

2002

## Race and Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong

Cynthia G. Hawkins-Leon

Carla Bradley

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Cynthia G. Hawkins-Leon & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 Cath. U. L. Rev. 1227 (2002).

Available at: <https://scholarship.law.edu/lawreview/vol51/iss4/6>

This Article is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

# RACE AND TRANSRACIAL ADOPTION: THE ANSWER IS NEITHER SIMPLY BLACK OR WHITE NOR RIGHT OR WRONG<sup>+</sup>

*Cynthia G. Hawkins-León<sup>++</sup> and Carla Bradley<sup>+++</sup>*

- I. PARAMETERS OF THE FOSTER CARE CRISIS: STATISTICS
- II. THE PHENOMENON OF TRANSRACIAL ADOPTION
  - A. History
    - 1. The 1904 Arizona Orphan Train: The Wrong Way on a One-Way Track
    - 2. Transracial Adoption in Modern Times
  - B. Federal Statutory Framework
    - 1. The Multi-Ethnic Placement Act of 1994 and the Removal of Barriers to Interethnic Adoption
    - 2. The Adoption and Safe Families Act and the Promoting Safe and Stable Families Amendments
  - C. Legal Implications and Considerations for MEPA/IEAA & ASFA
- III. APPLICATION OF MEPA/IEAA: *DOE V. HAMILTON COUNTY, OHIO*
  - A. The Major Parties and Issues
  - B. The Settlement of the Case
  - C. Future Impact
- IV. ARGUMENTS IN OPPOSITION TO AND IN SUPPORT OF TRANSRACIAL ADOPTION
  - A. In Opposition to Transracial Adoption
    - 1. One-Way Nature
    - 2. Racial Identity
    - 3. Cultural Genocide

---

<sup>+</sup> Portions of this article have been reprinted from *The Transracial Adoption Debate: Counseling and Legal Implications*, 80 *J. OF COUNSELING AND DEV.* 433 (2002) © ACA. Reprinted with permission. No further reproduction authorized without written permission of the American Counseling Association.

<sup>++</sup>Associate Professor, New England School of Law. J.D. Harvard Law School; B.A. Wellesley College. The author wishes to thank Dean John O'Brien (NESL) for a summer research grant for this project. The author also wishes to thank Professor Ruth-Arlene W. Howe (Boston College Law School) for her critique of an earlier draft of this article.

<sup>+++</sup>Associate Professor, University of North Carolina at Charlotte, Department of Counseling, Special Education & Child Development. Ph.D. Kent State University; M.S. University of Dayton; B.A. University of Akron.

4. African American Adoptive Parents
5. Federal Legislation: MEPA and IEAA
- B. In Support of Transracial Adoption
  1. Statistics
  2. Race Matching Harms Children
  3. Success Rate
  4. Self Identity and White Privilege
  5. Federal Legislation: MEPA and IEAA
- V. TRANSRACIAL ADOPTION FROM THE COUNSELING PERSPECTIVE
  - A. Studies of Transracial Adoptees and Their Families
  - B. Counseling Implications
- VI. KINSHIP CARE AND ADOPTION: A POSSIBLE SOLUTION?
  - A. Kinship Care Defined
  - B. History and Background
  - C. The Statutory Framework and Case Law
  - D. Interim and Alternative Programs

If a kid survives [foster care] . . . “it’s not because of the system, it’s despite the system.”<sup>1</sup>

If the nation had deliberately designed a system that would . . . abandon the children who depend on it, it could not have done a better job than the present child welfare system.<sup>2</sup>

The effort to shorten adoption waiting periods and to encourage multiethnic adoptions is a laudable one, but it is one that is fraught with danger if it is not approached in a thoughtful, sensitive manner that acknowledges (while seeking to ameliorate) the discriminatory conditions existing in today’s multiracial society. It is naïve and capricious to purport to turn a blind eye on race/racism and wish it away along with the effects it has had (and continues to have) on African Americans.<sup>3</sup>

---

1. Cheryl Wetzstein, *Case Studies Expose Failings of Foster Care: Writer Champions Better Chance for ‘Orphans of Living,’* WASH. TIMES, May 13, 1997, at A2 (quoting JENNIFER TOTH, ORPHANS OF THE LIVING: STORIES OF AMERICA’S CHILDREN IN FOSTER CARE).

2. NATIONAL COMMISSION ON CHILDREN, BEYOND RHETORIC: A NEW AMERICAN AGENDA FOR CHILDREN AND FAMILIES 293 (1991).

3. Defendant Barbara Manuel’s Motion to Clarify This Court’s Notation Orders Filed June 10, 1999 and January 27, 2000 (Amended) at 4-5, *Doe v. Hamilton County*, Ohio, No. C-1-99-281 (D.C.S.D. Ohio filed Mar. 2, 2000).

Undeniably, the nuclear family will not be the dominant family structure in America for the next millennium;<sup>4</sup> this is particularly true for the African American family.<sup>5</sup> The purpose of this article is to explore solutions to one symptom of the crisis within the American family generally and within the African American family specifically: the explosion in the number of children in foster care.

Using the unique interdisciplinary tools of law and counseling, the authors will review and interpret research studies, federal statutes, federal and state policies, and case law. With regard to each, they consider whether transracial adoption, as opposed to same-race placements, is a potential panacea for the current foster care dilemma.<sup>6</sup>

The authors posit that transracial adoption and the color-blind approach,<sup>7</sup> as endorsed and required by the Multi-Ethnic Placement Act<sup>8</sup> (MEPA), as amended by the Inter-Ethnic Adoption Act<sup>9</sup> (IEAA) (collectively MEPA/IEAA), will not serve the best interests of the majority of African American children in foster care who are awaiting permanent homes. Rather, the authors maintain that the two-pronged approach of increased recruitment of African American, non-kin, adoptive families, in addition to an in-depth focus on kinship care and

---

4. See Denise Burnette, *Grandparents Raising Grandchildren in the Inner City*, 78 FAMILIES IN SOC'Y: J. OF CONTEMP. HUM. SERVS. 489 (1997).

5. The authors have chosen to use the terms African American, Hispanic, White and/or Caucasian as indicators of racial classifications. However, many of the works cited use different terminology. The terms used in the original work are retained in quotations.

6. This Article shall focus primarily on the legal aspects of the issue. The authors have previously co-authored a companion article that focuses primarily on the counseling aspects. See generally Carla Bradley & Cynthia G. Hawkins-León, *The Transracial Adoption Debate: Counseling and Legal Implications*, 80 J. ON COUNSELING AND DEV. 433 (2002).

7. As will be explained further, in accordance with federal law, pre-adoptive placements are to be made without consideration of the race of either the child or the prospective parents. The result is the so-called "color-blind approach" to adoptive placement. Evidence of this color-blind approach is evidenced in an IEAA interpretation published by the Office for Civil Rights of the Department of Health and Human Services:

Congress has now clarified its intent to completely eliminate delays in placement where they were in any way avoidable. Race, culture or ethnicity may not be used as the basis for any denial of placement, nor may such factors be used as a reason to delay any foster or adoptive placement.

Office for Civil Rights, U.S. Dep't of Health and Hum. Servs., *Interethnic Adoption Provisions of the Small Business Protection Act of 1996*, available at <http://www.hhs.gov/progorg/orc/iepguide.htm> (June 4, 1997).

8. Multiethnic Placement Act of 1994, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994).

9. Removal of Barriers to Interethnic Adoptions, § 1808 of the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996).

adoption, will more readily decrease the number of waiting children in foster care. The authors hope that these steps will avert the current crisis.

Part I of this Article outlines the scope and magnitude of the foster care crisis in the United States. Part II provides the reader with an in-depth history of the transracial adoption debate, the parameters of recent federal legislation (e.g., MEPA, IEAA, the Adoption and Safe Families Act of 1997, and the Promoting Safe and Stable Families Amendments of 2001), states' responses to the federal mandates, and the potential legal implications. Part III provides a detailed synopsis of the sole case brought pursuant to the MEPA/IEAA and discusses the case's substantive issues as well as its procedural aspects. Part IV outlines the primary arguments in support of and in opposition to transracial adoption. Part V reviews quantitative and qualitative research studies undertaken primarily in the social work discipline and the concomitant literature. Part V also analyzes the transracial adoption debate from a unique counseling perspective. Part VI details the issue of kinship care and investigates whether kinship care would provide a possible solution to the foster care crisis.

This Article concludes that the foster care crisis cannot be resolved through the blanket imposition of a color-blind solution to what is unquestionably a racial issue, which disproportionately affects the African American community. This Article posits that kinship care and adoption are possible interim steps toward alleviating the foster care crisis and its disparate impact among population subgroups. Realistically, although kinship care and adoption are integral to resolving the problem, the foster care crisis is not merely a matter of Black and White.

#### I. PARAMETERS OF THE FOSTER CARE CRISIS: STATISTICS

According to data collected by the U.S. Department of Health and Human Services (DHHS), there were an estimated 547,000 children in foster care as of March 31, 1999.<sup>10</sup> Of those children, 117,000 were

---

10. Children's Bureau, U.S. Dep't of Health and Hum. Servs., *How Many Children Were in Foster Care on March 31, 1999?*, at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/rpt0100/ar0100c.htm> (last modified Oct. 3, 2000). The national estimate was based on returns from forty-three states and Puerto Rico. *Id.*

available for adoption.<sup>11</sup> Children were deemed “available for adoption” when their parents’ parental rights had been terminated.<sup>12</sup>

Those 547,000 children spent an average of thirty-three months in foster care, and the median age of the children was ten years old.<sup>13</sup> This median age was more than six months older than the median age for the previous year.<sup>14</sup> It is estimated that forty-six percent of the children in foster care were African American, three to four times greater than their proportion in the United States population of children, which has been estimated by the U.S. Census Bureau to be between twelve and fifteen percent.<sup>15</sup> Because this percentage is far greater than the percentage of African American children in the U.S. population,<sup>16</sup> it is clear that the

---

11. *Id.*

12. *Id.* For an explanation of which children are counted as waiting to be adopted, see *id.*

13. *Id.*

14. *Id.* (providing a medium age of 9.4 years for children in foster care in 1998). By 1998, it was estimated retroactively that the number of children in foster care in all fifty states in 1996 was actually 507,000. See Melissa Baker & Theresa Finchio, *APWA Survey of 1996 Foster Care Maintenance Payment Rates*, W. MEMO, Jan–Feb 1998, at 37. Statistics from individual states focus one’s attention even further. For example, as of March 31, 1998, there were 50,822 children in foster care in New York state alone. See Trudy Festinger, *New York City Adoptions [in] 1998 2 (1999)* (unpublished report on file with the author). Of the 3,820 children adopted from out-of-home care in New York City in 1998, 74.3% were African American. *Id.* For these New York state adoptees, the average stay in foster care prior to adoption was 6.8 years. *Id.* See also New York State Citizens Coalition for Children (telephone interview with a NACAC representative (Nov. 23, 1998)).

15. In 1994, African American children constituted forty-seven percent of the foster care population but only fifteen percent of the general population under eighteen years old. Nat’l Adoption Info. Clearinghouse, *Adoption from Foster Care*, at [http://www.calib.com/naic/pubs/s\\_foster.htm](http://www.calib.com/naic/pubs/s_foster.htm) (last modified Apr. 2, 2001). Caucasian children constituted thirty-two percent of foster care children and sixty-seven percent of the general population under eighteen years old. This percentage has varied. In 1994, it was estimated to be 47%. Megan M. O’Laughlin, *A Theory of Relativity: Kinship Foster Care May Be the Key to Stopping the Pendulum of Termination vs. Reunification*, 51 VAND. L. REV. 1427, 1445 (1998). In 1999, it was estimated to be 43%. See Children’s Bureau, U.S. Dep’t of Health and Hum. Servs., *How Many Children Were In Foster Care on March 31, 1999?*, at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/rpt0100/ar0100c.htm> (last modified Oct. 3, 2000).

16. In 1994, African American children made up only fifteen percent of the general population under eighteen years old. O’Laughlin, *supra* note 15, at 1445. The figures from the 2000 Census indicate that African Americans account for 12.3% of the population. U.S. CENSUS BUREAU, U.S. DEP’T OF COM., *PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS: 2000 CENSUS OF POPULATION AND HOUSING 1*, available at <http://www.census.gov/prod/cen2000/dpl/2kh00.pdf> (last visited May 2001).

problems of foster care disproportionately affect African American youth.<sup>17</sup>

On average, the length of stay in foster care has been projected as approximately thirty-seven months for White children and fifty months for African American children.<sup>18</sup> Additionally, once separated from their families, African American children are returned to their homes half as quickly as are White children.<sup>19</sup> Annually, approximately 15,000 children “age out”<sup>20</sup> of the foster care system without being adopted or permanently placed.<sup>21</sup> The annual number of finalized adoptions nationwide during the 1990s has not exceeded 19,000, which amounts to approximately four percent of the children in out-of-home care.<sup>22</sup> By virtue of these statistics alone, it is obvious that the number of children in the foster care system is indeed at a crisis level.

## II. THE PHENOMENON OF TRANSRACIAL ADOPTION

### A. History

Within the adoption process, “race-matching” describes the practice of placing children with prospective adoptive parents solely or primarily on

---

17. The corollary is that White children are underrepresented in the foster care statistics. Thirty-two percent of foster care children were Caucasian, while Caucasian children constituted sixty-seven percent of the general population under eighteen. See O’Laughlin, *supra* note 15, at 1445.

18. Naomi R. Cahn, *Children’s Interest in Familial Context: Poverty, Foster Care, and Adoption*, 60 OHIO ST. L.J. 1189, 1212 (1999) (citing DEP’T OF HEALTH AND HUM. SERVS., NATIONAL STUDY OF PROTECTIVE, PREVENTIVE AND REUNIFICATION SERVICES DELIVERED TO CHILDREN AND THEIR FAMILIES: FINAL REPORT IX, at 7-16 (1997)).

19. JOAN HEIFETZ HOLLINGER, ABA CENTER ON CHILDREN AND THE LAW, A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1999, 4 (1998) [hereinafter HOLLINGER, GUIDE].

20. The term “age-out” means that the child reaches the age of majority (typically eighteen years old) while still in foster care. For example, in FY 1999, 18,554 children exited foster care through emancipation. See Children’s Bureau, U.S. Dep’t of Health and Hum. Servs., *The AFCARS Report 3*, available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.pdf> (last visited Apr. 15, 2002). For use of the phrase “age-out,” see O’Laughlin, *supra* note 15.

21. See O’Laughlin, *supra* note 15, at 1433.

22. See Children’s Bureau, U.S. Dep’t of Health and Hum. Servs., *The AFCARS Report 3*, available at <http://www.acf.dhhs.gov/programs/cb/publications/afcars/june2001.pdf> (last visited Apr. 15, 2002).

the basis of race to achieve same-race placements.<sup>23</sup> Conversely, the practice of placing children with prospective adoptive parents who are not of the same race has been denoted as a transracial adoption (TRA) or transracial placement.<sup>24</sup> Transracial adoption in the United States is older than the nation itself: Christopher Columbus kidnapped and adopted a Native American boy who became his translator and guide.<sup>25</sup>

Transracial adoptions in America predominantly involve the adoption of African American children by White parents.<sup>26</sup> There are extremely few, if any, documented cases of African American parents adopting White children. However, the phenomenon of African Americans serving as foster parents for White children is slightly more frequent.<sup>27</sup> Allowing African Americans to serve as foster parents for White children is highly reminiscent of the practice of slave owners' use of slaves as "wet nurses" and "mammies" for their children.<sup>28</sup>

---

23. See R. Richard Banks, *The Color of Desire: Fulfilling Adoptive Parents' Racial Preferences Through Discriminatory State Action*, 107 YALE L. J. 875, 878-79 (1998). A further explanation states:

The hypothesis of matching was one of equalization. If all possible physical, emotional, intellectual, racial, and religious differences between adopter and child could be reduced, hopefully to zero, the relationship stood a better chance of succeeding. So ingrained was the matching idea that its assumptions, especially those relating to religion and race, were operationalized into law under the rubric of a 'child's best interests.'

RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE* 2 (1992) [hereinafter SIMON & ALTSTEIN, *ADOPTION, RACE AND IDENTITY*].

24. See generally SIMON & ALTSTEIN, *ADOPTION, RACE, AND IDENTITY* note 23.

25. L. ANNE BABB & RITA LAWS, *ADOPTING AND ADVOCATING FOR THE SPECIAL NEEDS CHILD* 11, 164-65 (1997).

26. See *id.* at 163. See generally Angela Mae Kupenda et al., *Law, Life and Literature: Using Literature and Life to Expose Transracial Adoption Laws as Adoption on a One-Way Street*, 17 BUFF. PUB. INT. L.J. 43 (1998-1999); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993-1994).

27. *Id.*

28. See MARGARET MITCHELL, *GONE WITH THE WIND* 545-48 (Warner Books 1999). The author wrote:

"Huh!" said Mammy. "Doan do no good ter sweet talk me, Miss Scarlet. Ah been knowin' you sence Ah put de fust pa'r of diapers on you. Ah's said Ah's gwine ter 'Lanta wid you an' gwine Ah is Miss Ellen be tuhnnin' in her grabe at you gwine up dar by yo'seff wid dat town full up wid Yankees an' free niggers an' sech like."

