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Breaking Down the Barriers to Transracial Adoptions: Can the Multiethnic Placement Act Meet This Challenge?

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NOTE

BREAKING DOWN THE BARRIERS TO TRANSRACIAL ADOPTIONS: CAN THE MULTIETHNIC PLACEMENT ACT MEET THIS CHALLENGE?

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I. INTRODUCTION

Timmy has been in the foster care system since he was born. His mother, an addicted drug user, disappeared soon after his birth. As a result of his mother’s drug abuse, Timmy needed serious medical treatment when he was born. Such treatment would last for a number of years.

Because neither Timmy’s mother nor any relatives could be found to care for Timmy, he was placed in the custody of Social Services. He was placed with his first foster family a few days after he was born. Although that family was instructed regarding the medical care that Timmy needed, they did not fully understand the extent of care required. In part because of his sickness, and in part because of Timmy’s incessant crying due to his sickness, that foster family asked Social Services to take him out of their home.

Since no foster care placement was immediately available, Timmy was placed in institutional care, where he stayed for a few months until his second foster family became available. Timmy lived with his second foster family for almost a year. However, Social Services had to remove him from that family because Timmy showed signs of physical abuse. The decertification of that family as a foster family soon followed; in the meantime, Timmy was thrust back into the uncertainty of the foster care system.

Timmy’s third placement was with an emergency foster care family to care for him temporarily. By now, Timmy was almost two years old. Because of the inadequate care that Timmy had received, he showed indications of slow physical and mental development. However, Timmy’s prognosis started to improve as soon as he began to live with his third foster family. Timmy’s foster family fell in love with him almost immediately. They nursed him and gave him all the care he required. Contrary to early medical opinions concerning Timmy’s future, under the supervision of his foster parents, Timmy’s medical condition flourished. In addition, he established strong emotional bonds with his foster parents and their two older children. Timmy was welcomed as a new member of the family. He was happy and well-adjusted. Within a relatively short period of time, Timmy’s problems were nearly overcome; his physical and mental development was on target for a child his age.

By the time Timmy celebrated his fourth birthday, his foster family wanted to adopt him. They treated him like one of their own and could not bear the thought of Timmy not being a part of their
family. When they approached Social Services about their intentions, they were shocked. Timmy’s foster family was told that Social Services was looking for a different adoptive family for Timmy. They urged Social Services to consider them as an adoptive family but Social Services refused. “Why?” Timmy’s foster parents asked. “Because your family is white and Timmy is Black,” the Social Services worker responded. Discouraged but not disheartened, Timmy’s foster family decided to challenge Social Services’ determination. Despite a long battle, Timmy was ultimately removed from his foster family. He was almost five years old and had been with his foster family for almost three years when he was removed. Subsequently, Timmy was placed with a Black family who eventually adopted him.

Timmy suffered emotionally for a long time after being torn away from the only parents that had ever properly cared for him and had given him the love he needed to flourish. Hopefully, Timmy’s adoptive family provided the same care for him. However, it seems unclear why Timmy ever had to suffer this emotional trauma. Stories like this provoke a feeling in most of us that something went wrong. It is troubling that this child was deprived of a family who cared for him during his worst times and wanted to see him through life with the same care and attention. Timmy’s story is fictitious; however, this example has attempted to recreate the life of some child out there who has suffered through just such an experience.

Every day, Black children2 wait in the foster care system for

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1. For the purposes of this Note, African-Americans will be referred to as Blacks and Caucasians as whites. For similar usage see Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 Harv. L. Rev. 1331, 1332 n.2 (1988) (capitalizing Black because it refers to a specific cultural group).

2. The center of the controversy over transracial adoptions has focused on the adoption of Black children by white adoptive parents. Thus, the central focus of this Note will concern those adoptions. Also included within the group of Black children are biracial children, children born to one Black parent and one white parent. Despite the fact that these children are mixed-race, courts and adoption agencies consider these children Black for placement purposes. For a discussion of the special concerns regarding the adoption of biracial children see infra part II.C; see also Kim Forde-Mazrui, *Note, Black Identity and Child Placement: The Best Interests of Black and Biracial Children*, 92 Mich. L. Rev. 925, 955-59 (1994).

years before being adopted, whether they are temporarily in a foster care home or in an institutional setting. If these children were white, they would be placed with an adoptive family within a substantially shorter time period. However, simply because they are Black, these children are often forced to languish in the foster care system for years before even the possibility of being adopted arises, if it ever does. Forcing these children to remain in foster care decreases their chances of ever being adopted, because the older a child gets, the harder it will be to find an adoptive placement for the child. However, the agencies consider race to be such an important factor that they are willing to take the chance that these children will never have a permanent home. Clearly, these race matching policies discriminate against Black children in violation of the Equal Protection Clause simply because of the color of their skin. There are numerous white families who would like to adopt these children, but unfortunately they are denied the right to do so by agencies which would prefer to see these children shuffled from foster home to foster home, or institution to institution, rather than permit a transracial adoption. Because of these policies, the number of transracial adoptions remains relatively low today even though Black children wait in foster care and white families wait to adopt children.

As a result of true stories similar to Timmy's, and the overwhelming figures showing that Black children are disproportionately represented in the foster care system, the debate over transracial adoption has been highly publicized in newspapers, magazines and on


3. See infra part III.D.
5. See infra part III.B.
6. For example, in 1992 only about eleven percent of the adoptions in Missouri and only about seven percent in Illinois were transracial. Robert L. Koenig, Senate Votes to Ease Cross-Race Adoptions, ST. LOUIS POST-DISPATCH, Mar. 30, 1994, at 3A. In the year ending June 30, 1993, in Illinois, only sixty-eight of 1,059 adoptions (or little more than six percent) involved transracial adoptions. The Racial Divide in Adoption, CHI. TRIB., Jan. 3, 1994, at N10 (unsigned editorial).


news broadcasts. The debate even reached Congress last year when Senator Howard Metzenbaum and Senator Carol Moseley-Braun proposed the Multiethnic Placement Act to eliminate bias against transracial adoptions. The focus of the controversy is whether adoptive parents of one race can rear a child of another race and still provide that child with a sense of that child's ethnic and cultural heritage. Despite numerous studies which show that transracially adopted children develop a sound racial identity and frequently emerge with unique advantages, the debate continues. Meanwhile, as the debate rages on, Black children are denied adoptive homes. Further complicating the issue is that, in most cases, these children do not have a choice between a Black home or a white home; rather, the choice is one between a white home or no home at all.

The purpose of this Note is to explore transracial adoptions that take place through the foster care system and the effect that the Multiethnic Placement Act, if enacted by Congress, will have on those adoptions. In doing so, this Note will show that the agencies that make adoption placements discriminate against Black children because of their race, a practice prohibited by the United States Constitution, and that the Act, as proposed, will have little effect in changing that practice. Part II traces the history of transracial adoption and the controversy surrounding it. It will show how the histori-

10. Race also plays a factor in other child placement contexts—for example, when a non-custodial parent sues to regain custody after the custodial parent marries a spouse of another race, as in Palmore v. Sidoti, 466 U.S. 429 (1984), or when parents of different races divorce and both seek custody of their biracial children. Those placements, however, are outside the scope of this Note. For a discussion of the issues surrounding the use of race in those placements see Twila L. Perry, Race and Child Placement: The Best Interests Test and The Cost of Discretion, 29 J. Fam. L. 51, 60-69 (1990-1991); Forde-Mazrui, supra note 2, at 930-32, 934-36.
11. Transracial adoptions can take place in two different contexts. The first is where a white foster family has had custody of a Black foster child for a period of time and decides that it wants to adopt the child. The second is where a white family and a Black family are competing to adopt a Black child and neither family has had any past relationship with the child. Although I believe that the latter situation may occur, there are no cases that present such a situation. In fact, in her article, Professor Perry distinguishes between these two types of adoptions, yet never cites a case involving the latter situation. See generally Perry, supra note 10, at 109-23 (arguing that race should not be a factor where adoption entails removing the child from foster parents who want to adopt the child, but that race should be given substantial weight where there is more than one family available to adopt the child). But see Elizabeth Bartholet, Where Do Black Children Belong? The Politics of Race Matching in Adoption, 139 U. Pa. L. Rev. 1163, 1248-54 (1991) (arguing that even in a case where there are both Black and white adoptive parents available to adopt a child, race should not be allowed to play a role in the decision).
cal policies of matching children to their adoptive parents continue today and how these policies cause Black children to remain without adoptive parents for a substantially longer period of time than white children. Part III will explore the role that race currently plays in adoption decisions. It first examines the state statutes that have been adopted to give preference to same race placements, and second, those that have been adopted to prevent such discrimination in placements. Next, it examines the cases and demonstrates that race is not an appropriate consideration when determining the “best interests of the child.” Part IV will explore the different versions of the Multi-ethnic Placement Act, a bill that has been proposed in both the Senate and the House of Representatives, in different forms, to combat discrimination in the placement of children\textsuperscript{12} for adoption or for foster care. This Note maintains that the bill, in either of its current forms, is insufficient to combat the racism that continues to occur in these placements—in most cases, with some sort of state support, whether by statute or by written\textsuperscript{3} or unwritten policy\textsuperscript{4} of the agencies. Finally, this Note will suggest alternatives to the Act which has denied Black children equal protection under the law. These alterna-

\begin{itemize}
\item[12.] Although this Note will focus on the adoption of Black children by white parents, as discussed supra note 2, the bills proposed in Congress will apply to any discrimination on the basis of “race, color, and national origin.” See infra part IV.

\item[13.] These policies are usually written out as guidelines for the social workers to follow in finding placements for children, whether for foster care or for adoption. For example, in J.H.H. v. O’Hara, 878 F.2d 240 (8th Cir. 1989), at issue was Guideline No. 3 of the “Guidelines for Placement Resources Selection” set out by the Missouri Division of Family Services. Guideline No. 3 provided that one issue to be considered in selecting a foster home is “[t]he ability of the foster family to preserve the child’s racial, cultural, ethnic, and religious heritage. In most cases, every attempt must be made to match the child with a foster family with the same racial, cultural, ethnic, and religious background.” Id. at 243.

\item[14.] Because of concerns on the agency’s behalf about the constitutionality of using race in making adoption placements, it is sometimes difficult to determine that an agency has a policy against transracial adoption because the policy remains unwritten. For example, despite the fact that neither Missouri nor Illinois have formal policies (as they did ten years ago) of waiting six months before allowing a transracial adoption, adoption experts in both states sometimes delay a child’s adoption in an effort to find an adoptive family of the same race as the child. Koenig, supra note 6, at 3A. It is clear that these states still have these policies if such practices continue, however, they now keep these policies hidden. For a general discussion of the unwritten policies of the adoption agencies that delay or deny the placement of Black children with white parents, see Bartholet, supra note 11, at 1183-88. After having conducted interviews with leaders in the adoption world and experts on race matching policies, together with having reviewed the literature in the field, Bartholet asserts that “it is the unwritten and generally invisible rules that are central to understanding the nature of current policies . . . . The rules generally make race not simply ‘a factor,’ but an overwhelmingly important factor in the placement process.” Id. at 1188.
\end{itemize}
tives would effectively eliminate the racism that occurs in these placement decisions. This Note concludes that the bill, as currently proposed, will have no effect on the state statutes because it provides that race may be a factor, but not the sole factor, in placement decisions; the same standard which has produced the racism in the foster care and adoption systems that exists today.

II. TRANSRACIAL ADOPTION BACKGROUND

A. History of Transracial Adoption

The primary focus of the debate over transracial adoption concerns the adoption of Black children by white families. Time after time, cases arise where a white foster family, despite having raised a Black foster child for years and now wanting to adopt the child, must fight dearly to hold onto the child, sometimes successfully, and sometimes not. These battles are the product of the historical development of transracial adoptions in this country. However, the history of transracial adoptions cannot be considered in a test tube; it must be considered in the context of the history of adoptions generally.

The adoption of white children began through a formal system. The system was originally designed to find white children for infertile white parents. At that time, there was a strong policy of matching the child with the prospective adoptive parents. This meant that adoption agencies aimed to match adoptive parents with a child who closely resembled them. They looked for characteristics ranging from similar physical characteristics to similar social status and intelli-

15. See, e.g., Raymond & Turner, supra note 8, at 140 (detailing the story of how Turner's white family fought to keep their Black foster son and eventually were able to do so).

16. See, e.g., In re D.L., 486 N.W.2d 375 (Minn. 1992); see also Karen Grigsby Bates, Are You My Mother?, ESSENCE, Apr. 1991, at 49 (describing the story of a white foster mother who wanted to adopt a Black foster child who suffered from medical and developmental disabilities but was denied that request and had the child removed from her care only to be placed in an institutional setting); Michael D'Antonio, Sad Goodbye to Michael: White Foster Parents Must Surrender Black Infant, NEWSDAY, Apr. 1, 1988, at 3 (describing the story of a white foster family who had their Black eight-month-old foster child removed from their care after they were rejected as adoptive parents because of their race and noting that four other families in the same program had similar complaints).


18. Adoption agencies would consider such factors as age, hair color, eye color and facial features of the prospective adoptive parents and child and would only place a child
gence when placing children. The agencies were motivated by their belief that the adoptive parents and the adopted child would adjust more easily to becoming a family if the child was placed with parents who actually could have parented him. Race matching was simply a logical outgrowth of this policy.

Moreover, adoptions were often "hidden." This meant that the adopted child often was not told that he was adopted and if he was told, it was not until he was an adult. An adopted child received a new birth certificate listing the adoptive mother as the biological mother so as to hide the fact that a different biological mother ever existed. The original birth certificate was placed in a sealed file to prevent any reconnection with the past. This notion of secrecy was more easily maintained by having parents who looked like the child. It was easier for the child to believe that his adoptive parents were actually his biological parents if they all looked the same. As a result, transracial adoptions were not considered. Transracial adoptions did not serve the purpose of creating a biological family where one did not exist nor did it permit adoptive parents to keep the fact of adoption a secret from the child.

By contrast, the adoption of Black children began less formally. During slavery, black families were often fragmented by slave owners. Because of this practice, Black children were often left parentless. However, children often found fictive "aunts and uncles" in other locations to act as parents for them. These extended families cared for the children and often explained their separation from

with parents who had similar physical characteristics. Id. at 42 n.19.

19. BARTHOLET, supra note 4, at 49 (stating that although these matching policies have significantly given way to reality today, they are still "very much alive with respect to race").

20. See Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205-06 (5th Cir. 1977).

21. For example, the 1958 Standards for Adoption Service of the Child Welfare League provided that "children placed in adoptive families with similar racial characteristics, such as color, can become more easily integrated into the average family group and community." Bartholet, supra note 11, at 1176 n.15 (citing CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE § 4.6 (1958)).

22. BARTHOLET, supra note 4, at 54.

23. Id. This practice of issuing a new birth certificate and placing the original birth certificate in a sealed file continues today. Id.

24. In fact, some states actually prohibited such adoptions. See infra notes 30-31 and accompanying text.

25. See Fenton, supra note 17, at 42.

26. See id.
their parents to them. Thus, there was no secrecy in the informal adoption of Black children.27

This informal approach to caring for Black children continues in the Black community today. The Black extended family functions as an informal adoptive family for Black children in need of care.28 In fact, the adoption rate amongst Black families may be underestimated because Black families often take in children of their kin and care for them for their lives without ever formally adopting the children.29

Historically, not only were transracial adoptions not considered, they were actually prohibited by statute either by allowing a person to adopt only a child of the same race30 or by affirmatively prohibiting such an adoption.31 These statutes were eventually struck down as violative of the Equal Protection Clause of the Constitution.32 However, the prohibitions existed until the 1960s and 1970s when the barriers to transracial adoptions began to breakdown.33 The first ma-

27. See id.
29. Fenton, supra note 17, at 45.
30. LA. REV. STAT. ANN. § 9:422 (West 1965) (providing 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”). The statute has since been amended to provide that a person may adopt “a child” and not only a “child of his or their race.” See LA. REV. STAT. ANN. § 9:422 (West 1991).
31. TEX. REV. CIV. STAT. ANN. art. 46a (West 1959) (providing that “[n]o white child can be adopted by a negro person, nor can a negro child be adopted by a white person”). The term negro as defined by the Texas miscegenation statute also included biracial persons. It included within the term negro “a person of mixed blood descended from negro ancestry from the third generation inclusive, though one ancestor of each generation may have been a white person.” TEX. PENAL CODE ANN. art. 493 (West 1959).
32. See Compo v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972) (holding that the Louisiana adoption statute permitting only same race adoptions violated the Equal Protection Clause of the Constitution); In re Gomez, 424 S.W.2d 656, 659 (Tex. Civ. App. 1967) (holding that the Texas statute prohibiting adoption of a negro child by a white person or of a white child by a negro person violated the Equal Protection Clause of the Constitution).
33. Commentators point to a number of factors that led to the increase in transracial adoptions during this period. See, e.g., Margaret Howard, Transracial Adoption: Analysis of the Best Interests Standard, 59 Notre Dame L. Rev. 503, 505-16 (1964). Professor Howard lists seven factors that led to this increase: (1) the identification of the battered child syndrome caused the number of children coming into the placement system to increase, id. at 505; (2) the inadequacy of the foster care system to care for children became apparent, id. at 505-06; (3) the results of the developmental effects of maternal deprivation that were caused by institutional care were reported, id. at 506-09; (4) the number of white infants for adoption decreased, id. at 509-10; (5) the decline in social workers following race matching adoption policies, id. at 510-13; (6) the number of minority families available to adopt minority children was insufficient, id. at 513-14; (7) the willingness of families to adopt transracially
A major step toward opening up the adoption world to transracial adoptions was an increase in the adoption of Asian children after the Korean and Vietnam Wars. Another major step was the advent of the civil rights movement which brought about a change in the policies against transracial adoption. With the goal of increasing racial integration, transracial adoptions became more acceptable. Some people sought to adopt Black children as part of their commitment to integrating the races. Others sought to adopt Black children as a way of helping children who needed families. By 1971, transracial adoptions of Black children by white adoptive families had peaked at 2,574.

