy statement describing transracial adoption as a form of racial genocide. Indeed many often express outrage, at least in public fora, at the notion that their position has anything to do with race separatism. But race matching policies only make sense when seen as part of a more general move for race separatism, a modern move reminiscent of the earlier trend which gave rise to the 1972 NABSW position. These policies make sense only in conjunction with a kind of racial fundamentalism which is newly popular. And, as demonstrated earlier, they make no sense whatsoever as a means of advancing the best interests of children, although these are the terms in which they are typically justified.

Arguments by the opponents of transracial adoption reveal the separatist nature of their position. For instance, it is said that only black parents can teach black children the "coping skills" necessary to survive in a racist society. Yet studies indicate that transracial adoptees actually cope very well. What seems to lie at the heart of the "coping skill" claim is a concern that black children develop a particular mode of interacting with whites, one that is arguably designed to advance the interests of the larger black community.

Another classic argument made by the opponents of transracial adoption is that it produces children with confused racial identities. The evidence, however, shows that transracial adoptees develop a positive sense of self-esteem and are not at all confused about the fact that they are black. Quite clearly, the real concern is that they may not be sufficiently committed to the black, as distinct from the white, community. They may not have what certain black leaders see as an "appropriate" black identity or an "appropriate" set of attitudes about racial relations. As one former president of the NABSW said, transracially adopted black children may end up with "white minds," which he saw as problematic for the black community because "our children are our future."⁸

These kinds of arguments could also be applied to oppose integrated education and interracial marriage. If we think that black children can only develop appropriate coping skills and racial identities under the tutelage of black adults, then we should send them to schools with all-black faculties. Furthermore, according to this logic, we should also do our best to prevent marriage and procreation across racial lines so as to protect black children from the problems involved in being raised by a white parent and the con-

8. *President's Message*, NAT'L ASS'N OF BLACK SOCIAL WORKERS NEWSLETTER (Nat'l Ass'n of Black Social Workers, Atlanta, Ga.), Spring 1988, at 1-2.

fusion of racial roles inherent in their own mixed-race status and their parents' interracial relationship. In fact, many of the arguments mounted against interracial marriage some decades ago sound remarkably similar to those now made against transracial adoption. Nine years ago, in reaction to claims that the children of interracial marriage would necessarily suffer identity confusion and related problems, Dr. Alvin Poussaint conducted an interview study of such children.⁹ Interestingly, but not surprisingly, empirical research evidence generally shows that the children of interracial marriage look much like the transracial adoption group on measures of self-esteem, racial identity, and basic attitudes about race relations.¹⁰

There are calls today for creating all-black schools for teenage boys, and there are many expressions of disgust with the failure of the integration strategy to empower the black community. And there is on-going hostility to interracial unions from many quarters. Last spring, a school principal in Montgomery, Alabama, threatened to cancel the high school prom to prevent interracial couples from attending, calling a student who was the child of an interracial couple "a mistake."¹¹ Debate within the black community over the pros and cons of interracial marriage is intense, with many expressing opposition.¹²

But race separatism is not the direction our country is taking as a general matter. And it is not the direction I think we should take.

I want to end with a call for courage and a call for action. A call for courage because I think it takes courage for blacks and whites to stand up against those black leaders who have opposed transracial adoption. The reason we have the policies that we have today is because many of those who know what is happening, and who care about children, have felt silenced. Whites have been too ready to assume that the limited number of black leaders who have opposed transracial adoption speak for the entire black community. Many have felt that as whites they have no right to a voice on issues involving black children, and have no right to question any black leader's claim to represent the entire black community. And many have undoubtedly simply felt intimidated. The price often involved in supporting transracial adoption is to be attacked as racist, and that is a label that white liberals do not relish.

Whites should not be ashamed to assert that they care about the fate of black children, and that they see these children as belonging not simply to the black community, but to the larger human community. It is absurd, and arguably racist, to assume that the black community is monolithic, and that

9. Dr. Alvin F. Poussaint, *Study of Interracial Children Presents Positive Picture*, 15 *INTERRACIAL BOOKS FOR CHILDREN BULL.* 9, 9-10 (No. 6 1984) (challenging the notion that biracial children suffer identity crises and suggesting that it may actually be an advantage in our country to come from an interracial background).

10. See, e.g., WILLIAM E. CROSS, *SHADES OF BLACK: DIVERSITY IN AFRICAN-AMERICAN IDENTITY* 108-114 (1991) (summarizing and comparing empirical research on biracial and transracially adopted children).

11. Ronald Smothers, *Principal Causes Furor On Mixed-Race Couples*, *N.Y. TIMES*, Mar. 16, 1994, at A16.

12. See DERRICK BELL, *RACE, RACISM AND AMERICAN LAW* § 2.4 (3d ed. 1992).

any black person who speaks on an issue should be seen as representing the black community view.