*Id.* at 548. See also Phil Patton, *Mammy, Her Life and Times*, 44 AMERICAN HERITAGE 78 (1993) ("Mammy was more complicated. All sorts of feelings and ideas became associated with her stereotype. She not only fed and raised white children but often mediated between whites and blacks. . . . Mammy is 'not merely a stereotype, but in fact a figment of the combined romantic imaginations of the contemporary southern ideologue



The one-way nature of transracial adoption is demonstrated not only by the lack of adoptions of White children by African American parents, but also by other non-White parents of color, and even to the adoption of White children by interracial couples.<sup>29</sup> The issue has been aptly summarized:

Today the rapidly expanding number of “mixed-race” couples and adoptions may be reducing the anxiety about “race mixing” in the present. But mixed-race adoptions, even more than mixed-race couples, occur only in one direction: there is debate about whether whites should adopt children of color, but adoptions of white children by parents of color are so rare they are not even debated. This dimension of racial policy in child welfare suggests something of the degree to which race is about hierarchy, not difference.<sup>30</sup>

### *1. The 1904 Arizona Orphan Train: The Wrong Way on a One-Way Track*

To appreciate the circular nature and the somewhat sordid beginnings of modern transracial adoption, it is necessary to delve briefly into the history of the phenomenon. In the Arizona territory in 1904, an interracial foster care placement of White children with Hispanic families nearly transpired.<sup>31</sup> The manner in which the case unfolded caused the incident to gain folklore status; the fact that the case was appealed to the United States Supreme Court is not its most notable attribute.<sup>32</sup>

The incident began when the New York Foundling Hospital, a Catholic institutional home founded in 1870 by the Sisters of Charity, as an alternative to the Protestant institutions that were predominant at the time, endeavored to place Catholic children in Catholic homes.<sup>33</sup> By paying foster mothers thirty-eight cents per day to care for its charges, “the Foundling [Hospital] established New York’s first system of paid

---

and the modern southern historian.”); *Black Women on TV Still Stereotyped*, 122 USA TODAY MAGAZINE 7 (1993); Randall Kennedy, *Interracial Intimacies: Sex, Marriage, Identity, Adoption*, 17 HARV. BLACK LETTER L.J. 57 (2001); E. Christi Cunningham, *Identity Markets*, 45 HOW. L.J. 491 (2002).

29. LINDA GORDON, *THE GREAT ARIZONA ORPHAN ABDUCTION* 309 (1999).

30. *Id.*

31. *Id.* At the time of the incident, legal adoption was not well known. *Id.* at 10.

32. *See generally id.* The Supreme Court dismissed the appeal for lack of jurisdiction. *N.Y. Foundling Hosp. v. Gatti*, 203 U.S. 429, 441 (1906).

33. *See GORDON, supra* note 29, at 12-15.

foster care.”<sup>34</sup> After twenty-four years, the sisters “had admitted 26,000 children and placed out 10,000, about 39 percent [of the total].”<sup>35</sup>

During the late 1800s, a common practice in the child welfare placement “industry” was to emigrate orphans from Eastern cities to more rural towns in the mid-West and far-West states and territories for foster care placement with no legal bonds.<sup>36</sup> By 1879, the Sisters of Charity had emigrated one thousand children.<sup>37</sup> By 1904, they were handling approximately 1900 children per year and emigrating between 450 and 475 of those children annually.<sup>38</sup> By 1919, a total of almost 25,000 orphans had been emigrated to the mid-West and far-West by the Foundling Hospital.<sup>39</sup> These planned exoduses — referred to as the “orphan trains” — were generally romanticized by the adults involved.<sup>40</sup>

In the fall of 1904, arrangements were made to send thirty-five to forty children from New York City to two small towns in the southeastern Arizona Territory, approximately ninety miles from the Mexican border.<sup>41</sup> The inquiring priest explained that the waiting families were “not wealthy people, but all had work at good wages, had comfortable homes, were mostly childless and could well take care of the little ones, that they were all good, practicing Catholics.”<sup>42</sup> What the priest failed to mention was that all of the couples were either Mexican or so-called Anglos interracially married with Mexicans.<sup>43</sup> In comparison, the orphans sent to Arizona were all of Irish-American descent.<sup>44</sup> “It may be noted that by moving the Irish-American children, mobility took the

---

34. *Id.* at 14.

35. *Id.*

36. *See id.* at 8-11. In the absence of legal bonds, foster parents could return children who did not meet their expectations. *Id.* at 9.

37. *Id.* at 14.

38. *Id.* at 15.

39. *Id.* at 14-15.

40. *Id.* at 9. Charles Loring Brace, the “initiator” of the trains, wrote:

The demand [in the West] for children’s labor is practically unlimited. A child’s place at the table of the farmer is always open; his food and cost to the family are of little account . . . The chances, too, of ill treatment in a new [part of the] country, where children are petted and favored, and every man’s affairs are known to all his neighbors, are far less than in an old [part of the country].

*Id.*

41. *See id.* at xiv (historical map of region). The records are unclear regarding the exact number of children involved.

42. *Id.* at 18.

43. *See id.* at 65-67, 109-17.

44. *Id.* at 19.

form of a racial transformation unique to the American Southwest,” and “the same train ride had transformed them from Irish to White.”<sup>45</sup>

When the Anglo townsfolk discovered that the Irish orphans were being placed with Mexican families, a vigilante<sup>46</sup> posse was formed, and the children were forcibly removed from their foster homes within twenty-four hours of their arrival.<sup>47</sup> The crux of the matter for the White townsfolk was that these were innocent White children in the care and custody of people perceived to be swarthy, unfit caretakers who would mistreat them.<sup>48</sup> Although twenty-one of the children returned to New York with the nuns and nurses who had accompanied them to the West, nineteen children were virtually kidnapped and held by Anglo residents.<sup>49</sup>

Through a writ of habeas corpus, the resulting civil suit sought the return of one of the children to the custody and control of the Foundling Hospital.<sup>50</sup> The suit alleged that “on or about the second day of October, 1904, the respondent unlawfully, and by means of force and violence, took possession of said child from the person to whom it was entrusted by the petitioner, and has ever since retained possession of the same.”<sup>51</sup>

The case’s recitation of facts described the Mexican foster parents as:

wholly unfit to be intrusted [sic] with [the children]; that they were, with possibly one or two exceptions, of the lowest class of half-breed Mexican Indians; that they were impecunious, illiterate, unacquainted with the English language, vicious, and in several instances, prostitutes and persons of notoriously bad character; that their homes were of the crudest sort, being for the most part built of adobe, with dirt floors and roofs; that

---

45. *Id.*

46. “The concept of vigilantism comes not just from the word *vigilante*, watchfulness, but more specifically from vigilance committees created to watch out for, spread the word about, prevent, and subdue attacks on the community.” *Id.* at 254. “Vigilantism has had a special affinity for the persecution of minorities, including ideological dissenters but particularly often racially subordinated groups.” *Id.* at 258.

47. *See id.* at 65–67; 109–17; 149–58; 201–08; 246–53.

48. *See, e.g., id.* at 109–17.

49. *Id.* at 253.

50. *See* N.Y. Foundling Hosp. v. Gatti, 79 P. 231, (Ariz. 1905), *appeal dismissed* 203 U.S. 429 (1906). Due to the similarities between this case and sixteen other cases involving sixteen other children, the cases were consolidated. *See* GORDON, *supra* note 29, at 232. The petition for writ of habeas corpus was filed after the hospital appealed a probate court’s decision granting letters of guardianship to the Anglo townspeople. *Id.* at 235.

51. GORDON, *supra* note 29, at 231.

many of them had children of their own, whom they were unable properly to support.<sup>52</sup>

The court also referred to the original foster parents as “degraded half-breed Indians.”<sup>53</sup> Interestingly, the vigilante mob that summarily took the children from their legal wards was described as consisting of “persons of some means and education from the day when, with humanitarian impulse, and actuated by motives of sympathy for their pitiful condition, they assisted in the rescue of these little children from the evil into which they had fallen.”<sup>54</sup> Stating that it was in the children’s best interest to remain with the White families, the court dismissed the writs.<sup>55</sup>

The New York Foundling Hospital appealed the case to the United States Supreme Court.<sup>56</sup> After referring to the original foster parents as “half-breed Mexican Indians of bad character,”<sup>57</sup> the Court dismissed the appeal for lack of jurisdiction.<sup>58</sup> Justice Day determined that a writ of habeas corpus for personal freedom does not apply to children.<sup>59</sup> In addition, the Court’s description of the events ignored the fact that the children had been violently taken from their legal guardians under threat of force.<sup>60</sup> The Court stated:

In the present case there was no attempt to illegally wrest the custody of the child from its lawful guardian while temporarily in the territory of Arizona. The [Sisters of Charity] voluntarily took the child there with the intention that it should remain. Through imposition the child was placed in custody of those unfit to receive or maintain control over it, and, as above stated, came into the custody and possession of the respondent.<sup>61</sup>

---

52. *Id.* at 233.

53. *Id.* at 237.

54. *Id.* at 238.

55. *See id.*

We [the court] feel that it is for their best interests that no change be made in their custody, and that, if anywhere, here in the changing West, the land of opportunity and hope, these children, as they grow to manhood and womanhood, will have the fullest opportunity that it is possible for them to have to be judged, not upon the unfortunate condition of birth, but upon the record they themselves shall make, and the character they shall develop.

*Id.*

56. *See* N.Y. Foundling Hosp. v. Gatti, 203 U.S. 429 (1906).

57. *Id.* at 436.

58. *Id.* at 441.

59. *See id.* at 439–41. The Court reaffirmed that the appropriate standard was the best interests of the child, rather than a notion of personal freedom. *Id.* at 439.

60. *See id.* at 440.

61. *Id.*

## 2. *Transracial Adoption in Modern Times*

The first documented modern transracial adoption occurred in Minneapolis, Minnesota in 1948.<sup>62</sup> Transracial adoption gained momentum in the mid-1950s and then declined in the early 1960s.<sup>63</sup> However, with the Civil Rights Movement in the mid-1960s, there was another rise in the number of transracial adoptions.<sup>64</sup> This trend continued until the early 1970s when vocal opposition began to cause a decline in the practice.<sup>65</sup>

The question of whether White parents should adopt African American children has been the subject of momentous debate in the social work and child development literature. The discussion was initiated by a position paper drafted by the National Association of Black Social Workers (NABSW), which vehemently opposed the placement of African American children with White families and referred to this type of placement as a form of “cultural genocide.”<sup>66</sup> The term “cultural genocide” was first coined in relation to the placement of Native American children outside of their tribal family, culture, and identity and into White families.<sup>67</sup> Outplacement of Native American children had occurred in such large numbers throughout the 1950s, 1960s, and 1970s that Congress responded by passing the Indian Child Welfare Act of 1978 (ICWA) to stop the irreversible decimation of the Native American tribal system.<sup>68</sup>

In 1972, using terminology similar to that which would be later used during the ICWA debate in Congress, the NABSW issued an official statement regarding the transracial adoption of African American children and stated:

. . . Black children should be placed only with Black families whether in foster care or for adoption. Black children belong,

---

62. Cynthia R. Mabry, “*Love Alone Is Not Enough!*” in *Transracial Adoptions - Scrutinizing Recent Statutes, Agency Policies, and Prospective Adoptive Parents*, 42 WAYNE L.REV. 1347, 1350-51 (1996); see also JOYCE LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 67 (1977).

63. See RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* 10 (1977) [hereinafter SIMON & ALTSTEIN, TRA].

64. *Id.*

65. *See id.*

66. *See generally* SIMON & ALTSTEIN, TRA, *supra* note 63, at 50-52 (reprinting a portion of the National Association of Black Social Workers (NABSW) position paper).

67. *See* Cynthia G. Hawkins-León, *The Indian Child Welfare Act and the African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. FAM. L. 201, 203 (1997-98).

68. *See id.* at 203-08. *See also* Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (2000).

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 . . . . The socialization process for every child begins at birth. Included in the socialization process is the child's cultural heritage, which is an important segment of the total process. This must begin at the earliest moment; otherwise our children will not have the background and knowledge which is necessary to survive in a racist society. This is impossible if the child is placed with white parents in a white environment.<sup>69</sup>

This groundbreaking and controversial NABSW position paper set the tone regarding transracial adoptions and same-race placements for more than two decades.

In an attempt to adhere to the tenets of the NABSW position paper, adoption agencies began to enact and enforce same-race placement policies.<sup>70</sup> As a result, the number of transracial adoptions dropped drastically nationwide.<sup>71</sup> While over 12,000 transracial adoptions occurred between 1960 and 1979, in 1972, the year in which the NABSW position paper was published, only 1,569 transracial adoptions occurred whereas the previous year had seen over 1,000 more placements.<sup>72</sup> By 1976, the annual number of transracial adoptions had shrunk to 1,076.<sup>73</sup> By 1987, despite a higher percentage of children in foster care,<sup>74</sup> the number of transracial adoptions had increased only slightly to 1,169.<sup>75</sup> In fact, even when including international adoptions, transracial adoptions account for only about eight percent of all adoptions in the United States.<sup>76</sup>

---

69. SIMON & ALTSTEIN, TRA, *supra* note 63, at 50 (reprinting a portion of the NABSW position paper).

70. See Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B.U.PUB. INT. L. J. 409, 441 (1997) [hereinafter Howe, *Halo*].

71. *Id.*

72. *Id.*

73. *Id.* The Transracial Adoption Group, a national nonprofit organization, estimates that, as of September, 1999, there have been "175,000 Black or biracial children adopted domestically by White parents since 1968." The TRA Group, *Transracial Adoption: A Brief History*, available at <http://www.transracial-adoption.org> (last visited on October 21, 1999).

74. See Howe, *Halo*, *supra* note 70, at 441-42.

75. *Id.*

76. BABB & LAWS, *supra* note 25, at 167.

In 1997, in response to the passage of federal legislation, NABSW issued a revised policy statement regarding transracial adoption. The statement emphasized:

Placement decisions should reflect a child's need for continuity safeguarding the child's right to consistent care and to service arrangements. Agencies must recognize each child's need to retain a significant engagement with his or her parents and extended family and respect the integrity of each child's ethnicity and cultural heritage.

The social workers' profession stresses this importance of ethnic and cultural sensitivity. An effort to maintain a child's identity and her or his ethnic heritage should prevail in all services and placement actions that involve children in foster care and adoption programs, including adherence to the principles articulated in the Indian Child Welfare Act.

The recruitment of and placement with adoptive parents from each relevant ethnic or racial group should be available to meet the needs of children.<sup>77</sup>

The 1997 NABSW position paper continued to stress the importance of identity, heritage, ethnicity, and culture in regard to the placement of children for both foster care and adoption.<sup>78</sup> In mentioning the importance of continued contact with extended family, NABSW implicitly supported kinship care and adoption.

The transracial adoption controversy has received increased attention in recent years from the United States Congress, state legislatures and lawmakers, and public interest groups. Because unwed mothers are no longer stigmatized to the same extent as they were in the past, fewer unwed mothers are placing their children for adoption.<sup>79</sup> Therefore, fewer White children are available for adoption.<sup>80</sup> However, to say that there is a lack of children, particularly infants, available for adoption is both true and misleading. While there are fewer White children available for adoption than there have been in the past, the number of children available for adoption remains high. Unfortunately, up to sixty-seven percent of the waiting children are African American.<sup>81</sup>

---

77. NABSW Position Statement (Detroit, 1997) *cited in* RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION ACROSS BORDERS* 47 (2000) [hereinafter *SIMON & ALTSTEIN, BORDERS*].

78. *Id.*

79. CAROLE A. MCKELVEY & DR. JOELLEN STEVENS, *ADOPTION CRISIS: THE TRUTH BEHIND ADOPTION AND FOSTER CARE* xvi (1994).

80. *Id.*

81. *Id.*

Despite the inordinately high percentage of African American children waiting for adoption, “[a]s recently as 1987[,] 35 states prohibited the adoption of black children by white families.”<sup>82</sup> Even in states that allowed transracial adoptions, however, state and private adoption agencies were committed to race matching.<sup>83</sup> In 1978, the Child Welfare League of America recommended the following standards:

The primary purpose of [adoption] should be to help children who would not otherwise have a home of their own and who can benefit from family life . . . .

The opportunity to have a permanent family should not be denied a child by reason of age, religion, race, nationality, residence . . . .

[However,] [i]t is preferable to place a child in a *family of his own racial background*.<sup>84</sup>

Preferences for same-race adoption placements continued despite legislation designed to alleviate the adoption crisis. In Title VI of the 1964 Civil Rights Act, Congress provided that “[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”<sup>85</sup>

Despite the strong, prohibitive language of Title VI, adoption law was viewed as outside the statute.<sup>86</sup> In the adoption context, race could be considered as a relevant factor because of the “unique aspects of the relationship between a child and his or her adoptive or foster parents.”<sup>87</sup> As a result, race matching existed as an unwritten policy,<sup>88</sup> and most adoption agencies had internal transracial adoption placement policies.<sup>89</sup>

82. See Bruce Boyer, *No Black and White Rules in Transracial Adoption*, CHI. TRIB., Mar. 19, 1999, at 25. When Congress intended to remove race as a factor in placement decisions, three states had a statute requiring race matching. ELIZABETH BARTHOLET, *NOBODY’S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE* 135 (1999) [hereinafter BARTHOLET, *NOBODY’S CHILDREN*].

83. See BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 82, at 26.

84. RITA J. SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION: A FOLLOW-UP* 59 (1981) (citations omitted) (emphasis added) [hereinafter SIMON & ALTSTEIN, *FOLLOW-UP*].

85. 42 U.S.C. § 2000d (1994).

