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Color-Coordinated Families: Race Matching in Adoption in the United States and Britain

Anjana Bahl*

I. INTRODUCTION

Race matching in adoption refers to the policy of placing children of a given race with adoptive parents of the same race. Ideally, the practice attempts to create a racially-similar family that is indistinguishable from the biological family.¹ Various groups, such as the National Association of Black Social Workers, have strongly defended race matching in adoptions.² The proponents of race matching claim that same-race adoptions are necessary in order for children to develop a positive racial identity.³ In addition, they argue that racially-dissimilar parents are unable to give a child such an identity.⁴

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1. See Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1173 (1991) [hereinafter Bartholet, *Politics of Race Matching*] (theorizing that what is "natural" in a biological family is desirable in adoptive families, which she terms "biologism"). Bartholet correctly argues that we should recognize and respect the ways in which adoption differs from biological parenting, and structure our laws and policies in a manner that consolidates the positive potential which the practice of adoption has as a family form. *Id.* at 1173. See also ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 93, 111 (1993) [hereinafter BARTHOLET, *FAMILY BONDS*]. Arguably, although adoption seems to be an acceptable way of forming a non-biological family, racial matching practices seem to suggest an attempt to hide the fact that the child is adopted.

2. See *infra* notes 20-26 and accompanying text. For the most part, black and minority children are placed with white families; only in very rare cases are white children not placed with white families. Bartholet, *Politics of Race Matching, supra* note 1, at 1175. For this reason, the term "transracial adoption" has sometimes been used only to refer to the adoption of black children by white families. In this Article the term is used to refer to the adoption of a child by racially-dissimilar parents. See also OWEN GILL & BARBARA JACKSON, *ADOPTION AND RACE: BLACK, ASIAN AND MIXED RACE CHILDREN IN WHITE FAMILIES* 1 (1983) [hereinafter GILL & JACKSON, *ADOPTION & RACE*] (defining the term "transracial adoption").

3. See *infra* notes 76-96 and accompanying text.

4. See *infra* notes 20-22 and accompanying text.

Several practical problems arise, however, when adoption agencies and local authorities pursue race-matching policies. First, there are significantly more white parents wishing to adopt than there are white children awaiting placement, and the black children waiting to be adopted outnumber the available adoptive black families.⁵ Second, same-race adoption does not seem to consider the plight of biracial and multiracial children, for whom an ideal “match” seems impossible.⁶ Most importantly, race-matching practices inevitably hinder the best interests of adoptees.⁷

Race matching also presents legal problems. In the United States, the exercise of racial matching is particularly curious given that in most areas of community life, race is a totally impermissible factor in classification.⁸ The unconstitutionality of certain race classifications, whether in the context of prohibiting interracial marriages or segregation in the public school system,⁹ suggests that significant efforts have been made to narrow the racial divide. Thus, permitting racial separatism in the adoption context seems an aberrant practice. Arguably, it indicates that despite the legislative attempts to be colorblind, there still remains a deep-seated hostility toward interracial families and relationships. Although the constitutional history and concomitant concerns of Britain and the United States are different, the social and political issues that trouble race relations, and thus

5. 136 CONG. REC. E2078-01 (June 21, 1990). Representative George Miller of California introduced a report of the Select Committee on Children, Youth and Families to the legislature, entitled *No Place To Call Home: Discarded Children in America*. *Id.* at E2079. The Report states that minority children in foster care are disproportionately represented: in 1988, approximately 46% of children in foster care were minority children, which was more than twice the number of minority children in the population. *Id.* Among the reasons given for this disparity was the increase in homeless persons, AIDS, poverty and drug abuse. These are factors that have particularly affected black families and minority communities and have displaced the children in both those groups. *Hearing on the Child Abuse Prevention, Adoption and Family Services Act*, Serial No. 102-96, 102d Cong., 2d Sess. 263, 265 (1992). Reports of child abuse and neglect have tripled since 1980 and even though most of the “child-victims” are white, black children are disproportionately represented. *See The Cost of Crack: Foster Care*, *ECONOMIST*, May 14, 1994, at 33. *See also* Twila L. Perry, *Race and Child-Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 52 (1991) (discussing the increased interest in transracial adoption due to the larger number of minority children being displaced from their homes because of growing social problems).

6. *See infra* notes 101-10 and accompanying text.

7. *See infra* notes 62-65 and accompanying text; *see generally* Part III.A.

8. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1226.

9. *See Brown v. Board of Educ.*, 347 U.S. 483 (1954) (holding that racial segregation in public schools is unconstitutional and ordering their integration).

transracial adoptions, are quite similar.¹⁰ The adoption system seems to serve as a forum for the articulation of historic grievances and greater racial polarization.¹¹

The purpose of this Article is to consider whether racial-matching practices that are undertaken by adoption agencies, local authorities, and the courts are in a child's best interests.¹² Reviewing the effects of those policies and the practice of transracial adoption, and assessing their competing strengths and weaknesses within the best interests framework, this Article will determine whether a racially-neutral system, in which race is eliminated as a factor in the placement process, is preferable to racial-matching policies.

Accordingly, this Article first considers arguments in favor of both race matching and transracial adoption policies.¹³ Next, this Article refutes traditional social arguments in favor of race-matching policies and illustrates the difficulty in reconciling race-matching policies and the best interests of the child.¹⁴ This Article then analyzes the legal challenges to racial matching in both the United States and Britain.¹⁵ Finally, this Article concludes that transracial adoptions offer children the opportunity to live in stable, permanent family environments, the true objective of the adoption process.¹⁶

II. THE COMPETING ARGUMENTS

A. *The Case For Race*

During the 1960s, there was a noticeable change¹⁷ in the attitude toward transracial adoptions in the United States. The number of children adopted increased, perhaps aided by the preference for international adoptions in the aftermath of the Korean War.¹⁸ Further,

10. *See infra* Part II.

11. *See infra* Part VI.

12. *See infra* Part III.

13. *See infra* Part II.

14. *See infra* Part III.

15. *See infra* Parts IV and V.

16. *See infra* Part VI.

17. Prior to this there were very strong legal and social barriers to transracial adoption. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1176. Adoption experts state that racial matching was practiced because a physical resemblance would facilitate identification between parents and adopted children. RUTH G. MCROY & LOUIS A. ZURCHER, *TRANSRACIAL AND INRACIAL ADOPTees: THE ADOLESCENT YEARS* 4 (1983).

18. After the war, South Korea permitted the adoption of abandoned and orphaned children. Many of them were mixed race children, fathered by black American soldiers stationed in Korea. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1178. This

the Civil Rights movement in that decade drew attention to the condition of minority children in ineffectual foster care programs and thus encouraged transracial placements. "This movement's integrationist ideology made transracial adoption a sympathetic idea to many adoption workers and prospective parents."¹⁹

Nevertheless, the National Association of Black Social Workers ("NABSW") adopted a hostile approach to the practice.²⁰ The organization's fundamental position has always been that black children need to be raised by black families in order to develop a positive racial identity.²¹ In short, the association believes that only black parents can teach black children the skills to cope with a racist society. Further, the NABSW has stated that transracial placements threaten black culture and the black community, and are a "blatant form of race and cultural genocide."²² Its consistent criticism has arguably been the most influential factor against transracial adoption and has

resulted in the formation of racially and ethnically mixed adoptive families in the United States. *Id.* See also Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 488 (1991). For a concise summary and historical overview of transracial adoption, see Arnold R. Silverman & William Feigelman, *Adjustment In Interracial Adoptees: An Overview*, in THE PSYCHOLOGY OF ADOPTION 187, 187-89 (Brodzinsky and Schechter eds., 1990).

19. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1178. Margaret Howard has identified a variety of factors which contributed to the increase in transracial placements in the United States: (i) a greater number of children entered the child-placement system due to the increased awareness and reporting of child abuse; (ii) the weaknesses of the foster care system which became increasingly obvious; (iii) data which highlighted the effects of "maternal deprivation" that resulted from the institutional care that infants were subjected to (foster care was thus considered preferable to institutional care, and an adoptive, permanent placement as the most attractive option); (iv) a considerable reduction in the number of minority homes in contrast to the number of available minority children; (v) social workers abated the practice of race matching; (vi) a paucity of minority homes given the number of available minority children; and (vii) a greater acceptance of racial integration, which made white parents more willing to adopt black children. Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 505-14 (1984).

20. RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 45, 50-52 (1977), [hereinafter SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*] (citing a position paper of the National Association of Black Social Workers). See also *id.* at 44-50 (reviewing the "Antitransracial Adoption Movement"); JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 74-76 (1977) (discussing the NABSW's views on transracial adoption). For a more moderate approach to the practice of transracial adoption, see Leon Chestang, *The Dilemma of Biracial Adoption*, 17 SOC. WORK 100 (1972).

21. See Bartholet, *Politics of Race Matching*, *supra* note 1, at 1195.

22. RITA J. SIMON, HOWARD ALTSTEIN & MARYGOLD S. MELLI, *THE CASE FOR TRANSRACIAL ADOPTION* 40 (1994) [hereinafter SIMON, ALTSTEIN & MELLI] (citing an excerpt from the testimony given by William T. Merritt, President of the NABSW, at the Senate Hearings before the Committee on Labor and Human Resources, June 25, 1985).

significantly affected the practice.²³ The number of transracial placements diminished from 2574 in 1971 to 831 in 1975.²⁴ A decade later, the NABSW still maintained that black children must not, *under any circumstances*, be placed with white families.²⁵ The president of the NABSW has stated:

The lateral transfer of our children to white families is not in our best interest. Having white families raise our children to be white is at least a hostile gesture toward us as a people and at best the ultimate gesture of disrespect for our heritage as African people. . . . It is their aim to raise Black children with white minds. . . . We are on the right side of the transracial adoption issue. Our children are our future.²⁶

Statistics indicating a trend of favoring transracial placements appeared later in Britain than in the United States. The numbers in Britain increased from the mid-1960s until the early to mid-1970s, corresponding to the decrease in the number of available white babies.²⁷ "Indeed, one of the central criticisms related to transracial adoption is that it was only when the supply of healthy white babies for adoption had failed that black babies were seen to be suitable for adoption"²⁸

However, in the early 1980s, the practice of transracial adoption was attacked in Britain, corresponding to the strong arguments that

23. Simon and Altstein have commented that:

[Transracial adoption] was not halted because data indicated that it was a failure, that adoptees and/or their adoptive families suffered any damaging social or psychological effects. It was not stopped because transracial adoptees were experiencing racial confusion or negative self-images. It did not end because there were no longer any non-white children in foster care or in institutions requiring permanent placements. It was not eradicated because the supply of families willing and able to adopt a child of another race was exhausted. *Transracial adoption died because child welfare agencies no longer saw it as politically expedient*, even though none of the 50 states recognizes race as a sufficient factor in denying an adoption.

RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTEES AND THEIR FAMILIES: A STUDY OF IDENTITY AND COMMITMENT* 141 (1987) [hereinafter SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEES*] (emphasis added).

24. *Id.* at 5.

25. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1182 n.43, 1195 (citing NABSW, *PRESERVING BLACK FAMILIES: RESEARCH AND ACTION BEYOND THE RHETORIC* 49 (1986)) (emphasis added).

26. Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 MICH. L. REV. 925, 961 n.205 (1994) (quoting Morris F.X. Jeff, Jr., *President's Message*, NAT'L ASS'N BLACK SOC. WORKERS NEWSLETTER, Spring 1988, at 1-2).

27. GILL & JACKSON, *ADOPTION & RACE*, *supra* note 2, at 2.

28. *Id.*

had become influential in the United States.²⁹ Moreover, in Britain, a considerable number of black children remain in out-of-home care because of the complete prohibition that many local authorities impose against the placement of black or mixed-race children with Caucasian parents.³⁰ In 1983, the Association of Black Social Workers and Allied Professionals (ABSWAP) was established in Britain. Similar to the NABSW in the United States, it turned to that organization for advice, after which it targeted social workers with proposed guidelines.³¹ The British Agencies for Adoption and Fostering (BAAF) established the Black Perspectives Advisory Committee and also expressed a similarly forceful view that black children should not be placed with white parents.³² The BAAF has stated:

Historically black people have been victims of racism for centuries. This has manifested and continues to manifest itself in many forms. Racism permeates all areas of British society. . . . Black children therefore require the survival skills necessary to develop a positive racial identity. This will enable them to deal with the racism within our predominantly white society.³³

Some critics of transracial adoption have added that the traditional criteria for prospective adoptive families, which focus on economic stability, marriage, and middle-class values, operate to disqualify blacks and other disadvantaged ethnic groups.³⁴ Black professionals argue that there is institutional racism in white welfare agencies that are staffed primarily by white social workers.³⁵ They state that whenever black child welfare agencies have made an effort to identify and recommend families, fairly large numbers of black children have been placed in black adoptive homes.³⁶

Others have reasoned that the inconsistency between the apparent wish to adopt by black families and the shortfall in acceptable black

29. Peter Hayes, *The Ideological Attack on Transracial Adoption in the USA and Britain*, 9 INT'L. J.L. & FAM. 1, 3 (1995).

30. Christopher Bagley, *Transracial Adoption in Britain: A Follow-Up Study, with Policy Considerations*, 72 CHILD WELFARE 285, 295 (1993) [hereinafter Bagley, *Transracial Adoption in Britain*]. Bagley states that "some local authority practice may be based on a naive, absurd antiracist policy, which assumes that keeping black children separated from white families will somehow serve their interests, or protect them from racism." *Id.* at 296.

31. Hayes, *supra* note 29, at 3.

32. *Id.* See also *Re N (A Minor) (Adoption)* [1990] 1 FLR 58, 62 (quoting summary to a practice note).

33. *Id.*

34. SIMON, ALTSTEIN & MELLI, *supra* note 22, at 42.

35. *Id.* at 43-44.

36. SIMON & ALTSTEIN, *TRANSRACIAL ADOPTTEES*, *supra* note 23, at 8.

homes can be explained as follows: (a) child welfare agencies have not utilized effective channels such as the black press and churches when recruiting families; (b) blacks have historically been wary of public agencies and have, for the most part, avoided contact with them; and (c) many blacks have felt that because they live in poorer areas, they are unlikely to be accepted, even if they largely satisfy the other qualifying criteria.³⁷ Some argue, therefore, that the practice of transracial adoption would be unnecessary if appropriate and equitable efforts were made to recruit families from black and minority communities and if the deep-seated racist perspective that questions their parenting abilities were dispelled.³⁸

B. *The Argument for Transracial Placements*

"In contrast to the evidence on which the case *for* transracial adoption rests, the case *against* transracial placements is built primarily on ideology and rhetoric."³⁹ Racial-matching policies delay the permanent placement of a child. They also result in denying foster parents the opportunity to adopt a racially-different child, even though their parenting has been excellent and the child is attached to them and emotionally well adjusted. In the United States, black children comprise a disproportionately high number of children in need of homes, and black children wait twice as long as white children for permanent homes.⁴⁰ Many agencies have mandatory policies against

37. *Id.* at 9. Gill and Jackson also provide a similar explanation about black families in Britain. GILL & JACKSON, *ADOPTION & RACE*, *supra* note 2, at 3. They further state that the Asian and West Indian communities in Britain may also have been discouraged by the alien nature of formal adoption procedures. *Id.*

38. See generally LEORA NEAL & AL STUMPH, *TRANSRACIAL ADOPTIVE PARENTING: A BLACK/WHITE COMMUNITY ISSUE* (1993). Neal & Stumph argue that the child care system in the United States serves black children inadequately and mirrors the well established racism and bureaucracy endemic in the system. *Id.* at 2.

