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A CHILD OF A DIFFERENT COLOR: RACE AS A FACTOR IN ADOPTION AND CUSTODY PROCEEDINGS

SUSAN J. GROSSMAN*

While adoptions concern only a limited number of individuals in a society, the handling of the matter of the disposition of a human life can both reflect that society as well as act back upon it.

D. Fanshel, *A Study in
Negro Adoption* 80 (1957).

I. INTRODUCTION

IN 1944, Gunnar Myrdal examined the "Negro problem" in America and characterized it as "the American dilemma," the "ever-raging conflict" between the white American's national and Christian values on the one hand, and his prejudices, jealousies, interests, and wants on the other.¹ The question of race as a factor in adoption and custody proceedings represents an offshoot of this dilemma which Myrdal never considered but might easily have predicted. Pitted against one another, are two sets of values: one, vesting in home and family great significance for the development of the child and for the health of society as a whole; the other, formed by prejudice and fear, denying that home and family to a child of a different race.

The family has always been viewed as a crucial element in American society. Despite repeated pronouncements that the American family is in a state of disintegration, in many ways "the nuclear family has become *more* important" in recent years.² "By and large, . . . our times are characterized by an increasing concern for strong parent-child relationships" and "increasing attention to . . . the welfare of the child."³ Thus, where a family is broken by divorce, the aim of a custody proceeding is, in theory, to place the child in the best home-life situation possible under the circumstances. Where a child is totally bereft of a family (because of illegitimate birth to a mother unwilling to raise him, for example), adoption is generally considered the best of several alternatives. Indeed, adoption's greatest value "lies in restoring to the child the security of permanent family life."⁴

Custody and adoption decisions have not been left, in our society, to the

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1. G. Myrdal, *Introduction* to *An American Dilemma* at lxxi (20th anniversary ed. 1962).

2. J. Udry, *The Social Context of Marriage* 10, 18 (1966). (Emphasis in original.)

3. C. Foote, R. Levy & F. Sander, *Cases and Materials on Family Law* 5 (1966) [hereinafter cited as *Foote, Levy & Sander*].

4. 1 M. Schapiro, *A Study of Adoption Practice* 16 (1966) [hereinafter cited as 1 *Schapiro*].

whims of private ordering.⁵ The disposition of a child is viewed as something in which the whole of society has a serious interest, and, as a result, it is hedged by social and legal restrictions reflecting the notions of social workers, judges, legislators, and ultimately the community itself. Like anything else subject to such influences, the benevolent goals of custody and adoption proceedings are sometimes twisted in response to them. One victim of this distortion may be the white child ordered to leave his mother merely because she has chosen a Negro as her second husband. Another victim is the unwanted Negro or part-Negro child. A home for him with white adoptive parents may be prohibited by statute, denied by the courts, discouraged by social agencies—or it may simply raise a sufficient number of eyebrows in the community to make its happening quite unlikely.

Is this situation a cause for concern? It may be, at least in the area of adoption, as an examination of the broad social problem involved there indicates. The demand by white couples for adoptable white children, once very great, has declined in recent years as the number of white children available for adoption has increased relative to the number of prospective parents. Yet even today it seems safe to say that almost any white child released for adoption can be placed in a satisfactory home without great difficulty.⁶ At the same time, the number of Negro and part-Negro children who might be adopted has also risen—but these children's prospects for adoption are much worse.⁷ A host of factors are credited with contributing to this result.

First, the illegitimacy rate among Negroes is relatively high. While this rate has increased among both whites and Negroes in recent years, the increase among whites has been from 2 percent in 1940 to 3.07 percent in 1963, compared with the increase from 16.8 percent to 23.6 percent among Negroes.⁸ Although for various reasons unwed Negro mothers may want to keep their children more often than unwed white mothers, there is evidence indicating that many more would give up their children if they knew that adoptive homes were available.⁹

Social agencies, which handle most non-relative adoptions, service few Negro unmarried mothers in proportion to their numbers. As a consequence, some agencies have never handled Negro children, or they have handled very few. This situation—although currently undergoing some change—has reinforced the Negro mother's tendency to keep her illegitimate children, even when she doesn't want to.¹⁰

Negro married couples, who would be the most likely adoptive parents for

5. See the discussion of this concept in H. Hart & A. Sacks, *The Legal Process* 207-209 (tent. ed. 1958).

6. Foote, Levy & Sander 506-507.

7. 3 M. Schapiro, *A Study of Adoption Practice* 9-10 (1957) [hereinafter cited as 3 Schapiro]; Herzog & Bernstein, *Why So Few Negro Adoptions?*, 12 *Children* 14 (1965) [hereinafter cited as Herzog & Bernstein].