86. Amanda T. Perez, *Transracial Adoption and the Federal Adoption Subsidy*, 17 YALE L. & POL’Y REV. 201, 217 (1998).

87. *Id.*

88. See BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 82, at 135.

89. See, e.g., *In re Griffin*, 690 A.2d 1192, 1195 (Pa. Super. Ct. 1997).



Before the passage of federal legislation in the mid-1990s,<sup>90</sup> not only did most states allow for considerations of race,<sup>91</sup> but some states even favored same-race placements over transracial placements via order of preference statutes.<sup>92</sup> These same-race policies were due, at least in part, to foster care and adoption professionals' concerns that transracial adoption did not offer optimal placements for African American children.<sup>93</sup>

[Transracially-adopted children] will have many more issues to resolve about who they are than children growing up in their biological families. Our children must learn not only basic developmental tasks, but also the following: what it means to be adopted, what it means to be a member of a minority, what it means to be a minority growing up with parents of the majority race and culture, and what it means to integrate pieces of the biological heritage . . . with the culture of the adoptive family.<sup>94</sup>

### *B. Federal Statutory Framework*

#### *1. The Multi-Ethnic Placement Act of 1994 and the Removal of Barriers to Interethnic Adoption*

The transracial adoption controversy continued to rage among social workers, lawyers, legislators, foster parents, and prospective adoptive parents for twenty years after the publication of the NABSW position paper. Because the debate that transpired during the 1970s, 1980s, and early 1990s raised concerns about the best interests of children who were transracially placed, race matching was regularly utilized as a determinative factor in placing African American children in adoptive homes.<sup>95</sup> During this time frame, transracial adoption was considered a last-resort placement alternative.<sup>96</sup>

---

90. See *infra* Part II.B.

91. See Mabry, *supra* note 62, at 1378. A few examples are California, Illinois, New Jersey, and Washington. See *id.*

92. See *id.* at 1379. A few examples are Arkansas, California, Maryland, and Minnesota. See *id.*

93. Jan McFarlane, *Self-Esteem in Children of Color: Developmental, Adoption and Race Issues*, OURS MAGAZINE 25 (1992).

94. *Id.*; See also *infra* Part V.

95. See HOLLINGER, GUIDE, *supra* note 19, at 4. For examples of litigation involving race matching, see *J.H.H. v. O'Hara*, 878 F.2d 240 (8th Cir. 1989); *DeWees v. Stevenson*, 779 F. Supp. 25 (E.D. Pa. 1991); *Drummond v. Fulton County Dep't of Family and Children's Servs.*, 408 F. Supp. 382 (N.D. Ga. 1976); *In re R.M.G. & E.M.G.*, 454 A.2d 776 (D.C. 1982); *In re Davis*, 465 A.2d 614 (Pa. 1983).

96. See Mabry, *supra* note 62, at 1378-79.

Eventually, race matching was identified as a cause of foster care drift<sup>97</sup> and the escalating number of children in foster care.<sup>98</sup> Some estimates indicated that there was a seventy-two percent increase in the number of children in the foster care system between 1986 and the early 1990s.<sup>99</sup> It is arguable whether the precipitous rise in the number of children in foster care was indeed due to race matching or to the federal and state welfare policies of the 1960s, 1970s, 1980s, and 1990s.

In 1993, Texas became the first state to pass a statute prohibiting “the use of race to delay, deny, or otherwise discriminate” in child placement decisions.<sup>100</sup> The following year, modeling its legislation after the Texas statute, Congress entered the transracial adoption debate by passing the Multi-Ethnic Placement Act of 1994 (MEPA).<sup>101</sup> The act’s stated purposes were: “(1) decreasing the length of time that children wait to be adopted; (2) preventing discrimination in the placement of children on the basis of race, color, or national origin; and (3) facilitating the identification and recruitment of foster and adoptive families that can meet these children’s needs.”<sup>102</sup>

MEPA prohibited child placement agencies receiving federal funds from “categorically deny[ing] to any person the opportunity to become 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.”<sup>103</sup> Further, the act prohibited the delay or denial of child placements due to the race, color, or national origin of the adoptive or foster parents or of the child.<sup>104</sup>

---

97. “Foster care drift” occurs when children remain in the foster care system for a long period and presumably live in multiple out-of-home placements. See Mary Beck, *Toward a National Putative Father Registry Database*, 25 HARV. J.L. & PUB. POL’Y 1031, 1034 (2002); Barbara Bennett Woodhouse, *Horton Looks at the ALI Principles*, 4 J.L. & FAM. STUD. 151, 158 (2002).

98. See Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care and Kinship Care*, in 8 THE FUTURE OF CHILDREN 72 (1998) (“The substitute care population increased from 276,000 children in 1985 to approximately 494,000 children a decade later.”).

99. *Id.*

100. BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 82, at 191.

101. See Multi-Ethnic Placement Act, 42 U.S.C. § 5115a (1994). See generally RICHARD J. PAYNE, *GETTING BEYOND RACE: THE CHANGING AMERICAN CULTURE* (1998); Ruth G. McRoy & Helen Grape, *Skin Color in Transracial and Interracial Placements*, CHILD WELFARE, Sept. 1, 1999, available at 1999 WL 23062183; Recent Legislation, *Small Business Job Protection Act*, Pub. L. No. 104-188 § 1808 (1996), 110 HARV. L. REV. 1352, 1354-55 (1997).

102. Pub. L. No. 103-382, § 552(b), 108 Stat. at 4056.

103. *Id.* § 553(a)(1), 108 Stat. at 4056.

104. *Id.*

MEPA was considered a “revolutionary act in concept.”<sup>105</sup> MEPA allowed consideration of the following factors:

- The child’s relationship to the prospective adoptive parent;
- The child’s age, sex, racial, ethnic, religious, and cultural background;
- The location of the child’s siblings, if any;
- The prospective adoptive parents’ capacity to meet the child’s needs;
- The child’s physical and emotional needs;
- The child’s education; and
- The continuity and stability of the child’s foster care placement.<sup>106</sup>

As the sponsors of the original legislation stated in separate MEPA-related articles, the wording of MEPA did not allow race to be the sole factor in rejecting pre-adoptive parents, but it did allow race to be considered in adoption placements.<sup>107</sup> Thus, rather than achieving the congressionally intended purpose of resolving the transracial adoption debate by limiting the basis for considering race, MEPA fueled the flames of the debate. In addition, there was evidence that, following the passage of MEPA, race matching in adoptions continued.<sup>108</sup> To close the so-called loophole for race matching, Congress repealed portions of MEPA and passed Section 1808 of the Small Business Job Protection Act of 1996, entitled “Removal of Barriers to Interethnic Adoption” (IEAA).<sup>109</sup>

IEAA’s purposes were to ensure that: (1) the practice of race matching ended, and (2) race was not considered at all during the adoption process — even for purposes of racial sensitivity screening or when the birth parent requested that the child be placed intrracially.<sup>110</sup> Further, IEAA contained an enforcement provision whereby federally funded state programs and private programs receiving federal funds that violated

---

105. BARTHOLET, NOBODY’S CHILDREN, *supra* note 82, at 186.

106. Mabry, *supra* note 62, at 1370.

107. See Carol Moseley-Braun, *Interracial Adoption*, 81 A.B.A. J., April 1995, at 45; Howard M. Metzbaum, S. 1224 - *In Support of the Multiethnic Placement Act of 1993*, 2 DUKE J. GENDER L. & POL’Y 165, 166-67 (1995) (“[MEPA] also makes it clear that race, color or national origin can be a factor in making foster and adoptive placements . . . .”); see also George L. Opie, Comment, *The Multiethnic Placement Act: A Critical Analysis of Why the Act Is Not in the Best Interests of Children*, 20 S. ILL. U. L.J. 605, 611 (1996).

108. See Recent Legislation, *supra* note 101, at 1355.

109. See Pub. L. No. 104-188, § 1808, 110 Stat. 1755, 1903-04 (1996).

110. See Recent Legislation, *supra* note 101, at 1355.

IEAA would have their funding reduced by two percent for the first violation, three percent for the second violation, and five percent for the third and each subsequent violation during any fiscal year.<sup>111</sup> Thus, Congress struck at the pocket books of state agencies and state-funded private organizations to ensure compliance with Congress's mandate that race should not be considered during the adoption process — even in transracial adoptions where, by definition, the race of the adoptive parents is different from that of the adopted child.

## *2. The Adoption and Safe Families Act and the Promoting Safe and Stable Families Amendments*

The most recent federal attempt to clear the log-jam of foster care was the passage of the Adoption and Safe Families Act of 1997 (ASFA).<sup>112</sup> ASFA was the first overhaul of federal child welfare laws since the passage of the Adoption Assistance and Child Welfare Act of 1980.<sup>113</sup> ASFA was signed in 1997 after President Clinton announced a goal of doubling the annual number of adoptions and permanent placements by 2002.<sup>114</sup>

ASFA emphasizes the importance of safety and permanence to children by placing detailed conditions on federal spending; the conditions aim to accelerate the adoption of neglected and abused children and the termination of parental rights.<sup>115</sup> Since a child's safety and permanent placement are the law's primary concerns, it can be implied that neither racial nor ethnic characteristics are to be considered unless they directly affect the child's safety or permanent placement.<sup>116</sup>

One of the act's provisions requires a state seeking funding under ASFA to begin termination proceedings once a child has spent fifteen of the last twenty-two months in foster care.<sup>117</sup> If the child was abandoned

---

111. See Pub. L. No. 104-188, § 1808(b), 110 Stat. at 1903.

112. See Pub. L. No. 105-89, 111 Stat. 2115 (1997).

113. See generally Stephanie Jill Gendell, *In Search of Permanency: A Reflection on the First 3 Years of the Adoption and Safe Families Act Implementation*, 39 FAM. CT. REV. 25 (2001).

114. Memorandum from President William J. Clinton on steps to Increase Adoptions and Alternate Permanent Placement for Waiting Children in the Public Child Welfare System, at <http://www.acf.dhhs.gov/programs/cb/initiatives/adopt2002/directad.htm> (Dec. 14, 1996); see also Adoption 2002 Initiative, at <http://www.acf.dhhs.gov/programs/cb/initiatives/adopt2002/index.htm> (last modified Jan. 17, 2001).

115. Pub. L. No. 105-89, § 101(a), 111 Stat. at 2116-17.

116. See HOLLINGER, GUIDE, *supra* note 19, at 5.

117. Pub. L. No. 105-89, § 103(a), 111 Stat. at 2118.

or abused, the termination proceedings must begin even sooner.<sup>118</sup> Also, within twelve months of a child entering foster care, the state must create a permanency plan for reuniting the foster child with his biological family or preparing the child for adoption.<sup>119</sup> This requirement was reduced from eighteen months under the previous law.<sup>120</sup>

Under one of the more controversial provisions of ASFA, states received "adoption incentive payments" during the 1998–2002 fiscal years.<sup>121</sup> Under this bounty-like program, the Secretary of the DHHS pays each state \$4,000 for each foster child that is placed into an adoptive home during a fiscal year above the number of children placed during the "base" year.<sup>122</sup> For a special needs child, the bonus is \$6,000.<sup>123</sup> As required under the Act, all fifty states and the District of Columbia have passed legislation complying with ASFA.<sup>124</sup> This annual bonus program has proved beneficial to the states. For fiscal year 2000 adoptions, DHHS awarded nearly eleven million dollars to thirty-five states and the District of Columbia in recognition of their increased adoption placements over the prior fiscal year.<sup>125</sup>

While increasing the number of adoptions, congressional legislation such as MEPA, IEAA, and ASFA may detrimentally affect adopted children by not placing their best interests above all other concerns. Neither MEPA nor IEAA explicitly incorporates a best interests standard for placement decisions. Further, ASFA's pledged fast-track parental rights termination may dissolve families more quickly, but it does not guarantee permanent homes for children. Thus, the system creates legal orphans out of children whose parents' parental rights have been terminated by operation of law but who have not yet been adopted.

---

118. *Id.*

119. *See* Pub. L. No. 105-89, §302, 111 Stat. At 2128.

120. *Id.*

121. Pub. L. No. 105-89, § 201, 111 Stat. at 2122-25.

122. *Id.*

123. *Id.*

124. *See* UNITED STATES GENERAL ACCOUNTING OFFICE, FOSTER CARE: STATES' EARLY EXPERIENCE IMPLEMENTING THE ADOPTION AND SAFE FAMILIES ACT, available at <http://www.gao.gov/archive/2000/he00001.pdf>, at 2 (last visited Dec. 1999).

125. HHS Awards Adoption Bonuses, at <http://www.acf.dhhs.gov/news/press/2001/adoption.html> (Sept. 10, 2001). DHHS stated that there was an approximately ten percent increase in adoption placements in fiscal year 2000 over fiscal year 1999. *Id.* California received a four million dollar bonus for its thirty-one percent increase in placements. *Id.*

In November 2001, ASFA was revisited. As a result, on January 17, 2002, President Bush signed the Promoting Safe and Stable Families Amendments of 2001 (PSSFA).<sup>126</sup> The purpose of PSSFA is:

to enable States to develop and establish, or expand, and to operate coordinated programs of community-based family support services, family preservation services, time-limited family reunification services, and adoption promotion and support services to accomplish the following objectives:

- (1) To prevent child maltreatment among families at risk through the provision of supportive family services.
- (2) To assure children's safety within the home and preserve intact families in which children have been maltreated, when the family's problems can be addressed effectively.
- (3) To address the problems of families whose children have been placed in foster care so that reunification may occur in a safe and stable manner in accordance with the Adoption and Safe Families Act of 1997.
- (4) To support adoptive families by providing support services as necessary so that they can make a lifetime commitment to their children.<sup>127</sup>

The authorized programs include: advertising the existence of so-called safe haven laws, which allow mothers to abandon their newborns at hospitals or police stations without fear of prosecution; mentoring for children of prisoners; extending funding for on-going state court improvement projects concerning juvenile dependency issues; and creating a voucher program to enable children aging-out of the foster care system to receive education and training for a value of up to \$5,000 per year.<sup>128</sup> The act reauthorizes and increases federal funding for programs by over \$1 billion over five years.<sup>129</sup>

### *C. Legal Implications and Considerations for MEPA/IEAA & ASFA*

In evaluating the MEPA/IEAA, there are four aspects that must be considered. First, MEPA/IEAA does not explicitly incorporate a best

---

126. See generally 147 Cong. Rec. H8088-03, 2001 WL 1409558 (Cong. Rec.); Pub. L. No. 107-133, 115 Stat. 2413 (2002); *Legislative Update*, 20 ABA CHILD LAW PRACTICE 187 (2002).

127. Pub. L. No. 107-133, §101, 115 Stat. 2414 (2002). The statute authorized programs to mentor children in light of the fact that in 1999, 2.1 percent of all children in the United States had a parent in either state or federal prison. *Id.*

128. Pub. L. No. 107-133, §§106, 107, 121, 201, 115 Stat. 2416-22 (2002); see also *Legislative Update*, 20 ABA CHILD LAW PRACTICE 187 (2002).

129. Pub. L. No. 107-133, §106, 115 Stat. 2416 (2002).

interests of the child standard in making adoption placements. Thus, there is concern that such a standard will not be utilized in adoption placements pursuant to MEPA/IEAA. Due to the lack of a best interest standard, the adoptive parents' interests may, in some instances, weigh more heavily than the child's interests.

Second, failure to comply with MEPA/IEAA constitutes a violation of Title VI of the Civil Rights Act of 1964.<sup>130</sup> Therefore, anyone who feels that he or she has been discriminated against on the basis of race, color, or national origin in relation to an adoption placement may file a complaint with the Office for Civil Rights for investigation and review.<sup>131</sup> This is particularly relevant for parents seeking to adopt transracially since race may not be considered even in terms of the potential parents' racial sensitivity and acuity. Further, the appropriate constitutional standard for evaluating the use of race, color, or national origin in adoption and foster care placements is strict scrutiny:

From the perspective of civil rights law, the strict scrutiny standard under Title VI, [IEAA,] and the U.S. Constitution forbid decision making on the basis of race or ethnicity except in the very limited circumstances where such consideration would be necessary to achieve a compelling governmental interest. The only compelling governmental interest related to child welfare that has been recognized by courts is protecting the "best interests" of the child who is to be placed. Additionally, the consideration must be narrowly tailored to advance the child's interests, and must be made as an individualized determination for each child.<sup>132</sup>

Thus, even the wishes of a child's birth parents for a same-race placement in foster care or for adoption does not amount to a compelling interest that would justify preferences for same race placements.<sup>133</sup>

---

130. 42 U.S.C. § 1996b(2) (2000 Supp. V); 45 C.F.R. §§ 80.1, 80.3 (2001).

131. See 45 C.F.R. § 80.7(b)-(c) (2001).

132. Memorandum from D. Hayashi, Director of the Office of Civil Rights, and O. Golden, Principle Deputy Assistant Sec'y of the Administration for Children and Families, U.S. Dep't of Health and Hum. Servs., on the Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, available at <http://www.hhs.gov/oer/iepguide.htm> (June 4, 1997).

133. The Office for Civil Rights published a series of questions and answers on MEPA/IEAA, including the following:

8. May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with foster parents of a specific racial, national, ethnic and/or cultural group?

A: No

9. Would the response to question 8 be different if the child was voluntarily removed?

The third consideration in evaluating MEPA/IEAA is the potential impact of private lawsuits. In addition to lawsuits under the Civil Rights Act, MEPA/IEAA allows individuals to bring a federal cause of action in a private lawsuit for alleged violations of the Civil Rights Act or MEPA/IEAA.<sup>134</sup> In certain instances, aggrieved persons have two years from the date of the alleged violation to file a lawsuit in federal court.<sup>135</sup>

Finally, due to long-standing practices of racial matching and sensitivity to race by individual adoption case workers, there may be resistance by case workers to implement fully the act's provisions. The fear of litigation may cause case workers to hesitate to exercise their discretion when attempting to determine the best interests of the child. Thus, there may be a substantial delay until the provisions of MEPA/IEAA are fully and willingly implemented. This delay means that it may take several years to determine the full effects of the statutory provisions.