There is also an interest in dispelling the public perception of black families as being inadequate and unwilling to care for black children in need. Perry, *supra* note 5, at 117. See also SIMON, ALTSTEIN & MELLI, *supra* note 22, at 46-47 (noting the ten-point *Minority Placement Position Statement* issued by the North American Council on Adoptable Children, favoring same-race placements for black, Hispanic, and Native American children).

39. SIMON, ALTSTEIN & MELLI, *supra* note 22, at 39 (emphasis in original).

40. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1187. Bartholet also states:

The socio-economic disadvantages of blacks as a group explain, to a significant degree, both the fact that disproportionate numbers of black children are living in out-of-home placements, and the fact that limited numbers of black families are available to adopt them. It is, for the most part, people living in relatively stable social and economic situations who have sought the opportunity to parent through adoption.

transracial placements, even though there are a large number of parents waiting to adopt.⁴¹ “While the months and years go by the children are pushed deeper into the hard-to-place category, as they get older and accumulate what are often damaging experiences in foster care. Delay thus puts the child at risk of yet more delay and, ultimately, the denial of placement altogether.”⁴² In Britain, it is argued that a transracial foster or adoptive placement is far preferable to long periods spent in residential care.⁴³ The research confirms that adoption has better results for the children than institutionalized or residential care.⁴⁴

Further, although some radical black organizations in Britain have stated that “the black community” is against transracial adoption, it is unclear whether those groups actually speak for the black community. There is also no clarity as to what the average member of the black community in Britain thinks about transracial adoption.⁴⁵ It is thus argued that organizations in both the United States and Britain that are opposed to transracial adoption have often used simplistic assumptions to validate their claim of speaking for the community, when in reality, they impose their views on the community.⁴⁶

Id. at 1203 n.106.

41. *Id.* at 1195. See also SIMON, ALTSTEIN & MELLI, *supra* note 22, at 4-8, 21-22.

42. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1204. See also SILVERMAN & FEIGELMAN, *supra* note 18, at 198.

43. CHRISTOPHER BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS: A MENTAL HEALTH PERSPECTIVE 260 (1993) [hereinafter BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS].

44. *Id.* It is further stated that even though a same-race placement might be desirable, many white families, with careful screening and support, are able to provide the stability, care, and sense of identity relevant in a transracial placement. *Id.*

45. *Id.* at 256. In 1979, 100 families in the London Borough of Merton were surveyed to ascertain their response to the acceptance of transracial adoption. *Id.* at 257. Seventy-one percent of them totally accepted the idea. *Id.* at 258. They nevertheless expressed their fears about the possible rejection and isolation from the black community for black children brought up in white homes. *Id.* However, 85% of respondents preferred a black child to be raised in a white adoptive home as opposed to foster care or an institution. *Id.* In 1989, a similar study to that undertaken in 1979 was conducted in South London; eleven of the respondents interviewed in 1989 were children of individuals interviewed in the 1979 study. *Id.* at 259. About one-third of the black respondents were strongly against the idea of transracial adoptions, but almost half of the respondents were quite accepting of the practice. *Id.*

46. Hayes, *supra* note 29, at 15.

[T]he viability of TRA [transracial adoption] does not depend upon the majority and minority opinions within ethnically defined communities but only on there being sufficient diversity of views and attitudes among members of society for someone who is transracially adopted to be able to integrate into the community in which they grow up, and in which they choose to live.

Id. at 16.

It is thus submitted that agency policies or authorities which keep children in institutions, with foster families, or move them from home to home to avoid a transracial placement are damaging to children and cannot be supported. For example, some agencies in the United States have "holding periods," which vary in duration, before a transracial placement is made; others have time-specific policies, but with vague guidelines, before permitting a transracial adoption.⁴⁷ These are practices that can only harm children awaiting permanent homes. There are also long delays in legally freeing a child for adoption. In the United States and Britain, court procedures to terminate the rights of biological parents can be lengthy. Specifically, in the United States the process may take two to four years.⁴⁸ Thus, when adoption workers postpone the steps for adoption because a same-race placement cannot be made, the delay is compounded and is ultimately detrimental to the child. "Even the best foster placement remains psychologically temporary in the minds of all concerned."⁴⁹

Proponents of transracial adoptions also argue that the criteria applied to screen parents in a mandatory race-matching process is significantly different for prospective white and black adoptive parents.⁵⁰ For example, efforts to enlarge the pool of black parents have included considering older people in their fifties and sixties, single persons, and those on welfare as potential parents — in essence, the type of person routinely excluded from the pool of white parents or, at best, given very low priority.⁵¹ Moreover, government subsidies, which may be misused by those in dire financial need, are provided as an incentive to single persons and minorities to encourage them to adopt minority children, even though they may have little interest in the adopted child.⁵² It is, therefore, stated that the racial factor helps include and give priority to those at the bottom of the black list over those on the white list to ensure that a same-race placement is

47. Barholet, *Politics of Race Matching*, *supra* note 1, at 1193-94.

48. *Id.* at 1194 n.77.

49. SIMON & ALTSTEIN, *TRANSRACIAL ADOPTIVES*, *supra* note 23, at 142.

50. Hayes, *supra* note 29, at 3-4.

51. Barholet, *Politics of Race Matching*, *supra* note 1, at 1199. Barholet states that "[a]s a result, the pool of black adoptive parents [in the United States] looks very different in socio-economic terms from the pool of white parents. Black adoptive parents are significantly older, poorer, and more likely to be single than their white adoptive counterparts." *Id.* at 1199-200.

52. *Id.* at 1206 n.117. Conversely, some argue that providing financial incentives would encourage those black and minority families who wished to adopt, but are economically unable, to take part in the adoption process. Perry, *supra* note 5, at 126 n.235.

made.⁵³ Arguably, the efforts should be directed toward assessing those prospective parents, despite their skin color, who best satisfy the parental fitness criteria, instead of race matching at any cost.⁵⁴

C. *The Compromise Position*

Some professionals in this area argue that the *initial* efforts should be directed towards placing children with same-race families.⁵⁵ If a suitable placement is unavailable, then applications for transracial adoptions should be considered.⁵⁶ Other professionals suggest that transracial placements, albeit a second choice to a same-race placement, are preferable to long-term institutional care and for difficult placements such as older or disabled black and minority children.⁵⁷

Professor Twila L. Perry argues that only "in the *initial* placement of a child for adoption," where two or more adoptive families are available, should race be given considerable weight.⁵⁸ At this stage there is no danger of disruption to the child or of severing ties with, quite often, the only family the child has ever known. Nevertheless, Professor Perry states that even though the initial placement of the child might be the only situation in which it is at all appropriate to consider race, ironically, it is a setting that is least likely to exist: very few black children in need of adoption will be in a position where two families of *different* races will be vying for the placement.⁵⁹ Moreover, there is a danger that adoption agencies and authorities will misuse this allowance and delay placements, yet again, in search of an "ideal" match. A child should not be denied the continuity and the

53. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1206. See also Hayes, *supra* note 29, at 3-4.

54. It has also been stated that the quality of parenting is more important than whether a child has been transracially adopted or placed with a same-race family. MCROY & ZURCHER, *supra* note 17, at 138.

55. See, e.g., SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEES*, *supra* note 23, at 142 ("clearly agency efforts should be initially directed at locating permanent inracial placements for children").

56. SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEES*, *supra* note 23, at 142.

57. 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, 511 (1987-88).

58. Perry, *supra* note 5, at 109 (emphasis added).

59. *Id.* at 110 n.200. Although Perry states that the NABSW adopts too extreme a position by opting for institutional life for a child when a permanent non-black placement is available, or by severing existing "family" ties to secure a same-race placement, she advocates that, where possible, black children should be placed in black homes. *Id.* at 113-14. See also Mahoney, *supra* note 18, at 499.

stability of a permanent home because racial barriers have been erected and, indeed, should have the right⁶⁰ to be an integral part of a family.⁶¹

III. IN WHOSE BEST INTERESTS?

The child's best interest is meant to be the primary concern of all parties in adoption proceedings.⁶² In essence, the test includes considering and weighing the various competing factors in any given case before making a decision that will promote the welfare of the child.⁶³ This Section will assess the race-matching argument by taking a closer look at the arguments against transracial adoptions.⁶⁴ In light of this examination, this Section will look at the best interest standard and whether race matching can meet this standard.⁶⁵

A. *Is Transracial Adoption "Cultural Genocide"?*⁶⁶

1. The Perceived Threats

Arguably, there are two separate issues in transracial placements: (a) the threat to the continuity of black and other minority groups as ethnic groups; and (b) the effect on the child who perhaps loses her cultural identity by not securing a same-race placement.⁶⁷ What is unclear,

60. See generally United Nations Convention on the Rights of the Child (1989), BLACKSTONE'S INTERNATIONAL HUMAN RIGHTS DOCUMENTS 102 (1st ed. 1995). The Preamble states: "Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding . . ." *Id.* at 103. It is also argued that removing race as a factor in adoption proceedings might provide each child with his "birthright" — the opportunity to be part of a loving family. See Shari O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 498 (1986).

61. Simon and Altstein, however, suggest that some basic questions in this area still await answers. "For example, does a child have the right to be adopted, or is it a privilege bestowed on him or her by the courts?" SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 20, at 21. See generally Michael King & Judith Trowell, *Responding to Children's Needs: An Issue of Law?* in A READER ON FAMILY LAW 311 (John Eekelaar & Mavis Maclean eds., 1994).

62. Howard, *supra* note 19, at 503-04 (discussing some of the inherent difficulties in the best interest standard). See *infra* notes 121-30 and accompanying text.

63. See *infra* notes 121-30 and accompanying text.

64. See *infra* Part III.A.

65. See *infra* Part III.B.

66. Forde-Mazrui, *supra* note 26, at 959 (noting the NABSW has described transracial adoption as cultural genocide). Further, Bowen argues that although transracial adoption may not have started as a "diabolical scheme," it has "diabolical consequences" for the black family. Bowen, *supra* note 57, at 528-29. He states that blacks need not wait to be threatened with "extinction" before retaliating against endangering practices like transracial placement. *Id.* at 529.

67. Howard, *supra* note 19, at 532 n.147.

however, is *why* transracial adoption is viewed as an invariable threat to ethnic continuity. The number of children placed transracially is not significant enough to raise concerns about cultural extinction.⁶⁸ In fact, a number of transracial placements in the United States have involved biracial or multiracial children⁶⁹ — those whose purely “black” identity in any event must be questioned.⁷⁰ Native-Americans, by contrast, have been threatened as a group, as a critical number of Indian children have been placed outside that community.⁷¹ Further, it is argued that there is great unity among the Native-American people against transracial placement.⁷² That is not the case in the black communities, either in the United States or in Britain. These communities, which are diverse, disagree on important political and social issues, and are divided along geographical and class lines. Thus, “[b]lack people do not comprise a discrete culture.”⁷³ They

68. There are no clear figures on the number of transracial adoptions. Silverman and Feigelman state that a “modest guess” of the number of black-white domestic placements in the United States would range between 1000 and 2000 annually. Silverman & Feigelman, *supra* note 18, at 189. In Britain, it is argued that the black family’s position has changed in that there is a “trend towards the embourgeoisment of the black family” as their socio-economic position has improved. BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS, *supra* note 43, at 248. Therefore, it is stated that not only are black families in Britain releasing fewer children, but stable, affluent black families are also in a position to assume the roles of foster and adoptive parents. *Id.* Mahoney argues that children from racially-different backgrounds can bring a new dimension to the family. Mahoney, *supra* note 18, at 501. Their culture is not necessarily lost, but can become a part of their adopted parent’s culture. *Id.* See also SIMON, ALTSTEIN & MELLI, *supra* note 22, at 1-8 (stating that from 1968-1975, approximately 12,000 black children were placed with white families).

69. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1175 n.14.

70. See *infra* notes 101-10 and accompanying text.

71. Howard, *supra* note 19, at 530-33. See also *infra* notes 72, 140-47, and accompanying text. Nevertheless, Bowen argues that the position of Afro-American families in the United States is similar to that of Native-Americans:

Both groups have suffered a history of extreme segregation, severe discrimination and tremendous oppression in America; both have been considered discrete and insular racial minorities; both have been viewed as, and in fact have been, politically powerless vis-a-vis the dominant white majority. . . . As a result of these discriminations, at least in part, both groups have experienced family breakdown in the modern era. This breakdown has caused children of both groups to be placed with persons not of their own racial background.

Bowen, *supra* note 57, at 522-23 n.185 (citations omitted).

72. Hayes, however, argues that it is somewhat artificial to claim that the Native-American community is *unanimously* against transracial adoption because the term “community” itself is ill-defined; it is thus difficult to assess if one or more groups speak for the *entire* community. Hayes, *supra* note 29, at 14-15.

73. Forde-Mazrui, *supra* note 26, at 962. The black community does not comprise a cohesive group with an identifiable leadership or distinguishable interests. *Id.* She further argues that the existence of diverse attitudes among black people towards black

cannot be culturally distinguished as having their own religion, language, or exclusive ethnic practices.⁷⁴ Thus, because "skin color is separate from cultural affiliation, a black or biracial child placed in a white home can learn the culture of her white parents while maintaining a realistic and healthy view toward her racial identity."⁷⁵

2. Racial Identity

It is the NABSW's position, and the position of those opposed to transracial adoption, that only black parents are able to instill a sense of racial identity in black children. Nevertheless, several empirical studies have confirmed the success of transracial adoptions, concluding that the children adjust to their new family as well as those placed with a same-race family.⁷⁶ Further, a transracial placement does not necessarily impede the development of a child's racial identity and self-esteem.⁷⁷ Although it is assumed that black children brought up by Caucasian families will have problems with their ethnic self-esteem, paradoxically, many black children brought up in *black* families face the same obstacles.⁷⁸ Thus, black and mixed-race

identity is inevitable when the common characteristic in a community is a physical attribute, as opposed to a religion, a political forum, or other interests. *Id.* at 964. *See supra* notes 68-70 and accompanying text; *see also* notes 81-82, *infra*, and accompanying text.

74. Forde-Mazrui, *supra* note 26, at 962.

75. *Id.* at 964. Hayes correctly argues that opponents of transracial adoption wrongly consider a person's culture and heritage to be the same as their biological make-up, in that it is argued that just as genes determine a person's physical appearance, culture and heritage comprise an inherent and vital aspect of a person, as opposed to being an aspect that is developed and somewhat conventional. Hayes, *supra* note 29, at 7. *See also* Mahoney, *supra* note 18, at 501.

76. *See, e.g.*, Silverman & Feigelman, *supra* note 18, at 198 (reporting favorable findings of comparative study of transracial adoption).

77. In a study done by McRoy and Zurcher in Texas, Kansas, and Minnesota of 60 black children, 30 adopted by black parents and 30 adopted by white parents, there was, overall, no difference in the adjustment of the two groups on standardized mental health scales. MCROY & ZURCHER, *supra* note 17, at 18. The black children in white families identified themselves as "black" considerably more often than the children adopted by black families. *Id.* at 129. The latter made "No Reference To Race." *Id.* Further, both the black same-race adoptees and the transracial adoptees had similar self-esteem scores. *Id.* at 118. *See also* BAGLEY, INTERNATIONAL AND TRANSRACIAL ADOPTIONS, *supra* note 43, at 79.