Then in 1972, the National Association of Black Social Workers ("NABSW") handed down their position paper on transracial adoption. Terming transracial adoption as a "form of genocide," their position paper had a strong psychological effect. In this period of racial integration, no one wanted to be accused of committing cultural genocide against the Black race. Moreover, their position was consistent with the traditional policies of matching children to adoptive families with similar characteristics. Thus, their position had an immediate impact on reducing the number of placements of Black children with white parents. The debate about the controversial position taken by this small but influential group continues today. The NABSW's position reflects the racism that has caused the separation due to the change in social attitudes about racial integration, id. at 514-16.

34. See Bartholet, supra note 11, at 1180.

35. The NABSW position, in part, was as follows:

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

We the participants of the workshop have committed ourselves to go back to our communities and work to end this particular form of genocide.


37. BARTHOLET, supra note 4, at 111 (stating that "[t]he NABSW leadership's attack on transracial adoption met with relatively ready acceptance from white social workers not just because of liberal white guilt, but because it fit with the traditional assumptions of their professional world").

38. By 1975, the number of transracial adoptions had fallen to 831. Bartholet, supra note 11, at 1180.
of the races in this country and it fosters the continuance of such separatism. In place of the old opposition to race mixing that was supported by whites, this new opposition to racial integration is supported by Black groups, such as the NABSW, which support race matching.

Of course, the NABSW has taken an extreme position and even those who oppose transracial adoption may disagree with the NABSW's position in some circumstances. For example, a director of the One Church, One Child Program, an organization which recruits Black adoptive parents, recalled one situation where the NABSW's insistence upon race matching went too far. She tried to place three Black siblings, ages six, seven, and nine, with white adoptive parents. The adoptive parents already had adopted one Black child with Down's Syndrome, two Korean children, and two Salvadorean children, one of whom was half Black. The social workers vetoed the idea, even though a sibling group of three children, none of whom are very young, would be the hardest group to place, especially together. She stated, "I recruit black families for black children... This would have been an excellent placement for these three children and it was turned down because the family was Caucasian... These children were kept from having a home... Agencies and social workers have to change their ways of thinking."
B. Reactions to Transracial Adoption Today

Largely due to the NABSW’s position, today there is a consensus among agencies that a child should be placed with a same race family unless no such family is available, in which case, the child can be placed with a family of a different race. For example, the Massachusetts Department of Social Services has a policy of searching vigorously for a matching-race adoptive family, but at some point if a Black adoptive family has not been found, then the child will be placed with a white adoptive family. However, it is unclear how long an agency will wait until it decides that a Black adoptive family cannot be found. What is clear is that the average time spent in foster care in Massachusetts is about two years. These policies are used by agencies to keep Black children out of white adoptive families even when there are no Black families available to adopt them. There are no laws requiring the agencies to make an adoption placement within a certain period of time; thus an agency can take as long as it wants to make a different race placement. In the meantime, however, a child suffers.

One of the NABSW’s reasons for opposing transracial adoption is the contention that a Black child who grows up in a white family will have a difficult time establishing a sense of racial identity.

45. Lynne Duke, Couples Challenging Same-Race Adoption Policies, WASH. POST, Apr. 5, 1992, at A1, A6 (quoting Mary Beth Seader of the National Committee for Adoption that the organization’s “position is first you look for a matching-race family[,] [i]f you can’t find a matching-race family, do not delay placements”).

46. Radin, supra note 43 (interviewing Janet Eustis, Deputy Commissioner of the Massachusetts Department of Social Services).

47. Id.

48. Identity has been defined as having three components: (1) a sense of ‘belonging’ in a stable family and community; (2) a feeling of self-esteem and confidence; and (3) ‘survival skills’ that enable the 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.


Racial identity, however, has been described as a theory of development. The psychological theory of racial identity involves four stages of development. Lena Williams, In a 90's Quest for Black Identity, Intense Doubts and Disagreement, N.Y. TIMES, Nov. 30, 1991, at A1, A26 (discussing the theory promulgated by William Cross in 1978). The four stages evolve as follows:

In the first stage, the individual attempts to deny membership in a race. Then an experience challenges this individual’s anti-black attitudes, causing psychological and emotional turmoil. Attempts to resolve the conflict are made in the third stage, when a person
They argue that because some transracial adoptees do not identify themselves first as being Black, they have not developed a sense of Black identity. However, empirical studies that have been conducted on transracial adoptees tend to show just the opposite; they show that transracial adoptees are comfortable with their racial identity. In fact, studies show that transracial adoptees are as well adjusted as any other adopted children. Studies assessing adjustment in terms of achievement, self-esteem, and behavioral problems show that transracial adoptees are doing well. In fact, one of the major differences between transracial adoptees and other Black children is that transracial adoptees are more comfortable in their relations with
discovers his or her cultural heritage. The person may develop new, idealized images and intense emotions about being black, and feel hostile toward whites. In the fourth stage, the person assumes a positive black identity and begins to accept a bicultural identity.

Id. It does not seem clear from this psychological theory why Black children who grow up with white adoptive parents would have a difficult time developing a Black identity. In fact, it almost seems as if Black children raised by white parents would be in the optimum situation for evolving through the four stages outlined above.

For example, many opponents of transracial adoption argue that Black children raised with white adoptive parents will have anti-Black attitudes because they have been raised in a white family, in a white neighborhood, in a white school, and in a white church. They also argue that these children will not be prepared to handle racism that they will encounter as they grow into their teenage years or beyond. Supposedly, they will not have been taught "survival skills" by their parents because their white adoptive parents never had to face such racism. However, the opponents of transracial adoption fail to consider that in accordance with the psychological theory of racial identity, the experience of encountering racism might be the perfect situation to challenge these children's anti-Black attitudes. Because of the internal conflict that they will encounter, they will come to see themselves as Black and resolve such conflicts through having been brought up by white adoptive parents. In the end, these children should be able to identify themselves as Black and with the bicultural society in which they were reared.

49. Studies of transracial adoptees show that "[t]hey think race is not the most important factor in defining who they are or who their friends should be. They often describe themselves as biracial or American or 'human' rather than black." BARTHOLET, supra note 4, at 103.

50. "'When a black kid says, 'I consider myself a human being,' that's cultural genocide. Anytime a person denies what he or she is, their race has lost one individual.'" Helene Lorber, Children of Two Worlds: Cross-Racial Adoptions Aren't New, DETROIT FREE PRESS, Sept. 30, 1990, at 1G (quoting Robbie Littles, past national vice president of the NABSW).

51. For a detailed discussion of the numerous studies that have been conducted on transracial adoptees see Bartholet, supra note 11, at 1207-26.

52. RITA SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 28 (1987) (finding that transracial adoptees were "aware of and comfortable with the racial identity imposed on them by their outward appearance").

53. Bartholet, supra note 11, at 1208 n.120.

54. Id. at 1209.
whites and with living a racially integrated life.\textsuperscript{55} Equally important, these studies show that transracial adoption has had an impact on the white members of these biracial families; the parents say they have "developed a new awareness of racial issues and describe their lives as significantly enriched by the experience" and the white children in these families seem to be free of racial biases and dedicated to the "vision of a pluralistic, multicolored world in which a person's humanity is more important than his race."\textsuperscript{56} Analogously, even though opponents of transracial adoption argue that placement with a family of the same race is "a benefit of overriding importance to black children . . . . [t]here is no evidence that same-race placement is beneficial to black children."\textsuperscript{57}

Contrary to the opinion taken by the NABSW, the position taken by the National Association for the Advancement of Colored People ("NAACP") reflects these positive studies. Their position is that:

If there are black families available and suitable under the criteria of advancing the "best interest of the child," black children should be placed with such black families.

If black families are not available for placement of black children, transracial adoption ought to be pursued as a viable and preferred alternative to keeping such children in foster homes.\textsuperscript{58}

The NAACP's position recognizes that there are not always Black families available to adopt a Black child and even in some cases where there are Black families, placement with those Black families may not be in the best interests of the child.\textsuperscript{59} In those circumstances, it recognizes that agencies should seek out white families so that these children can have permanent homes rather than languish in the foster care system. It encompasses both the notion that same race placements, where the placement is in the best interests of the child, should be the first alternative for a child and the notion that

\begin{flushright}
55. BARTHOLET, supra note 4, at 103.
56. Id. at 105.
57. Id. at 110 (stating that "the argument for racial matching policies rests on the unsupported assumption that black children will be significantly better off with 'their own kind')."
58. Memorandum from Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People to all NAACP Units, National Board Members and NAACP/SCF Trustees 7 (June 3, 1992), reprinted in Rebecca L. Koch, Note, Transracial Adoption in Light of the Foster Care Crisis: A Horse of a Different Color, 10 N.Y.L. SCH. J. HUM. RTS. 147, 176 n.226 (1992).
\end{flushright}
transracial placements should be an alternative for a child where no such placement exists. It recognizes that a home with a white family is better than no home at all, and thereby diverges significantly from the position taken by the NABSW. The NABSW, on the other hand, "steadfastly holds to the position that Black children should not be placed with white parents under any circumstances."59

In support of the position to place Black children with white families when there are no Black families available for adoption, studies which have been conducted on the emotional bonding of children show that children adapt best when placed with one family as early as possible.60 It is clear from these studies that disruption in the stability of a child's family life where the child has established bonds with a psychological parent61 is damaging to the child. Under the psychological parent theory, a child requires early stable attachments for normal development. Where there are frequent changes in the parent figure or other harmful interruptions, the child's ability to develop physically, emotionally, and mentally is lessened.62 Despite the fact that psychological bonding is a significant factor in a child's development, courts de-emphasize its importance by regarding it as merely one factor, among many, in determining the best interests of the child.63 Because of this de-emphasis, agencies and courts risk jeopardizing the child's stability and security by authorizing the movement of the child from placement to placement.64

In McLaughlin v. Pernsley,65 one can see how the psychological parent theory is affected by transracial adoption cases. The facts are

59. Bartholomew, supra note 4, at 97.
61. Psychological parent has been defined as "one who, on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs. The psychological parent may be a biological . . . adoptive, foster, or common-law . . . parent or any other person." Id. at 98.
62. Id. at 18.
64. Goldstein et al., supra note 60, at 42-44.

The procedures of child placement are not designed to assure a prompt final decision. The process is characterized by extended periods of uncertainty caused by over-cautious and over-worked administrative agencies; by courts with overcrowded dockets, extended and oft-postponed hearings; and by judges who are inclined to procrastinate before rendering their decisions at trial or on appeal. Id. at 43.
as follows. When Raymond, a Black child, was four months old, he was placed in the temporary care of the McLaughlins, white foster parents.\textsuperscript{66} An agency document stated that Raymond had to be placed in a white home because it was the only infant home available.\textsuperscript{67} After Raymond had lived with the McLaughlins for two years, Black foster parents, the Williamses, became available as foster parents. The agency decided to remove Raymond from the care of the McLaughlins and place him in the care of the Williamses. Although foster care regulations required the agency to advise the McLaughlins of their right to appeal the removal decision, the agency failed to do so.

The McLaughlins then brought an action in the family court seeking the return of Raymond. The family court denied the McLaughlins' motion but the McLaughlins filed exceptions to the court’s order. Thereafter, the McLaughlins agreed to an indefinite extension of time for the agency to respond to their exceptions and further agreed with the agency that a psychiatric evaluation might resolve the need for litigation. A psychiatrist chosen by the agency from a list presented by the McLaughlins recommended that Raymond be returned to the McLaughlins.

The agency did not respond to the psychiatrist’s recommendations and the McLaughlins brought this action in federal court. The McLaughlins and the agency again agreed to try to resolve this dispute through a psychiatric evaluation.\textsuperscript{68} This time, however, the agency appointed a three-psychiatrist panel. The panel noted that Raymond had been suffering from depression due to his removal from the McLaughlins.\textsuperscript{69} Their report recommended that the Williamses return Raymond to the McLaughlins.\textsuperscript{70} By this time, however, Raymond had been with the Williamses for more than one year and eight months. Eventually Raymond was returned to the care of the McLaughlins, but not before the changes in his family life had resulted in severe depression and slurred speech attributable to the fact that he was removed from his foster parents solely because of a difference in race between he and his foster parents.\textsuperscript{71}

Rather than viewing transracial adoptions as white families seek-

\begin{footnotes}
\item[66] 876 F.2d at 309-10.
\item[67] Id. at 310.
\item[68] Id. at 311.
\item[69] Id. at 316.
\item[70] Id. at 311.
\item[71] Id. at 323.
\end{footnotes}
ing to raise Black children as whites,72 those who oppose transracial adoption should view it as white families seeking to help both Black children in need73 and themselves by completing their families. White society has not banded together and decided that it can eradicate the Black race by adopting Black children and making them white.74 Transracial adoption stems from the fact that there are simply too many Black children suffering in the foster care system and what they need most are permanent families. That is not to say that Black children are the only ones who benefit from transracial adoptions; white adoptive parents likewise benefit from the love and joy they receive from their adopted child. They too receive as much pleasure from the Black child’s love as the Black child receives from her new home. However, there should be no concern that racist white parents will seek to adopt transracially.75 No racist, no matter how desperate for a child, will adopt a child of a race he despises.76

72. "The lateral transfer of our children to white families is not in our best interest . . . . It is their aim to raise Black children with white minds . . . ." Ford-Mazrui, supra note 2, at 961 n.205 (quoting Morris F.X. Jeff, Jr., President’s Message, NATL. ASSN. BLACK SOC. WORKERS NEWSL., Spring 1988, at 1-2).

73. But see Linda van Ekelenburg, Racial Matching, SAN FRANCISC0 CHRON., Dec. 15, 1993, at A26 (stating that "a more important reason for ethnic matching in adoption is to prevent the perception of the black child being rescued by white charity. Unfortunately, transracial adoption perpetuates the stereotypes of blacks as the social problem and whites as the solution").

74. It should be clear that transracial adoptive parents are not racists seeking to destroy the Black race. They do not take Black children into their homes because they hate the Black race and hope to eradicate it by adopting a Black child. See Fenton, supra note 17, at 52 ("those white people who do seek to adopt Black children are not typically motivated by a desire to participate in cultural genocide of the Black community"). They are simply concerned and loving parents with room in their hearts for one more child, who have decided that because of the large number of Black children in need of homes, they want to adopt a Black child. I do not mean to deny any notions that some white parents adopt Black children simply because there are no white children available. I am sure that this has been the case for some white parents. However, once those parents decide to consider adopting a Black child, I believe that thoughts of the numerous Black children waiting for homes play a large role in their decision to finally seek a Black child for adoption. Remember also that a large number of white parents seeking to adopt Black children come into that status because they were the child’s foster parents. Thus, although these parents may not have actively sought out a Black child for adoption, those are their circumstances. In any event, it seems outrageous to argue that a white family would operate at such cross purposes.

75. But see id. at 61 ("Ignoring race in placement decision would create the possibility of adoption by racist parents who are desperate for a child").

76. Remember, that by adopting a Black child, white parents may voluntarily subject themselves to racism. Even though white people generally are not subject to racism, Black children often are. By adopting a Black child, white parents subject themselves to possible racism either against them, because they are now part of an interracial family, or against their child, because of their child’s skin color. For example, parents who have adopted
Those who adopt transracially see past the color lines and see a child who they can love and make a part of their family.

C. Special Placement Situations

The adoption of biracial children presents even more troubling aspects than the adoption of Black children. Even though adoption by a white family is considered a transracial adoption for these children, adoption by a Black family is also a transracial adoption. Many argue that since society will view biracial children as Black children, they should be treated the same as Black children for placement purposes. Although courts and adoption agencies treat biracial children as Black, biracial children are a mix of both races and as such, should be able to identify with both races. By placing the child with one race or the other, one could argue that the child is being cut off from one half of her cultural heritage, whether it is Black or white. Thus, there could never be a placement for a biracial child where the child would not be deprived of a part of her cultural identity, unless it was with an interracial family.

Even more disturbing than the problems posed for biracial chil-

77. Forde-Mazrui, supra note 2, at 955-59.
78. "[I]n today's society, a person who has any black characteristics at all is generally perceived as black." In re Davis, 465 A.2d 614, 627 n.11 (Pa. 1983).
79. One article suggests that treating biracial children as Black for placement purposes may not be the proper approach.
[B]iracial children have a legitimate genetic and psychological claim to both their black and white heritage. The need for biracial children to identify positively with Black culture suggests the desirability of placing them with black parents. The equally legitimate need to identify positively with white culture, however, speaks in favor of placing biracial children with white parents. Two further considerations undermine the policy of favoring Black placement for biracial children. First, although biracial children are generally viewed as black by society at large, they are not always accepted as black by black people. Second, placing biracial children with white parents may afford certain benefits over placing them with Black parents. They are more likely to identify with their mixed heritage rather than as black alone. In at least this way, the biracial child may accept herself more completely.

Forde-Mazrui, supra note 2, at 959.
80. See id. at 956-57 ("[b]y treating a biracial child as black, the courts decide first, that the biracial child should identify herself as one and only one race, and second, that this race should be black").
Children is the fact that some of those who oppose transracial adoption only feel that way with regard to healthy Black infants. As for older Black children or handicapped Black children, they do not feel so strongly. For example, although Professor Bowen argues that "a Black child’s best interests entail being reared and socialized in the Black community," he takes a different approach with regard to older Black children and handicapped Black children. Professor Bowen states:

for the older Black potential adoptee (proportions are certainly high in comparison to total Black potential adoptees) and the Black handicapped potential adoptee, any offer by any family to take him or her should be welcomed, for these children are certainly hard to place. . . . Should a white family want to adopt these children, they should be encouraged; the long-run analysis is that the trauma and lack of family affection is more devastating than the denial of a home altogether, Black or white.  