In evaluating ASFA, there are four areas to be considered: kinship adoption, funding, inadequate consideration of age, and the best interests of the child standard. First, ASFA does not promote kinship adoptions. This is evidenced by the fact that expedited parental rights termination proceedings are not required when a child is in kinship care regardless of the unfitness of the birth parents. Thus, the child's permanent placement is in limbo for an extended time period.

Second, there is no guarantee under ASFA's provisions that federal funding to the states will be increased as subsidy and programmatic costs increase. If federal funding for reunification services merely remains stable, it will be inadequate for full implementation of ASFA's goals.

---

A: No.

...

15. May public agencies honor the request of birth parents to place their child, who was involuntarily removed, with adoptive parents of a specific racial, ethnic and/or cultural group?

A: No.

16. Would the response to question 15 be different if the child was voluntarily removed?

A: No.

Questions and Answers Regarding the Multiethnic Placement Act of 1994 and Section 1808 of the Small Business and Job Protection Act of 1996, *available at* <http://www.hhs.gov/oer/gaoreply.htm> (last visited June 4, 1997).

134. 42 U.S.C. § 674(d)(3)(A) (Supp. V 2000).

135. *See* 42 U.S.C. § 674 (d)(3)(B) (Supp. V 2000).



Third, ASFA treats children the same regardless of their ages.<sup>136</sup> However, it is undeniable that the older a child is, the harder it is to place the child. Therefore, older children will languish in the foster care system without a permanent placement even after parental rights have been terminated. As a result, ASFA may not significantly reduce foster care drift for children who are placed into the child protective system after their toddler years.

Finally, ASFA does not require states to adopt a best interests of the child standard.<sup>137</sup> In practice, therefore, states may implement AFSA in a fashion that places the parents' interests above the child's interests. This may be particularly relevant in color-blind transracial adoptions.

### III. APPLICATION OF MEPA/IEAA: *DOE V. HAMILTON COUNTY, OHIO*

#### A. *The Major Parties and Issues*

The first case brought as an enforcement action pursuant to Section 1808 and the color-blind strictures of MEPA/IEAA was filed on April 19, 1999, in the United States District Court for the Southern District of Ohio.<sup>138</sup> The complaint was filed by a John Doe plaintiff, later named as Ronald Halcomb, who was a licensed social worker formerly employed as an adoption social worker by the Hamilton County, Ohio Department of Human Services (HCDHS).<sup>139</sup>

Plaintiff sued on his own behalf, on behalf of African American children in the care, custody, and control of defendants, and on behalf of prospective adoptive parents who are or will be subject to defendants' unconstitutional and illegal policies, customs, and practices with respect to the use of race in adoption.<sup>140</sup> The complaint "challenge[d] discrimination against African American children and the White families that seek to adopt these children."<sup>141</sup>

Plaintiff stated that he attempted to keep the use of race in adoption placements within the legal constraints as required by MEPA/IEAA.<sup>142</sup>

---

136. See Pub. L. No. 105-89, 111 Stat. 2115 (1997).

137. *Id.*

138. *Doe v. Hamilton County, Ohio*, No. C-1-99-281 (D.S.D. Ohio) (filed Apr. 19, 1999). All citations to court documents in the following notes accompanying this discussion are documents filed in this case.

139. *Id.*

140. Complaint at 4; First Amended Complaint at 4.

141. Complaint at 3.

142. *Id.*

Plaintiff alleged that he was “harassed, targeted for retaliation, and forced off the job” because of these attempts.<sup>143</sup>

Plaintiff also alleged that defendants acted in concert to deprive the plaintiff, unnamed children, and prospective adoptive parents of “the rights, privileges, and immunities secured to them by the First, Fifth, and Fourteenth Amendments to the United States Constitution.”<sup>144</sup> The defendants allegedly committed unconstitutional and illegal adoption placements based on race.<sup>145</sup> The action was brought pursuant to Title VI of the Civil Rights Act of 1964, the Multi-Ethnic Placement Act of 1994, the United States Constitution, the Ohio State Constitution, and state law.<sup>146</sup> Further, the plaintiff charged wrongful discharge in violation of state and federal law.<sup>147</sup>

Plaintiff asserted the HCDHS had a long history of discriminating on the basis of race in child custody placements. Some of the plaintiff’s most serious MEPA/IEAA-related allegations included the following:

- (1) “The HCDHS, through the Defendants, intentionally prevents African American children from being placed adoptively with parents of another race;”<sup>148</sup>
- (2) “HCDHS, and these Defendants, also have a custom and practice of reserving healthy African American infants exclusively for African American adoptive families;”<sup>149</sup>
- (3) “Although transracial placement of African American children with parents of another race does occur in the HCDHS, it is only as a last resort, or when required by court order;”<sup>150</sup>
- (4) “Many examples of [race] matching and [racially-based] placement decisions, and delay and denial on the basis of race, exist at the HCDHS.”<sup>151</sup>
- (5) Geography or the geographical residence of the pre-adoptive parents is often used as a proxy for race;<sup>152</sup> and

---

143. *Id.*; First Amended Complaint at 3 (“In response, he has been harassed, targeted for retaliation, and subjected to intolerable working conditions.”).

144. Complaint at 8, 20–26; First Amended Complaint at 11, 21–22.

145. *See id.*

146. *See id.*

147. *See id.* Although the Complaint and Amended Complaint bring causes of action under multiple sources of law, this article will focus solely on the counts, motions, pleadings, and discussions relating to MEPA/IEAA.

148. Complaint at 12; First Amended Complaint at 15.

149. Complaint at 14; First Amended Complaint at 16.

150. Complaint at 14; First Amended Complaint at 16.

151. Complaint at 12; First Amended Complaint at 15.

(6) Defendants retaliated against Plaintiff Doe for his attempts to place children without using race as a dominant factor and for uncovering Defendants' discriminatory race-based actions.<sup>153</sup>

Plaintiff sought an award of no less than \$500,000 in compensatory damages, no less than \$1,500,000 in punitive damages, reasonable attorney's fees, and an injunction ordering the defendants to cease retaliation against Plaintiff Doe for his protected activity.<sup>154</sup> In addition, Plaintiff later joined additional plaintiffs and defendants.<sup>155</sup> One joined plaintiff sought an injunction ordering the defendants to cease discrimination on the basis of race in adoptive placements.<sup>156</sup> Plaintiff Doe unsuccessfully attempted to amend his complaint to bring the suit as a class action.<sup>157</sup>

Various defendants filed numerous answers, counterclaims, and motions.<sup>158</sup> Interestingly, Defendant Manuel alleged abuse of process pursuant to MEPA/IEAA in her counterclaim against Plaintiff Doe. Specifically, Manuel stated that

John Doe knew or should have known that [MEPA/IEAA]. . . is unconstitutional. . . . John Doe does not have the best interests of African American children at heart, but has filed this lawsuit for economic gain . . . [and] to serve the interest[s] of White families to adopt African American children regardless of what is in the child's best interests.<sup>159</sup>

Further, Manuel brought a third-party complaint against the United States of America for its enactment of MEPA/IEAA.<sup>160</sup> She claimed that

---

152. Complaint at 16; First Amended Complaint at 16.

153. Complaint at 14–18; First Amended Complaint at 17–21.

154. See Complaint at 26–27; First Amended Complaint at 30–31.

155. First Amended Complaint at 3, 5. The individual defendants named in the complaint were: Don Thomas, Director of HCDHS; Barbara Manuel, Assistant Director and former Section Chief, Children's Services Section; Linda Simonds, former Assistant Director; Paul Cohen, Section Chief, Children's Services Section; Jacqueline Poignard, Senior Supervisor, Adoption Units; Carol Wheeler-Strother, Adoption Supervisor; Michael Johnson, Employee and former Adoption Supervisor; and Vickie Brewer, Community Recruiter and former Intake Worker. Complaint at 4-8; First Amended Complaint at 6-10.

156. See First Amended Complaint at 30.

157. First Amended Complaint at 5–6. On the issue of class certification, the Court found that “[t]here is no commonality that predominates or that is over the individual situations. Each precious child is entitled to a clear determination of what's . . . in the best interests of that child . . . . I find that the adults are not — have no commonality with the children in the matter.” Excerpt of Proceedings (Aug. 14, 2000) at 4.

158. See, e.g., Manuel Answer; Wheeler-Strother Answer; Brewer Answer; Cohen Answer.

159. Manuel Answer at 7.

160. See generally Manuel Answer.

the provisions requiring color-blind adoption and foster care placements violated her First and Fourteenth Amendment rights.<sup>161</sup> Specifically, Manuel alleged that MEPA/IEAA's color-blind provisions were: (1) unconstitutionally vague by failing to define the terms "race" and "delay or denial, as a result of race;"<sup>162</sup> (2) unconstitutionally overbroad by failing to address important issues that are tangential to race;<sup>163</sup> (3) in violation of the Equal Protection Clause of the Fourteenth Amendment;<sup>164</sup> and (4) in violation of the nationally-accepted "best interests of the child" standard and policy for foster care and adoption placements.<sup>165</sup> Manuel requested relief in the form of: (1) compensatory damages against Defendant John Doe in the amount of \$5,000,000; (2) punitive damages against Defendant John Doe in the amount of \$10,000,000; and (3) a declaration that MEPA/IEAA is unconstitutional.<sup>166</sup>

However, the third-party complaint was dismissed.<sup>167</sup> The Court chose "to avoid the decision of a constitutional issue" — namely, the constitutionality of MEPA/IEAA § 1808 as questioned by the defendants' supporting memoranda.<sup>168</sup>

Since the original filing in 1999, Plaintiff successfully amended his complaint three times. However, the Court denied Plaintiffs' request to file a fourth amended complaint.<sup>169</sup>

### B. Settlement of the Case

As of June 12, 2001, the docket sheet for this litigation consisted of thirty-seven pages, including fourteen individually named plaintiffs, eleven individually named defendants, fourteen attorneys of record, and 186 individual pleadings and orders. Although a trial by jury was scheduled to commence in March of 2002, two years and eleven months

---

161. See Manuel Answer at 8–9.

162. Manuel Answer at 10.

163. See *id.*

164. See Manuel Answer at 11–13.

165. See Manuel Answer at 13.

166. See Manuel Answer at 14.

167. See Order, entered Aug. 15, 2000 (Plaintiffs' Motion to Strike Defendants' Third-Party Complaints) (Order Aug. 15, 2000). See generally Plaintiffs' Motion to Strike Defendants' Third Party Complaints, filed May 5, 2000.

168. See Plaintiffs' Motion to Strike Defendants' Third Party Complaints at 2 (citing *Univ. of Cal. v. Bakke*, 438 U.S. 265, 411 (1978)).

169. See generally Plaintiff's Motion to Amend Complaint filed May 19, 2000 (Second Amended Complaint); Plaintiff's Motion to Amend Complaint filed Aug. 28, 2000 (Third Amended Complaint); Plaintiff's Motion to Amend Complaint filed Dec. 27, 2000 (Fourth Amended Complaint)(motion denied by an order entered on Apr. 26, 2001).

after the original complaint was filed,<sup>170</sup> a proposed settlement was approved by a federal magistrate on May 28, 2002.<sup>171</sup> The five-year consent decree was approved by the Hamilton County Commission in March 2002. In addition, although officials admit no wrongdoing, the county agreed to \$400,000 in attorneys fees.<sup>172</sup>

### C. Future Impact

This lawsuit presented a case of first impression under MEPA/IEAA. As emphasized by the settlement of the *Hamilton County* case, state employees effectuating foster care and adoption placements must ignore factors involving race, culture, and ethnicity to deny or delay placements. Otherwise, the government may impose penalties upon their state employer.<sup>173</sup> In addition, a court can impose personal and individual liability on the caseworker.<sup>174</sup> The difficulty in imposing penalties under MEPA/IEAA lies in proving that a delay or denial was due to the caseworker's unlawful considerations of race, culture, or ethnicity.

Although the congressional intent in passing MEPA/IEAA was to promote and facilitate adoption placements and to curtail foster care drift,<sup>175</sup> the color-blind approach to placement, as required by MEPA/IEAA, may not be the approach that facilitates the best interests of the child. As discussed above, the parties in *Doe v. Hamilton County* have provided an in-depth response to this issue.

Curiously, while IEAA requires a color-blind approach to placements, it did not repeal section 554 of MEPA, which requires state agencies to diligently recruit potential foster and adoptive parents and families that reflect the ethnic and racial diversity of the children in foster care.<sup>176</sup> This

---

170. See Order, entered May 30, 2001.

171. Kimball Perry, *Race in Adoption Settlement Ok'd*, 2002 WL 6531270.

172. *Id.* See also 5/28/02 APWIREs 15:56:00; Hamilton County Settles Case Over Civil Rights for \$400,000, 5/29/02 AKRON BEACON J. (Ohio) 4, available at 2002 WL 6735367.

173. These penalties can be substantial. The DHHS Office for Civil Rights estimated that these penalties, which "are graduated, and vary according to the State population and the frequency and duration of non compliance," could range from one thousand dollars to more than three and a half million dollars per quarter. Office for Civil Rights, U.S. Dep't of Health and Hum. Servs., *Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996*, available at <http://www.hhs.gov/ocr/iepguide.htm> (June 4, 1997). "[P]enalties for continued non compliance could rise as high as \$7 million to \$10 million in some states." *Id.*

174. *Id.*

175. See generally MEPA, Pub. L. No. 103-382, §§ 551-54, 108 Stat. 3518, 4056-57 (1994); IEAA, Pub. L. No. 104-188 § 1808, 110 Stat. 1755, 1903-04 (1996).

176. IEAA, Pub. L. No. 104-185, § 1808, 110 Stat. 1755, 1903-04 (1996).

recruitment process shall not, however, cause delay or denial of placement based on race, culture, or ethnicity. As a result, caseworkers are faced with a Hobsonian choice, as demonstrated in *Doe v. Hamilton County*. Unfortunately, this case provided very few answers.<sup>177</sup>

#### IV. ARGUMENTS IN OPPOSITION TO AND IN SUPPORT OF TRANSRACIAL ADOPTION

In an attempt to move the discussion towards a resolution, the authors present arguments made by both supporters and opponents of transracial adoption. If there is no understanding of both perspectives, there can be no reconciliation.

##### A. In Opposition to Transracial Adoption

###### 1. One-Way Nature

One of the primary reasons that African Americans and organizations purporting to represent the interests of African Americans are opposed to transracial adoption is that the phenomenon of transracial adoption occurs unilaterally; the overwhelming trend in transracial adoption is for White adults to adopt African American children.<sup>178</sup> This one-way phenomenon is less prevalent in foster care. Namely, even though

---

177. "Ultimately, the suit may help clarify what adoption workers can and cannot do under the federal law. It might set standards for questions that social workers can ask about how parents will handle race-sensitive situations." Lucy May & Marie McCain, *Adoption Case Tests Bonds of Love and Race: Lawsuit Could Break Ground on Interracial Adoption Policies*, CINCINNATI ENQUIRER, July 9, 2000, available at [http://enquirer.com/editions/2000/07/09/loc\\_adoption\\_case\\_tests.html](http://enquirer.com/editions/2000/07/09/loc_adoption_case_tests.html) (last modified Apr. 5, 2000).

178. See CHRISTOPHER BAGLEY ET. AL., INTERNATIONAL AND TRANSRACIAL ADOPTIONS: A MENTAL HEALTH PERSPECTIVE 256 (1993); See Leslie Doty Hollingsworth, *Symbolic Interactionism, African American Families, and the Transracial Adoption Controversy*, 44 SOC. WORK 443, 444 (1999). See generally NABSW Position Statement, *supra* note 77; Kupenda et al., *supra* note 26; Perry, *supra* note 26, at 104-07; SIMON & ALTSTEIN, TRA, *supra* note 63, at 9, 45. The African American Caucus of the North American Conference of Adoptable Children supported every possible attempt to place African American children with parents of similar racial backgrounds. See SIMON & ALTSTEIN, TRA, *supra* note 63, at 46. The Child Welfare League, in its Standards for Adoption Services in 1959, stated that matching was a "responsible" part of the adoption practice. See *id.* at 13. Although the one-way nature of transracial adoption is cause for legitimate criticism and concern, an in-depth discussion of this particular issue is beyond the scope of this article. See generally Angela Mae Kupenda et al., *Law & Literature: Using Literature and Life to Expose Transracial Adoption Laws as Adoption on a One-Way Street*, 17 BUFF. PUB. INT. L.J. 43 (1998-1999); Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. REV. L. & SOC. CHANGE 33 (1993-1994).

African American adults serve as foster parents for White children, they are not allowed to adopt them. This alarming phenomenon is evocative of the common practice during slavery where female slaves served as “wet nurses” and so-called “mammies” for their masters’ children.<sup>179</sup>

## 2. Racial Identity

The earliest adoptions attempted to mimic the biological family.<sup>180</sup> Transracial adoptions make this attempt impossible and are not in the best interests of African American children.<sup>181</sup> It is in the best interests of a child to preserve a child’s racial, ethnic, and cultural heritage in adoption placement decisions.<sup>182</sup> “[African Americans] experience themselves as [African American] in a way that Whites do not experience themselves as White.”<sup>183</sup> Thus, an “[African American] child raised in a white family and a[n African American] child raised in a[n African American] family will have distinct experiences.”<sup>184</sup> It is virtually impossible for White parents to raise African American children in a White environment and have the children retain their African American identity.<sup>185</sup>

Identity is an individual’s conception of the self.<sup>186</sup> Racial matching is based on the concept that a child wants to be like his parents and that parents can more easily identify with a child who resembles them.<sup>187</sup> Thus, racial matching provides an atmosphere that helps instill a sense of personal, social, and racial identity.<sup>188</sup>

179. See *supra* note 28 and accompanying text.

180. See Douglas R. Esten, *Transracial Adoption and the Multi-Ethnic Placement Act of 1994*, 68 TEMP. L. REV. 1941 (1995).