In fact, there is no reason to assume that the NABSW leadership position on transracial adoption represents a majority position in the black community. The NABSW has never even taken a poll of its membership on the issue. A number of NABSW's members quit the organization in 1972 in protest against the new policy statement opposing transracial adoption. Those polls that have been taken of black people indicate no significant support for NABSW's position or for today's race matching policies. The private decisions of many black adults indicate significant and increasing support for interracial family relationships. The number of interracial marriages has jumped in the last two decades from 310,000 per year to 1.1 million, and mixed race births have multiplied at twenty-six times the rate of any other group.¹³ Biracial people are sufficiently proud of their biracial identities that they are now demanding their own census category. In addition, black birth mothers who feel that they have and want to exercise choice in placing their children for adoption often choose the private over the public adoption system *precisely because* they want their children to be placed as soon as possible, without regard to race.

In my call for action, I must first note the urgency of the situation. The foster care population is exploding, with figures projected to continue to escalate dramatically in coming years. Many now talk of the need to build orphanages. They engage in this talk knowing that orphanages have failed children miserably in the past, simply because they see no other way to house the overwhelming numbers of children whose birth parents cannot care for them. But orphanages seem necessary only to the degree we buy into the necessity for maintaining current barriers to transracial adoption. Foster care population numbers are overwhelming to a significant degree because of our refusal to place children for adoption whom we easily could place. We must do something to bring people to their senses.

There are many obvious targets for action. We need to challenge the organizations that purport to care about civil rights and children to take a stand on the transracial adoption issues and to take the right stand. We need to pass state laws like the law recently enacted in Texas, prohibiting child welfare agencies from using race to delay or deny placement, and from otherwise discriminating in the foster care and adoption processes.¹⁴ We need to work to revise the bill now pending in Congress that was proposed by Senator Metzenbaum to deal with issues of race and adoption.¹⁵ That bill was designed to free black children from foster care limbo by forbidding the use of race to delay or deny placement, which I applaud. In its current form, however, the bill endorses the use of race as a factor in such

13. See Jill Smolowe, *Intermarried . . . With Children*, TIME, Fall 1993 Special Issue, at 64.

14. TEX. FAM. CODE ANN. § 16.081 (West Supp. 1994); TEX. HUM. RES. CODE § 47.041 (West Supp. 1994).

15. Howard M. Metzenbaum Multiethnic Placement Act of 1994, Pub. L. No. 103-382, 551-54, 108 Stat. 3518, 4056-57 (1994) (to be codified at 42 U.S.C. § 5115a). For a reprinted version of the Act, See 2 DUKE J. GENDER L. & POL'Y 171 (No. 1 1995).

placement. This is wrong in principle, as it would put the federal government, for the first time in our history, in the position of endorsing race separatism in the family. The Metzenbaum bill also would be very problematic in practice, since social workers hostile to transracial adoption are likely to misuse the discretion it would give them to consider race, in order to continue current policies.¹⁶

There is much else that can and should be done. But before taking action, we need to decide whether race separatism is or is not an appropriate goal for this country in the 1990s. We need to decide what lesson to take from the racial hostilities that are tearing the world apart. Should we see these hostilities as reason to despair with the goal of an integrated, multicultural society, as reason to put our hopes for oppressed peoples in racial separatism and racial group empowerment? As South Africa lifts its ban on transracial adoption, do we want to insist that ours remains in place?

I suggest that we should instead view current racial hostilities as reason to embrace the special kind of diversity represented by the transracial family, and as reason to celebrate the success that these families have experienced in crossing racial lines. I suggest that the right move for this country in the 1990s is to shed the particular remnant of our apartheid history represented by the barriers to transracial adoption.

16. Since the time of these comments, the Metzenbaum bill, *supra* note 15, was unfortunately passed in the form described above, without the revisions that I and others urged upon Congress. While I believe that the Multiethnic Placement Act of 1994 is significantly flawed, it nonetheless could be effective in eliminating the worst excesses of current race matching practices. It prohibits adoption agencies that receive federal funds from using race to delay or deny placement. Public adoption agencies throughout the nation are systematically engaged in policies that violate this law, and, accordingly, are now subject to the termination of federal funds and other relief authorized under the Act. It remains to be seen, however, whether the United States Department of Health and Human Services, the designated enforcement agency, will take effective action to implement the Act.

As of April 1995, Congress was considering a law that would repeal the Metzenbaum Act and forbid any consideration of race in the adoption and foster care placement process. H.R. 4, 104th Cong., 1st Sess. (1995).