In other words, opponents of transracial adoption recognize that it would be in the best interests of older Black children and handicapped Black children to be adopted by parents of a different race than to languish in institutional care for the rest of their lives. In these special cases, no loving, caring parents should be ruled out because of their race. However, they fail to recognize that this is the same argument put forth by proponents of transracial adoption—that it is in a child’s best interest to be placed with a family of a different race rather than to remain in foster care homes or institutional settings for the rest of her life. Yet, every day, agencies take the chance that a healthy Black infant will be adopted by Black parents because of her age and medical condition. However, the risk that even one healthy Black child is not adopted by a Black family is not worth taking when a caring white family is available to adopt the child. Furthermore, it is as if these opponents of transracial adoption are saying that the older and handicapped Black children are not worth as much to the Black community as healthy Black infants are. In other words, white society is free to take these special needs chil-

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81. Bowen, supra note 28, at 488.
82. Id. at 511.
84. Id.
children because the Black community is not as concerned about their identifying with Black culture. However, the white community should not even try to adopt healthy Black infants because the Black community is so concerned about their racial identity that it is willing to put the good of the Black community ahead of each child’s own best interest.

D. The Problems Black Children Face Today

Due to “escalating rates of child poverty,” “growing numbers of births to unmarried teens,” growing numbers of homeless families, growing substance abuse, “a ninety percent rise in reports of abuse and neglect, and now the deadly threat of AIDS,” families have been burdened by increasing stress and have placed new demands on the child welfare system, particularly the foster care system. The results of these new demands on the system are even

85. In fact, a study by the Packard Foundation found that white families were more willing than Black families to adopt disabled Black children. Hanna Rosin, Children Without Choice: Transracial Adoption Taboo Leaves Black Kids Languishing, ROCKY MOUNTAIN NEWS, Jan. 16, 1994, at 85A. The study found that forty percent of transracially adopted children were disabled, twenty-three percent had psychological problems and thirty-three percent had been sexually abused. Id.

86. No PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. No. 395, 101st Cong., 2d Sess. 25 (1990) (hereinafter No PLACE TO CALL HOME] (reporting that one in five children, thirteen million children, lived in poverty). This, of course, may be affected by the fact that at that time, nearly one in four children lived in a single parent family. Id. at 26.

87. Id. The fertility rate for Black females between the ages of ten and nineteen is three times that of white females in the same age category. Anita Allen, Legal Rights for Poor Blacks, in THE UNDERCLASS QUESTION 138 n.67 (Bill E. Lawson ed., 1992).

88. No PLACE TO CALL HOME, supra note 86, at 28 (reporting that one-third of the homeless population included families with children).

89. A study of black children in foster care conducted by the National Black Child Development Institute found that drug abuse by parents contributed to placement for thirty-six percent of the 1,000 cases studied. Id. at 30. Moreover, substance abuse has caused a dramatic increase in the number of cases involving drug-addicted infants. For example, in Illinois in 1991, there were 1,223 drug-addicted infants in foster care, a 132 percent increase over 1987. Id. at 36. More startling, in 1991, New York City officials estimated that 2,000 “crack babies” would enter the foster care system in that year alone. Perry Lang, More Children, Fewer Homes: Crack Feeds Foster-Care Crisis, SAN FRAN. CHRON., May 31, 1991, at A1.

90. No PLACE TO CALL HOME, supra note 86, at 25.

91. Although this Note focuses on adoption, it is almost impossible to understand transracial adoption without at least a cursory review of the problems children face in the foster care system. A substantial number of adoptions that take place today are by foster parents. Bartholet, supra note 11, at 1186 n.59, 1193 n.74. As a result, foster parents are increasingly chosen with the thought of future adoption in mind where it is unlikely that the child will be returned to his parent(s). Id. at 1186 n.59. Thus, it has become important for
more disturbing with regard to minority children. Minority children are disproportionately represented in the foster care system\(^9\) and are entering the system at a higher rate than white children.\(^9\) There are not enough foster families to house these children\(^9\) which means that these children will be held in institutional care rather than in a foster family home.\(^9\) Moreover, the median length of stay in foster care for Black children is one-third longer than the national median.\(^9\) In particular, Black children are three times more likely to re-

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social workers to place children with families of the same race in the event that the child becomes available for adoption and the foster parents want to adopt the child. \(\text{Id.}\) Consequently, the same race-matching policies that occur in adoption are increasingly taking place in foster care placements. \(\text{Id.}\) In fact, many of the transracial adoption disputes that occur are the result of Black children being placed with white foster care parents who later want to adopt the child. For a discussion of the convergence of these concerns, see generally Michael P. Kennedy, Comment, \textit{In the Best Interests of the Child: Religious and Racial Matching in Foster Care}, 3 Geo. Mason. U. Civ. RTS. L.J. 299 (1993); Koch, \textit{ supra} note 58.

92. In 1985, minority children comprised forty-one percent of the children in foster care. That number rose to approximately forty-six percent in 1988, while the proportion of minority children in the nation was less than half that percentage, approximately nineteen percent. \(\text{No PLACE TO CALL HOME, supra} \) note 86, at 38. According to witness testimony, Black and Hispanic children are increasingly overrepresented among poor children, homeless children, drug-exposed children and children in foster care; in 1986, close to 80\% of the children in foster care in NYC were black and Hispanic. In our study of 194 boarder babies placed with foster families in 1987, close to 95\% were children of color. \(\text{Id. at} \) 38-39; \(\text{see also Duke, supra} \) note 45, at A6 (stating that according to the American Public Welfare Association, in 1988, roughly thirty-nine percent of the children in foster care waiting for permanent placements were Black).

93. In 1985, the percentage of minority children entering the foster care systems in eight of the most populous states were as follows: fifty-one percent in California, thirty-one percent in Florida, fifty percent in Illinois, fifty-three percent in Michigan, sixty-five percent in New Jersey, seventy-two percent in New York, thirty-five percent in Ohio, and fifty-two percent in Texas. \(\text{No PLACE TO CALL HOME, supra} \) note 86, at 19. Remember, minority children made up only nineteen percent of the children in the nation. \(\text{Id. at} \) 38.

94. For example, between 1986 and 1988, in California, although the number of foster families increased by eleven percent, the number of foster children coming into the system increased by twenty-eight percent. \(\text{Id. at} \) 8.

\[\text{T}he \text{pool of families potentially available to be foster families has been reduced because of the changing demographic profile of American families in which both parents work.} \ldots \text{[A]gencies have not always recognized the need to adapt to the new demographic realities.} \ldots \text{[T]hey screen out singles, low or fixed income people, people over a certain age, women who work and on and on.} \text{Id. at} \) 51.

95. Lang, \textit{ supra} note 89 (a study by the National Black Child Development Institute revealed that with the overload of Black children in the foster care system, many children were sent to group homes).

96. While the national median length of stay in foster care is seventeen months, the median length of stay for a majority of black children exceeds two years. \(\text{No PLACE TO CALL HOME, supra} \) note 86, at 39; \(\text{see also Lang, supra} \) note 89, at A16 (a study by the
main in long-term foster care.\textsuperscript{97}

These statistics are even more troublesome in the adoption setting. Black children comprise nearly half of the children available for adoption today.\textsuperscript{98} They wait twice as long as white children for an adoptive family.\textsuperscript{99} Black children are simply less likely to be adopted than white children.\textsuperscript{100} Even worse, statistics show that the percentage of Black children available for adoption far exceeds the percentage of the Black population.\textsuperscript{101} For example, in 1989, in Maryland, eighty-five percent of the children available for adoption within the state were Black, while only twenty-six percent of the population in Maryland was Black.\textsuperscript{102} Similarly, in Massachusetts, sixty percent of the children available for adoption within the state were Black, while

\textsuperscript{97} Smith, supra note 7, at E3.

\textsuperscript{98} Gregory Freeman, Adoption Gauge Should Be Love, ST. LOUIS POST-DISPATCH, Apr. 12, 1994, at 11B (stating that nearly half of the 45,000 children awaiting adoption in this country are Black).

\textsuperscript{99} Carol Statuto Bevan, Limits on Transracial Adoption Hurt Children; Foster Care Limbo, N.Y. TIMES, Dec. 8, 1993, at A24 (editorial by the Director of Public Policy for the National Council for Adoption stating that Black children wait twice as long as white children for an adoptive home); Freeman, supra note 98, at 11B (stating that, according to the National Council for Adoption, Black children wait three to five years for an adoptive home, one to two years longer than the wait for white children).

\textsuperscript{100} A 1993 study showed that a Black child in California's foster care system was three times less likely to be adopted than a white child. All in the Family, NEW REPUBLIC, Jan. 24, 1994, at 6 (citing a study by Rick Barth, professor at University of California at Berkeley). Moreover, that study found that "there are up to 1,200 more African-American children needing homes in California than African American couples likely to adopt them," based on studies of race, population, and adoption statistics. Smith, supra note 7, at E3 (citing the same study by Rick Barth).

\textsuperscript{101} Beth Brophy, The Unhappy Politics of Interracial Adoption, U.S. NEWS & WORLD REPORT, Nov. 13, 1989, at 72. Moreover, a study conducted by the Child Welfare League found that while large numbers of Black children were waiting for adoptive homes, large numbers of white parents were waiting for children, and a limited number of minority adoptive parents were applying to adopt. Bartholet, supra note 11, at 1202 n.103.

An argument consistently put forth by proponents of transracial adoption is that there are not enough Black families to adopt the Black children available for adoption. This argument has been highly criticized by those who oppose transracial adoption. They explain that there are reasons that Black families appear to adopt at a lower rate than white families. Some of these reasons include: lack of programs recruiting adoptive parents in the Black community; underestimation of the actual number of Black families that actually adopt due to the large number of extended family adoptions that take place; and biased criteria used by agencies in selecting adoptive parents. For a discussion of these arguments see Fenton, supra note 17, at 45-46.

\textsuperscript{102} Brophy, supra note 101, at 72.
only five percent of the state population was Black.\textsuperscript{103}

Today, agencies often do not take steps to free Black children for adoption if there are no Black families available to adopt them.\textsuperscript{104} These policies have become known as “holding” policies because agencies “hold” Black children in foster care for lengthy periods of time when Black adoptive parents are not available,\textsuperscript{105} even though the child is or could be free for adoption.\textsuperscript{106} During this “holding” period, adoptions by white parents are not considered by the agencies.\textsuperscript{107} Professor Bartholet describes two types of holding policies. The first of these policies requires a definite period of time, anywhere from three to eighteen months, to pass before a transracial adoption may be considered.\textsuperscript{108} However, Professor Bartholet states that even those periods of time are not accurate in many cases because the time period does not begin to run until the child becomes legally free for adoption.\textsuperscript{109} Very often, agencies do not even seek to free these children for adoption until there are Black parents waiting for them.\textsuperscript{110} Instead, these children wait in foster homes or institutions for lengthy periods of time, even when there is a white family available to adopt them. The second type of holding policy requires that the child be held until active efforts to recruit minority parents have proven fruitless or until documentation has been

\textsuperscript{103} Id.

\textsuperscript{104} "Black children can spend an average of three years in the limbo of foster care before the determination is made that adoption is the best option for them." Bevan, \textit{supra} note 99, at A24.

Of the 276,300 children of all races in the foster care system in 1985, adoption was the goal for only 36,000 of them. \textit{No Place to Call Home}, \textit{supra} note 86, at 54. However, studies indicate “that even when adoption or reunification has been identified as a goal for a child, it takes years to implement. . . . [e.g., in Maryland it takes 5 years for a child to be adopted, in Baltimore County it takes 7 years].” Id.

\textsuperscript{105} Numerous statistics show that there are not enough Black homes available to adopt the number of Black children available for adoption. For example, in April 1991, the Illinois Department of Child and Family Services announced that fifty-nine Black babies under the age of two were available for adoption but that no Black families could be found to adopt them. Jerry Thomas, \textit{Should White Parents Adopt Black Children?}, Chi. Trib., June 23, 1991, at C1. It is important to note that many opponents of transracial adoption claim that the lack of Black adoptive families is not due to a “shortage of families but a matter of institutional racism that screens out black families.” See id. (quoting Zena Oglesby, Executive Director of the Institute of Black Parenting in Los Angeles).

\textsuperscript{106} For a detailed discussion of “holding policies,” see Bartholet, \textit{supra} note 11, at 1193-96.

\textsuperscript{107} Id. at 1193.

\textsuperscript{108} Id.

\textsuperscript{109} Id.

\textsuperscript{110} Id. at 1194.
submitted to prove that such efforts have been made and that minority adoptive parents are not available. Professor Bartholet comments that many adoption professionals prefer the first type of policy because it at least sets a limit on the period of time a child may be "held" by the agency before a transracial adoption is considered and because under the second type of policy, Black children are held for even longer periods of time. Both of these holding policies are particularly troublesome in light of numerous studies which show that the effects of foster care can be damaging to a child. The foster care system is clearly an unacceptable way to provide for these children; it should not be employed to their detriment.

Moreover, New York state policy "requires an agency 'to make an effort to place each child in a home as similar and compatible with his or her ethnic, racial, religious and cultural background as possible.'" Ilene Barth, What Does NY Have Against Mixed-Race Adoptions?, NEWSDAY, Mar. 5, 1989, at 8. There is no way to determine how long these efforts can take since "there's no fixed rule about how long agencies can take to find a child a home, and . . . an agency's placement efforts aren't monitored until a year has passed." Id. (according to Cheryl Lanier, a state adoption official).

Children are often bounced from home to home without establishing roots or ties to many of these foster families; moved to different locations throughout the state; separated from their siblings; physically abused during their placements or on their return to their biological parents; and left in foster care for years until they are finally adopted. The Kansas Supreme Court recited a chronology of one child's foster placement in which all of these incidents occurred:

In February 1976, at the age of 11 months, A. was placed in SRS custody because he was abused and neglected by his biological parents. His older brother, D., born February 6, 1974, was also placed in SRS custody.

From February 1976 to June 1976, A. and D. were in the Nelson foster home. Mrs. Nelson requested the removal of A. and D. Her husband was threatening to leave because A.'s whining was getting on his nerves. From June 1976 to July 1976, A. was separately placed in the Smith foster home. In July 1976, A. was returned to his biological mother. A. was removed from his mother's home later that month and admitted to the University of Kansas Medical Center (UKMC) with a diagnosis of child abuse (a broken wrist, facial bruises, and swelling of the
the longer children are held in foster care awaiting adoption, the less likely they will ever be adopted.

E. Educational Programs for Transracial Families

There have been numerous articles suggesting what non-minority parents might do to help their minority adopted child adapt to their family situation more easily.\textsuperscript{116} In fact, recently, the Institute for Black Parenting, which has traditionally focused on finding Black families to adopt Black children, decided to offer classes to white families who have adopted Black children to teach them how to han-

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Some adoption specialists suggest that adopting two minority children, if possible, may help a child feel less isolated . . . .

To acknowledge differences and build cultural pride in children, [Sherry D. Molock, an assistant professor of psychology at Howard University and a practicing psychologist] urges adoptive parents “to get information about the child’s birth culture. Parents should be aware of the holidays and customs of the birth country and incorporate these elements into their family life.” Many adoptive parents bring back artifacts from their child’s native country, take their children to international festivals, and read books about the country and culture . . . .

In addition to integrating the child’s birth culture as a valuable part of family life, White parents need to be role models for their children in their response to racism, to teach them to recognize and reject it . . . .

For starters, adoptive parents need to be sensitive not only to their child’s culture, but to other cultures as well. No ethnic slurs should be tolerated, no racist remark left unaddressed. Jokes about any ethnic group, not just those of the family, should be discouraged. Interracial families—and maybe all homes—ought to have dolls of different racial groups, pictures, book, and magazines of all kinds of people . . . .

\textit{Id.}
dle matters ranging from hair and skin care to discrimination. By dispensing literature and by providing opportunities for white adoptive parents to speak with Black adults about specific issues that have been a problem, these classes can provide valuable information to concerned parents. However, these classes should be voluntary and not mandated by either a court or an adoption agency because such a mandate might provoke hostility and resentment in the adoptive parents, who may have already taken steps to ensure that they have prepared to adopt a child of a different race.

Another idea that has been proposed is for adoption agencies to monitor those homes where Black children have been adopted by white families to ensure that the children are learning about their own heritage. However, it seems doubtful that adoption agencies have the resources for this type of monitoring or that they would have any recourse if families were not in fact teaching the children about their heritage. Moreover, even if the agencies did have sufficient resources to monitor these families, such an intrusion into family life would likely be unconstitutional.

The Black community should realize that the situation for Black children is only getting worse. The first priority in placing Black children must be finding them homes with parents who love them. If those homes cannot be Black homes, the Black community should do everything it can to help Black children become comfortable with their Black identity. Classes, such as those offered by the Institute for Black Parenting, should be offered for both white adoptive parents as well as Black adopted children. Such classes provide an excellent opportunity for Black children to be exposed to Black adults. Moreover, the Black community should offer a Black role model program, whereby Black children living in white families could be exposed to Black families on a visitation basis. Black families might include the child in some of their family gatherings, teach the child about Black culture, or simply be available if the child feels he needs to speak with someone of his own race. Moreover, the children of the Black

117. See Smith, supra note 7.
118. See, e.g., Court Sets Terms for Whites Adopting Black, N.Y. TIMES, Aug. 10, 1990, at A13. A referee in the Hamilton County Court ordered a white foster family to receive an education in Black culture as a prerequisite to their being able to adopt their Black foster child, who they had had custody of since she was an infant. Id.; Freeman, supra note 98, at 11B.
119. See Freeman, supra note 98, at 11B.
120. See Fenton, supra note 17, at 54-59.
families might provide valuable friendships to transracially adopted children who may have only white friends because of the neighborhoods they live in or the schools they attend. This type of program might be embraced by a number of Black parents who simply cannot adopt a child but would like to do something to help Black children.

White parents themselves know that it will take a lot more effort to raise Black children, yet many are willing to try and often will take the extra steps necessary to ensure that the child will be comfortable with his identity. These steps often include teaching them about their ethnic culture, taking them to cultural awareness activities, and exposing them to Black playmates and Black role models. Today, white parents have become more aware of the fact that they cannot simply ignore their Black child’s race, but must recognize and embrace it. In fact, those who do not take these steps to teach their Black adoptive children about their cultural heritage may fail to do so simply out of ignorance as to how important these steps are in the child’s socialization process. Thus, education programs and recruiting transracial families into these education programs should be a high priority for the Black community.