181. See BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 82, at 126; see also Kristie Ann Rooney, *Racial Matching vs. Transracial Adoption: An Overview of the Transracial Adoption Debate*, 53 J. MO. B. 32, 33 (1997). Race is an important factor in determining the best interests of the child. See *id.*

182. See Myriam Zreczny, *Race-Conscious Child Placement: Deviating From a Policy Against Racial Classifications*, 69 CHI-KENT L. REV. 1121, 1124 (1994); see also, Banks, *supra* note 23, at 879. The guiding principle of child welfare policy is the child’s best interests, and race matching is in the child’s best interests. See *id.*

183. Banks, *supra* note 23, at 933. See generally JANET E. HELMS, *A RACE IS A NICE THING TO HAVE: A GUIDE TO BEING A WHITE PERSON OR UNDERSTANDING THE WHITE PERSONS IN YOUR LIFE* (2000).

184. See Perez, *supra* note 86, at 203.

185. See SIMON & ALTSTEIN, *TRA*, *supra* note 63, at 2–3.

186. See PAYNE, *supra* note 101, at 5. See generally BEVERLY DANIEL TATUM, “WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA?” AND OTHER CONVERSATIONS ABOUT RACE (1997).

187. See SIMON & ALTSTEIN, *TRA*, *supra* note 63, at 12.

188. See *In re Davis*, 465 A.2d 614, 622 (Pa. 1983).

Identity has been increasingly recognized as significant to a child's well-being.<sup>189</sup> Studies show that while a sense of identity is important for all children, it is crucial for ethnic minority children adopted by White parents.<sup>190</sup> When an African American child is adopted by White parents who do not have a significant number of African American friends or contacts and who are uninterested in teaching the child about African American culture, the child is left with little or no African American identity.<sup>191</sup> These children struggle unsuccessfully to acquire a positive racial identity; their parents simply cannot provide a same-race role model.<sup>192</sup> This lack of nurturing makes it virtually impossible for the child to develop pride, acceptance, and understanding of his or her heritage.

As the court stated in *In the Matter of B. Children*,<sup>193</sup> “[a child] is entitled to his ‘Black pride’ . . . [and] the child’s self-image and acceptance of his Black identity are crucial to his adjustment in life and place in the world.”<sup>194</sup> Thus, adoption agencies’ pre-MEPA/IEAA policies of placing African American children with African American

---

189. See Barbara Bennett Woodhouse, “Are You My Mother?:” *Conceptualizing Children’s Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL’Y 107, 109 (1995) [hereinafter Woodhouse, *Are You My Mother?*].

190. See generally Susan R. Harris, *Race, Search and My Baby-Self: Reflections of a Transracial Adoptee*, 9 YALE J.L. Feminism 5 (1997).

191. See BAGLEY, *supra* note 178, at 73-4. In fact, studies show that race and culture are indeed significant to a child’s identity. Perez, *supra* note 86, at 202. Susan R. Harris writes:

CAN YOU IMAGINE?

Have you ever spent time *imagining*  
 what it would have been like  
 to have been raised amongst individuals who were  
 racially different from you?  
 What it would have been like  
 to have gone FOR YEARS never having  
 spoken to a person who was of the same race as you;  
 What it would have been like  
 throughout the course of a typical day  
 never having encountered a person  
*who looked like you.*  
 What it would have been like  
 to have EVEN your own PARENTS be  
 of a different race from you?  
 Can you imagine?

Harris, *supra*, note 190, at 5-6.

192. See Woodhouse, *Are You My Mother?*, *supra* note 189, at 112.

193. 391 N.Y.S.2d 812 (N.Y. Fam. Ct. 1977).

194. *Id.* at 814.



families fostered a sense of necessary racial and personal identity.<sup>195</sup> This practice served the children's best interests because "[t]he key to successful living as a minority person in a discriminating. . . society is to have positive affiliations with others like oneself."<sup>196</sup>

### 3. Cultural Genocide

According to some perspective, transracial adoptions actually harm African American children.<sup>197</sup> Taking African American children away from the African American community, it is argued, is a form of "[cultural] genocide."<sup>198</sup> The experience of African American children growing up in a predominantly White world makes it "impossible for them to ever take their rightful place among African American communities."<sup>199</sup> Thus, "the ranks of the Black community are being depleted, but Blacks cannot truly [integrate] into the White community."<sup>200</sup> As evidence of their racial confusion and lack of racial identity, eleven percent of African American children who were transracially adopted prefer to be called "White" for purposes of racial classification.<sup>201</sup> It is further argued that transracial adoption deprives African American children of their identity, which essentially takes away their heritage.<sup>202</sup> The concern is that African American children are both literally and figuratively stolen from the African American community. In 1972, seventy-two percent of transracially adoptive families lived in all-White neighborhoods.<sup>203</sup> By 1980, seventy-seven percent of

---

195. See *In re Davis*, 465 A.2d 614, 623 (Pa. 1983).

196. Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. POL'Y 131, 133 (1995) [hereinafter Howe, *Redefining*].

197. See Banks, *supra* note 23, at 963; see also discussion *infra* Part V-A.

198. SIMON & ALTSTEIN, TRA, *supra* note 63, at 2 (quoting the NABSW position paper). As previously stated, the term "cultural genocide" has been utilized in discussions of transracial adoption, specifically in reference to the massive transracial adoption of Native American children by White families from the 1940s until the passage of the Indian Child Welfare Act of 1978.

Placing African American children in white European-American homes is an overt hostility, the ultimate insult to black heritage. It is the creation of a race of children with African faces and European minds. It is a simple answer to a complex solution. It causes more problems than it solves.

SIMON & ALTSTEIN, BORDERS, *supra* note 77, at 39 (quoting Morris Neff, Jr., former President, NABSW).

199. SIMON & ALTSTEIN, TRA, *supra* note 63, at 2 (quoting the NABSW position paper).

200. *Id.*

201. See Mabry, *supra* note 62, at 1394.

202. See *id.*

203. See SIMON & ALTSTEIN: FOLLOW-UP, *supra* note 84, at 10.

transracially adopted children had little, if any, contact with their own culture or people who resembled them.<sup>204</sup>

It is against human nature for individuals to be completely “color-blind;”<sup>205</sup> a person’s skin color unconsciously triggers certain stereotypes and assumptions.<sup>206</sup> The notion that a parent’s love is enough to overcome external racism is naïve.<sup>207</sup> “We live in a society. . . segregated along race and class lines,”<sup>208</sup> and the sad reality is that skin color matters.<sup>209</sup> In other words, “it makes no more sense to ignore the significance of racial and ethnic ties than it does to pretend up is down.”<sup>210</sup> Even if White parents raise an African American child, society still sees the child as African American. Society’s racial classifications and discrimination constrain all individuals designated as African American outside the walls of their insular homes. Further, “an adopted child whose ethnicity is different from [his or her] adoptive parents is stigmatized by prejudice and oppression of the wider society.”<sup>211</sup>

Even in this new millennium, African Americans are victims of racism and are subject to verbal attacks, physical altercations, employment discrimination, higher arrest rates, and discriminatory sentencing guidelines.<sup>212</sup> Without experiencing such discriminatory behavior themselves, White parents do not have and cannot share adequate survival skills to cope with racism.<sup>213</sup> Arguably, only African American parents, based upon their personal life experiences, can adequately teach such coping skills to their children.<sup>214</sup>

Race is different from other social classifications.<sup>215</sup> Race is unique because it was the only category by which people were “enslaved, and then having been granted a nominal freedom, were physically segregated, politically disenfranchised, physically brutalized, socially stigmatized, and

---

204. *Id.*

205. See generally HELMS, *supra* note 183.

206. See Howe, *Redefining*, *supra* note 196, at 133.

207. See BAGLEY ET AL., *supra* note 178, at 75-6.

208. See BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 83, at 4. See generally TATUM, *supra* note 186.

209. See generally McRoy & Grape, *supra* note 101.

210. Boyer, *supra* note 82.

211. BAGLEY ET AL., *supra* note 178, at 54.

212. See Mabry, *supra* note 62, at 1395-96.

213. See *id.*

214. See Elizabeth Bartholet, *Race Separatism in the Family: More on the Transracial Adoption Debate*, 2 DUKE J. GENDER & POL’Y 99, 102 (1995) [hereinafter Bartholet, *Race Separatism*].

215. Banks, *supra* note 23, at 946. See generally THOMAS C. HOLT, *THE PROBLEM OF RACE IN THE 21<sup>ST</sup> CENTURY* (2000).

economically oppressed.”<sup>216</sup> Evidence of racial discrimination still permeates our society and significantly affects adoptions, even though other categories are irrelevant.<sup>217</sup> For example, in terms of sex, boys and girls are adopted at roughly the same rate;<sup>218</sup> in terms of religion, Jews are adopted at approximately the same rate as Christians.<sup>219</sup> However, in terms of race, African American children are considered hard to place and have a statistically lower adoption rate than White children.<sup>220</sup>

#### 4. African American Adoptive Parents

To claim that there are many more African American children in foster care awaiting adoption than the number of prospective African American adoptive parents is inaccurate and insults the strength of the African American family.<sup>221</sup> African American adoptive homes can be found for African American children.<sup>222</sup> Nevertheless, many potential African American adoptive parents are disqualified because of agencies' widespread use of criteria that require a middle to upper-middle class income and lifestyle.<sup>223</sup> Due to these criteria, in general, many prospective African American adults interested in adopting have greater difficulty accessing the adoption system than many prospective White adoptive parents.<sup>224</sup> African American adoptive parents are in short supply because they encounter roadblocks in the adoption process, not because they are disinterested in adopting.<sup>225</sup> A 1991 study conducted by the North American Council on Adoptable Children (NACAC) found that “eighty-three percent of respondents said that they were aware of organizational and/or institutional barriers preventing or discouraging families of color seeking to adopt.”<sup>226</sup> The following problems were identified:

---

216. Banks, *supra* note 23, at 946.

217. *See id.*

218. *Id.*

219. *Id.*

220. *See* SIMON & ALTSTEIN, TRA, *supra* note 63, at 3.

221. *See id.* at 55.

222. *See id.* at 64.

223. *See id.* at 60.

224. *See* Cynthia Hawley Fogg-Davis, *A Race-Conscious Argument for Transracial Adoption*, 6 B.U. PUB. INT. L.J. 385, 386 (1997).

225. MCKELVEY & STEVENS, *supra* note 79, at 147.

226. Tom Gilles & Joe Kroll, North American Council on Adoptable Children (NACAC), Barriers to Same Race Placement, Executive Summary, April 1991, available at <http://www.nysccc.org/T-Rarts/Barriers.html> (summarizing a study of eighty-seven adoption agencies (sixty-four private, twenty-three public, located in twenty-five states)

- Institutional/Systematic Racism. Virtually all procedures and guidelines impacting standard agency adoption are developed from White middle-class perspectives.
- Lack of People of Color in Managerial Positions. Boards of directors and agency heads remain predominately White.
- Fees. Seventy-five percent of agencies surveyed said adoption fees are a barrier to minority families trying to adopt.
- “Adoption as a Business” Mentality/Reality. Heavy dependence upon fee income, coupled with the fact that supplies of healthy White infants are decreasing drastically, force many agencies to place transracially to ensure survival.
- Communities’ of Color Historical Tendencies Toward “Informal” Adoption. Potential adopters of children of color question the relevance of formalized adoption procedures, many times wondering why such procedures are needed at all.
- Negative Perceptions of Agencies and Their Practices. Families of color often possess negative perceptions of public and private agencies and their underlying motives.
- Lack of Minority Staff. Minority workers “in the trenches” are crucial in building trust among families of color. Consequently, their relative scarcity impedes minority families hoping to adopt.
- Inflexible Standards. Insistence upon young, two-parent, materially-endowed families eliminates many potentially viable minority homes.
- General Lack of Recruitment Activity and Poor Recruitment Techniques. Agencies are unable to set aside financial and human resources required for effective recruitment.
- Word Not Out. Communities of color remain largely unaware of the need for their services.<sup>227</sup>

Furthermore, transracial adoption will not relieve the number of African American children in foster care. Many Whites support race matching,<sup>228</sup> and White adoptive parents prefer White children over children of another race.<sup>229</sup> Often, many prospective parents are “not interested in adopting across racial lines.”<sup>230</sup> Further, while the median

---

that had placed 13,208 children (including 6,347 children of color) in their most recent reporting year).

227. *Id.*

228. Elizabeth Bartholet, *Private Race Preferences in Family Formation*, 107 YALE L.J. 2351, 2352 (1998) [hereinafter Bartholet, *Private Preferences*].

229. Banks, *supra* note 23, at 888.

230. Perez, *supra* note 86, at 204.

age of children in foster care is nine years, the majority of White adoptive parents are not interested in adopting older children (of any race) or children with handicaps. Additionally, less than one percent of Whites are willing to adopt African American children with special needs.<sup>231</sup> Thus, the vast majority of prospective White parents, if interested in adopting African American children, are only interested in adopting healthy African American infants; yet there are more than enough prospective African American adoptive parents available for those infants.<sup>232</sup> Therefore, even with the phenomenon of transracial adoptions, some hard-to-place children will remain hard-to-place and will continue to linger in the foster care system.<sup>233</sup> Aggressive recruitment of prospective African American adoptive parents will tend to make transracial adoptions unnecessary.<sup>234</sup>

#### 5. Federal Legislation: MEPA and IEAA

By prohibiting race from being considered in placement decisions, the MEPA/IEAA lacks the power to allow the best interests of children to be considered.<sup>235</sup> By eliminating racial considerations in adoption proceedings, these statutes completely ignore the racial attitudes of White prospective adoptive parents.<sup>236</sup> This denial will permit racially insensitive White parents to adopt African American children.<sup>237</sup> Further, “[e]limination of race from all placement decision-making sets the stage for reinforcing old prejudices and discriminatory practices toward African Americans and for anachronistic recommodification of *young* African American children, without providing any strong assurance that the needs of such children will be met appropriately.”<sup>238</sup> Therefore, not only are White adoptive parents generally unable to

---

231. See Hollingsworth, *supra* note 178, at 445. Special needs children are defined as those over eight years old, members of a sibling group, or those with emotional and/or physical disabilities. *Id.*

232. See SIMON & ALTSTEIN: FOLLOW-UP, *supra* note 84, at 74.

233. See PAYNE, *supra* note 101, at 187. Nationwide, amongst all children, the average length of stay in foster care is thirty-seven months. However, African American children remain in the foster care system for an average of fifty months. <http://www.acf.dhhs.gov/programs/cb/stats/afcars//snos96b.htm> (last visited November 18, 1998).

234. See BARTHOLET, NOBODY'S CHILDREN, *supra* note 82, at 127.

235. See Hollingsworth, *supra* note 178, at 446.

236. See Mabry, *supra* note 62, at 1423.

237. See LUCILLE J. GROW & DEBORAH SHAPIRO, BLACK CHILDREN WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION 58 (1974).

238. Ruth-Arlene W. Howe, *Adoption Laws and Practices in 2000: Serving Whose Interests?*, 33 FAM. L. Q. 677, 684–85 (1999) [hereinafter Howe, *Adoption Laws*].

prepare African American children to cope with societal prejudices, some Whites are teaching, consciously or unconsciously, their adopted African American children to be prejudiced against African Americans.<sup>239</sup>

Even Whites who are not necessarily prejudiced themselves may be unable to adequately care for an African American child. In *DeWees v. Stevenson*,<sup>240</sup> the plaintiff asserted that she did not want an African American child because she would not know how to take care of one.<sup>241</sup> The plaintiff also believed that race had no impact on developing a child's identity.<sup>242</sup> After an African American foster child was placed with the plaintiff, despite her initial confession, she reconsidered and wanted to adopt the child.<sup>243</sup> This case is a concrete example that non-prejudiced Whites may be unable to adequately care for African American children.

Before MEPA and IEAA, adoption agencies were able to consider racial attitudes in assessing prospective adoptive parents,<sup>244</sup> including whether the prospective adoptive parents lacked the necessary racial sensitivity.<sup>245</sup> As described above transracial adoption creates many unique difficulties that Congress should not ignore. One in six parents who adopted across racial lines identified that the problems they experienced were directly related to the transracial nature of the adoption.<sup>246</sup>

By ignoring race, "Congress ignored a plight that has thrived in America since the 1600s — racism."<sup>247</sup> With "a few strokes of a pen, [Congress] will not erase racism in America. Racism will not disappear overnight just because Congress passed new legislation."<sup>248</sup> While Congress may pass legislation decreeing that racism is not a reality, fortunately, the courts appear willing to face this issue. For example, in

---

239. See BAGLEY ET AL., *supra* note 178, at 262.

240. 779 F. Supp. 25 (E.D. Pa. 1991). The court decided to uphold the denial of the petition "presumably because the adoption agency properly concluded that the DeWees's refusal to engage in color-conscious parenting reflected unhealthy racial attitudes." RACHEL F. MORAN, *INTERRACIAL INTIMACY: THE REGULATION OF RACE AND ROMANCE* 142 (2001).