78. Bagley, *Transracial Adoption in Britain*, *supra* note 30, at 287-88. In several "projective" tests, for example, using photographs of Caucasian and black people, and black and white colors and figures, black children both in Britain and the United States have been inclined to devalue black people and blackness, and have indicated a preference for white figures to the extent of negating and occasionally denigrating their own blackness. *Id.* at 288. However, this has improved, and black children have since evaluated "self-characteristics" more positively. *Id.* In 1987, 20% of the black

children adopted by Caucasian parents may have different levels of racial identity and may evaluate black people in a similar or possibly more positive way than black children raised in same-race families.⁷⁹

A British study of 114 adopted and non-adopted children supports this contention.⁸⁰ In the study, thirty black or mixed-race children adopted by Caucasian parents were compared with thirty Caucasian children adopted by same-race parents, thirty black and mixed-race children in foster or group care who were not adopted, and twenty-four children in a comparison group comprised from school sources. The evaluation of the black and mixed-race adopted children, at the time between six and eight years of age, resulted, in general, in good psychological outcomes in reference to a number of standard measures of adjustment.⁸¹

Twelve years later, the study located twenty-seven of the thirty black and mixed-race children adopted by Caucasian parents, and twenty-five of the thirty Caucasian children adopted by same-race families. The children were, on average, nineteen years of age. In terms of adjustment and identity, the results for both groups, for the most part, were excellent.⁸² In *both* groups, approximately ten percent had adjustment difficulties.⁸³ The study thus indicated, as others have, that the multicultural identity a transracial adoptee forms is not

Jamaican children assessed in Toronto identified with white children, compared with 40% of black Jamaican children studied in Britain in 1976 and 53% of African-American children evaluated in 1976 using the same "projective" tests. *Id.* (citations omitted).

79. *Id.* Simon and Altstein have reported that:

[I]t appears that black children reared in the special setting of multiracial families do not acquire the ambivalence toward their own race reported in all other studies involving young black children. Our results also show that white children do not consistently prefer white to other groups, and that there are no significant differences in the racial attitudes of any of the categories of children. Our findings do not offer any evidence that black children reared by white parents acquire a preference for black over white. They show only that black children perceive themselves as black as accurately as white children perceive themselves as white.

SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 20, at 158.

80. Bagley, *Transracial Adoption in Britain*, *supra* note 30, at 289-96.

81. *Id.* at 289. Some of the Caucasian parents, however, had few black friends and were either not able to or were unwilling to inculcate a sense of black pride and consciousness in their children. *Id.* See also *supra* notes 76-77, and accompanying text.

82. Bagley, *Transracial Adoption in Britain*, *supra* note 30, at 292. The black and mixed-race adoptees, both male and female, had close Caucasian friends. *Id.* However "41% of the black adoptees ha[d] a best girlfriend/boyfriend who [was] black, mixed-race, Chinese, or Indian, compared with 24% of the Caucasian adoptees." *Id.* Neither group of adoptees had any difficulty "in finding friends of either sex." *Id.* at 293.

83. *Id.*

prejudicial to the child's development or adaptation. On the contrary, the children seemed well-positioned to be part of a multiracial society.⁸⁴

Further, proponents of racial-matching policies may have adopted a rather simplistic approach to the issues of racial and ethnic identity. These are terms which have no precise definition.⁸⁵ Some argue that "[w]hether adopted by parents of their *own or another race*, adoptees often find it difficult to establish a sense of identity."⁸⁶ For example, does racial identity mean that a child considers herself a black person, or that she identifies with black culture?⁸⁷ The two issues may (but not must) be interrelated. Thus "a child could feel good about being Black without identifying with Black culture."⁸⁸ There is no dispute that a strong ethnic and cultural identity provides support, as one can draw strength and encouragement from that community. Further, there is no doubt that ethnic diversity in society is intrinsically valuable. But in the context of any ethnic community, as indeed with any group, it is incorrect to state that there is just *one* culture with the same cohesive values that all families relate to and identify with. Further, a "color-blind" approach, which advocates that people should be treated as individuals irrespective of their color, does not contend that there are no cultural differences between people. In essence, it is simply that

84. *Id.* at 294.

85. Howard also states that it is impossible to define terms such as "successful" transracial placements, "cultural identity," and to measure what has been accomplished. Thus she states that any researcher analyzing transracial adoption must face these difficulties, and arguably all the data in this area can be criticized on those grounds. Nevertheless, she argues that it is "the only data we have . . . and must be relied on for whatever they are worth." Howard, *supra* note 19, at 534 n.155 (citations omitted). Hayes, however, argues that researchers analyzing the practice of transracial adoption have at times distorted research materials and positive results, and even come to conclusions that contradict their research findings. Hayes, *supra* note 29, at 5-6. See also Penny R. Johnson et al., *Transracial Adoption and the Development of Black Identity at Age Eight*, 66 CHILD WELFARE 45 (1987). The authors analyzed issues such as racial identity, the child's adjustment, and related factors. *Id.* at 46-47. Two different interpretations of the same research data were offered. *Id.* at 52-54. The first stated that transracial adoptions are working; the second expressed concerns about the development of racial identity and the acceptance of racial differences. *Id.*

86. *In re R.M.G.*, 454 A.2d 776, 787 (D.C. 1982) (emphasis added).

87. Forde-Mazrui, *supra* note 26, at 946 n.128.

88. *Id.* at 947. Silverman and Feigelman state that upon reviewing the research in this area, they find an absence of any link between levels of racial identification and self-esteem. Silverman & Feigelman, *supra* note 18, at 197. Thus, a black child who is transracially adopted might develop a positive sense of identity without exclusively identifying with the black community. *Id.*

“no-one is naturally predestined to conform to any particular culture, nor should they be forced to do so.”⁸⁹

Some observers state that there is no evidence that black parents better inculcate a sense of racial and cultural pride in black children than do white parents.⁹⁰ “It also seems clear that there are Black adults who have not been able to successfully handle the disadvantages of race in their own lives and who therefore might not be such effective teachers.”⁹¹ Thus it is stated that any policy or practice “that engages in racial steering *on the basis of a hunch* that certain people, *because of their race*, will know better than others how to raise a child” should be rejected.⁹²

It is further argued that there is no credible, empirical evidence to substantiate the proposition that, all things being equal, adults of the same race will be better positioned to raise a child than parents of a different race.⁹³ “[T]here exists no consensus on what constitutes racially-correct parenting.”⁹⁴

Others reason that a white parent’s denial of ethnic inferiority may be more credible because it is less self-serving.⁹⁵ If, in same-race families (biological or adoptive), the level of racial and ethnic identity developed in children is not monitored, why is it imperative, almost a qualifying standard, in transracial placements?⁹⁶ The best interests test

89. Hayes, *supra* note 29, at 7.

90. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1220. Studies indicate that there is a significant variation in the degree to which white families make deliberate attempts to make their adopted black children feel proud of their heritage and part of a black cultural community. *Id.* There is, however, no “evidence that such differences as may exist in racial attitudes have any negative implications on the well-being of those raised transracially.” *Id.* Mahoney argues that when white parents adopt racially-different children, they “must stop being white families and become mixed families.” Mahoney, *supra* note 18, at 500. She further states that many parents who adopt transracially are willing to accept this change, and in fact, welcome it. *Id.* See also Johnson et al., *supra* note 85, at 49-50, 52-54 (noting that the most difficult task facing black children that are transracially adopted is developing a sense of pride in being black).

91. Perry, *supra* note 5, at 110.

92. Randall Kennedy, *Interracial Adoption*, A.B.A. J., Apr. 1995, at 44 (emphasis added).

93. *Id.* See also SIMON, ALTSTEIN & MELLI, *supra* note 22, at 39 (noting that there is no scientific or empirical data which concludes “that transracial adoptions work against the best interests of children”). See also Hayes, *supra* note 29, at 6.

94. Kennedy, *supra* note 92, at 44.

95. Forde-Mazrui, *supra* note 26, at 954.

96. See Julie Lythcott-Haims, *Where Do Mixed Babies Belong? Racial Classification in America and its Implications for Transracial Adoption*, 29 HARV. C.R.-C.L. L. REV. 531, 555-56 (1994) (discussing transracial placement in the context of multiracial children).

is not satisfied by a single-factor determination of a positive racial identity.

3. Teaching "Survival Skills"

Some argue that only black parents can teach black children the "survival skills" necessary to cope in a racist society. Therefore, "[t]o suggest that the skills of survival, coping and defense can be taught by those who have never themselves learned them is at best mystifying."⁹⁷ But the definition of survival skills is unclear and controversial, and there is disagreement on the guidance that should be provided. "[W]hat is the best advice to give? . . . Blacks do not agree. Nor do whites."⁹⁸ By endorsing a survival skills approach, we are placing black and minority children on the defensive about their race and ethnic identity in a manner that can only inculcate a self-consciousness that is negative. While no one advocates denying one's ethnicity, it is not necessary to make it an issue at all times. Research has indicated that both non-white and white children brought up in mixed-race families are less inclined to view being "white" as necessarily positive and desirable, as compared to the perceptions of those children raised in same-race families.⁹⁹ By demystifying the "otherness" of different races,¹⁰⁰ and by blurring the racial boundaries that are pernicious and which have greatly harmed our society, we can begin to move away from a racist society to a racially-aware and integrated community.

4. Biracial and Multiracial Children — Misfits?

Racial-matching policies do not distinguish between black and biracial children. The NABSW argues that biracial children should be considered black.¹⁰¹ In American and British societies, too, a biracial child is regarded as black. If one natural parent is colored and the other is white, the child is categorized as black.¹⁰² Further, multiracial children in the United States are categorized according to the "one-

97. Bowen, *supra* note 57, at 510. See Amuzie Chimezie, *Transracial Adoption of Black Children*, 20 SOC. WORK 296 (1975).

98. Kennedy, *supra* note 92, at 44. See also Hayes, *supra* note 29, at 17.

99. See, e.g., SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 20, at 126, 161 (noting that although the practice of transracial adoption may have a revolutionary impact upon adoptees' notions of racial identity, "it is . . . too early to predict . . . what is likely to happen . . . in later years during adolescence and adulthood").

100. See Bartholet, *Politics of Race Matching*, *supra* note 1, at 1173.

101. Bowen, *supra* note 57, at 505 n.88.

102. Forde-Mazrui, *supra* note 26, at 955-56 n.168. See Martin Mears, *Adoption, Bigotry and Race*, 140 NEW L.J. 564, 565 (1990).

drop" rule: if the child has at least one drop of another race in her, she is regarded as non-white.¹⁰³ Thus, some adoption agencies in the United States have engaged in a form of skin color matching for multiracial children. For example, dark-skinned children are placed with black parents, tan-skinned children are considered appropriate for Hispanic parents, and only pale-skinned children are seen as white.¹⁰⁴ The NABSW's view, however, is that multiracial children should be placed only with black families.¹⁰⁵ In Britain, too, there are attempts to color-coordinate families in order to establish the same racial combination of the multiracial child in adoptive/foster parents.¹⁰⁶

Nevertheless, these children are as much black or colored as they are white. "If it is important to reflect the racial and cultural background of the child, why is it any less important to reflect the white part?"¹⁰⁷ Thus, to the extent that courts or child welfare agencies treat a biracial or multiracial child as black, they are, in effect, incorrectly imposing a racial identity on her.

This narrow view of biracial children is especially surprising in light of the increase in interracial marriages in the United States and in Britain.¹⁰⁸ It would be unacceptable to disapprove of racial mixing in marriages. Similarly, "[I]t is reactionary to criticize mixed adoptions simply on the grounds that somehow the identity of the partners in this

103. Lythcott-Haims, *supra* note 96, at 532.

104. *Id.* at 553.

105. *Id.* at 555. Lythcott-Haims states that, in a perfect world, where there are sufficient numbers of qualified adoptive parents of all races, arguably children should be raised by parents of the same race. *Id.* at 557. "But the attempt to create that perfect world through race matching fails because the complex issues of culture in a Multiracial society cannot be solved simply by placing Multiracial children with Black parents." *Id.*

106. *Re N (A Minor)(Adoption)* [1990] 1 FLR 58, 62.

107. Richard White, *Transracial Adoption Placements*, 139 *NEW L.J.* 1307, 1312 (1989). See also Bagley, *Transracial Adoption in Britain*, *supra* note 30, at 287 (noting that "[a]dvocates of mixed-race families, such as the British Harmony group . . . argue that mixed-race children are neither black nor Caucasian, but both, and form a special ethnic or cultural group").

108. There has been almost a fourfold increase in interracial (black/white) marriages in the United States since the Supreme Court's decision in *Loving v. Virginia*, 388 U.S. 1 (1967), which held the prohibition of interracial marriages unconstitutional. Lynell George, *Cross Colors*, *L.A. TIMES*, Mar. 27, 1994, at E1, E2 (stating that the number of interracial marriages escalated to more than 200,000 in 1991). In Britain, approximately one-fifth of all marriages involving a black person are between black and white partners. Bagley, *Transracial Adoption in Britain*, *supra* note 30, at 296. The increase in interracial marriages, combined with the high divorce rate, indicate that a greater number of children will probably be raised by a racially-different step-parent, as well as a greater number of custody disputes concerning children of interracial marriages. Perry, *supra* note 5, at 52-53.

relationship will be changed.”¹⁰⁹ Arguably, children of such marriages will have similar experiences as those children transracially placed. Thus, to draw a parallel between “mixed marriages” and “mixed adoptions,” in general, the children in these multiracial environments successfully adjust and develop their own identities.¹¹⁰ Therefore, the individuality of the child and the other salient needs must not be ignored in pursuit of rigid policies. Likewise, biased political views, which may promote harmful practices and obscure the objective of serving the child’s best interests in stability and permanence, should not be endorsed.

5. No Longer Black or White

It is fallacious to assume that a person’s identity is single-faceted and dominated by race. To let ethnicity determine one’s identity exclusively is to assume a narrow perspective which is damaging. If transracial adoptees state that they are human beings first rather than members of any specific ethnic group, or that they do not want to follow their ethnic culture, “[t]he obvious conclusion to be drawn from this evidence is that there is more than one viable form of identity.”¹¹¹ Research has, nevertheless, indicated that transracial adoptees have developed as positive a sense of racial identity and pride as other minority children.¹¹² Further, some studies indicate that transracially adopted children are more positive and confident in their relationships with whites than black children raised in black families. They are more perceptive about race relations and develop a racially-integrated approach to life.¹¹³ Although those who oppose transracial adoption state that these children gain white friends at the expense of their racial identity and self-esteem, it is submitted that such an intolerant view ignores social realities and cannot be substantiated. Why should interracial friendships constitute a threat to one’s racial identity and be any less satisfying than same-race relationships? Other studies have

109. Bagley, *Transracial Adoption in Britain*, *supra* note 30, at 293.

110. *Id.*

111. Hayes, *supra* note 29, at 7. Hayes argues that if transracial adoptees are otherwise well-adjusted without a strong ethnic identity, then this lack of ethnic identity does not really present an obstacle. *Id.* However, he rightly points out that opponents of transracial adoption incorrectly treat the absence of ethnic identity as a *problem in and of itself*. *Id.*

112. William M. Womack & Wayne Fulton, *Transracial Adoption and the Black Preschool Child*, 20 J. AM. ACAD. CHILD PSYCHIATRY 712, 722 (1981) (finding no significant difference between black children adopted transracially and the black children who were not adopted, nor any indication that transracial adoption inculcates “any obviously negative or antiblack attitude” in black adoptees).

113. SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEES*, *supra* note 23, at 59-68, 80-83.

indicated that transracial adoption may have a positive impact on the adoptive parents' *birth* children, as they "have developed insight, sensitivity and a tolerance that they could not have acquired in the ordinary course of life."¹¹⁴ This in turn may result in positive consequences for the adopted child. Almost all of the adoptive parents would recommend the practice of transracial adoption to other families and do it again.¹¹⁵

Thus, what in some cases might seem an "unsuccessful" transracial adoption often has its roots in institutional or extended foster care. Before dismissing the transracial placement as a failure, the length of time a child has spent in such institutional care, and the quality of that care, must be considered.¹¹⁶ Similarly, if a person raised in an interracial family does not develop into a well-adjusted person, it is difficult to ascertain what part race played in that final result.¹¹⁷

Silverman and Feigelman state that, despite the success of transracial adoption, it is an option that is often disregarded:

Perhaps the most disturbing part of our review of the transracial adoption literature is the extent to which it is ignored in formulating adoption policy. We are not recommending transracial placements as a panacea for the problems of family disintegration among non-white minorities in the United States. But their success suggests that they may at least be a useful resource. The effort to expand intraracial placement for minority children, however, does not require the cessation of transracial placements. At a time when few black leaders are sanguine about the deplorably low income and employment levels found among minority underclasses, as the rates of adolescent out-of-wedlock pregnancies continue to mount, transracial placement is a resource that cannot easily be ignored.¹¹⁸

Parents who are racially dissimilar from the children they adopt can assist them in encouraging a positive racial identity. Further, their

114. *Id.* at 108-09.

115. *Id.*

116. Howard, *supra* note 19, at 537 n.169. Simon and Altstein state that there is a link between parents who admit to having difficulties with an adopted child and the race of the adopted child. SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 20, at 89. However, the explanation most commonly offered for the difficulties are the problems which have developed while the child was in foster care *prior* to being adopted, and are not due to the child's race. *Id.* See also Silverman & Feigelman, *supra* note 18, at 198.

117. Perry, *supra* note 5, at 104 n.182.

118. Silverman & Feigelman, *supra* note 18, at 200. Hayes argues that almost all the evidence concerning minority children in adoptive homes indicates that transracial adoption is as successful as same-race adoption. Hayes, *supra* note 29, at 4-5.

efforts can be supported by developing techniques such as pre-adoption sessions and post-adoption consultation that would help them and their children identify with the child's ethnicity and culture, depending on the circumstances of the case.¹¹⁹ By not emphasizing racial differences and through seeking stable, permanent homes for children, transracial adoption serves their best interests. This group of children "represent a different and special cohort, one socialized in two worlds and therefore perhaps better prepared to operate in both."¹²⁰

B. *The Best Interests Standard*

The best interests standard has often been criticized as being unclear and unsatisfactory.¹²¹ It "does not encourage even the well-intentioned judge to be sensitive to the ways in which his own possible biases and assumptions may influence his decision-making process."¹²² In any

119. See generally Bartholet, *Politics of Race Matching*, *supra* note 1 (discussing author's personal experience with transracial adoption and her arguments in favor of it).

120. SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEEES*, *supra* note 23, at 10. One study reported that children who are transracially adopted seem comfortable with discussing and asking about their adoption, perhaps because the fact of adoption is apparent. Johnson, *supra* note 85, at 49. The study further stated that 65% of such children had asked about their biological parents, compared with only 30% of children adopted by same-race families. *Id.*

121. Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 *LAW & CONTEMP. PROBS.* 226 (Summer 1975) (providing a basis for most discussions that criticize the best interests standard). See *supra* text accompanying notes 61-63 for a discussion of the best interests standard. See also Stephen Parker, *The Best Interests of the Child—Principles and Problems*, 8 *INT'L J.L. & FAM.* 26, 27-28 (1994) (arguing that the best interests principle can be diluted depending on the particular statutory wording in a legal system). Parker explained that, while a child's welfare could be the "paramount consideration" in the proceedings, a weaker standard would provide that "first consideration" should be given to promoting the child's welfare. *Id.* A further dilution can be seen in Article 3(1) of the United Nations Convention on the Rights of the Child, which states that "the best interests of the child shall be a primary consideration." *Id.* (citing United Nations Convention on the Rights of the Child, Nov. 20, 1989, art. 3, para. 1).

122. Perry, *supra* note 5, at 79. Both American and British law demonstrate that there is no clear answer as to the weight that should be given to race, and racial issues tend to dominate the balancing exercise in the best interests test. See *infra* Parts IV.C., V.B. Silverman and Feigelman argue that judges make value-laden decisions and do not use the results of social science research on transracial adoption. Silverman & Feigelman, *supra* note 18, at 191. Further, Mnookin states:

Deciding what is best for a child poses a question no less ultimate than the purposes and values of life itself. . . . [W]here is the judge to look for the set of values that should inform the choice of what is best for the child? Normally, the custody statutes do not themselves give content or relative weights to the pertinent values. And if the judge looks to society at large, he finds neither a clear consensus as to the best child rearing strategies nor an appropriate hierarchy of ultimate values.

event, a more sensible label for the test does not eliminate the balancing of competing factors and the difficulties inherent in that process, especially when a complex factor like race is part of the equation.¹²³

Arguably, what is particularly pernicious is the hidden agenda, the undisclosed social and political policies which, in reality, may be far from the child's best interest. Proponents of race matching often couch their political objectives in psychological terms; the "need" for a child to develop an ethnic identity is deemed to be a universal, psychological imperative.¹²⁴ The promotion of other social goals is not the purpose of adoption. For example, the organizational interests of child placement agencies and the concerns of minority groups seeking to protect and develop their ethnic and cultural integrity¹²⁵ should not divert the adoption process from serving the child's best interests.

Despite the arguments made by proponents of race matching, racial-matching policies delay the placement of children.¹²⁶ "A child whose placement is delayed suffers immediate, concrete, and probably irreparable harm. Black culture, by contrast, if harmed at all, suffers the minute and diffuse harm that results when a de minimis number of Black children are placed in white homes."¹²⁷ Studies have concluded that delays in placement are far more harmful than any transracial placement, and that the later a child is placed, the greater the

Mnookin, *supra* note 121, at 260-61.

123. Howard, *supra* note 19, at 533 (citing J. GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 53-64 (1973)). Some commentators have suggested that a different standard, "the least detrimental alternative standard," should be introduced in order to dispel the idea that there is an ideal solution to child placement. *See id.* Supporters of this standard argue that both the courts and social workers should assess, in a practical manner, the choices available, recognize the risks and drawbacks of each, and then choose an option that provides the least likelihood of harm to the child. *Id.* at 533 n.150. Mnookin, however, states that the best interests principle is "indeterminate," and treats the "least detrimental alternative" standard in a similar manner. Mnookin, *supra* note 121, at 248-49, 256-62, and 285-87. *See also* Re O (Transracial Adoption: Contact) [1995] 2 FLR 597, 605.

124. Hayes, *supra* note 29, at 10. Opponents of transracial adoption misuse the best interests framework by averring that the child's interests come first, whereas in reality, the essence of these racial matching policies is to subscribe to segregatory practices and separatist objectives that are not in the best interests of children. *Id.* at 19.

125. Howard, *supra* note 19, at 504. Howard argues that using the phrase "best interests" to describe all the various competing interests, obscures the importance of that fact. *Id.* at 503. "The effect of this obfuscation is to include in child placement decisions considerations that serve other political and social ends but are unrelated to the best interests of the affected child." *Id.* *See also* Hayes, *supra* note 29, at 14-16.

126. *See* Bartholet, *Politics of Race Matching*, *supra* note 1, at 1201-06.

127. Forde-Mazrui, *supra* note 26, at 962.

adjustment difficulties.¹²⁸ Similarly, the benefits of a permanent, stable home, whatever the family's racial composition, are undeniable. The best interests, therefore, that racial-matching policies are meant to achieve must surely be questioned. In the attempt to secure the right racial match, children wait in institutions or are moved through foster homes, which disrupts any bonds that have been formed. These are practices that may encourage racial integrity but do not necessarily promote the child's best interests.¹²⁹

Racial-matching policies seem to eliminate the personalized attention that the best interests test mandates for *each* individual child. Social workers could better balance the interests of the child if they approached adoption placement from a racially-neutral perspective. Such an approach would indeed serve the overall well-being of children and avoid focusing only on the child's ethnic identity. Furthermore, there is no certainty that a delay in the process will result in placement either with adoptive parents or a foster family who will encourage and nurture the child's ethnicity. Arguably, what would be in the child's best interests is a change in the attitudes and perceptions concerning racial separatism. Moreover, an institutional setting cannot guarantee a positive racial identity either. Thus, opponents of race-based placement argue that "[t]he discretion permitted under the best interests test permits racial issues to dominate other concerns even where there is no guarantee that the interest allegedly sought to be protected will be furthered."¹³⁰

IV. LEGAL AND CONSTITUTIONAL CONCERNS IN THE UNITED STATES

Legislative actions and judicial decisions regarding race matching mirror the practical difficulties and issues that arise from race matching. In addition, constitutional issues arise whenever a legislature or an agency adopts or endorses race-matching policies. Courts are left with the struggle to consider race matching and its attendant political and legal questions within the context of the best interests standard.

128. See Barcholet, *Politics of Race Matching*, *supra* note 1, at 1224.

129. Simon and Altstein also state that if society's primary objective is the child's welfare, "our social orientation suggests it would be more in the child's best interest to grow up in a family situation than to suffer the often dire effects of long-term institutionalization or, to a lesser degree, the insecurity of foster placement." SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 20, at 22.

130. Perry, *supra* note 5, at 82. To deny a child a home, even if it is partly based on speculation as to the possible racial problems that might arise in the future, is to totally discount the vital importance to a child of growing up in a permanent, stable family. *Id.*

A. Racial Matching and Affirmative Action

Professor Randall Kennedy states that “[r]acial matching should have been consigned to the same dustbin into which *de jure* segregation was dispatched a generation ago. After all, one of the great achievements of the civil rights revolution was the institutionalization of skepticism toward state-sponsored racial distinctions.”¹³¹ Title VI of the United States Civil Rights Act of 1964 provides that programs which receive federal funds cannot discriminate on the basis of race, color, or national origin.¹³² Nevertheless, the federal policy guidelines interpret the anti-discrimination principle of Title VI within the context of adoption and foster care in a different manner. The guidelines state that:

In placing a child in an adoptive or foster home it may be appropriate to consider race, color, or national origin as one of several factors. . . . This policy is based on unique aspects of the relationship between a child and his or her adoptive or foster parent. It should not be construed as applicable to any other child welfare or human services area covered by Title VI.¹³³

In no other area of community life do state and state-licensed decision makers use race as a factor as unerringly as when making decisions in adoption cases.¹³⁴ Congress has generally drafted the anti-discrimination ethic in the United States, such as the “equal protection of the laws” or “prohibiting discrimination on the basis of race,” in terms that are racially neutral to protect all groups. The following limited circumstances have warranted race-conscious action in the United States: where a compelling need justifies it; where it prevents discrimination in order to benefit racial minority groups; or where it rectifies the effects of past discrimination through affirmative action.¹³⁵ In any event, these exceptions are very narrow in definition

131. Kennedy, *supra* note 92, at 44.

132. 42 U.S.C. § 2000d (1988).

133. H.R. REP. NO. 761, 103d Cong., 2d Sess. 6, *reprinted in* 1994 U.S.C.A.N. 2807, 3254. These regulations are important as most state adoption agencies and several private agencies are provided with federal funds.

134. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1226. For a concise overview of legislation and case law see SIMON, ALTSTEIN & MELLI, *supra* note 22, at 15-27.

135. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1227-28.

as well as application.¹³⁶ As a result, racial-matching policies do not fit into any of the recognized exceptions.¹³⁷

Notwithstanding the argument that racial-matching policies resemble affirmative action, these policies actually counteract the rationale of such programs, which are meant to promote racial integration, not separation. "Both anti-discrimination law and affirmative action programs have been designed to break down segregatory barriers and to promote integration."¹³⁸ Courts in the United States have, for the most part, upheld affirmative action programs that (1) are limited in duration, (2) look backwards rather than forward, and (3) are structured in a way that moves society closer to a stage where race can be totally removed as a factor in making decisions.¹³⁹ Racial-matching policies, however, contradict these requirements because they seem unlimited in duration, look ahead as much as at the past, and require race to be entrenched as a factor in the decision-making process.¹⁴⁰ The goal of affirmative action is not to harm one section of a minority community while purportedly benefiting another part of that group. Racial separation, in the form of racial-matching policies, promotes ethnic identity, yet operates at the expense of depriving children the opportunity to be placed in permanent homes.

Although some may argue that the racial problems in the United States have more to do with oppression and racial hierarchies than separatism,¹⁴¹ divisions along racial lines, as in racial-matching policies arguably constitute a similar kind of racial oppression, are as harmful as racism, and must be considered part of the offensive racial hierarchy. Whatever the form, a policy of racial stratification must end. Moreover, the adoption forum is not the appropriate place to

136. *Id.* An extensive discussion of affirmative action programs is beyond the scope of this Article. Nevertheless, a recent Supreme Court decision, *Adarand Constructors, Inc. v. Peña*, 115 S. Ct. 2097 (1995), indicates the Supreme Court's position. All official (federal, state, or local) race-based programs must be analyzed by a reviewing court under the 'strict-scrutiny' standard. *Id.* at 2100. Thus to accord differential treatment because of race can only be justified for the most compelling reasons, that is to remedy the effects of prior discrimination. *Id.* at 2101. See also David G. Savage, *Race Matters: New Cases Return A Volatile Issue To The Top Of The Supreme Court's Agenda*, 81-Jan. A.B.A. J. 40, 42 (1995) (discussing *Adarand*).

137. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1231-32 (including an interesting discussion on how racial matching policies may be seen, in a general sense, as a remedial justification). See also Mahoney, *supra* note 18, at 490 (discussing transracial adoption in light of the strict scrutiny of racial discrimination).

138. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1233.

139. *Id.* at 1232.

140. *Id.* at 1232-33.

141. *Id.* at 1234. See also Shelby Steele, *Race and the Curse of Good Intentions*, N.Y. TIMES, Oct. 24, 1995, at A27.

promote ethnic self-determination, if indeed that is what racial-matching policies seek to achieve.

B. Racial Matching Legislation

The *Indian Child Welfare Act* of 1978¹⁴² was enacted to rectify the discriminatory treatment of Indian families and their children by the states.¹⁴³ It was also an effort to preserve Native-American culture and to give that community rights in the placement of its children. Congress found that “an *alarmingly high percentage* of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an *alarmingly high percentage* of such children are placed in non-Indian foster and adoptive homes and institutions.”¹⁴⁴ The Act thus gives first preference to the child’s extended family, then to members of the child’s tribe, followed by other members of the Indian community.¹⁴⁵ Only as a final choice can a non-Indian be considered.¹⁴⁶ Arguably that legislation has set a precedent for same-race preference legislation, and both the NABSW and scholars have stated that a similar statute should be enacted for the black community.¹⁴⁷ However, the number of black and minority children transracially placed is small, and the threat to the Native-American community and its practices is much greater.¹⁴⁸ Thus, because the plight of these communities is not analogous, the need for similar legislation is not compelling. It has also been argued that, ironically, such legislation would result in a greater number of black and minority children being confined to years

142. 25 U.S.C. §§ 1901-63 (1994).

143. See 2 ANN M. HARALAMBIE, *HANDLING CHILD CUSTODY, ABUSE, AND ADOPTION CASES* 115 (1993).

144. 25 U.S.C. § 1901(4) (1994) (emphasis added). Congress also determined that the courts and agencies had a policy in effect on the placement of Indian children which conflicted with Indian culture and indigenous child rearing practices. *Id.* § 1901(5). See also Howard, *supra* note 19, at 520-21 (arguing that the traditional child welfare system is insensitive to Indian culture and child-rearing practices).

145. 25 U.S.C. § 1915(a) (1994).