121. See McCauley, supra note 116 (interviewing transracially adoptive parents).

[Y]ou ‘have to make a commitment to having a culturally diverse life’ when adopting transracially, says Carol Roberts [a transracially adoptive parent]. ‘Obviously teaching kids about racism is harder for us. You can’t do it if you live in an exclusive world. Our decision to live in an integrated area has been a conscious one, even before adopting. We constantly try to respond to things sensitively, but our reaction to racism is not reflexive. I may not be able to teach my children everything, but I’m sure going to try hard.’

Id.

122. See Raymond & Turner, supra note 8 (recounting the struggle that Turner’s family went through to hold onto Jordan, their Black foster child).

I’m sure life is easier when parents and children are of the same race, but we feel our love for Jordan can overcome any drawbacks. He’ll have plenty of exposure to black friends and role models—our church, local schools, and neighborhood are integrated, and adults and children of all races regularly visit our home. The mother of one of Jordan’s black playmates has agreed to be his surrogate grandmother, and members of Joy of Jesus, an interdenominational community-outreach group in Detroit, regularly sends us information on black history and culture.

Bob and I have also decided to adopt another black baby, Myryah, to share Jordan’s heritage and complete our family.

Id. at 144; see also Freeman, supra note 98, at 11B.
F. Efforts to Recruit Minority Adoptive Parents

1. Changing the Criteria

Many opponents and proponents of transracial adoption argue that the adoption system was designed to place white children with white families and that the system has never quite adapted to placing Black children with Black families. They contend that an adoption agency should not employ the same criteria when searching for a Black adoptive family as it does when it searches for a white adoptive family. Many assert that using the same criteria prevents Black families from becoming adoptive families and they cite studies to prove their point. For example, a National Urban League Study found that although 800 Black families applied to become adoptive families, only two of those families were accepted. That approval rate equals one-quarter of one percent whereas the national average approval rate equals ten percent.

Accordingly, they argue that adoption agencies should not employ the traditional criteria when searching for Black adoptive families because that criteria focuses on white middle class values. This traditional criteria has often focused upon two-parent families, where the parents were relatively young, had a stable marriage, and were economically secure. Some argue that since more and more Black families are headed by single parents, and since this type of family structure has been a tradition in the Black community, single parent adoptions should be encouraged. They assert that there should be no reason to deny a single parent an adoption simply because of that person’s marital status. Similarly, because parenting by grandparents and great-grandparents has traditionally been done in the

123. See, e.g., Fenton, supra note 17, at 39-40.
125. Id. The article cites another instance where two thousand Black families responded to a California television advertisement to become adoptive parents, yet only fifteen families were accepted. Id.
126. Id.
127. Id.
128. Fenton, supra note 17, at 63.
129. This approach has been codified by the Connecticut legislature. CONN. GEN. STAT. ANN. § 45a-727 (West 1993 & Supp. 1994) (providing that “[t]he court of probate shall not disapprove any adoption under this section solely because of an adopting parent’s marital status . . . ”).
Black community, age alone, should not be a basis for denying adoption.\footnote{130. Fenton, supra note 17, at 63.}

In response, agencies have abandoned traditional criteria when recruiting Black adoptive families, at least significantly, if not completely.\footnote{131. See, e.g., id. at 59-66.} However, these agencies have not "repudiated these criteria as irrelevant to determining parental fitness."\footnote{132. BARTHOLET, supra note 4, at 96.} Consequently, Black adoptive families may be older,\footnote{133. Professor Bartholet cites to a 1986 study which showed that forty-five percent of minority adoptive fathers were age forty-five or over in contrast to only nineteen percent of white adoptive fathers and fourteen percent of minority adoptive fathers were age sixty-one or over in contrast to only two percent of white adoptive fathers. Bartholet, supra note 11, at 1200.} poorer,\footnote{134. Professor Bartholet cites to a 1986 study which showed that fifty percent of minority adoptive families in contrast to fourteen percent of white adoptive families had incomes below $20,000 per year and twenty percent of minority families in contrast to two percent of white families had incomes below $10,000 per year. Id.} and more likely to be single than white adoptive families.\footnote{135. Id.} In seeking to expand the list of prospective Black adoptive parents, adoption agencies have included Black families on a prospective Black parent list that would normally be excluded from a prospective white parent list.\footnote{136. Id.} Moreover, those at the bottom of the Black parent list are given priority over those at the top of the white parent list.\footnote{137. Id.}

The agencies fail to consider that when placing children, the standard to be used regardless of race is "the best interests of the child." One might question whether placement with an older, single, Black parent who has a low income and lives in a relatively poor neighborhood is in the best interests of the child. Opponents of transracial adoption would of course state that this is in the best interests of the child because it allows the child to be adopted by a parent of the same race. They would put race above all other factors and would prefer to see a child living in this situation rather than living with a white family who meets the traditional adoptive family criteria. This view completely ignores the best interests of the child standard by placing a Black child in a setting in which a white child would not be placed, simply because the child is Black, not because the setting is in the best interests of the child.

Black children are being placed with parents that agencies would
not even consider for a white child’s placement. How then, can anyone say that these children are being treated “equally” under the law? Clearly they are not. If Black children are not forced to languish in foster care, they are forced into adoption by families who society says should not be permitted to adopt children because they are incapable of caring for children. It is not that society does not believe that these potential adoptive parents are moral or loving people. Rather, it is that they do not have the time, energy or money necessary to raise a child today. In the name of race matching, however, Black children are being placed with these less fit parents.¹³⁸

2. Recruitment Programs

The Black community has reacted to the shortage of Black adoptive parents in numerous ways which have been very effective. These include private Black adoption agencies and recruiting agencies. For example, there are private Black adoption agencies such as the Institute for Black Parenting¹³⁹ and ROOTS¹⁴⁰ which have had enormous success in finding Black families to adopt Black children. Some of these agencies have even been more successful than traditional adoption agencies¹⁴¹ and state agencies. For instance, Homes for Black Children, a Black adoption agency, placed 132 Black children

¹³⁸. See Barth, supra note 111, at 8 (quoting a child welfare specialist who remained unnamed because he feared reprisal as stating that “[t]he walking wounded can adopt, as long as they’re black”).
¹³⁹. After only two years of operation, the Institute for Black Parenting had already placed 200 Black children with Black families. See Bates, supra note 16, at 94. The adoption agency attributes its success to taking a different approach to finding adoptive parents.

Everything public agencies do, we don’t. We send Black social workers to Black homes to interview these families. We send them at night and on weekends, when it’s convenient for working people. We don’t charge money for adoptions (most private agencies do). And we try to place a child within a few months (usually two to eight) and not the year and half to three years it takes public agencies to place them.

Id. (quoting Zena F. Oglesby, Jr., Executive Director of the Institute for Black Parenting). After five years of operation, the Institute had increased adoptions by thirty-nine percent in the four major counties of Southern California by employing these innovative ideas. Page, supra note 124, at B7.
¹⁴⁰. Toni Oliver, Looking at Adoption in Black and White, ATLANTA CONST., Dec. 9, 1993, at K5 (noting that ROOTS committed itself to increasing adoption opportunities for Black children by eliminating the barriers to adoption that Black families often experience and by obtaining a list of potential Black adoptive families).
¹⁴¹. A report by the North American Council on Adoptable Children reported that Black adoption agencies found same race homes for Black children ninety-four percent of the time, while traditional private adoption agencies which found same race homes for Black children only fifty-one percent of the time. See id.
in Black homes during one year, which equalled more placements than all of Detroit's other child welfare agencies combined. ¹⁴²

Other agencies have been successful as recruiting agencies. For example, Miracle Makers, a nonprofit agency, placed 671 Black children in 473 Black foster homes during a two year period by recruiting parents at churches, civic centers, and homes. ¹⁴³ The agency later sent letters to those 473 homes asking them if they were interested in adopting the children and they received 125 affirmative replies. ¹⁴⁴ Other programs such as One Church, One Child have been likewise successful. The premise of this organization is to ask each church to find one family in its congregation to adopt a child. ¹⁴⁵ With more than 1,000 Black churches in the Central City and South-Central Los Angeles area alone, it is easy to see how this organization can reach thousands of potential adoptive families and be successful. ¹⁴⁶ Another way that agencies have recruited Black adoptive parents is by having an Annual Black Adoption Fair. ¹⁴⁷ This type of fair enables prospective adoptive parents to meet with the prospective adoptive children and see how they get along.

Others have suggested ways for agencies to improve recruiting further. For instance, in addition to searching among strangers to the child, programs may want to focus on searching for relatives of the child who may be willing to adopt the child. ¹⁴⁸ Their search should not be limited to the extended family of the child, such as grandparents, aunts and uncles, but should also include "fictive kin" derived from the community and friends. ¹⁴⁹

In addition to programs which seek to recruit Black adoptive parents, there are entitlement programs which make payments to parents who want to adopt but cannot afford to do so. As encouraging as these programs may seem, they do have their limitations and
will only increase adoptions among Black families to the extent that Black families do not adopt for financial reasons. However, all states have Adoption Assistance Programs. The intent of these state assistance programs is to serve two important purposes: first, they offer incentives to families to adopt children who might not otherwise be adopted and second, they reduce the government’s spending on the foster care systems which have proven financially burdensome to the state and inimical to the best interests of children. These programs vary by state. For example, the California program provides that at the time an application for adoption is made for a child who is potentially eligible for assistance, the adoption agency or the department shall notify the prospective adoptive parents about their eligibility for the benefits. The statewide median income is used to determine eligibility; only those families with incomes below the median may qualify for an amount up to the state

151. Howard, supra note 33, at 546 n.216.
152. No PLACE TO CALL HOME, supra note 86, at 170. The federal government provides the states with matching funds for these subsidies. Id.
153. See, e.g., CAL. WELF. & INST. CODE § 16122(a) (West 1991) (stating that the purpose of the entitlement program is to “provide special needs children with permanent adoptive homes” and to “encourage private adoption agencies to continue placing special needs children, and in so doing, to achieve a substantial savings to the state in foster care costs”); N.Y. SOC. SERV. LAW § 450 (McKinney 1992) (stating that the purpose of the entitlement program is to “promote permanency of family status through adoption for children who might not otherwise derive the benefits of that status” and to “substantially reduce, unnecessary and inappropriate long-term foster care situations which have proven financially burdensome to the state and, more importantly, inimical to the best interests of many children”).
154. In order to be eligible for assistance, a child must meet the requirements of CAL. WELF. & INST. CODE § 16120 (West 1991 & Supp. 1994). By virtue of their race, Black children meet the first requirement which states that “[a]doptive placement without financial assistance is unlikely . . . by virtue of race, ethnicity, color, . . . ” Id. § 16120(a)(1).
155. CAL. WELF. & INST. CODE § 16119(a) (West Supp. 1994). The New York program is similar but it goes one step further and requires the Social Services district or the agency “to provide information on the adoption subsidy program to all foster care parents who are caring for a child who is eligible for adoption.” N.Y. SOC. SERV. LAW § 458 (McKinney 1992). This program would probably be more effective in finding homes for children in foster care because it requires that the foster care parents be informed about the subsidies even before they consider adopting the child, whereas the California program only requires informing the prospective parents once they have made an application for adoption. The New York program is clearly preferable to handle those situations where foster parents would like to adopt a child but do not think they can afford to do so because they will lose their payments under the foster care program. Therefore, they continue as foster parents even though they could probably become adoptive parents. Under the New York program, they will be advised about the subsidies and may well decide to adopt their foster child. Under the California program, the foster care parents may not know that they can get subsidies until after they have made the decision to adopt, a decision which may never be made because they think that they cannot afford to do so.
approved foster care rate. The amount of benefits received are based on the needs of the child and the ability of the family to meet those needs. These benefits may be provided for up to five years.

3. Recruitment Statutes

Some states have taken the initiative and have enacted legislation requiring agencies to recruit adoptive families of the same racial or ethnic heritage as the child. For example, Minnesota requires agencies to make "special efforts" to recruit families of the same ethnic or racial heritage as the child. "Special efforts" include "contacting and working with community organizations and religious organizations and may include contracting with these organizations, utilizing local media and other local resources, and conducting outreach activities." In order to satisfy this "special efforts" requirement, the agency must continue these efforts for six months after the child

156. Cal. Welf. & Inst. Code § 16119(c), (d) (West Supp. 1994). However, even those families with incomes above the statewide median may qualify to receive benefits up to the state approved specialized care increments. Id. § 16119(d)(2).


158. Cal. Welf. & Inst. Code § 16121.05(d) (West Supp. 1994). The benefits can be extended for more than five years if there is a continuing need for support related to a chronic health condition. However, benefits cannot be extended past the time the child reaches the age of eighteen. Id. By contrast, the New York program provides that benefits shall be paid until the child reaches the age of twenty-one. N.Y. Soc. Serv. Law § 453(1)(a) (McKinney 1992).

159. E.g., Minn. Stat. Ann. § 259.455 (West 1992 & Supp. 1994). Minnesota also has a similar statute for recruiting foster families of the same racial or ethnic heritage as the child. Minn. Stat. Ann. § 257.072(subd. 1) (West 1992 & Supp. 1994). That statute even provides that the Commissioner of Human Services shall have a permanent staff position for a "Minority Recruitment Specialist" whose responsibility is to "provide services to child-placing agencies seeking to recruit minority adoptive and foster care families and qualified minority professional staff." Minn. Stat. Ann. § 257.072(subd. 3). In addition, the statute imposes duties upon child-placing agencies. Minn. Stat. Ann. § 257.072(subd. 7). Some of those duties are that the agency must:

[1] have a written plan for recruiting minority adoptive and foster families. The plan must include (a) strategies for using existing resources in minority communities, (b) use of minority outreach staff wherever possible, (c) use of minority foster homes for placements after birth and before adoption, and (d) other techniques as appropriate;
[2] have a written plan for training adoptive and foster families of minority children;
[3] if located in an area with a significant minority population, have a written plan for employing minority social workers in adoption and foster care.

becomes available for adoption. Likewise, California requires agencies to show that a "diligent search" has been made for a family meeting the criteria of the California preference statute. In making a diligent search, the agency "shall use all appropriate resources . . . through (1) the use of all appropriate intra-agency and interagency, state, regional, and national exchanges and listing books, (2) child-specific recruitment in electronic and printed media coverage, and (3) the use of agency contacts with parent groups to advocate for specific waiting children." The statute imposes an additional burden on the agency by requiring them to maintain records for each child to show that a diligent search has been made.

III. RACE AS A FACTOR IN PLACEMENT DECISIONS

A. State Statutes

1. Preference Statutes

In response to concerns about transracial adoptions, three states have enacted what can be called preference statutes. These statutes

161. Id.
163. CAL. FAM. CODE § 8710.
164. Id.
165. ARK. CODE ANN. § 9-9-102(b) (Michie 1987); CAL. FAM. CODE § 8708 (West Supp. 1994); MINN. STAT. ANN. § 259.455.

While other states do not have specific legislation providing preferences for adoption placement, some do have regulations on preferences. For example, even though Texas has recently adopted a statute which forbids the use of race as a primary factor in making placement decisions, TEX. FAM. CODE ANN. § 16.081 (West Supp. 1994), it previously had regulatory guidelines which made same race placements a preference. See TEXAS DEPT. OF HUMAN SERV., CHILD PROTECTIVE SERVICES HANDBOOK § 6925 (1990) reprinted in Jo Beth Eubanks, Transracial Adoption in Texas: Should the Best Interests Standard be Color-Blind?, 24 ST. MARY'S L.J. 1225, 1227 n.7 (1993). The regulations provided that:

The workers and supervisors must consider the following issues when selecting a home.

1. The child's need for placement with his siblings. DHS prefers to place siblings as a family group . . .
2. Preservation of the child's racial and ethnic identity and heritage. DHS prefers to place children with adoptive parents whose race or ethnicity is the same as the child's.

Note: When the selection of an adoptive home does not conform to either of the two considerations listed above, the worker must document the reasons for the exception and the supervisor must approve and sign the worker's documentation.

166. Id., Some states provide similar statutes for foster care placements. ARK. CODE ANN. § 9-
give preference to adoptive parents of the same race as the child. For example, the Minnesota statute provides that:

The authorized child placing agency shall give preference, in the absence of good cause to the contrary, to placing the child with (a) a relative or relatives of the child, or if that would be detrimental to the child or a relative is not available, (b) a family with the same racial or ethnic heritage as the child, or, if that is not feasible, (c) a family of different racial or ethnic heritage from the child which is knowledgeable and appreciative of the child’s racial or ethnic heritage.166

Minnesota also has a similar preference statute which applies to the court when reviewing and determining appropriate adoption placements.167

Besides encouraging holding policies, the Minnesota statute is troublesome in other ways. First, it provides that a child should be placed with a relative unless it “would be detrimental to the

9-102(a) (Michie 1987); MINN. STAT. ANN. § 257.071(subd. 1-a) (West 1992 & Supp. 1994). For example, the Minnesota statute provides that an “agency shall ensure that the child’s best interests are met by giving due, not sole, consideration of the child’s race or ethnic heritage in making a family foster care placement.” MINN. STAT. ANN. § 257.071(subd. 1-a). Thus, the agency is required to consider the child’s race or ethnic heritage from the outset. Moreover, the Minnesota statute even provides that where a child is placed in a family foster home of a different racial or ethnic background, the agency “shall review the placement after 30 days and each 30 days thereafter for the first six months to determine if there is another available placement that would better satisfy the requirements of [subdivision 1-a].” Id. These statutes have become important due to the changing role of the foster care system. What was once viewed as a temporary home has now become a home for a much longer period of time. Moreover, often agencies will offer adoption opportunities to foster care parents. Thus, if it is the policy of the state to race-match adoptions, the state must also race-match foster care placements since they may later lead to adoptions.

166. MINN. STAT. ANN. § 259.255 (West 1992 & Supp. 1994). In the Minnesota statute, the legislature stated that the policy of the state 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.” Id. The statute originally required “due consideration” of the child’s race or ethnic heritage, however, it was amended in 1993 to require “due, not sole, consideration” of the child’s race or ethnic heritage. Id.