241. *DeWees*, 779 F. Supp. at 26.

242. *Id.* at 27.

243. *Id.*

244. *See id.* at 28.

245. *See id.* at 27.

246. *See* SIMON & ALTSTEIN: FOLLOW-UP, *supra* note 84, at 113.

247. Mabry, *supra* note 62, at 1423.

248. *Id.* at 1385.

the case *Adoption of Vito*,<sup>249</sup> the judge properly considered the future difficulties that an African American child would face in an all-White community without contact with the African American community.<sup>250</sup> These are realities that should not be ignored. Due in large part to the fact that adoption is not a fundamental right,<sup>251</sup> the constitutionality of using race as a factor has been upheld on Fourteenth Amendment grounds where the best interests of the child are considered.<sup>252</sup> Empirical studies of transracially adopted African American children and adults have not conclusively proven that such adoptions are not psychologically harmful to these children.<sup>253</sup>

### B. In Support of Transracial Adoption

#### 1. Statistics

Significant support for transracial adoption stems from the existence and effect of race-related statistics for foster care and domestic adoption. African American children comprise approximately sixty-seven percent of the children in the foster care system.<sup>254</sup> Furthermore, approximately forty-six percent of children who are available for adoption are African American.<sup>255</sup> Meanwhile, sixty-seven percent of American families waiting to adopt are White.<sup>256</sup> Although many White families state their willingness to adopt transracially, domestic transracial adoptions comprise less than one percent of all completed adoptions.<sup>257</sup> Further, the ratio of prospective adoptees to prospective adopters has been projected at approximately thirty-five to one.<sup>258</sup>

While the number of African American children in foster care substantially outnumber the White children available for adoption, African American children did not account for even half of the adoptions in 1999.<sup>259</sup> Accordingly, African American children remained in foster

---

249. 712 N.E.2d 1188 (Mass. App. Ct. 1999).

250. *Id.* at 1195.

251. See Howe, *Redefining*, *supra* note 196, at 133.

252. See Rooney, *supra* note 181, at 33.

253. See *infra* Part V-A; see also *In re B. Children*, 391 N.Y.2d 812, 814 (N.Y. Fam. Ct. 1977) (quoting a 1975 report).

254. See PAYNE, *supra* note 101, at 179.

255. See *id.*

256. See *id.*

257. See Rooney, *supra* note 181, at 32.

258. See Marlon N. Yarbrough, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353, 356 (1988).

259. PAYNE, *supra* note 101, at 179.

care thirty-three percent longer than the national median;<sup>260</sup> on average, Black children remain in foster care for two years.<sup>261</sup> Although African Americans adopt at the same rate as Whites, African Americans would have to adopt at a rate many times that of Whites to provide homes for all of the African American children available for adoption.<sup>262</sup> Therefore, with the passage of MEPA/IEAA, Congress concluded that race matching was responsible, at least in part, for the length of time children spent in foster care.<sup>263</sup> Furthermore, the more older children grow, the less likely it becomes that they will ever find a permanent home.<sup>264</sup>

Evidence demonstrates that children suffer irreparable harm from growing up without permanent parents.<sup>265</sup> Almost thirty percent of children who grow up in unstable circumstances, including foster care, have reported instances of crime, alcoholism, or both.<sup>266</sup> This startling figure is even more disturbing considering that the number of children in foster care is now double what it was during the 1970s, with infants and children under the age of four being the fastest growing population in adoption agencies.<sup>267</sup>

## 2. Race Matching Harms Children

In passing the aforementioned Acts, Congress determined that racial matching and same-race placements were responsible, at least in part, for the length of time children spent in foster care.<sup>268</sup> Furthermore, children are less likely to find permanent placements as they age.<sup>269</sup> Thus, race matching decreases the probability that children, particularly African American children, will be placed into permanent homes for adoption. Rather than same-race placement, it is more important that children receive love, attention, and permanency and that they do not languish in foster care.<sup>270</sup>

---

260. See Rooney, *supra* note 181, at 32.

261. See Esten, *supra* note 180, at 1952.

262. See Bartholet, *Race Separation*, *supra* note 214, at 101; BARTHOLET, NOBODY'S CHILDREN, *supra* note 82, at 127.

263. See Recent Legislation, *supra* note 101, at 1354-55.

264. See Amanda Spake, *Judges Push to Get Kids Into Stable Homes*, U.S. NEWS & WORLD REP., Apr. 19, 1999, at 62-3; see also Rooney, *supra* note 181, at 32.

265. See BARTHOLET, NOBODY'S CHILDREN, *supra* note 82, at 81.

266. See BAGLEY ET. AL., *supra* note 178, at 21.

267. BARTHOLET, NOBODY'S CHILDREN, *supra* note 82, at 82.

268. See Recent Legislation, *supra* note 101, at 1354-55.

269. See Spake, *supra* note 264, at 62-3.

270. See BAGLEY ET AL., *supra* note 178, at 257.



### 3. Success Rate

Adoptions are not all successful,<sup>271</sup> however, the failure rate is unrelated to adoptions across racial lines.<sup>272</sup> There is no evidence that transracial adoptions harm children; in fact, transracial adoptions have proven to be successful.<sup>273</sup> Pointedly, research data indicates that transracial adoptees fare well.<sup>274</sup> Over seventy-five percent of transracial adoptions are considered successful—a number comparable to same-race adoptions.<sup>275</sup> Sixty-eight percent of children who were adopted transracially do not feel any discomfort with their appearance compared to their adoptive parents or the community in which they were raised.<sup>276</sup> It can be concluded from these statistics that transracially adopted children are proud of their heritage. Finally, “there is no evidence that adoptive parents form weaker bonds to dissimilar looking children than to similar ones.”<sup>277</sup>

### 4. Self Identity and White Privilege

While identity is admittedly a complex topic,<sup>278</sup> social and cultural attitudes are learned, not inherited.<sup>279</sup> Individuals are not born with a sense of self, but develop self-awareness through social interaction.<sup>280</sup> Furthermore, “[s]elf-concept represents the combination of those aspects of the self that the individual considers important.”<sup>281</sup> Studies show that most transracial adoptees experience a positive sense of ethnic identity as well as a high comfort-level dealing with White people.<sup>282</sup> Barbara Bennett Woodhouse summarizes this conflict:

In an objective sense, it is impossible to say that a child has acquired a ‘good’ or ‘bad’ self-concept or acquired a ‘healthy’ or ‘unhealthy’ individual, racial, or cultural identity without also

271. Jason Swenson, *Rainbow Families*, DESERT NEWS, Oct. 7, 1999, available at 1999 WL 26535694.

272. See Bartholet, *Race Separatism*, *supra* note 214, at 100-01.

273. See BARTHOLET, *NOBODY’S CHILDREN*, *supra* note 82, at 126-27; Bartholet, *Race Separatism*, *supra* note 214, at 100.

274. See MCKELVEY & STEVENS, *supra* note 79, at 148. See discussion *infra* Part V.

275. See GROW & SHAPIRO, *supra* note 237, at 103; SIMON & ALTSTEIN, *TRA*, *supra* note 63, at 37.

276. See GROW & SHAPIRO, *supra* note 237, at 182-83.

277. See MORAN, *supra* note 240, at 145 (citing GROW & SHAPIRO, *supra* note 237, at 5-18, 25-28, 224-5, 236.)

278. See BAGLEY, ET AL., *supra* note 178, at 53.

279. See SIMON & ALTSTEIN, *TRA*, *supra* note 63, at 14.

280. See Hollingsworth, *supra* note 178 at 446.

281. See BAGLEY ET AL., *supra* note 178, at 54.

282. BAGLEY ET AL., *supra* note 178, at 73; Banks, *supra* note 23, at 890.

making tacit judgments regarding relative values of sameness and difference, individual and group, independence and interdependence. . . . White parents, by de-emphasizing race . . . enable a Black child [to] cope better with racial attacks because the child may view the attacks less personally.<sup>283</sup>

Most White parents meet the identity needs of their adopted African American children.<sup>284</sup> Many adoptive parents create a multi-racial environment for their children to offset potential identity problems and to provide same-race mentors.<sup>285</sup> Furthermore, White adoptive parents are in a unique position to teach their Black children how to “maneuver in the White world of power and privilege.”<sup>286</sup>

##### 5. Federal Legislation: MEPA and IEAA

Race-matching violates state and federal civil rights laws, as well as constitutional guarantees against racial discrimination.<sup>287</sup> African American children are stigmatized as hard-to-place because same-race matching policies *make* them hard to place and jeopardize their opportunity for permanent placement.<sup>288</sup>

The purpose of MEPA/IEAA is to facilitate adoption placements by making it illegal for government adoption workers to use race as a dominant factor to either delay or deny adoption placements.<sup>289</sup> MEPA/IEAA does not promote numerical quotas,<sup>290</sup> it does not prefer unqualified parents,<sup>291</sup> and it does not foster reverse discrimination.<sup>292</sup> On the contrary, MEPA/IEAA successfully “repudiates the antiquated White-supremacist notion that the mixing of races should be prohibited”<sup>293</sup> and replaces it with the notion that “[a]doption is about matching a parent to a child, not a parent to a race.”<sup>294</sup>

---

283. Woodhouse, *Are You My Mother?*, *supra* note 189, at 113-14.

284. See BAGLEY ET AL., *supra* note 178, at 79.

285. See PAYNE, *supra* note 101, at 187.

286. *Id.* at 184.

287. BARTHOLET, NOBODY'S CHILDREN, *supra* note 82, at 126.

288. *Id.* at 125; Yarbrough, *supra* note 258, at 357; Fogg-Davis, *supra* note 224, at 398.

289. See *supra* Part II-B-1.

290. Mabry, *supra* note 62, at 1371.

291. See *id.*

292. See *id.*

293. Esten, *supra* note 180, at 1980.

294. Banks, *supra* note 23, at 909.

## V. TRANSRACIAL ADOPTION FROM THE COUNSELING PERSPECTIVE

A. *Studies of Transracial Adoptees and Their Families*

It is well documented in counseling, social work, and legal literature that African American children are disproportionately represented among populations of children that have been separated from their families and placed in foster care.<sup>295</sup> Factors such as poverty and the lack of understanding on the part of agency personnel regarding the disciplinary practices of African American parents have contributed to the over-representation of African American families in the child welfare system.<sup>296</sup>

In addition to the concerns raised by the NABSW discussed earlier, African American child-rearing experts have affirmed that African American parents must prepare their children to succeed in a society that has a history of being hostile and racist toward African Americans.<sup>297</sup> As early as preschool, African American children are bombarded with negative messages about race from authority figures.<sup>298</sup> In particular, African American male children "are frequently the victims of negative attitudes and lowered expectations from teachers, counselors, and administrators."<sup>299</sup> Several scholars have posited that the internalization of such messages by African American youth can lead to higher levels of anxiety and lowered self-esteem.<sup>300</sup>

To counteract the impact of these societal pressures on African American children, African American parents have employed a variety of adaptive strategies to expose their children to accurate and positive

---

295. See Carla M. Curtis, *The Adoption of African American Children by Whites: A Renewed Conflict*, 25 J. CONTEMP. HUM. SERVS. 156, 157 (1996); R.J. Taylor & M.C. Thornton, *Child Welfare and Transracial Adoption*, 22 J. BLACK PSYCHOL. 282 (1996).

296. See C. Bradley, *The Disciplinary Styles of African American Fathers: A Closer Look*, 5 J. AFRICAN AMERICAN MEN 43 (2000); Ramona Denby & Keith Alford, *Understanding African American Disciplinary Styles: Suggestions for Effective Social Work Intervention*, 4 J. OF MULTICULTURAL SOC. WORK 81, 82 (1996).

297. See C. Bradley, *Cultural Interpretations of Child Discipline: Voices of African American Scholars*, 4 FAMILY J. 272, 273 (1998); Tracy L. Robinson & Earl J. Ginter, *Racism: Healing Its Effects*, 77 J. COUNS. & DEV. 3 (1999).

298. See generally TATUM, *supra* note 186.

299. C.C. LEE, *EMPOWERING YOUNG BLACK MALES* 1 (1991).

300. See B.A. Greene, *Racial Socialization as a Tool in Psychotherapy with African American Children*, WORKING WITH CULTURE: PSYCHOTHERAPEUTIC INTERVENTIONS WITH ETHNIC MINORITY CHILDREN AND ADOLESCENTS 64 (L. A. Vargas & J. D. Koss-Chioino eds. 1992); J.S. Phinney, B.T. Lochner & R. Murphy, *Ethnic Identity Development and Psychological Adjustment in Adolescence*, in ETHNIC ISSUES IN ADOLESCENT MENTAL HEALTH 54 (A.R. Stiffman & L.E. Davis eds. 1990); TATUM, *supra* note 186, at 32.

information about African American people and their history. In this process, known as racial socialization, "African American parents must find ways of warning their children about racial dangers and disappointments without overwhelming them or being overly protective. Either extreme will facilitate the development of defensive styles that leave a child inadequately prepared to negotiate the world with a realistic perspective."<sup>301</sup> Thus, the socialization process for African American children has been documented differently than for White children.

Advocates of transracial adoption responded to the NABSW's criticisms by conducting numerous investigations on the effects of transracial adoption on African American children. Most of these studies consistently indicated that adolescent and younger African American children adjusted well in their adoptive homes. Our analysis of these studies, however, finds cause for concern for transracially adopted African American children.

The work of Lucille J. Grow and Deborah Shapiro annotates one of the earliest studies on the placement of African American children with White American parents. Grow and Shapiro conducted a follow-up study of 125 adoptions of African American children by White parents.<sup>302</sup> Children were classified as African American if one of the biological parents was African American. The primary focus of this research was to assess the adjustment and well being of pre-adolescent African American adoptees.<sup>303</sup> Adjustment was calibrated by the child's responses to the California Test of Personality, which measures social and personal adjustment, and the Missouri Children's Behavior Check List Test.<sup>304</sup> Researchers also evaluated interview data regarding the parents' assessment of the children's attitude toward race.<sup>305</sup> The study found that seventy-seven percent of the children had adjusted successfully and that this percentage was similar to reports from previous studies.<sup>306</sup> Grow and Shapiro also compared the responses of African American children adoptees with those of adopted White children and found that the scores from these two groups matched very closely.<sup>307</sup> Grow and Shapiro

---

301. Greene, *supra* note 300, at 64.

302. *See generally* GROW & SHAPIRO, *supra* note 237.

303. *See id.*

304. *Id.* at 12-13.

305. *Id.* at 12.

306. *See id.* at 224.

307. *See id.* at 184.

concluded that the children were adjusting to their adoptive homes successfully.<sup>308</sup>

In 1981, Arnold R. Silverman and William Feigelman reported their findings on the psychological adjustment of transracially adopted children. Their sample consisted of fifty-six White families who adopted African American children and ninety-seven White families who adopted White American children.<sup>309</sup> Each parent or couple was asked to make a judgment about their child's overall adjustment and the frequency of their child's emotional and growth problems.<sup>310</sup> The findings showed a positive correlation between age at adoption and maladjustment.<sup>311</sup> Silverman and Feigelman interpreted this result as indicating that a child's age at adoption, not the transracial adoption itself, had the most significant impact on the child's development.<sup>312</sup> Both researchers continue to support the position that transracial adoption is a viable option.<sup>313</sup>

Ruth G. McRoy and Louis A. Zurcher conducted the first study of transracial adoptees using a comparison group of interracial adoptees.<sup>314</sup> They were also the first to examine the experiences of African American children from both the adoptive parents' and the adoptees' perspective. The sample consisted of sixty families, thirty White and thirty African American.<sup>315</sup> Slightly more than half of the children available for adoption had two biological African American parents.<sup>316</sup> Most of these children were placed with African American adoptive parents. Nearly all of the children with only one biological African American parent were placed with White parents.<sup>317</sup> Face-to-face interviews were conducted with both the adoptive parents, and the children were evaluated on the Tennessee Self-Concept Scale.<sup>318</sup> The results indicated

---

308. *Id.* at 224.

309. See Arnold R. Silverman & William Feigelman, *The Adjustment of Black Children Adopted by White Families*, 62 *SOCIAL CASEWORK* 529, 532 (1981).

310. *See id.*

311. *See id.* at 534.

312. *Id.* at 535.

313. *See generally* Silverman & Feigelman, *supra* note 309.

314. See RUTH G. MCROY & LOUISE A. ZURCHER, *TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS* 18 (1983).

315. *See id.*

316. *See generally id.*

317. *See generally id.*

318. *See generally id.* The scale is intended to measure an individual's feelings of self-worth. *Id.*

that “transracial and intraracial adoptive parents enjoyed their adopted children and considered their decision to adopt a good one.”<sup>319</sup>

The researchers also noted that the families were different in several aspects. The transracial adoptive parents were less likely than intraracial adoptive parents to deliberately instruct their adoptees about African American heritage and pride.<sup>320</sup> The transracial parents primarily emphasized that “all humans are alike.”<sup>321</sup> The interracial parents accentuated the positive qualities of being African American.<sup>322</sup> The intraracial adolescent adoptees tended to discuss racist experiences more openly and frequently with their parents than did the transracial adoptees.<sup>323</sup> Nevertheless, McRoy and Zurcher concluded that although White adoptive parents did not behaviorally respond to the racial and cultural needs of African American children, they should still be considered as a resource for permanent placement for African Americans.<sup>324</sup>

In order to determine the effects of transracial adoption over time, several scholars conducted longitudinal investigations. Shireman and Johnson published their findings from a longitudinal study of adopted African American children reared in single parent, transracial, and African American homes.<sup>325</sup> The children were studied at four, eight, twelve, sixteen and twenty years of age.<sup>326</sup> The Clark Doll Test, a measure in which children attribute various qualities to either a White or an African American doll, was administered to adoptees at age four and at age eight.<sup>327</sup> The test indicated that the racial preferences and awareness of transracially adopted children remained constant, while that of a child in an interracial family continued to evolve over time.<sup>328</sup> Shireman and Johnson concluded that although the racial development of transracial adoptees was “of concern,” most of the children appeared to “grow well” in their adoptive homes.<sup>329</sup>

---

319. *Id.* at 36.