146. *Id.* Although there have been several attacks on the constitutionality of the statute, they have been unsuccessful. A detailed discussion of those issues is beyond the scope of this article.

147. Bowen, *supra* note 57, at 522-23. Bowen argues for the enactment of an Afro-American Child Welfare Act, which would, *inter alia*, form an Afro-American Child Welfare Commission responsible for evaluating all cases where black children are (or will be) removed from their biological parents. *Id.* See also *id.* at 533-44 app. (laying out a proposed draft for the Afro-American Child Welfare Act of 1988).

148. Howard, *supra* note 19, at 532-33.

of institutional or foster care and denied permanent placement and a stable family life *because* of their race.¹⁴⁹

Some state legislatures in the United States have, however, incorporated same-race placement policies into their laws.¹⁵⁰ For example, “[t]he policy of the state of Minnesota is to ensure that the best interests of the child are met by requiring due, not sole, consideration of the child’s race or ethnic heritage in adoption placements.”¹⁵¹ Most recently, federal legislation in the form of the *Improving America’s Schools Act* of 1994 attempts to address, in part, the racial issues that have troubled the adoption and foster care process.¹⁵² Part E of Title V (Miscellaneous Provisions) of the Act refers to “Multiethnic Placement,” and prohibits any adoption or foster care agency or entity which receives federal funds from (a) categorically denying a person the opportunity to adopt a child or become a foster parent solely on the basis of race, color, national origin, either of the child or the adoptive/foster parent; or (b) denying or delaying a child’s adoptive or foster care placement, or in any other manner discriminating when making a placement decision, solely on the basis of race, color or national origin of the child or the adoptive or foster parent.¹⁵³

Although the Act states in section 553(e) that noncompliance is deemed to violate Title VI of the Civil Rights Act of 1964, the Act, unfortunately, does not go far enough. Section 553(a)(2) provides for a “permissible consideration” which operates to, in effect, largely defeat the purpose of the prohibitions. Accordingly, an agency or relevant entity is permitted to consider the child’s cultural, racial, or ethnic background, and to consider whether the prospective adoptive or foster parents are capable of meeting the needs of the child, as one of the several factors to be considered when determining the best interests of the child. Phrases in the Act such as “may consider” and “one of a number of factors” are probably meant to provide some reassurance that, in determining the best interests of the child, a multi-

149. SIMON, ALTSTEIN & MELLI, *supra* note 22, at 49.

150. See SIMON, ALTSTEIN & MELLI, *supra* note 22, at 16-19 (approximately 20 states specifically make reference to race in their adoption laws, seven of which prohibit the use of race to deny an adoption or a placement, while Minnesota, California, and Arkansas have laws which mandate a same-race preference in adoption).

151. MINN. STAT. ANN. § 259.29 (West 1996).

152. Prior to this, adoption (and transracial practices) were primarily determined by state laws.

153. *Improving America’s Schools Act* of 1994, Pub. L. No. 103-382, 108 Stat. 3518 (1994).

factor exercise will take place in which competing concerns are balanced without race being excessively emphasized.

Those concessions are not convincing, however. In practice, the Act may assist some families to foster children or adopt those from different racial backgrounds that are already in their care.¹⁵⁴ But it will probably give rise to protracted litigation that is emotionally charged, can only harm the child, and will not make much of a difference to the lives of many children who are the subjects of a bitter debate.

C. *Judicial Juggling of Race*

The state cannot compel the use of race as a factor in regulating the private lives of people.¹⁵⁵ For example, in *Loving v. Virginia*,¹⁵⁶ the United States Supreme Court held that it was unconstitutional to prohibit interracial marriages.¹⁵⁷ Further, in *Palmore v. Sidoti*,¹⁵⁸ the Supreme Court unanimously ruled that, on the facts of a child custody case, the use of race as a deciding factor violated the Equal Protection Clause of the Fourteenth Amendment.¹⁵⁹ Chief Justice Burger reiterated that the best interests of the child had to be protected. Justice Burger stated, "[T]here is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."¹⁶⁰ But the equal protection principle prohibited considering the "reality of private biases and the *possible* injury they might inflict."¹⁶¹ Although the case suggests that child custody

154. *Black or White*, ECONOMIST, May 14, 1994, at 33. In discussing the implications of the Act in its preliminary stages, the bill was perceived as a "small step away from America's increasing drift towards self-segregation." *Id.*

155. Bartholet, *Politics of Race Matching*, *supra* note 1, at 1227.

156. 388 U.S. 1 (1966).

157. *Id.* at 2. The Supreme Court struck down Virginia's anti-miscegenation statute for violating the Due Process and Equal Protection Clauses of the Fourteenth Amendment. *Id.* The trial court had stated that: "Almighty God created the races white, black, yellow, malay and red, and he placed them on separate continents. And but for the interference with his arrangement there would be no cause for such marriages. The fact that he separated the races shows that he did not intend the races to mix." *Id.* at 3 (citing the trial judge's opinion).

158. 466 U.S. 429 (1984).

159. *Id.* at 433. The Fourteenth Amendment to the United States Constitution states, in relevant part, "nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

160. *Palmore*, 466 U.S. at 433.

161. *Id.* (emphasis added). The white biological father petitioned the court for the custody of his white child, arguing that it would be harmful for the child to be raised in a black neighborhood by the child's mother and black boyfriend with whom she was

decisions cannot be made on the basis of an interracial marriage, and is encouraging in that respect, in reality the decision is narrow and does not provide much guidance for racial issues in adoption cases. In other words, *Palmore* states that race may not be the sole factor when removing a child from her natural mother in a child custody case.¹⁶²

1. Not Only, But Also

In *Compos v. McKeithen*, a federal court prohibited strictly race-based adoptions, declaring a Louisiana state statute invalid for specifically disallowing transracial adoption.¹⁶³ The Louisiana statute at issue mandated that “[a] single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race.”¹⁶⁴ The plaintiffs, a Caucasian couple, were interested in adopting a black child.¹⁶⁵ They were informed by the various adoption services that a black child of suitable age was not available, and that, in any event, the Louisiana statute prohibited interracial adoption.¹⁶⁶ The authorities had also made no effort to inquire about the couple’s home life or their general parental fitness to adopt a child.¹⁶⁷

The plaintiffs sued, and a federal district court invalidated the Louisiana statute under the Fourteenth Amendment’s Equal Protection Clause. The court stated that, because any consideration of race in a statute is constitutionally suspect, there had to be some compelling state objective to justify the racial classification.¹⁶⁸ Thus, if the racial

living prior to marrying him. *Id.* at 430.

162. *Id.* at 432, 434. See Forde-Mazrui, *supra* note 26, at 932; see also SIMON, ALTSTEIN & MELLI, *supra* note 22, at 24 (arguing that *Palmore* is especially important because racial issues were not permitted to be part of the best interest analysis concerning the child); Bowen, *supra* note 57, at 522 n.184 (arguing that *Palmore* is correctly decided on its facts and that the decision “speaks to a situation (custody battle between former spouses) where the social fact of racism should not be allowed to enter because it has no place”); *infra* note 174 and accompanying text (discussing *In re R.M.G.*, 454 A.2d 776 (D.C. 1982), a case in which the court considered race in determining placement).

163. 341 F. Supp. 264 (E.D. La. 1972).

164. *Id.* at 264, 268 (citing LA. REV. STAT. ANN. § 9:422 (West 1950) (amended 1975 deleting reference to race, repealed 1992 by ACT NO. 235, § 17, 1991 LA. ACTS 1056)).

165. *Id.* at 265.

166. *Id.* at 265 (referring to LA. REV. STAT. ANN. § 9:422 (1950)).

167. *Id.* “The actions of . . . [the adoption agencies] in refusing the requests for adoption reflect solely the provision of the state law and were not the product of any investigation into the requesting couples’ home life or their fitness as adoptive parents.” *Id.*

168. *Id.* at 266. The defendants argued that the use of race as a factor in adoption was reasonable because of the duty to find a child a home “where he can develop normally. . .

classification was not reasonable in light of its purpose, it could be seen as "arbitrary, invidious discrimination."¹⁶⁹ The court further stated that the defendants could not conclusively claim that foster care or institutional life was always preferable to a transracial placement.¹⁷⁰ However, the court did recognize the innate difficulties in transracial adoption, which could justify the consideration of race in adoption placements.¹⁷¹ But, while race could be regarded as a "relevant" factor, the Fourteenth Amendment prevented it from being the "determinative" factor.¹⁷² Thus, the court stated that if race is made the decisive factor, it "subordinates the child's best interests in some circumstances to racial discrimination. . . . The statute thus promotes not the child's best interests but only the integrity of race in the adoptive family relationship."¹⁷³

In the case of *In re R.M.G.*,¹⁷⁴ a white foster couple sought to adopt a black child whom they had raised for almost two years.¹⁷⁵ This was challenged by the child's black paternal grandmother who argued that the child should be placed with her.¹⁷⁶ The trial court considered all the relevant factors and found both families suitable, but concluded that the racial factor favored the black, biological grandparents.¹⁷⁷

The court of appeals, however, reversed the lower court's decision, concluding that the trial court's analysis of the race factor was

The rational basis suggested is that it is not normal or natural for white parents to beget a black child or for black parents to beget a white child." *Id.*

169. *Id.*

170. *Id.*

171. *Id.* In making its decision, the court stated:

Cognizant of the realities of American society, this Court would agree that an interracial home in Louisiana presents difficulties for a child, including the possible refusal by a community to accept the child, and other community pressures, born of racial prejudice, on the interracial family. A determination of reasonableness of racial classification in this statute would seem to follow recognition of such difficulties, but we regard the difficulties inherent in interracial adoption as justifying consideration of race as a relevant factor in adoption, and not as justifying race as the determinative factor.

Id.

172. *Id.*

173. *Id.* at 267. The court did not believe that the disadvantages in a transracial adoption would in all cases outweigh the advantages of having a permanent home and family life instead of an institution or foster care. *Id.*

174. 454 A.2d 776 (D.C. 1982). This case has been described as "[t]he Definitive Case." Bowen, *supra* note 57, at 517.

175. *In re R.M.G.*, 454 A.2d at 780.

176. *Id.*

177. *Id.* at 781-82.

imprecise and not sufficient to satisfy constitutional standards.¹⁷⁸ The court of appeals stated that the District of Columbia's adoption statute, with its express recognition of race among the factors relevant to adoption, had to be considered under the strict scrutiny standard of the equal protection framework.¹⁷⁹ The court stated that racial classifications are constitutional only when they advance a compelling or overriding government interest and if the particular use of race is essential to achieve that purpose.¹⁸⁰ Further, the court explained that a compelling government interest is only served when the racial classification is specifically designed to achieve its legitimate purpose.¹⁸¹ Upon analyzing the statute, the court of appeals concluded that the Act did not deny equal protection of the laws and thus withstood constitutional challenge but that the trial court might not have applied it correctly.¹⁸²

The court of appeals delineated the analytic steps concerning race that the trial court should have addressed. The three relevant concerns were: (1) the manner in which each family's race would impact "the child's development of a sense of identity, including racial identity;" (2) comparing each family in that respect; and (3) the importance of those racial differences when all the relevant factors pertaining to adoption were considered.¹⁸³ Although the trial court had focused on

178. *Id.* at 779-80. In its assessment of the trial court's decision, the appellate court stated:

Although race, among other factors, can be relevant in deciding between competing petitions for adoption, the statute expressly incorporating that factor, as well as the trial court's application of it, must survive 'strict scrutiny,' in order to comport with the equal protection requirement of the Constitution. I conclude that the statute on its face withstands constitutional challenge but that the trial court's application is not sufficiently precise to satisfy the Constitution.

Id.

179. *Id.* at 784-86.

180. *Id.* at 784.

181. *Id.*

182. *Id.* at 779-80.

183. *Id.* at 791. See also Perry, *supra* note 5, at 118 n.227 (arguing that even the trial court set up a "structured process" for the analysis of race in the best interests framework).

In a later case, the same court did not follow the three-step analysis set out in *R.M.G.* *In re* D.I.S., 494 A.2d 1316 (D.C. 1985). The *D.I.S.* court stated that it was not sensible to depart from the flexible infrastructure established by the best interests test. *Id.* at 1327. The meaning of identity had also been elaborated upon in *R.M.G.* as entailing: "(1) a sense of 'belonging' in a stable family community; (2) a feeling of self-esteem and confidence; and (3) 'survival skills' that enable a child to cope with the world outside the family. One's sense of identity, therefore, includes perceptions of oneself as both an individual and a social being." *In re R.M.G.*, 454 A.2d at 787.

the first step, it had not engaged in a comparative analysis of both families required by the following two steps. Arguably, if the lower court had articulated a thorough consideration of those factors and if considerable importance was given to the effect of severing the child's ties with her foster parents¹⁸⁴ and the other positive factors which favored them, the balance should have tipped in their favor.¹⁸⁵

The foster parents had argued that the equal protection doctrine prohibited the use of race as a relevant criterion in adoption matters.¹⁸⁶ The court of appeals, however, could not accept that statement without qualification. The court stated that "an inherently suspect, indeed presumptively invalid, racial classification in the adoption statute is, in a constitutional sense, necessary to advance a compelling governmental interest: the best interest of the child."¹⁸⁷ Nevertheless, the court reversed and remanded the case because the evidence evaluated by the trial court had been insufficient to confirm that race had not been impermissibly used to automatically or presumptively favor the same-race grandparents.¹⁸⁸ Race could only be considered as a factor if there was an affirmative justification for doing so.¹⁸⁹ The race factor was apparently determinative of the case,¹⁹⁰ but the trial court's analysis failed to provide the requisite reasoning to satisfy a

184. The decision seemed to ignore the fact that removal from the foster parents home could cause emotional damage to the child. However, until such time as the continuity of relationships is given sufficient importance, the best interests test will probably result in a decision that favors the black parent. Perry, *supra* note 5, at 118-19 n.227. In that respect, an encouraging development can be noted in a New York case where a white lesbian was permitted to adopt her three year old African-American foster child despite the fact that the child's African-American grandmother wished to adopt her. *In re Commitment of J.N.*, 681 N.Y.S.2d 215 (Fam. Ct. 1993). The court found that the child had established strong emotional ties with her foster mother and had lived with her since she was four months of age. *Id.* at 218. The court maintained that disruption in the child's life would be harmful and against her best interests. *Id.*

185. *In re R.M.G.*, 454 A.2d at 793.

186. *Id.* at 784.

187. *Id.* at 788.

188. *Id.* In discussing the use of race as a factor, the court stated:

[I]f race is to be a relevant factor, the court cannot properly weight it, either automatically or presumptively—i.e., without regard to evidence—for or against cross-racial adoption. To do so would add a racially-discriminatory policy to evaluation of the child's best interest. As a consequence, in an adoption contest, petitioners of a particular race would receive a head start, contrary to the constitutional requirement that the use of race—which is "presumptively invalid"—must be affirmatively justified.

Id. at 787.