167. MINN. STAT. ANN. § 259.28(subd. 2) (West 1992 & Supp. 1994) provides:

In reviewing adoptive placement, the court shall consider preference, and in determining the appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child, or if that is not feasible, to (c) a family of different racial or ethnic heritage from the child that is knowledgeable and appreciative of the child’s racial or ethnic heritage.

The preferences in the Arkansas statute mimic those in the Minnesota statute. See ARK. CODE ANN. § 9-9-102 (Michie 1993).
A standard which merely considers whether the placement would be "detrimental to the child" is a marked departure from one which considers "the best interests of the child." One can easily imagine a situation where a placement, although not detrimental to the child, is not in the best interests of the child. Nonetheless, under the Minnesota statute the child would have to be placed in that situation. The best interests of the child has been the traditional standard employed by courts in making child placement decisions, yet nowhere in the Minnesota statute is there a requirement that these preferences be followed consistent with the child's best interests. While it is true that Minnesota subordinates statutory preferences to the best interests of the child standard, a court might still misapply the preferences as a result of giving the statutory "detrimental to the child" standard too much weight.

Also, the Minnesota statute provides that the second preference is for placement with a family of the same race unless "that is not feasible." However, nowhere in the statute does the legislature define what is meant by "not feasible." Thus, this non-feasible language may provide an avenue for agencies to continue the holding policies that they have previously used. For example, an agency could arguably hold a child in an institutional setting for an indefinite period of time until a family of the same race becomes available and be protected by the statute. By stating that an agency is permitted to seek parents of a different race only after a determination that finding parents of the same race is not feasible, Minnesota is condoning and encouraging the holding policies that agencies follow today. To avoid this, the statute should have defined "feasibility" by placing a limit on the period of time that a child can be held by an agency while it seeks a family with "the same racial or ethnic heritage as the child."

The Minnesota statute does provide an exception to the "same race" preference for placements where there is "good cause to the contrary." However, the legislature again does not define what it means. It is arguable that "good cause to the contrary" could encompass the best interests of the child standard, however it is by no
means clear. Consequently, in a situation where the placement of a child with a relative is not “detrimental to the child,” but is also not in “the child’s best interests,” the court could avoid making the placement by relying on the “good cause to the contrary language.” However, in the interest of clarity and as a safeguard for the child’s interests, the Minnesota legislature should have used the traditional best interests of the child standard.

The statute does provide that if the biological parent explicitly requests that the preferences not be followed, the agency “shall honor that request consistent with the best interests of the child.” This section may be particularly important, for example, in a situation where a teenage mother wants to give up her baby for adoption but her parents want to keep it. It would allow the teenage mother to give her child up for adoption without fear that the grandparents would adopt the child. While the statutory preference would call for placing the child with the grandparents (i.e., with relatives) the teenage mother could request that this preference not be followed. This request will be honored if it is found to be in the newborn child’s best interests. However, it is unlikely that a Minnesota court would find that the statutory preference was not in the child’s best interests.

One of the first cases to challenge the Minnesota preference statute was *In re D.L.* At that time the Minnesota preference statute applied only to the placement of minority children and the appellants raised the issue of whether the statute violated the Equal Protection Clause by establishing preferences only for the adoption of minority children. The court stated that it was not necessary to reach that constitutional issue to resolve this case because a strong family preference exists for all child placements, regardless of race or ethnicity. Whether or not the statute was constitutional, the court stated that a strong familial preference has always been embodied in the best interests of the child standard. Accordingly, the court held that an “adoptive placement with a family member is presumptively in the best interests of a child, absent a showing of good cause to the

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174. *Id.*
175. *Id.*
176. 486 N.W.2d 375 (Minn. 1992).
177. *Id.* at 379.
178. *Id.* Thereafter, the statute was amended to read as stated in *supra* note 167 and to apply to children generally.
179. 486 N.W.2d at 379-80.
contrary or detriment to the child." The rationale behind the presumption is that those who are related to the child will be willing to do more for the child’s welfare than those who are not. It would seem almost certain from this case that the Supreme Court of Minnesota would hold that the current preference statute is constitutional.

Another version of the preference statute is California’s, which provides:

Where a child is being considered for adoption, the following order of placement preferences regarding racial background and ethnic identification shall be used . . . in determining the placement of the child:

(a) In the home of a relative.

(b) If a relative is not available, or if placement with available relatives is not in the child’s best interest, with an adoptive family with the same racial background or ethnic identification as the child. If the child has a mixed racial or ethnic background, placement shall be made with a family of the racial or ethnic group with which the child has the more significant contacts.

(c) If placement cannot be made under the rules set forth in this section within 90 days from the time the child is relinquished for adoption or has been declared free from parental custody or control, the child is free for adoption with a family of a different racial background or ethnic identification where there is evidence of sensitivity to the child’s race, ethnicity, and culture . . . . Unless it can be documented that a diligent search . . . for a family meeting the placement criteria has been made, a child may not be placed for adoption with a family of a different racial background or ethnic identification . . . .

While the California statute shows improvements, it also reinforces the acceptability of adoption agency holding policies by not prohibiting them outright. In fact, it actually encourages holding policies by establishing a detailed set of preferences for same race placements and requiring a “diligent search” to be documented before a child can be placed transracially. These documentation requirements frequently act as a deterrent to social workers to make transracial placements for fear that even though they did a diligent search, the docu-

180. Id. at 380.
181. Id.
183. CAL. FAM. CODE § 8708(c).
mentation may not appear to support their conclusion.  

Although the California statute attempts to limit the period of time that a child can be held by an agency, this limitation is ineffective in reducing the period of time a child can spend in the foster care system because it only applies to the child after the "child is relinquished for adoption" or is "declared free from parental custody or control." As previously discussed, holding policies allow social workers to delay freeing the child for adoption until such time when same race parents are available. Thus, under this statute, an agency can keep a child in foster care indefinitely before freeing her for adoption and it is only once the child is freed for adoption that the ninety day time limit comes into effect. This ninety day limit will never become an issue because the adoption agency can delay freeing the child for adoption until such time as it has Black adoptive parents immediately available to adopt the child. Without an additional time restriction on the agencies limiting the amount of time a child can sit in foster care before being freed for adoption, agencies can continue to hold Black children in foster care for years without hope of a permanent family.

Moreover, the California statute is unclear as to how biracial children should be placed. It provides that biracial children should be placed with a family with a racial background with which the child has "the more significant contacts." The statute does not define "more significant contacts" and therefore, the term will be left to judicial interpretation. With respect to older children, the court may be able to rely on the child's past upbringing. For example, if the child had been brought up by her Black parent in a predominantly Black neighborhood, attending Black churches and schools, the court could easily determine with which race the child has had more significant contacts. The majority of cases, however, will not be so clear. Moreover, when placing an infant, who has had no contact with either race, the decision may be based solely on the child's skin color—with light-skinned biracial children being placed with white parents and dark-skinned children being placed with Black parents. Since

184. See Bartholet, supra note 11, at 1195.
185. "If placement cannot be made . . . within 90 days from the time the child was relinquished for adoption . . . the child is free for adoption with a family of a different racial background or ethnic identification . . . ." Cal. Fam. Code § 8708(c).
186. Id.
187. See supra text accompanying notes 104-15.
there are currently more white parents available to adopt, light-skinned biracial children will have an extreme advantage over their darker-skinned counterparts who will sit in foster care simply because they were born with darker skin.

Despite the negative aspects of the California statute, it does provide some improvements over the Minnesota statute. The California statute, like its Minnesota counterpart, provides that there can be a showing of good cause not to follow the preferences provided in the statute. Unlike the Minnesota statute, however, the California statute defines "good cause." It provides that good cause can be based on: the request of the birth parent; the extraordinary physical or emotional needs of the child; the fact that the child has been legally free for adoption for more than ninety days and even though a diligent search has been made, no family meeting the preference has been found; or the fact that application of the preference statute would not be in the best interests of the child.

This last basis for avoiding the preference statute is the most significant. By providing that the statute can be avoided when it is in the best interests of the child, the California legislature has at least provided the court with a means of avoiding a same race placement where it is not in the child's best interests. This is particularly important in placements where the child has been in a foster care placement with a white family for years before a Black adoptive family becomes available to adopt the child. The statute provides that in these situations, the judge will not be bound by the statutory preferences to place the child with Black adoptive parents if such placement is not in the best interests of the child. Therefore, the court could consider whether the emotional bonding between the Black child and her white foster parents outweighs the fact that Black adoptive parents are now available. Thus, the court's decision will be based on the child's best interests rather than on the preference statute alone.

Lastly, with respect to placement with relatives, the statute provides that the child shall not be placed with relatives if it is not in the best interests of the child. In this way, the California approach is consistent with the standard by which child placements have historically been made and not with the Minnesota approach, which is

190. Id.
191. CAL. FAM. CODE § 8708(b).
192. Traditionally child placement decisions have been made based on the best interests
to place the child with a relative unless it would be detrimental to the child.\textsuperscript{193}

Although both the California and the Minnesota statutes act as three-tier preferences, I suggest that the legislatures used this three-tier preference simply as a distraction from the statutes' real purpose. Since there has always been a preference for placing a child with relatives when making placements,\textsuperscript{194} there is no reason why a statutory preference for relatives is necessary. This common law preference stems from the premise that a person will better care for a child to whom he is related than one to whom he is not.\textsuperscript{195} In fact, the "relative" preference is actually encompassed in the "same race" preference since a child's relatives will be the same race as the child. However, by placing relatives as the first preference, the legislature masked its real purpose which was to provide a statutory preference for same race placements and to provide that different race placements should be used only as a last resort. By hiding behind this three-tier preference, however, the legislatures have attempted to remove themselves from being attacked based on their true purpose.

\section*{2. Anti-Discrimination Statutes}

In contrast to preference statutes, some states have adopted statutes which provide that a petition for adoption shall not be denied on the basis of a difference in race or ethnic heritage between the prospective adoptive parent and the child.\textsuperscript{196} In states such as Connecticut...
cut, the statute merely states that the court may base its decision in part on race, so long as the decision is not based solely on race.\textsuperscript{197} On the other hand, in states such as Kentucky and Texas, the statutes are more prohibitive of any use of race to deny an application for adoption.\textsuperscript{198} These statutes simply provide that an adoption may not be denied on the basis of race.\textsuperscript{199} Thus, they are more prohibitive in that not only may race not be the "sole" basis for denial of the adoption, it may not be the basis for denial at all. For example, in a situation where "but for" the factor of race an adoption petition would have been approved, the Kentucky and Texas statutes would be violated. As such, these statutes afford Black children greater opportunity for placement in permanent homes by prohibiting any consideration of race in the adoption process.

The Kentucky statute also provides that the prohibition against denying adoptions on the basis of race shall not apply if it is against the wishes of the biological parent.\textsuperscript{200} This provision has the effect of transforming the Kentucky statute into a preference statute by permitting the court to deny an adoption petition on the basis of race where that is the desire of the biological parent. Moreover, the Kentucky statute contains no exception for an adoption which is in the best interests of the child.\textsuperscript{201} Thus, in Kentucky, a transracial adoption which is in the best interests of the child may be denied because the biological parent expressed a desire against such an adoption.

There are also some statutes which provide that a public agency shall not refuse to place a child with a prospective adoptive parent on the basis of difference in race.\textsuperscript{202} For example, the Connecticut stat-
ute provides that "[i]f the commissioner of children and families is appointed as statutory parent for any child free for adoption . . . said commissioner shall not refuse to place such child with any prospective adoptive parent solely on the basis of a difference in race." In contrast to the proposed Senate bill, the Connecticut statute does not provide adequate protection to eliminate the race matching policies that exist. The Connecticut statute applies only to those children who are free for adoption. Thus, agencies are still able to engage in race matching games prior to when the child is freed for adoption. In fact, it is typically during this time period in which agencies delay an adoption because Black children are generally not freed for adoption unless a Black adoptive family has already been found. In contrast, the Texas statute, appears to address this problem by providing simply that "[t]he department, a county child-care or welfare unit, or a licensed adoption agency may not deny or delay placement of a child for adoption or otherwise discriminate on the basis of the race or ethnicity of the child or prospective adoptive parents." Although the Texas statute was only recently enacted, and as a result has been subject to little judicial interpretation, it appears to apply even to those children who have not yet been freed for adoption. Therefore, it appears that under the Texas statute an agency would not be permitted to delay freeing the child for adoption because that would be considered delaying the placement of a child for adoption.

3. Reporting Statutes

Other states have adopted statutes that require either the petition for adoption or the order of adoption to state the race of the foster care or otherwise discriminate on the basis of race or ethnicity of the child or the foster family.

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203. CONN. GEN. STAT. ANN. § 45a-726 (emphasis added).
204. See discussion infra part IV.A.
205. CONN. GEN. STAT. § 45a-726.
206. For a discussion about the delaying procedures of placement agencies, see supra part ILD; see also Bartholet, supra note 11, at 1193-96.
207. Bartholet, supra note 11, at 1193-94.
208. TEX. HUM. RES. CODE ANN. § 47.041.
209. E.g., D.C. CODE ANN. § 16-305 (1989) (A petition for adoption shall contain "the race . . . of the prospective adoptee, or his natural parent or parents [and] the race . . . of the petitioner."); OKLA. STAT. ANN. tit. 10, § 60.12(1)(c) (West 1987) ("A petition for adoption . . . shall specify . . . [t]he date and place of birth of the child and sex and race."); 23 PA. CONS. STAT. ANN. § 2701 (Supp. 1993) ("A petition for adoption shall set forth . . . [t]he racial background of the adopting parent or parents and their relationship, if any, to the
child, adoptive parents, or both. Where race is a requirement of the adoption petition, the statute implies that the court may take race into consideration when making the adoption placement.\textsuperscript{211}

In \textit{In re V.M. DeF.},\textsuperscript{212} the court held that where the petitioners refused to include racial information in the petition, yet the court had such information from a social services investigation report, the petition for adoption was considered amended to include such information so that the adoption could be approved.\textsuperscript{213} The petitioners had urged that the statutory requirement of requiring the race of the prospective parents and of the child or his natural parents in the petition for adoption violated the Equal Protection Clause of the Fifth Amendment of the Constitution.\textsuperscript{214} While petitioners conceded that race could be considered a factor when social services examined the prospective parents' home, they challenged the "predominance" accorded race by including it in the petition.\textsuperscript{215} In holding as it did, the court skirted the issue of whether the requirement of such information in the petition was constitutional.\textsuperscript{216}

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\textsuperscript{210} E.g., S.D. CODIFIED LAWS ANN. § 25-6-13 (1984) (The order of adoption shall contain the "color or race . . . of the adopted child" [and the] "color or race . . . of both adoptive persons.").

\textsuperscript{211} See \textit{In re R.M.G.}, 454 A.2d 776, 783 (D.C. 1982) (finding that because the statute which set out the requirements for the petition for adoption required the petition to include the race of the prospective adoptive parents and the child, the court was permitted to take race into account).

\textsuperscript{212} 307 A.2d 737 (D.C. 1973).

\textsuperscript{213} \textit{Id.} at 739-40.

\textsuperscript{214} \textit{Id.} at 738.

\textsuperscript{215} \textit{Id.} at 739.

\textsuperscript{216} \textit{Id.} at 740. Significantly, statutes which require marriage license applicants to state their race have been held unconstitutional. See, e.g., Pedersen v. Burton, 400 F. Supp. 960, 963 (D.D.C. 1973). These courts have recognized that once the legal barrier to interracial marriage had been broken down, race could no longer play a role in whether or not a marriage application was accepted. Therefore, they acknowledged that inclusion of race on the application affected whether or not the application would be accepted. By contrast, even though the legal barrier to transracial adoption has been broken down, the inclusion of race on an adoption petition is still permissible. Because of this, courts still consider race as a factor in deciding whether or not to approve the adoption even where it is only implicitly suggested that race should be a factor in making this decision by its inclusion on the petition for adoption.
B. Equal Protection Analysis

The Supreme Court has never addressed the use of race as a factor in foster care or adoption placements. However, the Court has examined the use of race as a factor in a custody proceeding in *Palmore v. Sidoti.*217 That case involved a petition for modification of a custody award by the child’s natural father, a white man, after the child’s natural mother, a white woman, remarried a Black man.218 The trial court granted the father’s petition for custody. The Supreme Court found that the trial court had based its decision solely on race.219 The Court held that “[t]he effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody.”220 Thus, the holding has been interpreted to mean that race cannot be the sole factor in making a custody decision. Since the lower court had based its decision solely on the race factor, the court was not presented with the issue of whether race may be a factor in the decision at all. Thus, *Palmore* leaves it unclear whether race may be a consideration in custody decisions.221

Some suggest that the holding of *Palmore* applies to transracial adoption cases.222 I disagree. Because adoption cases and custody cases involve different social realities, it is necessary for the Supreme Court to decide a transracial adoption case before we apply the same standards to both types of cases. The social reality of a custody case means that if the child is not placed with one of his legal parents, he will be placed with his other legal parent. From the outset, it is clear that the child will have a home with one of his natural parents. There is no chance that the child will remain in multiple foster care placements or institutional care for the rest of his minority. By contrast, the social reality of an adoption case means that if an agency denies one set of parents the right to adopt a particular child, another set of parents may not become available for a long period of time or in

218. Id. at 430.
219. Id. at 432.
220. Id. at 434.
221. There has been much debate about whether *Palmore* prohibits the consideration of race entirely from custody decisions. See Perry, supra note 10, at 56 n.7.
some cases, they will never become available. Once the agency removes the child from the home of the foster care parents who want to adopt him, the agency risks the chance that that might be the last stable home in which the child ever lives. In fact, many children are removed from a foster home even when there is no other foster home or adoptive home available. Because of these distinctions, even if the Court's holding in *Palmore v. Sidoti* would allow race to be a factor, but not a decisive factor, in a custody hearing between the two natural parents of a child, that alone should not justify subsequent decisions to hold that race may be a factor in adoption decisions.