320. *See generally id.* at 143.

321. *See id.*

322. *See id.*

323. *See id.*

324. *See id.* at 144.

325. *See generally* John F. Shireman & Penny R. Johnson, *A Longitudinal Study of Black Adoptions: Single Parent, Transracial, and Traditional*, 62 *SOC. WORK* 172 (1986).

326. *Id.*

327. *Id.* at 174.

328. *Id.*

329. *Id.*

Over a period of twenty years, Rita James Simon and Howard Altstein followed a group of families that adopted African American children. Their research began in 1972 and the original sample consisted of 204 families who had adopted transracially.<sup>330</sup> Of the 366 adoptees, 120 were African American.<sup>331</sup> Using projective measures such as the Clark Doll Test, pictures, and other instruments, Simon and Altstein found that “African American children perceived themselves as African American as accurately as White American children perceive themselves as White American.”<sup>332</sup> They also found that the parents tended to believe that race did not and would not be a major issue for their children.<sup>333</sup> A large majority, seventy-seven percent, of the White parents lived in predominately White neighborhoods and sixty-three percent of the adoptees reported that most of their friends were White.<sup>334</sup> Simon and Altstein concluded that African American children reared by White parents fared no worse than other children raised by parents of the same race.<sup>335</sup>

Most recently, Karen S. Vroegh reported the fifth phase of her longitudinal study of transracial adoption outcomes. The sample consisted of fifty-two late adolescent African American adoptees.<sup>336</sup> Thirty-four of the adoptees were from transracial families and the remaining eighteen were from intraracial families.<sup>337</sup> Each of the participants were interviewed by an interracial team of researchers and were given the Rosenberg Self-Esteem Scale. Findings revealed that ninety percent of the participants sampled were “doing... well in life.”<sup>338</sup> The researchers also noted that sixty percent of the transracial adoptees wanted to change their weight and temper.<sup>339</sup> Vroegh concluded that transracial adoptees had “developed identities,” where ninety percent of the intraracial adoptees, and eight-eight percent of the transracial

---

330. See generally RITA JAMES SIMON & HOWARD ALTSTEIN, *TRANSRACIAL ADOPTION* (1977); R.J. SIMON & H. ALTSTEIN, *TRANSRACIAL ADOPTION: A FOLLOW-UP* (1981).

331. *Id.*

332. RITA JAMES SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE, AND IDENTITY: FROM INFANCY THROUGH ADOLESCENCE* 87 (1992).

333. *Id.*

334. *Id.*

335. *Id.*

336. Karen S. Vroegh, *Transracial Adoptees: Developmental Status After 17 Years*, 67 *AM. J. OF ORTHOPSYCHIATRY* 568, 572 (1997).

337. *See id.*

338. *Id.*

339. *Id.*

adoptees, labeled themselves as either African American or of “mixed” race.<sup>340</sup>

Although a majority of the findings appear to support the conclusion that African American adoptees are “adjusting well” in transracial home environments, these and other often-cited conclusions have been challenged on methodological, analytical, and interpretative grounds.<sup>341</sup>

An extensive review of studies on transracial adoption conducted by Hollingsworth indicated that most of the data regarding the experiences of transracial adoptees was gathered only from the adoptive parents.<sup>342</sup> This particular research method provided very little insight into the child’s own perception of their adoptive experience.<sup>343</sup> Further, Willis reported that when transracial adoptees were interviewed, many of the appraisal and evaluation procedures used by the researchers had numerous methodological limitations. For example, the Clark Doll Test, a projective measure used in several of the longitudinal studies, has been severely criticized as being invalid if used to evaluate anything more than a child’s preference for a doll in a contrived, forced-choice situation.<sup>344</sup>

Additionally, numerous researchers charged that when the research population involved African American and White adoptees, the behaviors and experiences of White children were held as the standard.<sup>345</sup> Further, if White children were not part of the study, African American adoption experiences were compared to White children both indirectly and by assumption. Seminal studies such as the work of Grow and Shapiro and Simon and Altstein are prime examples of this tendency.<sup>346</sup> In each of these two studies, researchers found that African American

---

340. See generally *id.*

341. See generally Rudolph Alexander & Carla M. Curtis, *A Review of Empirical Research Involving the Transracial Adoption of African American Children*, 22 J. OF BLACK PSYCHOL. 223 (1996); Amazie Chimezie, *Bold But Irrelevant: Grow & Shapiro on Transracial Adoption*, 56 CHILD WELFARE 75 (1977); Leslie Day Hollingsworth, *Effect of Transracial/Transethnic Adoption on Children’s Racial and Ethnic Identity and Self-Esteem: A Meta-Analytic Review*, 25 FAMILIES AND ADOPTION 99 (1997); Sharon-ann Gopaul-McNicol, *Critique of a Review of the Research on Transracial Adoptions*, 22 J. OF BLACK PSYCHOL. 270 (1996); Michael L. Penn & Christina Coverdale, *Transracial Adoption: A Human Rights Perspective*, 22 J. OF BLACK PSYCHOL. 240 (1996); M.G. Willis, *The Real Issues in Transracial Adoption: A Response*, 22 J. OF BLACK PSYCHOL. 246 (1996).

342. See Hollingsworth, *supra* note 341, at 103.

343. See Penn & Coverdale, *supra* note 341, at 244.

344. See Willis, *supra* note 341, at 250.

345. See Alexander & Curtis, *supra* note 341, at 231.

346. See GROW & SHAPIRO, *supra* note 237, at 234; SIMON & ALTSTEIN, *TRA*, *supra* note 63, at 534.



adoptees evidenced psychological outcomes similar to those found in White children.<sup>347</sup> Based on these findings, the investigators concluded that transracial adoption was a logical option for African American children.<sup>348</sup>

Finally, and most importantly, Robert J. Taylor and Michael C. Thornton argued that of the studies that reported “the successful adjustment” of transracial adoptees, researchers omitted or minimized other important outcomes in their analyses such as the presence of racial identity and awareness issues among transracial adoptees, and the large number of transracial adoptive families who resided in predominately White neighborhoods. Further, Taylor and Thornton asserted that, in general, White parents did not think that race would be a major issue for their transracially adopted children in the future.<sup>349</sup>

### *B. Counseling Implications*

Perhaps the most salient theme evident from the body of work reviewed above is that although most White adoptive families provide loving homes for their African American children, only a few of these families are able to effectively educate and prepare their African American children for the realities of racism in this country. Furthermore, many White parents may be unclear as to what exactly this particular socialization entails and how it translates into parenting practice.

Counseling can provide an arena for transracial adoptive families to process parenting concerns. The family, school, and community counselors best equipped to respond to the racial and cultural needs of these parents in a proactive and empowering way are those who are aware of their own racial and cultural backgrounds and how their personal backgrounds impact the racial and cultural identities of their clients. These counselors must initiate open and thoughtful dialogue with parents who have adopted transracially regarding the impact of White privilege on the client as well as the client’s interaction with others. Finally, both the client and counselor must have an understanding of racial socialization and its importance in the lives of ethnic minority children.<sup>350</sup>

---

347. *See id.*

348. *See id.*

349. *See generally* Taylor & Thornton, *supra* note 295, at 283.

350. *See generally* Tracy L. Robinson, *The Intersection of Dominant Discourse Across Race, Gender, and Other Identities*, 77 J. OF COUNSELING AND DEVELOPMENT 76 (1999).

One important way counselors can begin to work with transracial families is through the facilitation of pre-adoption, psycho-educational counseling groups. The primary purpose of psycho-educational groups who work with potential White adoptive parents is to provide in-depth historical and current information regarding African American history, assist parents with exploring their own issues around race and White privilege, and provide White parents with constructive and empowering ways to prepare their African American children to succeed in a racist environment. Special attention should also be given to other counseling-related topics.

The various reasons or motives for adopting an African American child should be taken into account by prospective adoptive parents. It is well-documented that there is a shortage of White infants and toddlers available for adoption.<sup>351</sup> As a result, many White parents compromise and select from the ready pool of ethnic minority youth.<sup>352</sup> Although some White parents may attempt to approach the process of adoption from a "second choice" or "color-blind" perspective, they may consciously or unconsciously have the attitude of either "White superiority" or pity for African Americans.<sup>353</sup> Consequently, one of these attitudes may convey to the transracial adoptee a disrespect or dislike for African Americans which may cause identity confusion or self-hate, which is often difficult to resolve.<sup>354</sup>

Counselors can be instrumental in assisting White parents with their issues regarding race. Encouraging White parents to read narratives by families who share their own personal journeys towards racial and cultural awareness and acceptance is one of the ways to initiate dialogue

---

351. See GROW & SHAPIRO, *supra* note 237, at 3; Hawkins-León, *supra* note 67, at 212-15; McROY & ZURCHER, *supra* note 314, at 6. From 1952 to 1972, 8.7% of all premarital births were placed for adoption. From 1973 to 1981, this percentage fell to 4.1%. From 1982 to 1988, it fell further to two percent. Of Black women with premarital births, from 1952 to 1972, 1.5% placed their children for adoption. From 1973 to 1981, this percentage fell from 0.2%. From 1982 to 1988, it rose to 1.1%. Of White women with premarital births, from 1952 to 1972, 19.3% placed their children for adoption. From 1973 to 1981, this percentage fell to 7.6%. From 1982 to 1988, it fell further to 3.2%. NATIONAL ADOPTION INFORMATION CLEARINGHOUSE, PLACING CHILDREN FOR ADOPTION 2 (1996).

352. McROY & ZURCHER, *supra* note 314, at 18.

353. See generally BEVERLY DANIEL TATUM, WHY ARE ALL THE BLACK KIDS SITTING TOGETHER IN THE CAFETERIA? 120 (1997).

354. See A.L. BADEN & R. STEWART, THE ROLE OF PARENTS AND FAMILY IN THE PSYCHOLOGICAL ADJUSTMENT OF TRANSRACIAL ADOPTEES: IMPLICATIONS FOR THE CULTURAL-RACIAL IDENTITY MODEL FOR TRANSRACIAL ADOPTEES (1997) (unpublished manuscript on file with author).

on this issue.<sup>355</sup> Periodic assessment for family counseling is also crucial. Marriage and family counseling can be instrumental in addressing the ongoing concerns of individual families. For example, White siblings may need concrete help regarding racism and their feeling about their African American siblings.<sup>356</sup> In the same vein, African American adoptees may need a “safe” place to share their feelings with White family members.

Family counselors can also provide resources to assist White parents in the racial socialization process. Research studies have revealed that the majority of transracial families rear their children in predominantly White neighborhoods, schools, and social groups.<sup>357</sup> This particular social context could interfere with the development of self-esteem in African American adoptees.<sup>358</sup> Such information could emphasize the importance of White parents in creating numerous and consistent opportunities for their African American children to interact meaningfully with African American peers, role models, communities, and social groups.

## VI. KINSHIP CARE AND ADOPTION: A POSSIBLE SOLUTION?

### A. Kinship Care Defined

For the most part, modern African American families have adopted the clan familial structure or extended family as opposed to the nuclear family.<sup>359</sup> Similar to the tribal structure within the Native American community, this clan approach is reminiscent of the West African tribal structure that was further cultivated during American slavery.<sup>360</sup> The

---

355. See Robinson & Gintner, *supra* note 297, at 3; TATUM, *supra* note 186, at 108.

356. Mae Hill & Joyce Peltzer, *A Report of Thirteen Groups for White Parents of Black Children*, 31 FAMILY RELATIONS 557, 563 (1982).

357. See GROW & SHAPIRO, *supra* note 237, at 45; Hill & Peltzer, *supra* note 356, at 557; Hollingsworth, *supra* note 341, at 126.

358. See TATUM, *supra* note 186, at 55.

359. See Hawkins-León, *supra* note 67, at 210.

360. See *id.*

[O]ne third of African American families with a female head-of-household who is over age sixty-five includes children who have not been formally adopted. Among all family groups (both marital and nonmarital), forty-four percent of African Americans live in an extended family situation, whereas only eleven percent of Whites reflect a similar family structure.

*Id.* (citations omitted). The seminal importance of kinship care within Native American tribal families was affirmed by the passage of the Indian Child Welfare Act of 1978; although in recent years, there have been attempts to corrode the Act's reach and effectiveness. See generally Cynthia Hawkins-León, *The Indian Child Welfare Act and the*

term “kinship care” was originally coined in 1974 in research documenting the importance of kinship networks within the African American community in the United States.<sup>361</sup> Kinship care has been defined by the Child Welfare League of America as “the full time nurturing and protection of children who must be separated from their parents by relatives, members of their tribes or clans, god-parents, step-parents, or other adults who have a kinship bond with a child.”<sup>362</sup>

Signifying a modern, expanded view of kinship care, in its Report to the Congress on Kinship Foster Care, DHHS notes that “[i]n its broadest sense, kinship care is any living arrangement in which a relative or someone else emotionally close to the child takes primary responsibility for rearing a child.”<sup>363</sup> Further, a kinship parent has been statutorily defined, for example, in Maryland as “an individual who is related by blood or marriage within 5 degrees of consanguinity or affinity . . . to a child who is in the care, custody, or guardianship of the local department [of child services] and with whom the child may be placed for temporary or long-term care *other than adoption*.”<sup>364</sup> As the Maryland statute implies, there is an underlying premise within the child welfare system that kinship adoption is not as readily facilitated as “stranger” adoptions.

It should be noted that, historically, federal child welfare policy systematically overlooked the role of kinship caregivers, particularly informal kinship care where child welfare agencies are not involved.<sup>365</sup> Therefore, if states provided financial assistance to kin, the families

*African American Tribe: Facing the Adoption Crisis*, 36 BRANDEIS J. OF FAM. L. 201 (1997–1998).

361. U.S. Dep’t of Health and Hum. Servs., Administration for Children and Families, Children’s Bureau, *Report to Congress on Kinship Foster Care V 5*, at <http://aspe.hhs.gov/hsp/kinr2coo/index.htm> (June 2000).

362. Marla Wilhelmus, *Mediation Kinship Care: Another Step in the Provision of Culturally Relevant Child Welfare Services*, 43 SOCIAL WORK 117, 118 (1998); see also O’Laughlin, *supra* note 15, at 1447. Kinship care is “[a]ny form of residential caregiving provided to children by kin, whether full time or part-time, temporary or permanent, and whether initiated by private family agreement or under custodial supervision of a state child welfare agency.” *Id.*

363. *Report to Congress*, *supra* note 361 at 5.

364. MD. CODE ANN. FAM. LAW § 5-534(a) (Supp. 1997) (emphasis added). Out of a total of forty-five states plus the District of Columbia, twenty states include non-relatives, such as neighbors, godparents, and other adults who have a close relationship with the child, within their definition of kin for kinship care. *Report to Congress*, *supra* note 361, at 18, B-1, B-4 (Table B.1) (listing the various state codes).

365. See The Urban Institute for DHHS, Assistant Secretary for Planning and Evaluation (ASPE), *On Their Own Terms: Supporting Kinship Care Outside of TANF and Foster Care I* (May 30, 2001) (*On Their Own Terms*), available at <http://aspe.hhs.gov/hsp/kinicare01/index.htm>.

received monies through income assistance programs rather than becoming a part of the child welfare system.<sup>366</sup> A loophole exists where a child welfare agency has helped to arrange the placement of a child with a relative, but does not seek court action for custody of the child.<sup>367</sup> Curiously, this “voluntary kinship care” placement or arrangement falls neither within the purview of informal, private kinship care nor formal, public kinship care.<sup>368</sup>

### B. History and Background

Obvious and key benefits of kinship care are family continuity and reduced trauma of separation.<sup>369</sup> However, a concern or challenge to kinship placement may be that similar issues or situations that caused the child’s removal from his or her parents’ home may be present in the kinship placement as well. Further, due to the familial relationship, the birth parent will more than likely have access to the child. Such access is particularly troubling where documented abuse was a reason for the child’s removal. Despite the negative attributes:

Kinship placements enable children to live with persons they know and trust, rather than subjecting them to the potential trauma of living with persons initially unknown to them . . . .

[K]inship placements usually facilitate the transmission of the child’s family identity and history, ethnicity, and culture.<sup>370</sup>

Although the use of kinship foster care has risen dramatically due to the influx of children into the foster care system over the last ten to fifteen years, it remains an “under-recognized component of the foster care system.”<sup>371</sup> Across the nation and across racial boundaries, the influx is undoubtedly due to increased incarceration rates, the drug epidemic, and the spread of HIV and AIDS.<sup>372</sup>

Notably, as the number of kinship foster care homes rose, the number of non-kin foster care homes declined. In 1987, there were 147,000 non-

---

366. *Report to Congress, supra* note 361, at 5.

367. *Id.*

368. *Id.* at 6. The numbers affected are considerable: in 1997, nationwide state agencies arranged for the “voluntary” placement of 283,000 children with kin. *See id.* at 7.

369. *See generally* Helaine Hornby, Dennis Zeller & David Karraker, *Kinship Care in America: What Outcomes Should Policy Seek?*, 75 CHILD WELFARE 397 (1996).