189. *Id.*

190. *Id.* at 793 n.40.

reviewing court that the inclusion and assessment of race was precisely tailored for the best interests of the child.¹⁹¹

The trial court had expressed concern that little medical or scientific attention had been paid to racial matters in the context of adoption and that “there are not conclusive absolutes to be drawn on the basis of race.”¹⁹² Yet, despite those concerns, the court stated that “it would seem, however, *entirely reasonable* that as a child grows older the ramifications of this problem would increase.”¹⁹³ The court thus allowed the racial factor to tip its decision in favor of the black grandparents.¹⁹⁴ The dissenting judge, while acknowledging the paucity of empirical data, especially in the adolescent years, confirmed the trial court’s finding that, in all probability, questions concerning racial identity would arise later.¹⁹⁵ According to the dissent, the trial court’s conclusion that such risks exist was well substantiated by trial testimony, despite the general conclusion that there was a dearth of materials in this area.¹⁹⁶

The trial court ignored the efforts and the conscious attempts that the foster parents had made to help the child integrate racially and socially. For example, the parents had previously adopted another black child, and they lived in a racially-integrated area that had mixed-race schools.¹⁹⁷ They were well equipped with their earlier experiences of transracial adoption, had black history pre-school books and coloring books, and were well prepared to augment the child’s awareness of her racial identity.¹⁹⁸ The child in question was almost two years old and had already suffered several traumatic changes in her life; another disruption would only harm her yet again.¹⁹⁹ In fact, the court of appeals stated that when all the factors were considered, including financial, blood ties, stability of the family and the effect of moving the child, the grandparents’ claim was “somewhat less than, or at best equal” to that of the foster parents.²⁰⁰ Thus, but for the race factor, the trial court’s decision might well have been quite different.²⁰¹

191. *Id.* at 794.

192. *Id.* at 792.

193. *Id.* at 782 (emphasis added).

194. *Id.* at 792-93 & n.40

195. *Id.* at 797-98 & nn.4 & 5.

196. Howard, *supra* note 19, at 542. The author comments: “Thus, social science speculation is elevated to social science fact.” *Id.*

197. *In re R.M.G.*, 454 A.2d at 780.

198. *Id.*

199. *Id.* at 781.

200. *Id.* at 793 n.40.

201. Bowen argues that:

In *McLaughlin v. Pernsley*,²⁰² a federal court held that the removal of a black child from white foster parents solely on the basis of race violated the Equal Protection Clause.²⁰³ The child had been with the foster parents for a two year period from the time he was five months old.²⁰⁴ Later, when a black foster family became available, the defendants moved the child.²⁰⁵ The plaintiffs argued that the defendants' decision to place the child with a black family was solely on the basis of race and violated their rights to equal protection under the law and due process guaranteed to them by the Fourteenth Amendment.²⁰⁶

The defendants had acted pursuant to their policy against transracial adoption and cross-racial, long-term foster care placements.²⁰⁷ The plaintiffs had provided a sensitive, caring and secure home for the child, who was psychologically attached to them.²⁰⁸ Thus the decision to move the child had nothing to do with the quality of care given.²⁰⁹ Further, the child was suffering from depression upon being moved from his foster parents and was likely to suffer irreparable damage from the disruption.²¹⁰ The court thus stated that when a government entity, such as the Department of Human Services, determines a foster care placement on the basis of race, a decision made by racial classification is inherently suspect and is subject to strict judicial scrutiny.²¹¹

[f]or the present, the social fact of racism in America does not allow *R.M.G.* to be ignored. . . . *R.M.G.* proffers a rule that an intrinsic aspect of the child (his 'skin-color-defined race') must necessarily be considered in determining his best interests even where that factor — race — is 'inherently suspect, indeed presumptively invalid.'

Bowen, *supra* note 57, at 522 n.184. The distinction that Bowen makes between the relevance of racial issues in child custody cases such as *Palmore*, 466 U.S. 429 (1984), where he maintains that it has no place, and in adoption proceedings is interesting, but not convincing.

202. 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd on other grounds*, 876 F.2d 308 (3d Cir. 1989).

203. *Id.* at 323. The petitioners also claimed that their due process rights were violated because they did not receive any of the procedural rights the regulations provided. *Id.* at 327.

204. *Id.* at 319.

205. *Id.* at 321.

206. *Id.* at 319-20.

207. *Id.* at 321.

208. *Id.*

209. Although the social workers registered minor criticisms of the McLaughlins, the court dismissed these as attempts to explain the agency's prior culpable behavior. *Id.* at 321.

210. *Id.* at 327.

211. *Id.* at 323-24. Although the court accepted the idea that racial concerns were a

The court further stated that, rather than using race as the sole criterion, factors such as the ability of foster parents, despite their skin color, to adequately take care of the child and to provide a stable and secure home should be considered.²¹² Thus the court determined that “[f]oster care decisions made under these circumstances should not be decided by use of pernicious generalization but rather should be decided on individual merit.”²¹³ The child was returned to the custody of his white foster parents.²¹⁴

2. Not Also, But Only

In the case of *In Re Davis*,²¹⁵ the Pennsylvania Supreme Court stated that the trial court had made an error by *not* taking race into consideration.²¹⁶ Nevertheless, the error was “harmless” as the trial court reached the same decision it would have had race been included, and had granted custody to black foster parents who were also custodians of the child’s siblings.²¹⁷ The child lived with a white couple who had cared for him from the time he was three days old until the age of four.²¹⁸ At the appellate level, the court stated that as a biracial child is considered black, the child should be placed in a black home.²¹⁹ Yet the court seemed to struggle with the importance of the racial factor in placement decisions. The court was anxious not to place excessive emphasis on race because doing so could “inadvertently place a premium on preservation of a status quo of racial prejudice.”²²⁰ Nevertheless the court maintained that until such time as racial prejudices and tensions had disappeared from society, its obligations required it not to ignore the importance of race in determining the child’s best interests.²²¹ Instead of assessing the

compelling government interest, it did not feel that race alone was necessary to accomplish that interest. *Id.* at 324. The court noted that “[m]aking decisions about persons according to their race is more likely to reflect racial prejudice than legitimate public concerns.” *Id.*

212. *Id.* The court also held that public interest was not served: “Removing children from their psychological parents merely because the parties happen to be of [a] different race can never serve the public interest.” *Id.* at 331.

213. *Id.* at 324.

214. *Id.* at 332. “[A] return to the McLaughlins is not only in Raymond’s best interest but it offers Raymond his only real chance to be made whole.” *Id.* at 331.

215. 465 A.2d 614 (Pa. 1983).

216. *Id.* at 622.

217. *Id.* at 628.

218. *Id.* at 617.

219. *Id.*

220. *Id.* at 628.

221. *Id.* at 629.

parental fitness and stability that each family had to offer the child, and the length of time the child had already spent with the white couple, the appellate court was more concerned with subscribing to biased views and the allegedly harmful repercussions of placing a "black" child with white caregivers.²²²

In *Drummond v. Fulton County Department of Family & Children's Services*,²²³ white foster parents sought to adopt the biracial child placed with them for a period of two years.²²⁴ The level of care provided by them had been consistently evaluated as excellent.²²⁵ Nevertheless, the child placement agency determined that as the child was phenotypically black, and would retain the characteristics of his black father, the white foster couple would be denied their adoption request.²²⁶ Although the agency did not have a black home in which to place the child, it was their intention to find one.²²⁷

It was thus apparent that the child's race and that of the Drummonds were given substantial weight in reaching the placement decision.²²⁸ The court stated that "consideration of race in the child placement process suggests no racial slur or stigma in connection with any race," and that it was but natural for children to be brought up by parents of the same race.²²⁹ The court was quite content in asserting that "[f]rom

222. *Id.* The court stated:

In comparison with the environment at the Youngs' residence, the situation with the Millers does not seem to be very conducive to the inculcation of a sense of racial identity in Shane. . . . The record speaks loud and clear of their love and compassion for Shane and his mother (now deceased) and their genuine concern for people regardless of race. This discussion is only intended to demonstrate the relevance of race as a factor in this case and the minimal potential at the Miller farm in Stony Run for the nourishing of Shane's personal and social identity.

Id. at 628. It should be noted that the child was of mixed race. *Id.*

223. 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978).

224. *Id.* at 1203.

225. *Id.*

226. *Id.* at 1204.

227. *Id.*

228. *Id.* The dissent argued that the only consideration for removing the child was race, and it was a misconceived perception that mixed race or black children could only be raised by black parents. *Id.* at 1212-19 (Tuttle, J. dissenting).

229. *Id.* at 1205. The court approved the practice of the adoption agency, noting:

[A]doption agencies quite frequently try to place a child where he can most easily become a normal family member. The duplication of his natural biological environment is a part of that program. Such factors as age, hair color, eye color and facial features of parents and child are considered in reaching a decision. This flows from the belief that a child and adoptive parents can best adjust to a normal family relationship if the child is placed with adoptive parents who could have actually parented him. To permit

the child's perspective, the consideration of race is simply another facet of finding him the best possible home."²³⁰

Although the court seemed to suggest that race cannot presumptively deny a transracial placement,²³¹ arguably race was *the* determining factor, not "simply another facet" in the case. But for the racial factor, the decision would have favored the Drummonds. Undoubtedly parents have no right to adopt a child that they are unable to look after. But does being of the same race guarantee parental fitness? The best alternative for the child would have been to follow a course of action that was least disruptive and one which promoted long-term stability.²³² The court, however, paid scant attention to the potential harm that would result in severing the child's attachment to his foster parents.²³³ It focused, instead, on hypothetical long-term racial concerns and avoiding the "potentially tragic possibility of placing a child in a home with parents who will not be able to cope with the child's problems."²³⁴

The courts in the United States thus seem to have an ambivalent approach towards race as a factor in adoption proceedings.²³⁵ They have been somewhat content with the legal doctrine that race can be one factor, an important factor, but not the determining factor in the proceedings. Yet they have somehow failed to appreciate (or have deliberately ignored) the fact that often race is the only issue at stake, and while other competing concerns are considered, they inevitably assume a secondary role.²³⁶ Race as a factor in the decision-making

consideration of physical characteristics necessarily carries with it permission to consider racial characteristics. This Court does not have the professional expertise to assess the wisdom of that type of inquiry, but it is our province to conclude, as we do today, that the use of race as one of those factors is not unconstitutional.

Id. at 1205-06.

230. *Id.* at 1205. The district court found:

[T]he consideration of race was properly directed to the best interest of the child and was not an automatic-type of thing or of placement, that is, that all blacks go to black families, all whites go to white families, and all mixed children go to black families, which would be prohibited.

Id. at 1204.

231. *Id.*

232. *See infra* Part VI.

233. *Drummond*, 563 F.2d at 1204.

234. *Id.* at 1205.

235. *See supra* notes 158, 163, 174, 202, 215, and 223.

236. *See also* Angela T. McCormick, *Transracial Adoption: A Critical View Of the Courts' Present Standards*, 28 J. FAM. L. 303 (1989-90). McCormick argues that the principle that race can be a "relevant but not decisive" factor does not operate well in practice. *Id.* The application of that principle permits courts to hide behind racially-

process in other areas of the law is impermissible.²³⁷ This is part of the anti-discrimination ethic in the United States. Although the courts favor a mixing of the races in general, they are not always supportive of the practice in family life.²³⁸ Where adoptive families are concerned, one court stated, "It is a natural thing for children to be raised by parents of their same ethnic background."²³⁹ Further, in the absence of a specific statutory check-list of factors that must be considered, the best interests test provides the courts with substantial discretion to consider, and even overemphasize, race in the placement process, provided it is within the parameters of what is constitutionally permitted.

Thus the endorsement of racial-matching policies by the courts indicates their predilection, at times, for creating a racially-similar, nearly biological, adoptive family. For example, by stating that this is an effort toward a "normal family relationship,"²⁴⁰ the majority in *Drummond* seemed to imply an abnormality in mixed-race families or, at any event, in transracial adoption. It is indeed curious why racial-matching policies have been tolerated at a time when efforts are being made at all levels to harmonize relations between races and to promote integration, not separatism. A plausible explanation is that the issue is simply not important enough. The problems that center around a vulnerable group of minority children and those interested in caring for them do not merit a campaign for ending these harmful practices.²⁴¹ Though some might view such issues as being socially and politically insignificant, they are also a troubling indicator of race relations and the true picture of racial tolerance in our society when racial boundaries are spanned or blurred. More importantly, in the context of adoption, it is indeed questionable as to whose best interests are being served.²⁴²

biased decisions. McCormick therefore proposes a three-part, arguably cumbersome, examination which is meant to ensure accountability when courts consider race in child placement decisions. *Id.* at 315-17.

237. *See supra* notes 8-10 and accompanying text.

238. *See supra* notes 163-214 and accompanying text. The Supreme Court held that anti-miscegenation statutes were unconstitutional 13 years after it ruled on the unconstitutionality of segregation in the public school system. "The law reflected the primal importance to a segregated society of maintaining racial separation in the context of the family." Barthelet, *Politics of Race Matching*, *supra* note 1, at 1176.

239. *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

240. *Id.* at 1205-06 (emphasis added).

241. Barthelet, *Politics of Race Matching*, *supra* note 1, at 1242-43.

242. *See supra* notes 124-29 and accompanying text.

V. LEGAL CONCERNS IN BRITAIN

A. *Legislative Lacuna*

There are no racial-matching statutes in Britain comparable to the legislation in the United States.²⁴³ Section six of the *Adoption Act* 1976 states that when making any decision concerning a child's adoption, a court or adoption agency must consider all the circumstances, "first consideration being given to the need to safeguard and promote the welfare of the child throughout his childhood."²⁴⁴ There is, however, no check-list of factors in the statute to be considered in determining the child's best interests. The *Children Act* 1989, which amends the *Adoption Act* in part, also does not make any specific reference to racial or cultural issues concerning a child in its section 1(3) check-list. In any event, even if sections 1(3)(b)-(d) of the *Children Act*²⁴⁵ were considered broad enough to encompass those concerns, for adoption purposes, guidance concerning the child's welfare must be sought from the 1976 Act, not the *Children Act*.²⁴⁶

Many local authorities and adoption agencies in England are partial to racial-matching practices, although any rigid policy which fetters their discretionary powers would almost certainly be subject to judicial review. For some time now, the BAAF has had in effect a policy which advocates that a child should be raised by parents of the same ethnic and racial group, unless there is an unacceptable delay in achieving this.²⁴⁷ In 1990, the Chief Inspector of the Social Services

243. See generally *Adoption: The Future 1993*, London HMSO, Cm 2288 [hereinafter, *White Paper*]

244. *Adoption Act* 1976, ch. 36, § 6 (Eng.). Parker argues that this formulation of the best interests principle is "weaker" than the standard which requires the best interests of the child to be "paramount" in any decision. Parker, *supra* note 121, at 27. Arguably, this wording is a recognition of the competing interests.

245. The *Children Act* 1989, ch. 41 § 1(3)(b) (Eng.), refers to the "child's physical, emotional and educational needs;" § 1(3)(c) refers to the "likely effect on him of any change in circumstances;" and § 1(3)(d) considers the child's "background and any characteristics of his which the court considers relevant," all of which could be relevant to the racial, cultural and status quo issues that arise in transracial adoption matters. The *Children Act* 1989, ch. 41, § 1(3)(b-d). Section 22(5)(c) of The *Children Act* permits race as a factor to be taken into "due consideration" in relation to children in local authority care. The *Children Act* 1989, ch. 41 § 22(5)(c). See also Hayes, *supra* note 29, at 3 (correctly arguing that "due consideration" has been "wilfully misinterpreted to mean 'paramount consideration,'" which results in some authorities prohibiting transracial placements, while others strictly screen white parents) (citations omitted).