Lower courts, however, have uniformly applied a rule that race may be a factor but not the sole factor in making an adoption decision. Because race cannot be the sole factor, statutes which completely banned transracial adoptions have been held unconstitutional.\(^{223}\) In *Compos v. McKeithen*,\(^ {224}\) there were two sets of plaintiffs; the first was a white couple who sought to adopt a Black child, and the second was an interracial couple where the husband was Black and the wife was white who sought to adopt a child.\(^ {225}\) The first couple was informed by the adoption agency that they could not adopt a Black child because the Louisiana statute\(^ {226}\) prohibited the adoption of a child of a different race than the parents and the second couple was informed that because they were of different races they could not become adoptive parents.\(^ {227}\) The rationale for the statute put forth by the defendants was that it is not "normal or natural" for white parents to have a Black child or for Black parents to have a white child.\(^ {228}\)

The court found, however, that the inherent problems in a transracial adoption justified the consideration of race but did not justify its use as a determinative factor.\(^ {229}\) The court stated that a "statute making race the decisive factor in adoption 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."\(^ {230}\) Accordingly,

\(^{223}\) *See supra* note 32.
\(^ {225}\) Id. at 265.
\(^ {227}\) 341 F. Supp. at 265.
\(^ {228}\) Id. at 266.
\(^ {229}\) Id.
\(^ {230}\) Id. at 267.
the court held that the Louisiana statute violated the Equal Protection Clause of the Constitution.231

In so holding, the court reasoned that statutes employing a racial classification must be examined more closely than others because such statutes are "constitutionally suspect."232 Thus, the court applied the strict scrutiny test. The court stated that in order for the statute to be upheld under equal protection analysis "it must be found that the racial classifications are necessary to the accomplishment of some permissible state objective and that the classifications are reasonable in light of their purpose."233 Accordingly, the court held that the statute could not be justified under strict scrutiny analysis because "[t]he necessity for racial matching . . . in adoption to promote the best interests of the child, and the reasonableness of that racial classification in light of that purpose cannot be sustained"234 because given the alternatives to transracial adoption, it could not be said that the alternatives would prevail over transracial adoption in every case.235

Courts also have applied strict scrutiny to determine whether an agency policy that takes race into account as a factor in adoptions is constitutional.236 These courts have found that racial classifications are inherently suspect and must therefore survive strict scrutiny analysis to be constitutional.237 Under strict scrutiny review, a racial classification will be upheld only if it is shown to advance a compelling state interest and if it is necessary to accomplish that interest.238 Accordingly, the state's responsibility to protect the best interests of a child in its custody is a compelling state interest.239

231. Id. at 268.
232. Id. at 266.
234. 341 F. Supp. at 268.
235. The court stated that the defendants "do not urge, nor could they successfully do so, that given the alternatives of institutional life, foster home care or an interracial family home, the institutional life or foster home care would prevail in all instances over the interracial family in serving the best interests of the child." Id. at 266.
238. Palmore, 466 U.S. at 432-33.
239. See, e.g., DeWees, 779 F. Supp at 28; see also Palmore, 466 U.S. at 433 (stating that "[t]he goal of granting custody based on the best interest of the child is indisputably a substantial governmental interest for the purposes of the Equal Protection Clause").
For example, in *Drummond v. Fulton County Department of Family & Children's Services*[^240^] the Drummonds, white foster parents, brought an action against the Department of Family & Children's Services [the "Department"] for refusing to allow them to adopt Timmy, their mixed race foster child for over two years. Timmy had been placed with the Drummonds when he was only one month old[^241^]. The Drummonds had become attached to Timmy and their care as foster parents had been consistently rated as excellent[^242^]. Within a year, they requested permission to adopt him[^243^].

The Department decided that it would be best to look elsewhere for an adoptive home for Timmy. Almost one year later, the Drummonds renewed their request for permission to adopt Timmy[^244^]. After a number of meetings with the Drummonds, the Department held a final decision-making meeting and denied the Drummonds’ request to adopt Timmy. It was clear that race and the racial attitudes of the Drummonds were given substantial weight in the decision at the final meeting[^245^].

The Drummonds filed suit against the Department claiming that the Department had denied them equal protection[^246^] because of the extent to which race was considered in denying the Drummonds’ request to adopt Timmy. The trial court found that “race did enter into the decision of the Department . . . [but] that the consideration of race was properly directed to the best interest of the child and was not an automatic-type of thing or of placement . . . which would be prohibited.”[^247^] The trial court dismissed the Drummonds’ suit and the Drummonds appealed.

The appellate court held that the trial court’s holding was not clearly erroneous because the trial court had found that race was not the sole determining factor in the Department’s decision. Consequently, the appellate court was bound by that finding[^248^]. In so holding,

[^240^]: 563 F.2d 1200 (5th Cir. 1977) (en banc).
[^241^]: *Id.* at 1203.
[^242^]: *Id.*
[^243^]: *Id.*
[^244^]: *Id.* at 1204.
[^245^]: *Id.*
[^246^]: The Drummonds' suit against the Department also included claims that the Department had deprived the Drummonds and Timmy of their due process rights as protected by the Fourteenth Amendment by removing Timmy from their home. *Id.* at 1206-11. For the purposes of this Note, those claims will not be discussed.
[^247^]: *Id.* at 1204.
[^248^]: *Id.* at 1204-05.
the appellate court had framed the issue as: “can race be taken into account, perhaps decisively if it is the factor which tips the balance between two potential families, where it is not used automatically?”249 The appellate court held, as in Compos, that the difficulties inherent in transracial adoption justify the use of race as a relevant factor in making the decision.250

The appellate court’s holding relied on a number of factors. One factor was that the consideration of race in the adoption context suggests no racial slur or stigma about race.251 However, consideration of race in this context is stigmatizing in that it says that “in the most intimate association of all, family life, it is best that the races should remain separate.”252 To continue such a stereotype that was eradicated with the invalidation of miscegenation statutes and statutes prohibiting transracial adoption, ignores any progress that has been made in this country to desegregate the races. Moreover, in cases where there are no Black adoptive parents available to adopt the child, it also says that a Black child should be forced to stay in foster care placements or institutions potentially for the rest of her life rather than be adopted by a family who loves and cares for her. Since white children are not subjected to this treatment, it says that Black children are not as deserving of family life as white children.

The Drummond court also considered the fact that the professional literature on transracial adoption stressed the importance of considering the racial attitudes of the prospective parents as a factor.253 Somehow the court interpreted this to mean that the agency must consider not only the prospective parents’ racial attitudes but also the prospective parents’ race. This suggests that because a person is of one race, they also have a set of racial attitudes that goes along with that race. The professional literature requires consideration of the parents’ racial attitudes, not their race. In fact, this means that because a prospective parent is of the same race as the child, that prospective parent has the proper racial attitudes to raise that child. No such assumption should be made in the context of placing children for adoption.

249. Id. at 1205.
250. Id. (citing Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972)).
251. Id.
252. Perry, supra note 10, at 78.
253. 563 F.2d at 1205.
C. In the Best Interests of the Child

The problem in transracial adoptions with respect to the child’s best interests is that there are two competing interests: those of the particular child to be adopted and those of the Black community as a whole. Because these interests are in conflict with one another, the court must choose which interest to weigh more heavily. Heavier weighting of the former encourages transracial adoptions whereas heavier weighting of the latter discourages transracial adoptions. Whenever a court allows the interests of Black society as a whole to outweigh the interests of an individual Black child, the court abandons the best interests of the child standard and opts for a new approach where the interests of the child are subordinate to the interests of society. Instead, courts should realize that “[a] child who must forego parents, whatever their color, is victimized, not benefitted, by well-intentioned but misdirected attempts to promote racial pride.”

Placing the interests of Black society first and prohibiting Black children from being placed in white homes only further harms Black society by depriving its next generation of the essential tools necessary to survive in this world. Black society’s interests should be focused on the success of its people, in this case, its children. A child’s likelihood of success is significantly diminished when that child grows up in foster care, without the support of a devoted family and a stable home. Thus, the interests of Black society are not promoted by prohibiting healthy Black children from being adopted by white parents only so that they can remain in the foster care system where they are apt to be shuffled from placement to placement.

254. See Bowen, supra note 28, at 530 (stating that “children have inextricably intertwined interests both in a stable family and in a cultural identity”); Howard, supra note 33, at 503-04 (“[C]hildren in need of homes clearly have an identifiable interest in being part of a stable and permanent family. . . . [H]owever, another important and competing interest arises—the child’s interest in his or her cultural identity as a member of a minority group.”); Forde-Mazrui, supra note 2, at 961 (“Even if transracial placement did threaten Black culture, the best interests standard does not permit courts and agencies to advance cultural interests at the expense of an individual child’s interests.”).

255. Howard, supra note 33, at 504.


257. “A recent study of the experiences of youth after foster care in California demonstrated that even among those former foster care youth who might be considered the most successful, many were ‘struggling with ill health, poor education, severe housing, substance abuse, and criminal behavior.’” NO PLACE TO CALL HOME, supra note 86, at 44 (citation omitted).
and school to school; to be placed in group homes because of the lack of available foster homes; to be separated from their siblings; and to be caused to suffer serious developmental delays and emotional problems. Children who grow up under these conditions will have difficulty effectively contributing to Black society.

Furthermore, no child should be made to suffer for the “good” of Black society and culture. Since it is the individual child who is most directly and strongly affected by the decision whether or not to permit a transracial adoption, the individual child’s interests should be weighted more heavily in the decision. Clearly then, the child’s best interests should be placed ahead of those of society as a whole, and what is in the best interests of Black children are homes with parents who love them and care for them, whatever their color.

The best interests of the child standard has typically been used in making foster care and adoption placements. In this context, the best interests test takes into consideration numerous factors, including: the age of the child and the prospective parents; the stability of the prospective adoptive family; the reasons the prospective adoptive parents are seeking an adoption; the financial and other resources of the prospective adoptive family; the existence of love and affection between the child and the prospective adoptive parents; the blood relationships, if any, between the child and the prospective adoptive family; the child’s development; and the child’s desire to be adopted by the prospective parents.

258. See Goodman, supra note 40, at 77 (stating that “[h]arming black children to ‘save’ the black community is like destroying a village to save it”).

259. Howard, supra note 33, at 533.

260. No child should be denied what for him are his best interests: the continuity and stability of an enduring psychological relationship with adult(s); the minimum intervention of the state into his ongoing or emergent family integrity; and the selection of the alternative which will cause him or her the least harm.

Bowen, supra note 28, at 528 (emphasis added).

261. “There is simply no compelling reason to delay even briefly, for the purpose of racial matching, placing parentless children in permanent homes. What parentless children need most are not ‘white’ parents or ‘black’ parents or ‘yellow’ parents but loving parents able to raise children in a nurturing environment.” Kennedy, supra note 7, at A18.


263. With regard to blood relationships, although some courts find that these relationships are a factor to be considered, in selecting a placement for a child, see, e.g., In re R.M.C., 454 A.2d 776, 782 (D.C. 1982), others hold that placement with a family member is presumptively in the best interests of the child, unless there is a showing of good cause to the contrary or detriment to the child. See, e.g., In re D.L., 486 N.W.2d 375, 380 (Minn. 1992).

Although there are usually no blood relationships involved in a foster family situation, foster families have been given greater regard than unrelated individuals by the Supreme
tive parents; and the race of the child and the prospective adoptive parents. The difficulty inherent in the application of this standard is represented by the court in *Coles v. Coles*:

Out of a maze of conflicting testimony, usually including what one court called ‘a tolerable amount of perjury,’ the judge must make a decision which will inevitably affect materially the future life of an innocent child. In making his decision the judge can obtain little help from precedents or general principles. Each case stands alone. \ldots \text{[T]he question for [the trial judge] is what is best for the child within the limitations presented. When the judge makes his decision, he has no assurance that his decision is the right one. He can only hope that he is right. He realizes that another equally able and conscientious judge might have arrived at a different decision on the same evidence.}

Because of these difficulties, applying the best interests of the child standard presents one of the heaviest burdens for a trial judge. Accordingly, trial judges have traditionally been granted extensive discretion in the application of this standard, with an appellate court reversing only for an abuse of discretion.

Race has traditionally been one of the factors considered by the best interests test. In fact, some courts believe that they have an

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264. *In re R.M.G.,* 454 A.2d at 781. The courts not only consider these factors in terms of the present, but also in terms of the past and future. *Id.* For example, even though no love and affection may exist between the child and the prospective parents because the child has not been in their care, the court will consider the likelihood that such love and affection will exist in the future if the prospective parents are permitted to adopt the child.


266. *Id.* at 331-32.

267. *Id.* at 331.

268. *See, e.g., In re D.L.,* 486 N.W.2d 375, 379 (Minn. 1992) (stating that “courts have independent authority to determine a child’s ‘best interests’

269. *See, e.g., In re R.M.G.,* 454 A.2d at 790.
obligation to consider race as a factor. However, consideration of race has been limited to its consideration as one factor, among many, in determining the child's best interests. The court in In re R.M.G. elaborated on the consideration of race and set out a three-step evaluation for courts to follow: (1) "how each family's race is likely to affect the child's development of a sense of identity, including racial identity;" (2) "how the families compare in this regard;" and (3) "how significant the racial differences between the families are when all the factors relevant to adoption are considered together." However this three-step approach was severely undercut by the court in In re D.I.S. In that case, the court held that the three-step approach enunciated by In re R.M.G. was an "unwarranted and unwise intrusion" into the trial court's discretion in transracial adoption cases. The court stated that it was unwarranted because

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270. See, e.g., In re Davis, 465 A.2d 614, 629 (Pa. 1983) (stating that "[a]ll reasonable people look forward to the day when racial prejudice and tension has disappeared; until that day comes, however, this Court would be remiss in our obligation to determine and further a child's best interest if we ignored the relevance of race in placement proceedings").

271. In re Moorehead, 600 N.E.2d 778, 786 (Ohio Ct. App. 1991) (stating that "[t]he difficulties inherent in interracial adoption justify consideration of race as a relevant factor in adoption, but do not justify race as being the determinative factor"); In re Davis, 465 A.2d at 625-26 (stating that "[a]s with all factors, however, the importance of race in a particular case will vary greatly in accordance with the vast array and unlimited combinations of facts and circumstances possible in child placement proceedings").

272. In re R.M.G., 454 A.2d at 791. With regard to the first step of the evaluation, the court stated that the relevant considerations would be:

To what extent would the family expose the child to others of her own race through the immediate family? Through family friendships? Through the neighborhood? Through school? What other efforts will the family most likely make to foster the child's sense of identity—including racial and cultural identity—and self-esteem? To what extent has the family associated itself with efforts to enhance respect for the child's race and culture? To what extent has the family reflected any prejudice against the race of the child it proposes to adopt?

Id. at 792; see also In re Moorehead, 600 N.E.2d at 786 (stating that a factor to consider "is the racial attitudes of the prospective couple and whether they could instill and foster a positive sense of racial identity").

273. In re R.M.G., 454 A.2d at 791. The court noted that in this step of the evaluation, it "hardly would be surprising" if the prospective parents of the same race as the child were favored, but it cautioned that prospective parents of a different race may also receive "very positive ratings." Id. at 792. Accordingly, if the prospective parents of a different race do well in this part of the analysis, the racial factor may not have the significant or even determinative effect that it would have had, had the different race parents done poorly on this second step. Id.

274. Id. at 791.


276. Id. at 1326-27. The court held that because the three-step approach was not adopted by any other member of the panel, it was not precedent binding on the In re D.I.S. panel
there was no need to reach the equal protection issue in transracial adoption cases, and that it was unwise because it was a sharp departure from the flexible framework for determining the best interests of the child.\textsuperscript{277} Also, the court pointed out that the three-step approach undermines the best interests standard because it selects out race as a factor for special consideration under a structured three-step approach.\textsuperscript{278} The concurrence, written by the judge who wrote the three-step approach in \textit{In re R.M.G.}, disagreed with this aspect of the opinion and stated that the three-step approach was always required when race was at issue in an adoption case.\textsuperscript{279} The concurrence stated that although the trial judge omitted the three-step approach from its decision, a reversal was not required because it would not have effected the result of the case since the trial judge’s decision was heavily influenced by other factors in the case.\textsuperscript{280}

The majority in \textit{In re D.I.S.} is correct in stating that requiring a court to go through a three-step analysis for race, but not for any other factor, clearly places too much weight on the race factor. For example, when considering other factors, the court will note “the prospective adoptive parents are young, they have a stable marriage, they have adequate financial resources . . . .” However, when considering the factor of race, the court will have to involve itself in an in-depth analysis of the inner thoughts of the prospective parents about race. In doing so, the court unconstitutionally places race in a special position by saying that it is deserving of more consideration than any other factor.

The more troubling problem arises where race becomes the controlling factor in the case yet the court masks that fact by referring to other factors as well in making a decision.\textsuperscript{281} Although numerous

\begin{enumerate}
\item \textsuperscript{277} \textit{Id.} at 1326.
\item \textsuperscript{278} \textit{Id.} The court pointed out that because the three-step approach sets out race for special consideration, it deflects the focus from the real inquiry, which is determining the best interests of the child. \textit{Id.} at 1327 n.18. For example, in this case race was at most a minimal factor in determining the child’s best interests. The trial judge’s decision was based on a number of factors, including the fact that the adoptive parent chosen was the grandmother of the child who would have extensive support from other relatives in the child’s natural family. Also considered was the fact that the foster parents were in the process of a divorce and that the foster father who had moved out of the home had completely rejected the child. \textit{Id.} at 1323-24. Yet, the foster parent, who was of a different race than the child, argued that the trial judge improperly failed to apply the three-step approach of \textit{In re R.M.G.} \textit{Id.} at 1327 n.18.
\item \textsuperscript{279} \textit{Id.} at 1328 (Ferren, J., concurring).
\item \textsuperscript{280} \textit{Id.}
\item \textsuperscript{281} An example of where a court may have masked a race based decision against a

\url{http://scholarlycommons.law.hofstra.edu/hlr/vol22/iss4/18}
cases make it clear that race may not be the sole factor in making placement decisions, many commentators argue that because the best interests standard gives great discretion to placement agencies and courts, that standard has operated to make race a determinative factor. In other words, although courts consider what difficulties this Black child might face growing up in a white family, they do not consider two other important considerations: first, the child's alternatives if she is not adopted by the white foster family and second, the potential emotional damage to the child that will be

transracial adoption is Rockefeller v. Nickerson, 233 N.Y.S.2d 314 (N.Y. Sup. Ct. 1962). In that case, the Rockefellers alleged that their application to adopt a Black child was rejected because of an unwritten policy of the Commissioner of Welfare not to accept white parents as adoptive parents for Black children. Id. at 315. Instead, the court found that the Rockefellers were not accepted as adoptive parents because of the size of their present family which already consisted of three natural and two adopted children, the fact that the Rockefellers were still physically capable of having children of their own, the fact that the last adopted child had been adopted only a few months before and the fact that Mrs. Rockefeller intended to continue to work outside the home as a kindergarten teacher. Id. Despite these facts however, the court never found that the Rockefellers were incapable, physically, emotionally, or financially, of caring for another child. Without a finding that any of these facts inhibited the ability of the Rockefellers to adopt and care for another child, the court should not have considered these facts determinative of whether they should be permitted to adopt. Also the court acknowledged that the Assistant Director of Child Welfare discussed with Mrs. Rockefeller her personal views about problems that might arise with regard to a transracial adoption, id. at 316, hinting at the possibility that the agency thought there were problems attendant with a transracial adoption about which Mrs. Rockefeller should be advised.