370. RELATIVES RAISING CHILDREN: AN OVERVIEW OF KINSHIP CARE 94 (Joseph Crumbley & Robert L. Little eds., 1997).

371. Note, *The Policy of Penalty in Kinship Care*, 112 HARV. L. REV. 1047, 1048 (1999).

372. *Id.*; *see also Report to Congress, supra* note 361, at 7.

kin foster care homes; in 1990, there were only 100,000.<sup>373</sup> From 1986 to 1990, the number of children placed with kin rose from eighteen percent to thirty-one percent of the total foster care placements, with the largest growth in urban areas.<sup>374</sup> Despite the early rise in kinship care, the most recent DHHS report states that “both the number and prevalence of kinship care children has decreased” since 1994.<sup>375</sup> Obviously, these official DHHS statistics do not include informal, undocumented kinship care placements.<sup>376</sup> For example, according to the 2000 United States Census, approximately forty-two percent of the nation’s grandparents live in a familial constellation where they have responsibility for their grandchildren under the age of eighteen.<sup>377</sup> It should be noted that sixty-two percent of these grandparent-headed households consist of a grandmother alone and eighteen percent of these grandparent-headed households live in poverty.<sup>378</sup>

On a macro level, the statistics are even greater. One study reported that fifty percent of New York City’s 50,000 children in the foster care system had been placed with relative caregivers.<sup>379</sup> A Census Bureau Report in 1993 reported that 4.3 million children nationwide lived with relatives either other than or in addition to their parents.<sup>380</sup> By 1998,

---

373. See Patricia Chamberlin, Sandra Moreland & Kathleen Reid, *Enhanced Services and Stipends for Foster Parent: Effects on Retention Rates and Outcomes for Children*, 71 CHILD WELFARE 387 (1992).

374. RELATIVES RAISING CHILDREN, *supra* note 370, at 95; *Report to Congress, supra* note 361, at 9. “Between 1983 and 1985 and again between 1992 and 1993, the number of children in kinship care grew at a slightly faster rate than the number of children in the United States as a whole—8.4 percent to 6.6 percent.” *On Their Own Terms, supra* note 365, at 5 (citations omitted).

375. *On Their Own Terms, supra* note 365, at 5. “The number of children in kinship care decreased from an average of 2.16 million between 1995–1997 and 1998–2000 and the average prevalence decreased from 3.05 percent to 2.98 percent.” *Id.* at 9 n.4.

376. See Ann E. Schwartz, *Societal Value and the Finding of Kinship Care*, 76 SOC. SERV. REV. 430, 432 (2002).

377. Thus, an estimated 2,350,477 grandparents are responsible for their own grandchildren under the age of eighteen. See United States Census Bureau Statistics, as of April 1, 2000. <http://factfinder.census.gov> (last visited Aug. 31, 2001). In addition, DHHS reports that “[i]n 1998, approximately 2.13 million children in the United States, or just under 3 percent, were living in some type of kinship care arrangement. In 1997, approximately 200,000 children were in public kinship care, well below 1 percent of all U.S. children but 29 percent of all foster children.” *Report to Congress, supra* note 361, at 6.

378. See United States Census Bureau Statistics, as of April 1, 2000. <http://factfinder.census.gov> (last visited Aug. 31, 2001).

379. See Timothy J. Gebel, *Kinship Care and Non-Relative Family Foster Care: A Comparison of Caregiver Attributes and Attitudes*, 75 CHILD WELFARE 5, 6 (1996).

380. See RELATIVES RAISING CHILDREN, *supra* note 370, at xiii - xiv.

although it is unclear how high the total figure for all children living with kin had risen, the Census Bureau reported that four million children nationwide were living with one or more of their grandparents.<sup>381</sup> A 1990 national study estimated that thirty-one percent of children placed by child welfare services were placed in kinship care.<sup>382</sup> DHHS data for the period of April 1996 through September 1996 indicated that thirty-two percent of children in foster care had been with a relative, forty-six percent were in non-relative foster care, and seven percent were in a group home where a number of children live in a dormitory-like setting rather than a family household.<sup>383</sup>

The general goals of the child welfare system are to protect children from danger caused by their parents or other caregivers, to enhance family preservation and support, and to find permanence for the child.<sup>384</sup> As illustrated below, kinship care and adoption achieve these goals.

### C. *The Statutory Framework and Case Law*

The Adoption Assistance and Child Welfare Act of 1980<sup>385</sup> (AACWA) has been touted as supportive of kinship care. However, although AACWA as originally passed by the United States House of Representatives included a provision giving preference to kinship foster care placements,<sup>386</sup> the final act did not contain such provisions.<sup>387</sup> Fortunately, in application, many state legislatures have interpreted the act to include such a preference based on Congress's originally-stated intent.<sup>388</sup>

There are, however, what appear to be concerted efforts to undermine acknowledgement of and support for kinship care. For example, the final version of the Uniform Adoption Act changes course from previous drafts by reversing the order of placement priorities by placing kinship

---

381. See United States Census Bureau Statistics, as of April 1, 2000, available at <http://factfinder.census.gov> (last visited Aug. 31, 2001); see also *Report to Congress*, *supra* note 361, at 34.

382. See RICHARD P. KUSSEROW, USING RELATIVES FOR FOSTER CARE.

383. See National Adoption Information Clearinghouse, *Adoption from Foster Care*, at <http://www.calib.com/naic/adptsear/adoption/research/stats/foster.htm> (last visited May 26, 1999).

384. Christina A. Zawisza, *Protecting the Ties That Bind: Kinship Relative Care in Florida*, 23 NOVA L. REV. 455, 458-59 (1998).

385. See Pub. L. No. 96-272, 94 Stat. 500 (1980).

386. See generally Pub. L. No. 96-272, 94 Stat. 500 (1980).

387. *Id.*

388. Schwartz, *supra* note 376, at 433, 436.

placements last.<sup>389</sup> The funding disparity described below is another example.

Individuals providing formal kinship foster care are eligible to receive federal maintenance payments from the Federal Aid to Families with Dependent Children Foster Care Program (AFDC-FC).<sup>390</sup> This federal program provides federal matching funds to states that provide foster care to AFDC-eligible children.<sup>391</sup> As part of welfare reform initiatives, the AFDC program has recently been renamed and replaced by the Temporary Assistance to Needy Families Program (TANF).<sup>392</sup> To qualify for TANF, a child must meet several eligibility requirements: the child must be a ward of the state, the corresponding state agency must have legal responsibility and have placed the child in a foster home or institution, and the child must have either been eligible for, or have been receiving, AFDC benefits during the month that the petition for removal from the parent's custody was filed by the state agency.<sup>393</sup> Currently, approximately fifteen percent of all AFDC families are so-called kinship care families.<sup>394</sup> Importantly, under federal welfare reform legislation, a five-year lifetime benefit cap has been placed on TANF benefits, and there are certain work requirements for all adult recipients.<sup>395</sup> There is, however, some recently released somewhat-encouraging news for kinship caregivers receiving TANF funds.

In general, states do not impose work requirements or time limits on kinship caregivers who receive child-only TANF grants, because they are under no legal obligation to support the relative child. If kinship caregivers themselves receive TANF payments, federal work requirements and time limits do

---

389. Uniform Adoption Act, § 2-104 (1994) ("Preferences for Placement When Agency Places Minor"). Kinship placement is fourth on a list of five categories, the fifth category being "any other individual selected by the agency." *Id.*

390. *See Policy of Penalty, supra* note 371, at 1051.

391. *See Report to Congress, supra* note 361, at 15.

392. *See Personal Responsibility and Work Opportunity Reconciliation Act of 1996*, Pub. L. No. 104-193, 110 Stat. 2105 (1996). TANF became effective on July 1, 1997. *See Aid to Families With Dependant Children and Temporary Assistance for Needy Families (Title IV-A), Ways and Means Committee*, GREEN BOOK 495 (U.S. Gov't Printing Office) (1998).

393. *Policy of Penalty, supra* note 371, at 1051.

394. *See* Randi Mandelbaum, *Trying to Fit Square Pegs Into Round Holes: The Need for a New Funding Scheme for Kinship Caregivers*, 22 *FORDHAM URBAN L.J.* 907, 910-11 (1994).

395. Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 *N.Y.U. L. REV.* 1121, 1148-50 (2000).



apply. States may exempt relative caregivers from state requirements and may support them using state-only funds.<sup>396</sup>

Notably, foster care benefits are larger than welfare payments.<sup>397</sup> Although legally eligible to apply for these foster care payments, many kinship caregivers do not meet the objective qualifications for foster caregiver status, such as the number of bedrooms and square footage of the living areas, state or county licensing, and minimal training.<sup>398</sup> Therefore, the majority of kinship caregivers rely on the lower TANF welfare payments for support.

Additionally, due to federal reimbursement guidelines that result in higher levels of state funding responsibility, some states refuse to award state foster care payments to eligible kinship foster care givers.<sup>399</sup> In effect, these states are circumventing the long standing United States Supreme Court decision of *Miller v. Youakim*,<sup>400</sup> which held that kinship foster care givers were eligible to receive state AFDC-FC funding on the same basis as non-kin foster caregivers.<sup>401</sup>

Kinship caregivers are also shortchanging themselves on additional state and Federal benefits.

In addition to TANF, kinship caregivers and relative children may be eligible for a wide range of federal and state programs. For example, almost all foster children are eligible for Medicaid, and children cared for by kin who are outside the child welfare system and receive a TANF child-only payment are eligible for Medicaid. Kin are also eligible to receive Supplemental Security Income (SSI) for any related child who meets the disability guidelines of the program. Kin who are income-eligible for food stamps are eligible to receive additional food stamp benefits for related children. Depending upon the state, kin may also be eligible to receive housing assistance, subsidized child care, or emergency financial assistance. But in spite of their eligibility, many kin do not receive this wide range of supports. For example, only 60 percent of kin who are income eligible receive food stamps and only 54 percent receive Medicaid for their related child. In

---

396. *On Their Own Terms*, *supra* note 365, at 7 (citations omitted).

397. For example, in Maryland, the state pays \$165 dollars per month for welfare whereas the foster care payments would be between \$535-\$550 per month. *Report to Congress*, *supra* note 361, at 21. Nationwide, foster care payments vary from \$212 to \$708 per month. *On Their Own Terms*, *supra* note 365, at 6.

398. *See Policy of Penalty*, *supra* note 371, at 1051-52.

399. *Id.* at 1052.

400. 440 U.S. 125, 146 (1979).

401. *Id.*

comparison, 78 percent of all food stamp eligible children participate in the program. Of all children eligible for both TANF and Medicaid, about 65 percent receive Medicaid benefits.<sup>402</sup>

Despite the opportunity for increased benefits as outlined above, some kinship caregivers, even if eligible, may balk at the prospect of further government involvement in and scrutiny of what they view as a private family matter. This may be particularly true in light of the fact that when a child becomes a ward of the state and a kinship caregiver receives government payments, the state is ultimately responsible for the child's care and placement.<sup>403</sup> Thus, similar to the restrictions upon a non-kin caregiver, the kinship caregiver would have a secondary role in making important decisions.<sup>404</sup>

Studies of kinship foster care placements show that relative placements are more stable and the caregivers are more committed to caring for the children as long as necessary.<sup>405</sup> This creates a double-edged sword because while the kinship foster caregiver is willing to care for the children indefinitely, reunification rates are statistically lower for kinship care than for non-kin foster care.<sup>406</sup>

Despite data indicating that children are more likely to fare better when placed in kinship foster care than the home of a stranger, only since 1996 has federal legislation required that states give priority to placing children with relatives rather than non-kin providers as long as the kinship caregiver meets all relevant standards.<sup>407</sup> Further, despite the fact that kinship caregivers have been found to be older, less financially stable, single parents, with less education and poorer health than non-kin caregivers,<sup>408</sup> studies show that kinship caregivers on the whole receive less support, fewer services, and have less contact with state or federal agency workers than do non-kin foster caregivers.<sup>409</sup>

The disparate treatment continued in 1992 when the Ninth Circuit affirmed an opinion upholding an Oregon statute that allowed state

---

402. *On Their Own Terms*, *supra* note 365, at 7.

403. *See generally* Schwartz, *supra* note 376.

404. *See* RELATIVES RAISING CHILDREN, *supra* note 370, at 88.

405. *See* Rebecca Heger & Maria Scannapieco, *From Family Duty to Family Policy: The Evolution of Kinship Care*, 74 CHILD WELFARE 200, 210 (1995).

406. *Id.*

407. *See* 42 U.S.C.A. § 671 (a)(19) (West, Supp. 1998); *see also* O'Laughlin, *supra* note 15, at 1431-32.

408. *See* Jill Duerr Berrick, *When Children Cannot Remain Home: Foster Family Care*, 8 THE FUTURE OF CHILDREN 72, 77 (1998).

409. *Id.*

welfare agencies to spend more money per child if the child is not placed with relatives instead of paying less money per child and enabling more children to live with relatives.<sup>410</sup> This result essentially deprived some children of the option of living with relatives.

Overall, kinship caregivers are less likely, and less willing, to adopt the children in their care.<sup>411</sup> This is undoubtedly due to their reticence to sever a relative's parental rights, particularly where the caregiver is the child's grandparent.<sup>412</sup>

#### D. *Interim and Alternative Programs*

An interim step to adoption is subsidized kinship guardianship. There, the biological parents' rights are not terminated, but there is less government supervision and court intervention than with foster care.<sup>413</sup> However, these subsidies are not reimbursed by the federal government, and therefore, only half of the states have implemented programs.<sup>414</sup>

In light of the issues discussed throughout Part VI, some states have instituted alternative programs outside of both the child welfare and TANF systems to further facilitate kinship care.<sup>415</sup> The 2001 study by the

---

410. See *Lipscomb v. Simmons*, 962 F.2d 1374, 1380, 1384 (9th Cir. 1992).

In a perfect world perhaps every juvenile ward could have a custom-made child care plan funded by the state, giving both the benefits of care provided by loving relatives and medical services, counseling, and other professional services that would answer that child's particular needs at no cost to those relatives. The State of Oregon, finding itself in an imperfect budgetary environment, believed that it has allocated its limited resources in the best possible way in order to accomplish the goals of its foster care program.

At argument it was suggested that Oregon would be on firmer constitutional ground if it were to fashion a need-based schedule of payments to relatives providing foster care. The state is free to adopt any statutory scheme that meets minimal constitutional requirements. It is not the function of the judicial branch of the federal government, however, to fashion new and improved child-care plans for the states.

Whether we would vote for the state's plan if it were placed before us as members of the legislative assembly is not the question we are to decide.

*Id.* at 1384.

411. Rebecca Hegar & Maria Scannapieco, *From Family Duty to Family Policy: The Evolution of Kinship Care*, 74 CHILD WELFARE 200, 210 (1995); Burnette, *supra* note 4, at 492. Sixty-four percent of the children were adopted by former foster parents, fourteen percent were adopted by relatives. NAIC, *Adoptions From Foster Care (as of 01/01/99; Adoption and Foster Care Analysis and Reporting System (AFCRS) data from October 1, 1997 to March 31, 1998)*; see also <http://www.calib.com/naic/adptsear/adoption/research/stats/foster1999.htm> (site visited May 26, 1999).

412. Burnette, *supra* note 4, at 491-93.

413. *Report to Congress*, *supra* note 361, at 50.

414. *Id.*

415. See generally *On Their Own Terms*, *supra* note 365.

Urban Institute, undertaken for DHHS, found fifty-seven alternative programs: thirty-four are subsidized guardianship programs (ten of which are funded through TANF, fourteen receive state funds; and one receives other federal funding); twenty-three are non-subsidized guardianship programs (four of which are funded through TANF; thirteen receive state funds; one receives other federal funding; eight receive local funding; and ten receive private financial support).<sup>416</sup>

Fortunately, more attention is being paid to the needs of kinship caregivers as evidenced by the 2001 DHHS Kinship Care Report.<sup>417</sup> The 2001 DHHS kinship care report listed the following so-called “lessons learned” about kinship care families:

- Kinship [care] families are diverse . . .
- Kinship care families have a wide range of needs . . .
- Kinship care families need more than money . . .
- Kinship care families benefit tremendously from support groups . . .
- Nearly all kinship care families need mental health services . . .
- Kinship care families need safe and accessible transportation . . .
- Kinship caregivers do not access available supports . . .
- Kinship caregivers want permanency, too . . .<sup>418</sup>

In conclusion, to get the country’s foster system out of its current state, education programs must be implemented to disabuse kinship caregivers to the notion that it is in the child’s best interest for parental bonds not to be broken. Stability and permanency are ultimately in the child’s best interest. Kinship foster care and kinship adoption provide stability and permanency while keeping the child within the family.

#### CONCLUSION

In conclusion, the transracial adoption debate is far from over. Counselors are faced with the task of ameliorating the effects of transracial adoption at the back-end inasmuch as race cannot be considered on the front-end. Further, because states continue to implement laws and regulations passed in compliance with the tenets of the federal MEPA/IEAA and ASFA, it may be years until the results of these directives are fully realized. Hopefully, this federal attempt to

---

416. *See id.* at 2.

417. *See generally id.*

418. *Id.* at 25.

resolve the foster care crisis through a “color-blind” approach will not produce deleterious affects on the psyches of transracially adopted African American children.

The extension of kinship care and kinship adoption, perhaps through alternative programs, along with the increased recruitment of pre-adoptive African American families may be the two-pronged solution to the crisis at hand. It is clear that the single-minded approach of transracial adoption is not an adequate solution: there are just too many waiting children.