246. See Mears, *supra* note 102, at 564.

247. White, *supra* note 107, at 1308. See also *Re N*, [1990] 1 FLR 58, 62 (noting that British agencies forcefully expressed that black children should never be placed

Inspectorate provided guidelines on issues of race and culture in the family placement of children.²⁴⁸ Although the advice provided is meant to impart a well-rounded approach concerning the welfare of a child, the emphasis is on same-race placements:

[I]t may be taken as a guiding principle of good practice that, other things being equal and in the great majority of cases, placement with a family of similar ethnic origin and religion is most likely to meet a child's needs as fully as possible and to safeguard his or her welfare most effectively.²⁴⁹

In 1993, a *White Paper* entitled *Adoption: The Future*²⁵⁰ was issued after a substantive review of adoption laws, including the practice of transracial adoption. The *White Paper* states that although the *Adoption Act 1976* makes no reference to issues of ethnicity or culture, in practice, local authorities and adoption agencies have taken such factors into account and have given them disproportionate importance. "[I]n some cases it is clear that those assessing parents may have given these factors an unjustifiably decisive influence and failed to make a balanced overall judgment of the parents' suitability."²⁵¹ The *White Paper* further states that:

There is no conclusive research which justifies isolating such questions from other matters needing assessment; or which supports the proposition that children adopted by people of a different ethnic group will necessarily encounter problems of identity or prejudice later in life.²⁵²

The *White Paper* clearly provides that even though issues such as a child's ethnicity and cultural needs are relevant, they are among other issues that need to be considered but should not necessarily be more important. Further, the *White Paper* affirms that the most important factor in assessing prospective adoptive parents is their ability to assist and support children through all the difficulties and challenges they might face in life, "not just any risk of difficulty attributable to ethnic background."²⁵³ The *White Paper* also attempts to put racial issues into perspective, emphasizing that they are part of the overall concerns

with white foster parents).

248. Letter No. C1(90)2, Jan. 29, 1990, A6/99.

249. *Id.* at A6/101. Arguably, this "guiding principle" cannot result in "good practice" if children are kept in institutions or impermanent foster care homes in furtherance of that principle.

250. *White Paper*, *supra* note 243.

251. *Id.* at ¶ 4.32, at 9.

252. *Id.* at ¶ 4.33, at 9.

253. *Id.* at ¶ 4.34, at 9. The *White Paper* has, however, been criticized for promoting an ideal family ideology. See Simon Jolly & R. Sandland, *Political Correctness and the Adoption White Paper*, [1994] *FAM. LAW* 30, 31-32.

and the balancing exercise and do not necessarily merit more importance than any other factor.

B. *Courting Race*

1. Is Race the Case?

In *Re P (A Minor)(Adoption)*,²⁵⁴ the Court of Appeal affirmed the deputy High Court judge's decision in wardship proceedings which ordered the transfer of a mixed-race baby (then sixteen months old) from white foster parents to prospective black adoptive parents.²⁵⁵ The local council had clearly adopted the policy of racial matching, reflecting "national guide-lines" in which "the key feature was that, where possible, every child should be brought up by a family of the same race and ethnic group."²⁵⁶ The policy was developed by the local council's witnesses in evidence, which included the statement of the team manager of the council's family placement team "that a mixed-race child was seen as black in society."²⁵⁷ Thus, despite the fact that the foster mother had provided excellent care for the child and she was the only "mother" he had ever known, she was rejected as a prospective adoptive parent solely on the grounds of race.²⁵⁸ The judge at first instance accepted the benefits of placing a mixed-race child in a black or mixed-race family and concluded that it was in the child's best interests to integrate as soon as possible into the new family selected by the council.²⁵⁹ The foster mother appealed on the grounds, *inter alia*, that the judge had incorrectly carried out the balancing exercise. She claimed that, on the facts of the case, the risk to the child's stability, by removing him from the only home known to him, far outweighed the other relevant factors.²⁶⁰

The Court of Appeal stated that it was bound by precedent.²⁶¹ Thus, the court was unable to intervene unless the judge's decision was so obviously wrong that the only legitimate conclusion was that he had

254. [1990] FAM. LAW 66.

255. *Id.*

256. *Id.*

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. See *G v. G* [1985] 1 WLR 647, 647. It is argued that this "'principle' [of being bound to precedent], however, is rightly seen as, in practice, little more than a sham, being easily circumvented in any particular case where the Court of Appeal actually wishes to allow an appeal." Mears, *supra* note 102, at 564.

erred in the exercise of his discretion.²⁶² Although the court referred to the so-called "national guidelines," it did not actually comment on them or on the council's policy towards transracial adoptions.²⁶³ Further, the court declined to comment on whether its decision would have been the same; it simply could not state that the judge had been plainly wrong.²⁶⁴ Be that as it may, the case illustrates the rigid application of a misplaced social policy that, in practice, gives first consideration to the child's race and not necessarily the overall welfare. The confident manner in which anticipated, hypothetical problems in the future concerning racial identity are presented and accepted is indeed mystifying. It is also puzzling how the zeal to racially match children with strangers is in their best interests, even though the child is well settled and even if it means severing ties that will cause great harm.

2. Racial Equipoise

In *Re N (A Minor)(Adoption)*,²⁶⁵ the foster parents of a child who was born to unmarried Nigerian parents applied to adopt her and for leave to dispense with the natural mother's consent on the basis that it was being withheld unreasonably.²⁶⁶ The father, a naturalized American citizen, made an application in wardship for care and control of the child and for leave to take her out of the jurisdiction.²⁶⁷ He was supported by the natural mother in this action. Both the foster parents' and the father's applications were heard together.²⁶⁸

The judge addressed the politically and racially-fraught issue of transracial adoption in a sensible and robust manner. He sought to strike a balance between the traumatic impact on the child if she were moved from her foster parents, with whom she had developed very

262. *G v. G* [1985] 1 WLR at 647

263. See White, *supra* note 107, at 1312. White states that the Court of Appeal seemed to place emphasis on the evidence provided in the case that a mixed race child is considered as black in society, which he argues suggests that black adoptive parents are more suitable to assist the child in dealing with racism. *Id.* However, White continues that this "seems to be a personal perception not borne out by the experience of some. What if a child has a particular religious background? Catholics might regard their religious upbringing as more important than the color of the skin." *Id.*

264. *Id.* at 1308.

265. *Re N (A Minor) (Adoption)* [1990] 1 FLR 58.

266. *Id.*

267. *Id.*

268. *Id.* In hearing these cases together, the court stated that in adoption it should give due consideration to a child's wishes and feelings regarding the adoption as far as it can be ascertained and with regard to the age and understanding of the child. *Id.* at 59. However, in wardship proceedings, "the first and paramount consideration is the welfare of the child." *Id.*

strong emotional ties over the four and one-half years of her life, and the effect of an adoption order on the natural father.²⁶⁹ Adoption is an alien practice in Nigerian society; an adoption order would thus have shamed and distressed him and had a resulting impact on the child.²⁷⁰ Further, the natural father would have an important role to play in the child's future, when she would probably inquire about her cultural and ethnic background.²⁷¹ Thus, in balancing those factors against the stability an adoption order would provide the child, the judge concluded that the wardship should continue, with care and control to the foster parents and reasonable access, to be agreed on, to the father.²⁷²

The judge clearly did not subscribe to the dogmatic attitude that is often assumed by race-matching proponents.²⁷³ "The mischief that an unquestioning application of this approach has engendered has been clear to this Division of the High Court for some time;" "the emphasis on colour rather than cultural upbringing can be mischievous and highly dangerous when you are dealing in practical terms with the welfare of children."²⁷⁴ The judge referred to the various theories concerning ethnicity, identity and the need for "black" children to develop "survival skills" in black families.²⁷⁵ He stated that other than anecdotal evidence, there was little proof that black children from white backgrounds struggle with racism and that such placements are harmful.²⁷⁶ The judge also referred to the absurd devotion to ideology and color-coordinated schemes which local authorities tended to rely on in advocating racial matching.²⁷⁷ Although the judge acknowledged

269. *Id.* Although the father had gone to see his daughter in England, "there was not very much progress so far as getting the child to know or accept the father. . . . [O]ver the 4 1/2 years the father has had about 18 hours in the child's company." *Id.* at 61. On the other hand, the father had difficulty in obtaining a United States visa for his daughter and always kept in contact with the foster parents and sent them money and clothing for support. *Id.* at 60.

270. *Id.* at 64.

271. *Id.*

272. *Id.* Because of the particular circumstances of the case, the judge did not think it right to grant the adoption. *Id.* at 68.

273. The judge stated that the natural father:

does not have to be condescended to because he is black. . . . To suggest that he and his children need special help because they are black is, in human terms, an insult to them and their abilities. *Yet it is to this principle that a whole social work philosophy has been dedicated.*

Id. at 63 (emphasis added).

274. *Id.*

275. *Id.* at 62.

276. *Id.*

277. *Id.* The court added, "I have only to cite this doctrine to show the ridiculous

that a child should, if at all possible, be brought up by her natural parents, this had to be balanced with the severe psychological problems which would arise if this child were moved from the only caregivers she had ever known.²⁷⁸ The welfare of the child, her future, and individual well being had to be considered before any order could be made by the court.²⁷⁹

The court in *Re N* properly considered the child's best interest. The natural father had not spent more than eighteen hours with the child during the four and one-half years of her life.²⁸⁰ She, understandably, was very reluctant to leave her foster parents for a person who, although her natural father and thus racially suited, was in reality a stranger.²⁸¹ Although racial, cultural, and competing issues were considered, the factors were balanced sensibly, without the social and political hysteria that has often accompanied the matter.²⁸²

In *Re JK (Adoption: Transracial Placement)*,²⁸³ the foster parents of a three year old Sikh girl who was born out of wedlock, and had been placed with them since her birth, sought to adopt her.²⁸⁴ The local authority had, however, considered the placement to be short-term, and, in accordance with their racial-matching policy (based on guidelines), wanted to place her with racially-similar adoptive parents.²⁸⁵ It was unlikely that the local authority would find such a family, as adoption in the Sikh community is extremely rare, unless the placement is with a blood relative.²⁸⁶

nature of a dedication to dogma." *Id.*

278. *Id.* at 63.

279. *Id.* at 59.

280. *Id.* at 61.

281. *Id.*

282. See *Re O (Transracial Adoption: Contact)*, [1996] 1 FLR 540. Thorpe J. tried to balance the competing issues in a factually complicated case. *Id.* White foster parents were permitted to adopt a Nigerian child who had been placed with them for a period of four years from the age of seven. *Id.* The judge, however, also permitted the child to have contact with her Nigerian mother as there were potential benefits for the child in developing this relationship. *Id.* See also Mears, *supra* note 102, at 565 (questioning how her best interests could possibly have been promoted had she been raised in the black community, "surrounded by race relations enthusiasts assuring her that she was destined to be a lifelong victim of unfriendly people operating a bigoted system").

283. *Re JK (Adoption Transracial Placement)* [1991] 2 FLR 340.

284. *Id.* at 344.

285. *Id.* at 342. In this case, the local authority considered children of Asian background to fall under their policy on fostering and adoption of black children. *Id.* at 341.

286. *Id.* It is especially uncommon when the child's mother is unmarried, due to the concomitant stigma which attaches. *Id.* The social services department had attempted to find a suitable adoptive family from 63 different agencies. *Id.*

The child was very fond of her foster parents and had psychologically “bonded” with them.²⁸⁷ She was well adjusted and looked after, but the local authority still wanted to move her to a bridging family in order to weaken the ties between the foster mother and the child until such time as an appropriate adoptive family had been selected.²⁸⁸ The foster parents thus issued wardship proceedings for the child to remain a ward during her minority and for care and control to be granted to them until further order.²⁸⁹ The local authority applied for a care order with leave to place her with long-term foster parents with a view to adoption.²⁹⁰

The child’s welfare was the first consideration. The Official Solicitor, who represented the child, obtained a detailed report from an experienced child psychiatrist that firmly stated that if the child were moved at that stage from the only home she had ever known, it would probably cause her irreparable psychological damage.²⁹¹ She would not likely trust people again and would almost certainly spurn any new “parents.”²⁹² The judge thus had to balance the competing concerns and consider whether the child should, at the age of three, be taken away from her foster parents, and the only parents she had known all her life. Although the judge stated that “this case raises in some degree the sensitive issue of so-called transracial adoption, the general principle is not the prime issue in these proceedings.”²⁹³ Arguably the question of transracial placements was intrinsic to a decision that served the child’s best interests.

The foster parents were considered good, short-term caregivers, and had made an effort to help the child assimilate and identify with her ethnic background.²⁹⁴ They had taken her on a weekly basis to a Sikh temple in the area. Further, they lived in a community that accommodated different racial groups and had schools which children

287. *Id.*

288. *Id.* at 343. Although the local authority had not been able to find an appropriate adoptive family for three years, they felt it necessary to remove the child from her foster home and place her in a temporary home to weaken the bonds so that the transition to an adoptive family, when they finally identified one, would be easier. *Id.*

289. *Id.*

290. *Id.*

291. *Id.* at 344. In his report, the child psychiatrist stated the issue as “whether there should be a decision to leave the child in her present home and to set in process an adoption procedure for the foster-parents, or whether she should be removed, because of her racial and cultural background, to an as yet unidentified family.” *Id.*

292. *Id.*

293. *Id.*

294. *Id.* at 346.

of varied racial, especially Asian, backgrounds attended.²⁹⁵ The foster parents stated, and the judge accepted, that if the child remained in their care, they would make an effort to help the child maintain contact with her ethnic background and would seek assistance in dealing with this matter.²⁹⁶ Further, and of great significance, was the fact that the natural mother supported the placement with the foster parents.²⁹⁷ She recognized the near impossibility of placing a child born out of wedlock with a Sikh family, and she wanted a permanent placement for her child.

The court ordered the wardship to be continued and for the child to be committed to the care of the local authority.²⁹⁸ The child would thus be placed with the foster parents with a view to adoption by them, and they were granted leave to commence the adoption procedure.²⁹⁹ Clearly it was in the child's best interest, as the judge believed, to maintain the status quo and consolidate the sense of stability that had been developed over the three years of her life. Arguably the case also illustrates the willingness of some local authorities to go to extreme lengths to put into effect racial-matching policies. The disruption upon being moved, first to a bridging family and later to another foster or adoptive family, would only have harmed the child—how could that possibly be justified as being in her best interest? If psychological 'bonding' and ties are evaluated as only *one* of the several factors in the balancing process, then race should be accorded similar consideration. There was no certainty of locating a racially-suitable family that would nurture her Sikh and racial identity any more than her foster parents had, let alone the impossibility of ever finding a Sikh adoptive family.

3. The Reasonable Use of Race?

The Court of Appeal in *R v. Lancashire County Council ex parte M*³⁰⁰ dismissed the renewed application for judicial review made by the foster parents of a mixed-race child.³⁰¹ The local authority had placed the child with them on a short-term basis, but the foster parents, who had provided excellent care, were interested in adopting the child.³⁰²

295. *Id.*

296. *Id.*

297. *Id.* at 347.

298. *Id.* at 348.

299. *Id.*

300. [1992] 1 FLR 109.

301. *Id.* at 114.

302. *Id.* at 111.

The local authority rejected their application and found prospective adopters who had already been placed with two mixed-race children.³⁰³ The foster parents initially commenced wardship proceedings, which were later discharged.³⁰⁴ Meanwhile, the child was removed from their care and placed with the prospective adopters with whom he remained. The foster parents then applied for leave to seek judicial review of the local authority's decision, which was dismissed.³⁰⁵ Their renewed application included the claim that no reasonable local authority would make the decision to remove the child from their care and place him with a different family.³⁰⁶

During the course of the abandoned wardship proceedings, the local authority had prepared an unsworn affidavit which substantiated their reasons for moving the child and which also affirmed that they had considered all the relevant competing concerns before coming to a decision. They maintained that the child's mixed racial background would become increasingly important with the passage of time. However, they were uncertain about the foster parents' ability to deal with issues such as racial and cultural identity as the child grew older.³⁰⁷

Although the new "parents" were white, they had already adopted two mixed-race children who were well adjusted and happy, and the two children were well aware of their ethnicity, which had been openly discussed.³⁰⁸ Further, the child's natural mother lived in the vicinity and knew of her child's whereabouts. The judge sympathized with the foster parents, but the local authority had apparently not rigidly applied a policy of racial matching and had not acted unreasonably.³⁰⁹

303. *Id.* The court noted that the family chosen by the local authority were also white, "from the same sort of area and provide[d] no higher or better level of care" than the foster family. *Id.* The only significant difference was that the approved adoptive family had two mixed-race children. *Id.*

304. *Id.* at 110.