See Clark, supra note 36, at 27 (stating that if race is a relevant factor, there is no reason why it cannot become the deciding factor in any adoption in the hands of a judge who frames her judgment carefully); Howard, supra note 33, at 513. See generally McCormick, supra note 222.

282. For example, in In re Minor, 228 F.2d 446 (D.C. 1955), the court stated that "[t]here may be reasons why a difference in race . . . may have relevance in adoption proceedings. But that factor alone cannot be decisive in determining the child's welfare. It does not permit a court to ignore all other relevant considerations." Id. at 448.

283. See, e.g., Perry, supra note 10, at 71-72.

Where race is an issue, a general best interests test does not ensure that a court properly balances a child's need to develop a healthy racial identity along with her need for a permanent home and a stable relationship with people to whom she has become attached. As a result, race often has become the dominant consideration, leading courts to ignore or minimize these other interests of children about which there is substantial consensus.

Id.

284. This factor should be a very important consideration where the child's only alternative is to be placed with another foster family or in an institutional setting. Clearly, in those situations, it is in the child's best interests to be adopted by a family of a different race who wants to adopt the child rather than be transferred from foster family to foster family or from institution to institution.
caused by removing her from her foster family. Furthermore, discretion permits the judge’s personal views and biases, with regard to race, to influence her decision, causing her to overlook other important factors. Or, even more troublesome, discretion may be an invitation to judges to defer to the opinions of social workers on the assumption that they are more knowledgeable than the judge on the issue.

As an alternative, Professor Howard suggests that there should be a presumption that ‘should place a checkmark in the same-race applicants’ column, which is then weighed along with the results on the other factors (e.g., age, economic circumstances, emotional maturity, and stability) in deciding between in-race and cross-race applicants.” Applying the approach above in considering the best interests of the child, the court will note that the prospective adoptive parents are young, they are of a different race than the prospective adoptive child, they have a stable marriage, they have adequate financial resources, etc. In other words, race plays no more of a role than any other factor in the decision. This approach would protect those children who have lived with foster parents of a different race who want to adopt them. Although there would be a checkmark in the column of the Black prospective adoptive parents for race, there would be substantially more checkmarks in the column for the white foster parents for providing care for the child, for loving the child, and for establishing emotional bonds with the child. If a set of foster parents did not have this advantage over the new prospective adoptive parents, then they have proven that they are not the adoptive parents in the best interests of the child.

The problem with this approach, as with any other approach short of prohibiting the courts from considering the factor of race, is that it too, can fall prey to the judge’s subjective intent. Thus, a policy of prohibiting the court from considering the factor of race seems more attractive, but here too, the judge’s subjective intent plays

285. Perry, supra note 10, at 72.
286. Smith v. Organization of Foster Families, 431 U.S. 816, 835 n.36 (1977) (stating that ‘judges too may find it difficult, in utilizing vague standards like ‘the best interests of the child,’ to avoid decisions resting on subjective values’); Perry, supra note 10, at 79 (stating that “[t]he best interests rule 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”); Forde-Mazrui, supra note 2, at 939-40.
287. See Howard, supra note 33, at 530.
288. Id. at 512 n.34.
a role. If the judge cannot write that race was a factor in his decision, he will find another factor to stress so that he ends up with the same outcome. Moreover, it is not clear whether or not ignoring the factor of race would serve the child's best interests either. There will be some cases where an older child has special needs with regard to his race. To forbid the court from considering that child's special needs would not serve the best interests standard either. Thus, although a policy permitting the use of race as a checkmark might seem like a solution because it takes the emphasis off of race, it poses the same problems as any other approach—the court, although not outright, might place too much weight on the race factor.

Although it is clear that courts may not use race as the determinative factor, this rule was expanded by the holding in In re Moorehead9 so that a court could not even rely on an agency opinion which had been based on race as the determinative factor. The court held that the trial court had abused its discretion in determining the best interests of the child when it deferred to the agency that used race as a determining factor in choosing an adoptive home for a child.290 The facts were as follows. Andrea was born to a mother who used crack cocaine and abandoned her shortly after birth.291 As a result, Andrea was placed in the custody of Montgomery County Children Services Board ["CSB"]. Due to her health, Andrea was placed on an apnea monitor. Nine days after her birth, CSB placed Andrea with the Dearths who were instructed how to use the apnea monitor and how to perform cardiopulmonary resuscitation. When Andrea was ten months old, the Dearths told CSB that they wanted to adopt Andrea. Despite evidence that the Dearths would make a good family for Andrea, CSB discouraged the Dearths and denied the adoption because the Dearths were white and Andrea was Black.292 CSB subsequently asserted additional reasons for its denial of adoption to the Dearths. However, CSB was unable to substantiate any of those later reasons. The Dearths were subsequently decertified as foster parents by CSB.

290. Id. at 779-80.
291. Id. at 780.
292. There were numerous factors that should have warranted a placement with the Dearths. First, they presented evidence of the emotional bonding that had taken place between Andrea and their family. In addition, they lived in an interracial neighborhood, attended an interracial church and schools. The Dearths had two of their own children, a stable marriage and a stable family income. Id. at 785.
The Dearth family filed a motion for review of CSB's actions and for custody of Andrea. The referee ordered two home studies; one on the Dearth family and the other on the family that CSB had chosen to adopt Andrea. The results of the studies were divided. The referee denied the Dearth family's motion for custody and recommended that CSB retain custody of Andrea and that CSB determine who should adopt Andrea. The trial court adopted the recommendations of the referee. On appeal, the Dearths claimed that CSB chose an adoptive home for Andrea solely on the basis of race in violation of the Equal Protection Clause and that the trial court, in deferring to the CSB, failed to consider the best interests of the child. The appellate court found that there was clear evidence that CSB had a policy of restricting the adoption of Black children to Black adoptive parents and that such a policy violated the Equal Protection Clause of the Constitution. The court held that the trial court could give no deference at all to CSB's determination since it was based upon a policy that used race to an unconstitutional extent. The court held that the trial court must make its own determination.

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293. Id. at 779.
294. The court found that an internal memorandum was compelling evidence that CSB had made at least its initial determination to find a Black couple to adopt Andrea based on race alone. The memo stated:

The above named child's case was transferred to Adoption on July 27, 1989. At the adoption transfer conference on August 4, 1989 the former caseworker, Chris Mulcahy, shared that Andrea, upon birth and for some time afterward, child had a very light complexion, which made her appear bi-racial. Mrs. Dearth also had received some questionable information pertaining to Andrea's parentage. It is felt that these circumstances possibly influenced the previous caseworker and Mrs. Dearth to consider that this child would be appropriate for them to keep. However, by the time the conference was held, Andrea's skin color had deepened considerably and Chris Mulcahy and the Agency identified this child as black. At the conference, Ms. Mulcahy stated she felt child should be placed with a black family, but she did indicate foster parents' interest in adoption.

"On August 7, 1989, I visited the Dearth home, met Andrea and discussed with Mrs. Dearth our plan to place Andrea with a Black family as soon as one was identified and that we were currently reviewing homestudies. Mrs. Dearth was not accepting of this plan, as she repeatedly said she wanted to keep Andrea. Mrs. Dearth was told that we wanted to place Andrea with a Black couple so that she could grow up in the same racial and cultural environment."

Id. at 787. The memo prompted the court to state that "Andrea's chances of being adopted by the Dearths vanished along with her light complexion. As long as the child was regarded as bi-racial, she was regarded as 'appropriate for . . . [the Dearths] to keep.' Once the child was revealed as being black, the Dearths were not to be considered." Id.
295. Id. at 785.
296. Id. at 788.
of Andrea’s best interests and although the trial court may consider race as a factor, race alone could not outweigh all other factors and be the determinative factor.297

This decision is encouraging. It shows that the appellate court will not only prohibit the trial court from using race as a determinative factor but it will also prohibit the trial court from relying on an agency’s decision that has been made based on race as a determinative factor. Thus, agencies cannot follow discriminatory policies and expect that the courts will adopt their determination automatically.

In an interesting twist of cases based on the best interests of the child, in Gloria G. v. Department of Social and Rehabilitative Services,298 a Black adoptive parent filed a personal injury action on behalf of her Black adopted child against the Department of Social and Rehabilitation Services [“SRS”] for damages caused by SRS’s removal of the child from his foster home.299 In part, the claim alleged that SRS caused the child, A., emotional damage in breaching a duty to protect A.’s best interests by denying A.’s foster family the possibility of adopting him based on race.300 SRS did not deny that race was one of the factors used in selecting adoptive parents for A., but argued that it also used other factors in deciding to remove A. from the home of his foster family.301 SRS argued that the decision to remove A. from his foster family was a discretionary act entitled to immunity.302 A. claimed that SRS was not entitled to immunity

297. Id. at 785-86, 788.
299. Id. at 981.
300. Id. at 983. A. claimed that SRS was liable as a governmental entity under KAN. STAT. ANN. § 75-6103(a) which provided that “a governmental entity is liable for the negligent or wrongful acts or omissions of its employees acting within the scope of their employment under the same circumstances that a private person would be liable.” Id. at 985.
A.’s claim also alleged that SRS caused A. emotional damage in breaching a duty to protect A.’s best interests by removing A. from his foster family because of an unsubstantiated report of sexual abuse. Id. at 983. For the purposes of this discussion, this additional aspect of the case will not be discussed. For the specific facts concerning A.’s history of placements by SRS, see supra note 115.
301. Id. at 984.
302. Id. SRS claimed immunity under KAN. STAT. ANN. § 75-6104 which provided:
A governmental entity or any employee acting within the scope of the employee’s employment shall not be liable for damages resulting from:

(c) any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a governmental entity or employee, whether or not the discretion is abused and regardless of the level of discretion involved.
because it disregarded a clearly defined standard when it used race as a controlling factor in making an adoption determination for him. Because the court found that SRS did not consider race as the sole factor in removing A. from his foster family, SRS's decision was a discretionary act and thus, SRS was immune from liability.

Although A. was not successful in his suit, the case presents an interesting concept for other foster children removed from foster parents because of their race. If A. could have proven that SRS had removed him from his foster family solely because of his race and that he suffered emotional damages due to that removal, it is likely that the court may have decided otherwise. The possibility that an agency might be subjected to a tort action for removing a Black child from a white foster family solely because of race might deter agencies from making a decision based solely on race. Even if the decision acts only as a deterrent, it nonetheless is encouraging.

IV. THE MULTIETHNIC PLACEMENT ACT

A. The Proposed Senate Bill

Prompted in part by a 1989 case in which a Black foster child was taken away from a white foster family to be placed with a Black adoptive family which killed the child only a few months later, Senator Howard Metzenbaum and Senator Carol Moseley-Braun proposed the Multiethnic Placement Act. The purpose of the proposed bill is "to decrease the length of time for children waiting to be adopted and to prevent discrimination in the placement of children on the basis of race, color, or national origin." As originally proposed, the main prohibition of the bill provided that:

[a]n agency, or entity, that receives Federal assistance and is involved in adoption or foster care placements may not delay or deny the placement of a child for adoption or into foster care, or other-

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304. Id. at 986, 988.
305. See Waldman & Caplan, supra note 8, at 65.
306. As of the date of this writing, Senator Howard Metzenbaum and Senator Carol Moseley-Braun are joined by Senator Dan Coats, Senator Dave Durenberger, Senator Dianne Feinstein, Senator Daniel Inouye, Senator Nancy Kassebaum, and Senator Paul Simon as sponsors of this bill. 140 Cong. Rec. S4037 (1994).
wise discriminate in making a placement decision, solely because of
the race, color, or national origin of the adoptive (or foster) parent
or parents or the child.\textsuperscript{309}

As a remedy, the bill provides that the Secretary of Health and Hu-
man Resources (“HHR”) shall withhold adoption assistance funds
from any covered agency which is not in compliance with the
bill.\textsuperscript{310} Moreover, it provides a private cause of action for any per-
son aggrieved by a covered agency.\textsuperscript{311}

The term “placement decision” is defined by the bill as “the
decision to place, or to delay or deny the placement of a child in a
foster care or adoptive home, and includes the decision of the agency
or entity involved to seek the termination of birth parent rights or
otherwise make a child legally available for adoptive placement.”\textsuperscript{312}
The importance of the emphasized section of the definition is essen-
tial; in fact, without this definition, the bill would be ineffective to
confront the race matching policies that adoption agencies practice
today. As discussed previously in Part I, adoption agencies often
delay the adoption of a Black child by white parents by failing to
make the child available for adoption until there is a Black adoptive
family available to adopt the child.\textsuperscript{313} At that point, which could be
years after the child was initially placed with the foster family, the
child would be placed with the Black family due to the considera-
tion of race as a factor.\textsuperscript{314} Under this bill, however, even delaying the
decision to make a child available for adoption is prohibited.\textsuperscript{315}
Thus, a child will not wait in foster care, developing bonds with his
foster care family, only to be taken away from that family years later
when a same race adoptive family is finally found. Each child will

\begin{itemize}
\item \textsuperscript{309} S. 1224, 103d Cong., 1st Sess. § 3(a)(1) (1993) (emphasis added).
\item \textsuperscript{310} S. 1224, 103d Cong., 1st Sess. § 3(b) (1993).
\item \textsuperscript{311} S. 1224, 103d Cong., 1st Sess. § 3(c) (1993).
\item \textsuperscript{312} S. 1224, 103d Cong., 1st Sess. § 3(a)(3) (1993) (emphasis added).
\item \textsuperscript{313} By failing to make a child legally available for adoption, agencies protect them-
selves against discrimination claims by white prospective adoptive parents asserting that they
were denied the right to adopt the child because of the difference in race. The agencies’
defense is that the white parents were denied that opportunity because the child was not free
for adoption. However, upon freeing the child for adoption when a Black family becomes
available, the agency can use the added factor of race to match the child with the Black
adoptive family, without being subject to suit by the white family for failing to permit them
to adopt the child.
\item \textsuperscript{314} For a discussion of the case law and statutes that have made it permissible to con-
sider race as a factor in placements, see supra part III.
\item \textsuperscript{315} In this respect, the bill provides advantages over its state counterparts that do not
offer this type of protection from discrimination. See supra part III.A.2.
\end{itemize}
have the right to be placed with a permanent family within a reason-
able period of time, even if the agency has been unable to locate a
Black adoptive family.

Furthermore, under the bill, race, color, or national origin may
only be a consideration if (1) it is relevant to the best interests of the
child and (2) it is considered in conjunction with other factors.\textsuperscript{316}
Senator Metzenabum's remarks when he introduced the bill made his
intent clear. He stated:

I believe that same race placement is always desirable, if possible
and if the prospective parents are appropriate.\textsuperscript{317} For that reason
my bill states that race, national origin or color may be one of
many factors to consider in determining the placement that is in the
best interest of the child. However, my bill will also make it clear
that race, national origin, or color cannot be the only consideration
in making foster care and adoptive placements. Policies prohibiting
racial and ethnic mixing have no place in determining what is in
the best interests of any child.\textsuperscript{318}

After being sent to the Labor and Human Resources Committee,
the bill was reported favorably.\textsuperscript{319} However, it had been substantially
amended.\textsuperscript{320} The main prohibition in the new bill stated as follows:

[a]n agency, or entity, that receives Federal assistance and is in-
volved in adoption or foster care placements may not—

(A) categorically deny to any person the opportunity to be-
come an adoptive or a foster parent, solely on the basis of the
race, color, or national origin of the adoptive or foster parent,
or the child, involved; or

(B) unduly delay or deny the placement of a child for adop-

\textsuperscript{316} S. 1224, 103d Cong., 1st Sess. § 3(a)(2) (1993).

\textsuperscript{317} 139 CONG. REC. S8707-02, S8713 (1993). It appears that in this area, most com-
mentators start with the unproven premise that same race placement is always preferred if it
is available. \textit{But see} Charles Fried, \textit{Limits on Transracial Adoption Hurt Children: No To
Race Preferences}, \textit{N.Y. Times}, Dec. 8, 1993, at A24 (In response to an article about
transracial adoption, Fried states 'you go on to repeat the canard that 'clearly, matching
adoptive parents with children of the same race is a good idea.' Why is this so clear? Lurk-
ing behind this unproven assumption is the same logic that held that 'clearly' blacks and
whites should serve in segregated military units.') However, one can easily imagine a case
where although there are suitable Black adoptive parents, there are also potential white adop-
tive parents who, because of a number of factors to be considered, are in the best interests
of the child. In fact, in these cases, it seems that the best interests of the child standard is
displaced by the notion that a child should be placed with a parent of the same race.

\textsuperscript{318} 139 CONG. REC. S8707-02, S8713 (1993).

\textsuperscript{319} 139 CONG. REC. D1096 (1993).

\textsuperscript{320} S. 1224, 103d Cong., 2d Sess. (1994).
tion or into foster care, or otherwise discriminate in making a placement decision, solely on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.\textsuperscript{321}

Nowhere in the bill is the term "unduly delay" defined. What exactly does it mean to "unduly delay"? Does it mean to delay for six months, one year, two years, or more? To those who support transracial adoption, a delay of even one month could be considered undue, especially if there is a white family available to adopt the child.\textsuperscript{322} By contrast, however, to those who oppose transracial adoption, any period of time that a child waits for a Black adoptive home would not be an undue delay, even if that meant a period of three or more years. The bill, as amended by the Committee, implicitly permitted agencies to take significant delays in placing Black children in adoptive homes by failing to limit the period of time an agency can delay an adoption by a white family when there is no Black adoptive family available.\textsuperscript{323}

It can reasonably be assumed that those who amended the bill in the Committee were concerned that only an undue delay should be prohibited because some type of administrative delay is always neces-

\begin{itemize}
\item \textsuperscript{321} S. 1224, 103d Cong., 2d Sess. § 3(a)(1) (1994).
\item \textsuperscript{322} See, e.g., Bartholet, supra note 4, at 112 (stating that "[n]o delays in placement, whether for six months or one month, should be tolerated in the interest of ensuring a racial match . . . . Any preference for same-race placement that causes delay or that otherwise threatens the interest of the children involved should be viewed as unlawful racial discrimination"); Kennedy, supra note 7, at A18 (stating that "[t]here is simply no compelling reason to delay even briefly, for the purpose of racial matching, placing parentless children in permanent homes").
\item \textsuperscript{323} For criticisms of the amended version of the bill, see All in the Family, supra note 100, at 6 (stating that "[u]nfortunately, as currently written, the bill will do little to change the essential nature of current practices"); Elizabeth Bartholet, Race Separatism Bill Is a Big Mistake, SAN FRANCISCO CHRON., Nov. 4, 1993, at A25 (stating that "[i]f Congress is to act at all, it should eliminate rather than endorse race matching"); Elizabeth Bartholet, Adoption is About Family, Not Race, CHIC. TRIB., Nov. 5, 1993, at N23 (stating that "[t]he bill in its current form would make things worse, not better, for Black children held in foster care by validating the kind of racial matching policies now considered legally and politically suspect"); Elizabeth Bartholet, Limits on Transracial Adoption Hurt Children, N.Y. TIMES, Dec. 8, 1993, at A24 [hereinafter Bartholet, Limits on Transracial Adoption] (stating that "[t]his version endorses race matching, prohibits only 'undue' delay, and would permit social workers to choose 'long-term foster care' in preference to adoption"); Goodman, supra note 40, at 77 (stating that "[a] move that promised change authorizes and legitimizes the very racial matching that would keep foster children in place"); Kennedy, supra note 7 ("At present, there exists no congressional authorization for race matching, much less for any delay in child placements for purposes of racial matching. If this bill is enacted, there will exist congressional authorization for both.").
\end{itemize}
sary so that the agency can find suitable adoptive parents. Clearly, there must have been a concern that, without an allowance for some delay, agencies might be forced to make lifetime decisions for a child in a short period of time where possibly no qualified parents were available, thereby compromising the best interests of the child. There must have been some uncertainty as to what the term “delay” was to mean; but instead of defining that term, the Committee simply replaced it with another undefined term. By amending the bill to prohibit an undue delay without defining that term, the Committee failed to address one of the primary purposes of the bill—the term “unduly delay” does not proscribe the continued use of the delaying practices used by adoption agencies. Instead, the bill implicitly permits the continuance of these practices.

The Committee should have defined the term “unduly delay” as a definite period of time so that it could not be interpreted to mean two, three, or more years. For example, the Committee should have defined “unduly delay” to mean that the agency cannot delay any placement decision for a period of more than twelve months. Such a time period balances the competing interests involved in transracial adoptions by providing ample time for the agency to find Black adoptive parents if such parents are available, while enabling a child to become a member of a permanent family within a reasonable period of time. Instead, the Committee chose to avoid defining “unduly delay,” leaving it to the courts to decide on a case by case basis as suits are brought under the statute or to the regulation of the Department of Health and Human Services.

Senator Metzenbaum recognized the problem with the new bill and quickly responded by proposing another amendment to the bill which would leave the second version of the bill untouched except for the removal of the word “unduly” from section 3(a)(1)(B). In his statement, Senator Metzenbaum acknowledged:

The lack of definition for the term “unduly delay” in S. 1224 has caused some concern among the foster care and adoption community. Some who otherwise support S. 1224, fear that the term

324. The addition of the word “unduly” to the amended version of the bill caused the bill to receive substantial criticism. For example, Professor Randall Kennedy wrote that “[t]he Multiethnic Placement Act is thus an egregious example of legislative consistency. Its aim is to decrease the length of time that children wait to be adopted. Yet it expressly permits delay for the purpose of racial matching, prohibiting only undue delay.” Kennedy, supra note 7, at A18.

325. 140 CONG. REC. S4037 (1994).
“unduly” will not or cannot be defined in a manner consistent with the goals of the bill. In order to make it clear that appropriate out of home placements should be made as soon as possible, the latest version of S. 1224 has eliminated the term “unduly.”

Despite the fact that Senator Metzenbaum’s new amendment was intended to restore the integrity of the bill, the proposed bill as currently proposed, is still insufficient to cure all the ills that have plagued adoption and foster care placements. Although at first it appears that the bill will be able to eradicate the holding policies that force children to stay in the foster care system for years, it is likely that the bill will have no such effect. Like the lack of definition for the term “unduly delay” in the previous version of the bill, the lack of definition for the term “delay” presents the same problems. Unless the bill defines what length of time constitutes a “delay,” the holding policies will remain in effect. The agencies will claim that the delays they are encountering are only administrative delays which are necessary to comply with finding a placement which is in the best interests of the child. Because the holding policies are not articulated by the agency, it is even more difficult to prevent their use and thus, firmer guidelines are necessary to prohibit them.

According to Senator Metzenbaum’s office, the Department of Health and Human Services will set and enforce guidelines for how long an agency may wait in making a placement. However, the

326. Id.
327. In fact, even if the bill were amended to change the term “delay” to “minimal delay,” it would still be insufficient to combat the discriminatory practices in adoption placements. An agency could argue, that in light of the importance of making the best appropriate placement for a child, a delay of two or three years is still a minimal delay. In every case, the agencies would argue that these substantial delays are only minimal. Thus, the only way to avoid these discriminatory practices is to specifically limit the period of time that an agency may wait before making an adoption placement. Without such a specified period of time, the agencies will continue to argue that the delays are in the best interests of the child despite the fact that studies show that a permanent placement, as soon as possible, is in the best interests of the child.

328. The holding policies that the agencies follow are not open policies. In other words, the agency workers follow these policies because they know its part of their job to do so but the policies are not written down. Because of this, proving that an agency delayed a child’s placement will be nearly impossible unless a former agency worker was to testify that these policies existed or statistics were able to show that these policies existed. Statistics would have to show that, in cases where foster parents expressed an interest in adopting their foster child, there was a lower percentage of Black foster children adopted by their white foster parents than there were by their Black foster parents.

329. Rosin, supra note 85, at 85A (quoting Gail Lacider, an aide to Senator Metzenbaum).
Department has a longstanding policy of ignoring its own rules for adoption placements. For example, the Department has never enforced its rule requiring the Department to monitor adoptable foster care children every six, twelve and eighteen months. Thus, given the longstanding failure to monitor the problem at hand, the Senate’s reliance on the Department is irresponsible. In order to effectively eradicate discrimination in child placements, Congress must set down the guidelines for how long an agency may wait before it is considered to be “delaying” a placement decision.

The bill should have clearly defined the term “delay,” in the context of making an adoption placement or a decision to make a child legally available for adoption. Delay should mean “failing to make a placement within twelve months.” Although a twelve month limit is an arbitrary period of time, such a time period balances the competing interests involved: it affords the child the security of knowing that a placement cannot be postponed for an indeterminate period of time; it provides the natural parent with guidelines for planning to be reunited with the child; and it instructs the agency of the sufficient length of time to seek out a placement.

Under such a revised bill, an agency would only have one year to hold a Black child in foster care while it seeks out Black adoptive parents. After one year, the agency would have to make the child available for adoption regardless of whether or not Black adoptive parents are available. If the agency believed that parental rights should not be terminated at this point, then, rather than keep the child in foster care for an indeterminate period of time, the agency would have to make a plan to reunite the child with her parent(s). Of course, there would have to be an exception for those situations where the agency decides that parental rights should not be terminated while also deciding that the child should not be reunited with her natural parent(s) at this time. This exception, however, should be used only in very limited circumstances and the facts surrounding the exception should be critically examined by the court. This would set down firm guidelines for agencies to follow and at the same time result in a permanent placement for the child.

330. Id.
331. Id.
332. For example, this exception might apply where the child’s natural parent is in a drug rehabilitation program and although the natural parent is not yet ready to have the child returned after one year, neither should the natural parent’s rights be terminated, since there is a likelihood that the natural parent will be rehabilitated and will be reunited with the child.
With regard to making foster care placements, the term "delay" should be defined to mean "failing to make a placement within three months." As the role of foster care has changed from temporary care to long term care that often results in adoption, agencies are beginning to look more carefully at the placements they choose from the outset. Thus, agencies are becoming increasingly reluctant to place Black children in white foster homes because they fear the consequences if the white parents decide they want to adopt the child. The alternative to placing a child in a foster care home is to leave the child in an institutional setting. Because the institutional setting can be so damaging to the child, and in light of the fact that foster care placements are not necessarily permanent, agencies should be forced to place children in foster care homes as quickly as possible. Of course, this three month period would allow the agency sufficient time to ensure that the placement is in the child's best interest.

That the bill permits race to be a determinative factor where there are both Black and white prospective adoptive parents available is also troublesome. Under the current law, Title VI of the Civil Rights Act of 1964 prohibits any discrimination on the basis of race, color, or national origin in the provision of any service or program that receives federal financial assistance. Senator Metzenaburn made it clear that where there are two appropriate families, one Black and one white, the intent of the bill is to make race a determinative factor. 140 CONG. REC. S4037 (1994). At the introduction of the amendment, the following exchange took place:

Mr. COATS. . . . I would like to ask for clarification of one section in the bill that states that a covered agency may consider race, color, or national origin as a factor in making placement decisions if it is relevant to the best interests of the child involved and is considered in conjunction with other factors. Does the Senator intend that this section allow the use of race, color, or national origin as a determining factor between two otherwise appropriate and available families, when to do so is in the best interests of the child? The reason I am asking this question is that the bill also prohibits denial of adoption based on race. This appears to be a contradiction.

Mr. METZENBAUM. . . . [T]he intent is to allow race to be considered as one of many factors and to allow race to be the determinative factor between two otherwise appropriate and available families, if and only if the consideration of race is in the child's best interest.

Mr. COATS. So, I gather from the Senator's response that the primary concern of this bill is the child's best interest.

Mr. METZENBAUM. That is correct . . . .

Id. Unfortunately, one can easily imagine a case where white foster parents have raised a Black child since her infancy only to find that when she becomes available for adoption, presumably within a reasonable period of time, Black adoptive parents are available for her. In such a case, race will be a determinative factor and the child will be placed with the Black adoptive parents, despite the fact that the child may already view her white foster parents as "psychological parents." See GOLSTEIN ET AL., supra note 60, at 98. It does not appear that the bill would make any improvements for Black children in this type of situation, except that it may force the agency to speed up the process so that this whole scenario
Rights Act prohibits discrimination by public and private adoption agencies that receive federal funds. The guidelines for Title VI provide that race may be used as a factor in making adoption and foster care placements, but that it cannot be a determinative factor. The fact that race may be the determinative factor puts the bill in direct conflict with cases, state statutes, and Title VI's guidelines, all of which expressly provide that race may not be the determinative factor in making a child placement. Thus, the irony is that by allowing race to be a determinative factor, the Senate bill actually does a disservice to Black children in the foster care system—it diminishes the effect of state court decisions and statutes that have protected Black children by prohibiting race from being used as a determinative factor in making their placement decisions.

Thus, despite Congressional action to improve the state of transracial adoptions, the standards for agency placement decisions will remain uncertain and therefore, subject to litigation. The weight race plays in the placement decision will again be determined by the subjective mind of a judge; such a discretionary standard is not acceptable. Moreover, the legislative history of the proposed Senate bill indicates clearly that so long as a preference statute establishes a system consistent with the best interests of the child, the bill would not prohibit the policy. Consequently, no sooner than Congress...
enacts such a bill, there will be a manifest need for statutory reform.

Despite the bill’s problems, “[w]ith little fanfare and no recorded vote,” the Senate adopted the Multiethnic Placement Act as an amendment to another bill just after 1 A.M. on a Saturday. The bill is currently awaiting approval in the House of Representatives.

B. The Proposed House Bill

After the proposal of the Multiethnic Placement Act in the Senate, Representative Luis Gutierrez proposed a similar bill in the House of Representatives. The main prohibition under H.R. 3307 states:

[i]n determining the placement of a child for foster care or adoption, in a case in which an individual of the same race, color, or national origin as the child is not available to be the parent of the child, an entity that receives Federal assistance may not give greater weight to any difference between the race, color, or national origin of the child and that of any prospective parent of the child than the entity gives to any other factor used in determining the best interests of the child.

The problem with this version of the bill is that it does not define what it means by “a case in which an individual of the same race, color, or national origin as the child is not available.” It does not address how long an agency may wait for parents of the same race to become available. Does it mean that an agency can wait five years until a family of the same race comes along and then give the child to the family of the same race? The problem does not lie when the child becomes available for adoption, it begins long before. The holding policies which the agencies use to keep Black children from becoming available for adoption are the problem that needs to be addressed. The purpose of enacting this bill is defeated if it can be interpreted to allow an agency to “hold” a child for years until a

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340. Koenig, supra note 6, at 3A.
Black family becomes available.

The House bill does not provide a solution to the problem. The problem that most often arises is that minority children are placed with non-minority foster families for a substantial period of time and when the families wish to adopt the children, the agency stalls the adoption while it searches for minority parents. The bill provides that when an individual of the child’s race, color, or national origin is not available, the agency, in examining factors, may not give greater weight to any difference between the race, color, or national origin of the child and that of any prospective parent of the child. Clearly, this bill provides that in a situation where no Black parent is available, the agency may not discriminate against the potential white parent. However, the bill does not provide any time frame during which the agency may search for a parent of the same race, color, or national origin. Thus, if the agency is permitted to take years to find adoptive parents, there can potentially be parents of the child’s race, color or national origin available in every case.

The House bill protects the interests of Black children even less than the Senate bill. It does not recognize the fact that children need protection from agencies who hold up their adoptions simply because that adoption might involve a family of a different race. Although the problem does exist at the foster care and adoption stage, it must be attacked at its root, the decision to make the child available for adoption. Children do not need protection in cases where parents of the same race do not exist because the agencies will forbid those cases from ever arising by tying the child up in the red tape of waiting to be made legally available for adoption. Without a time limit for making these children available for adoption, the statutory protection the bill provides will be circumvented and ultimately irrelevant.

C. Public Reactions to the Proposed Bills

Despite the fact that the bill explicitly states that affirmative efforts are needed to recruit adoptive parents of every race, members of the NABSW have condemned the Senate bill, saying that it will make it harder to recruit Black families to adopt Black children. They assert that the “bill is camouflaged as a ‘multiethnic’ adoption initiative, but it’s really designed to help white families adopt black

343. Koenig, supra note 6, at 3A.
children."  

Similarly, dozens of law professors condemn the bill, although their reasons differ from the NABSW's. They assert that the "bill, by continuing to allow race to be considered as one factor, will perpetuate a 'new racism' that now allows some social-service agencies to prevent or delay transracial adoptions." They contend that the bill is an example of legislative inconsistency because on the one hand, its aim is to prevent discrimination on the basis of race, color, or national origin in placement decisions while on the other hand, it permits an agency to consider race as a factor in these placement decisions. They note that, "[a]t present, there exists no congressional authorization for race matching, much less for any delay in child placements for purposes of racial matching. If this bill is enacted, there will exist congressional authorization for both." To advance their position, the professors have sent a letter to Congress urging it to reject the bill as "unwise, intolerable and unconstitutional."

V. CONCLUSION

Title VI of the Civil Rights Act currently prohibits discrimination by public adoption agencies and private adoption agencies which receive federal funds. The Multiethnic Placement Act, although it has enormous potential, is no more than a restatement of the current federal law under Title VI. Even Senator Metzenbaum, for whom passage and enactment of the Act is the highest legislative priority, has acknowledged that the Act merely restates Title VI. If Title VI has not afforded Black children any protection from discriminatory agency practices, there is no reason to believe that the Multiethnic Placement Act would afford such protection. In fact, if passed, the Multiethnic Placement Act will only diminish the limited

344. Id. (quoting Johnny White, a member of the NABSW's adoption panel).
345. Id.
346. Bartholet, Limits on Transracial Adoption, supra note 323, at A24; Kennedy, supra note 7, at A18; Koenig, supra note 6, at 3A.
347. Koenig, supra note 6, at 3A.
348. Kennedy, supra note 7, at A18.
349. Id.
351. See supra note 334 and accompanying text.
352. 140 CONG. REC. S4037 (1994).
protections that the states and the federal guidelines have provided to Black children by prohibiting race from being a determinative factor in making placement decisions.

The bill should be rejected because if Congress is going to acknowledge that discrimination in foster care and adoption placements is taking place, then the Black children of this country deserve more than merely a restatement of a law which has provided them no protection in the past. What they need now is protection from child placing agencies that believe if Black adoptive families are not available, it is better for Black children to sit in institutions or be shuffled from foster home to foster home than to have a permanent home with a white family. The bill, as passed in the Senate, provides no protection to Black children from these practices. In fact, the agencies that abide by these policies acknowledge that the bill, if passed, will have little effect on their procedures. Therefore, it should be rejected.

In contrast to those who would rather leave a child in limbo than place them with a white family, others encourage transracial adoption as a viable alternative and even believe that transracial adoption may have its own unique advantages. I agree. Most importantly, I believe that mixing the races can only promote more understanding between the races, thereby eradicating the ignorance that causes racism in society today.

Michelle M. Mini