305. *Id.*

306. *Id.* at 111. The petitioners contended that "there was never any criticism by the local authority of [them] in respect of their physical or emotional care of D, of their love for him or his for them." *Id.*

307. *Id.* at 112. In the authority's report about the foster parent, they stated "[the foster parents] do not accept that colour is significant and do not see D as a different race/colour. . . . [the applicants'] general attitude does not bode well for them coping with issues of cultural and racial identity as D grows older." *Id.* at 113.

308. *Id.*

309. *Id.* Although the judge sympathized with the foster parents, he stated:

[W]e have to apply the law and the law requires, . . . for judicial review, certainly in this case, that we should not grant leave unless we consider there is a reasonable prospect . . . that the local authority's conclusion, bearing in mind its statutory duties, was so unreasonable that no reasonable local

Further, the application for judicial review was made after the child had been removed from their care, and he had spent time with his new “parents”.³¹⁰

The Court of Appeal thus refused to grant the foster parents leave on the basis that it was implausible that a court would conclude that the local authority’s decision, in light of its statutory duties, was so unreasonable that no reasonable local authority could come to it. It was not for the court to delineate what *it* would have done in the same situation; in these judicial review proceedings the court had to ascertain whether the local authority’s actions could be considered perverse. In light of all the evidence, the foster parents’ application had to be denied.³¹¹

The case is interesting in that the child was apparently not moved to a family in compliance with a rigid racial-matching policy that sought to create an ethnically similar social unit. On the contrary, the new “parents” were white, though they had adopted two mixed-race children who were, it was said, ethnically well adjusted. Presumably this indicated a healthy, “correct” attitude in the family towards sensitive, racial matters. Although the local authority had expressed concern that the foster parents might not be able to cope with racial and cultural issues that *could* arise later, these were hypothetical difficulties and might equally have posed a problem for the new family.³¹² The foster parents were said to have a “colour blind” approach,³¹³ were obviously aware of the child’s mixed parentage, and thus were plainly willing to assume the responsibility of a transracial placement. It seems that the local authority did not evaluate that asset fairly or consider the impact of a new placement, albeit permanent, on the child. Undoubtedly their decision was not so unreasonable that no reasonable authority would have come to it. But in elevating the status and importance of race, had they in any way fettered their discretion? Further, by relying on the possibility of “problems” that *could* arise in the future, but had as yet no empirical basis, had the authority taken irrelevant considerations into account? By ignoring the excellent care and stability provided by the foster parents, had the local authority discounted relevant considerations? More importantly, whether their decision actually served the child’s best interests is questionable.

authority could ever have come to it.

Id.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.*

In *Re P (A Minor)(Removal of Child for Adoption)*,³¹⁴ the local authority, in accordance with a care plan which placed children for adoption with same-race parents, sought to institute proceedings to remove a twenty-one month old girl of Afro-Caribbean descent from her white foster parents.³¹⁵ She had been placed with them since birth, and the foster parents wished to adopt her. There was no doubt that she had formed a significant attachment to her foster parents, and the local authority stressed that it had no criticism of the love and care they had provided for her.³¹⁶ The couple had previously adopted a mixed-race child who at the time of the hearing was twelve years old.³¹⁷

Although the local authority accepted the foster parents as potential adopters, they felt that the child's long-term interests were best promoted by a placement with a black family.³¹⁸ Further, they maintained that although they did not have a rigid racial-matching policy, the importance of a long-term, same-race placement had to be balanced against the importance of the strength of the ties that the child may have formed in her present placement.³¹⁹

A sensible course of action was outlined by the child psychiatrist. The child needed a permanent, stable home and severing ties with the foster parents would only harm her.³²⁰ If the foster parents were allowed to adopt her, they could seek advice and benefit from the assistance provided by post-adoption support agencies.³²¹ The fact that the foster parents had raised a mixed-race child provided support for their ability to deal with problems that *might* arise from a transracial placement.³²²

314. [1994] 2 FCR 537.

315. The local authority had, under §§ 30, 31 of the *Adoption Act* 1976, made an application for leave to serve a notice on the foster parents of their intention to remove the child. *Id.* at 537. The local authority stated that if they were granted leave, they would not serve the notice immediately, and perhaps would not serve it at all. *Id.* They hoped that the foster parents would continue to care for the child until a racially-suitable adoptive family was identified, and a placement was made. *Id.* at 538.

316. *Id.* at 540. The court stressed the fact that the local authority had never criticized the love and care given by the foster parents. *Id.*

317. *Id.*

318. *Id.*

319. *Id.* at 541. The authority maintained that although the race of a child and the prospective adoptive parents is a significant factor in these cases, it is balanced with the "degree and strength of any attachment which the child may have formed elsewhere." *Id.*

320. *Id.* at 542. The child psychiatrist specifically stated that the child would "suffer significant harm if removed now." *Id.*

321. *Id.*

322. *Id.* at 543. The child psychiatrist testified that, "to remove her from a secure and loving home on the theoretical assumption that she may in the future run into difficulties is against all good child care practice." *Id.*

The judge, too, stressed the importance of stability and continuity in this young girl's life and was concerned that any change would cause her both short-term and long-term harm.³²³ The court thus refused the local authority's application for leave to serve a notice on the foster parents and maintained that an early hearing of the foster parents' adoption application was the best way forward.³²⁴

Although the local authority stated that it did not pursue a rigid racial-matching policy,³²⁵ the fact that it was willing to find *another* short-term foster care family for the girl until they had identified a racially-suitable family must call its statement into question. The fact that these repeated disruptions would be harmful for the child and that her best interests would be far from served apparently were secondary matters to the authority's racial-matching policy. The judge should have made some reference to the harm that results from the relentless pursuit of such a rigid policy, which although denied, was clearly in operation in this case.

Thus the concerns that are predominant in cases in the United States often have constitutional foundations: denial of due process and equal protection of the law, Fourteenth Amendment violations, and issues affecting civil rights.³²⁶ Further, American judges have tried to address racial matters in adoption with varying degrees of success and consistency, and although they have kept constitutional parameters in mind, they have not always analyzed whether, and to what extent, race is a constitutionally permitted factor in the best interests framework.³²⁷

In Britain, concerned parties do not contest racial-matching policies by asserting the Bill of Rights, rule of law, *Race Relations Act* of 1976 or constitutional guarantees to equal protection.³²⁸ In the absence of a "written" constitution, like the United States Constitution, local British authorities are brought to task and made accountable by the process of judicial review by invoking the jurisdiction of the court³²⁹ or by making a complaint about the local authority through its internal complaints procedure.³³⁰ The absence of constitutional limitations in

323. *Id.* To disrupt that attachment would be extremely detrimental. *Id.*

324. *Id.* at 544.

325. *Id.* at 541.

326. See *supra* note 159 and accompanying text.

327. See *supra* note 235 and accompanying text.

328. See *supra* text accompanying notes 235-38.

329. To invoke this jurisdiction, an application must be made to the High Court. Supreme Court Act, 1981, ch. 54, Sch. 1, ¶ 3(b)(ii) (Eng.), amended by the Children Act, 1989, ch. 41, Sch. 13, ¶ 45(3) (Eng.).

330. Children Act, 1989, ch. 41, § 26(3) (Eng.). See also National Health Service and Community Care Act, 1990, ch. 19, § 50 (Eng.) (informing the Secretary of State

Britain seems to permit the judges to keep the main aim of satisfying the child's best interest in mind, while deliberating, not always thoroughly, the concerns that emanate from transracial adoption or rigid racial-matching policies. Thus, even though the underlying issues concerning transracial adoptions and racial-matching policies in both countries are similar, the case law analysis is inevitably different given the dissimilar constitutional mandates.³³¹ In both jurisdictions, there has at times been excessive emphasis on hypothetical issues concerning race.³³² In both countries, the practice of transracial adoption remains highly charged and controversial, the adoption forum simply operating as another means of litigating divisive social and political issues.

VI. CONCLUSION

"Indeed, the evidence is so overwhelmingly in favor of transracial adoption that one must wonder whether the best interests of the child are really everyone's concern."³³³ The best interests objective is often made more difficult when factors such as race, and the accompanying political, social, and economic influences are included, either overtly or as part of a hidden agenda.³³⁴ The issues become more complex when constitutional restrictions and ambiguous and ineffective statutes regulate the area.

Unfortunately, the political, social, and legal influences that frequently surround the issue of transracial adoption have obscured the fact that the exercise relating to adoption decisions is for the child's benefit and not an attempt to obliterate the individuality of different races. The best interests test, which is an exercise that should function as a multi-factor approach, often transforms into a one-factor conclusion when race is included. Racial-matching policies consistently isolate just one factor in that test — the child's ethnic

about the social service functions of local authorities, and the proper procedures to be followed when a complaint arises against local authorities). See also P.M. BROMLEY & N.V. LOWE, *BROMLEY'S FAMILY LAW* 545-47 (8th ed. 1992) (explaining the courts' reluctance to use their jurisdictional power to challenge decisions of local authorities).

331. Hayes, *supra* note 29, at 19. In both countries, however, opponents of transracial adoption have tried to frame their legal deliberations in psychological terms, arguing about the "need" for an ethnic identity, and they have sensibly tried to refrain from allowing the more radical and political arguments from entering into their legal discussions. *Id.*

332. There also is a lack of consistency in the recommendations made by social workers and in judicial decisions in general.

333. Lythcott-Haims, *supra* note 96, at 552-53.

334. See *supra* note 125 and accompanying text.

identity — and decisions are made solely on that basis, regardless of the individual circumstances of a particular child. Thus, some argue that race as a factor in the adoption process should be entirely eliminated.³³⁵

Professionals and social workers almost unanimously agree that children should be raised by racially-similar parents, if at all possible.³³⁶ However, the inclusion of race in the placement process eliminates other considerations and seems to result in race being the determining factor.³³⁷ If in other areas of community life, including family matters, we persistently advocate a nonpartisan system, why are adoption and foster care singled out for mandating same-race preferences?³³⁸

Understandably a racially-neutral system poses difficulties. But is there a suitable or appropriate body that can decide the correct racial composition of an adoptive family? Past experiences and practices have resulted in racial segregation that has operated to the detriment of innocent children for whom the system is meant to provide. Thus in the United States, children are kept in institutional care or moved through foster homes until a racially-suitable family is identified. Similarly, in Britain, children are kept in local authority care or moved from foster parents to prevent a transracial placement, with little thought given to the devastating impact on the child which results from disrupting often the only family the child has ever known.

As it is, adoption is a second-best alternative for children whose birth families cannot provide them with a suitable upbringing.³³⁹ Whenever children's relations with the adults who care for them are disrupted, it is traumatic, whatever their age. "Adopted children of necessity face one such disruption."³⁴⁰ Those who oppose transracial adoption must believe that their views are well intentioned and designed to benefit the child and the community. But, in reality, their practices hurt those they presumably most want to safeguard.

Organizations and authorities that are responsible for the welfare of children must be made more accountable for their practices. Further, if

335. See generally Barholet, *Politics of Race Matching*, *supra* note 1, at 1248 (arguing for the abandonment of current racial matching policies in adoption).

336. See SIMON & ALTSTEIN, *TRANSRACIAL ADOPTEES*, *supra* note 23, at 142.

337. See Barholet, *Politics of Race Matching*, *supra* note 1, at 1240, 1248.

338. In the case of *In re R.M.G.*, the dissenting judge, in supporting the trial court's decision in favor of the same-race grandparents, concluded by stating that "[w]e must live in the world as it is while we strive to make it as it should be." *In re R.M.G.*, 454 A.2d 776, 810 (D.C. 1982) (emphasis original).

339. See *White Paper*, *supra* note 243, ¶ 4.5 at 6.

340. *Id.*

prospective parents are included in the decision making process and are guided in addressing the diverse and difficult issues that might arise as a result of adopting a racially-different child, then some of the tensions in permitting transracial adoption might be alleviated.³⁴¹ If a carefully selected family is able to provide a home for a child who is ethnically dissimilar, it is irrational to erect racial obstacles. Further, the allocation of funds to recruit families, and the provision of subsidies and resources to those who wish to adopt and provide a home for waiting children, might also be another way of addressing some of the concerns.³⁴² But to place a prohibition on all transracial placements until we achieve desired social reforms will only result in serious harm to those children who await homes at present. Children should be freed from institutional care and the impermanence of foster homes and placed with qualifying adoptive families, whatever their racial origins, while concurrent efforts are made to include more families in the system.

It is thus submitted that the practice of racial matching is harmful when children are the victims of rigid policies which do not serve their best interests and when it may only result in the perpetuation of racial divisions in society. It is also an unrealistic attempt to form a superficially similar family, futile because the family itself is changing with the increasing number of step-families, artificial insemination, and other developments which contradict this preference to have a mirror-image social unit.³⁴³ Thus, even though the model nuclear family seems to have disappeared, there is a great effort to recreate it in the promotion of an ideal adoptive family based on racial similarity.

341. Barthelet, *Politics of Race Matching*, *supra* note 1, at 1253-54. *See also* MCROY & ZURCHER, *supra* note 17, at 145 (suggesting that because adoption agencies should recognize that their responsibilities do not end once the adoption is legally finalized, the agencies should provide post-placement support services and recommend support groups for parents and children in which concerns can be addressed with black and white adoption workers and other families that have adopted transracially); *see also* Mahoney, *supra* note 18, at 499 (suggesting that prospective adoptive parents should have input in and guidance about the race of the child they are interested in adopting).

342. Howard, *supra* note 19, at 546; *see also* SIMON & ALTSTEIN, *TRANSRACIAL ADOPTION*, *supra* note 20, at 165-79 (discussing subsidized adoptions); BAGLEY, *INTERNATIONAL AND TRANSRACIAL ADOPTIONS*, *supra* note 43, at 326 (suggesting that social workers should look to the extended family as a possible resource in the temporary or permanent placement of children whose parents are unable to care for them).

343. *See* Perry, *supra* note 5, at 97. *See also* *The Disappearing Family*, *ECONOMIST*, Sept. 9, 1995, at 19 (discussing the breakdown of the family and the role of government in it); *Home Sweet Home*, *ECONOMIST*, Sept. 9, 1995, at 25 (comparing governmental family policies in America and Britain with those in Sweden and Germany).

Those who advocate the practice seem to forget that there are many competing interests in the adoption process other than nurturing a child's racial identity, such as the compelling need for a child to have a stable family and to be free from institutional homes and the transient nature of foster care. Proponents of the practice of race matching, of course, state that it is *only* in the child's best interest to have parents of a racially-similar background. Nevertheless, it is submitted that a bigoted perspective is harmful and it further prevents children from reaching adoptive, permanent homes. The practice also ignores the plight of biracial and multiracial children for whom an ideal "match" is almost impossible.

If in providing homes and stability for children in need, transracial adoption results in rigid racial and ethnic boundaries being crossed, and if an effort is made to counter discrimination and separatism both legally and socially, even in the most intimate of settings like the family, then any policy or practice that attempts to recreate those divisions must be strongly resisted. Such policies harm those they are meant to benefit, and impede our commitment to ending racism and promoting social integration.