8. Office of Policy Planning & Research, U.S. Dep't of Labor, *The Negro Family: The Case for National Action* 7 (1965) [hereinafter cited as *The Negro Family*].

9. Herzog & Bernstein 14-15.

10. *Id.*; 1 Schapiro 49-54.

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Negro children,¹¹ adopt children to a relatively smaller extent than do white couples. The primary explanation appears to lie in the generally lower degree of financial resources in the Negro community.¹² One student of the problem concludes that the amount of income is probably less significant a consideration than the stability of employment and income.¹³ Allied to economic insecurity may be a generally uneasy feeling about the future: "[T]o attain that state of mind that makes it possible to contemplate the future with any measure of equanimity is difficult for everyone these days—and perhaps more so for Negroes. . . ."¹⁴

Another probable factor is the relatively high degree of family instability among Negroes. One recent study has noted some relevant statistics: "Nearly a quarter of Negro women living in cities who have ever married are divorced, separated, or are living apart from their husbands." While in 1940, both whites and Negroes had a divorce rate of 2.2 percent, by 1964 "the white rate had risen to 3.6 percent, but the nonwhite rate had reached 5.1 percent. . . ."¹⁵ This high proportion of marital instability of course reduces the number of Negro couples who might adopt a child.¹⁶

There may also be significance for adoption in that "the law represents to the Negro a punitive power" and that previous experience with social agencies has in many cases adversely affected the Negro's opinion of agencies.¹⁷ Agencies themselves have also been blamed for insisting upon unrealistic standards for Negro applicants, and for a number of other practices which have, in general, inhibited adoption by Negro couples.¹⁸

Whatever the causes, the result is that "a much smaller percentage of Negro children is adopted than white children."¹⁹ There may be in this result "solid grounds for concern," for where a child is neither adopted nor absorbed into the mother's family without difficulty, he will remain indefinitely in foster or institutional care or will be raised by a mother "unable or unwilling" to care for him adequately.²⁰ The children who grow up in such environments are likely to have less chance "to develop into normal, integrative personalities."²¹

11. See the discussion of "matching" in *infra* Sec. II(B) (2) pp. 318-25.

12. 3 Schapiro 11; Herzog & Bernstein 16-17.

13. D. Fanshel, A Study in Negro Adoptions 83 (1957). But the same author also comments that economic "marginality is experienced differently by individuals" and that further analysis is required to determine why "some couples, whose economic circumstances parallel those who have been able to move into adoption, have made the choice not to have a child." *Id.* at 67.

14. Deasy & Quinn, *The Urban Negro and Adoption of Children*, Child Welfare (1962), quoted in Herzog & Bernstein 16.

15. The Negro Family 6-8.

16. Indeed, when only husband-wife families with heads under 45 years of age were compared, the rate of adoptions by Negroes was approximately as high as that by whites. When families with incomes under \$3000 were excluded from this group, the Negro rate was even higher than the white. Herzog & Bernstein 17.

17. 3 Schapiro 12.

18. See *id.*; D. Fanshel, *supra* note 13, at 84-85; Herzog & Bernstein 16.

19. 3 Schapiro 9.

20. Herzog & Bernstein 14.

21. Address by N. Jackson, National Conference on Adoption, January, 1955, quoted in 3 Schapiro 10.

Recognizing that attempts to increase the number of Negro adoptions have not met with much success in the past, some have suggested such possible alternative approaches as modifications in agency policies and practices, *e.g.*, subsidizing a child in a Negro home lacking nothing but financial ability, and the expansion of resources other than adoption, *e.g.*, improving group care.²² Others, however, have proposed that greater attention be given to "the possibility of interracial placement."²³ As one worker in the field has phrased it: white adoptive homes for Negro children are "the obvious conclusion."²⁴

This proposal is a controversial one. It calls for an examination of current law and practice in the area of adoption and in the related field of custody determinations. It also requires careful consideration of the social and psychological factors inherently involved, and a discussion of the constitutional questions raised. In analyzing these considerations, the following theses will, in general, be maintained: That interracial adoption must not be illegal under statutory law, must not be denied by the courts in the absence of compelling reasons to support such a denial, and must receive continued encouragement from social agencies; further, that, in a custody determination, a difference in race must not override all other considerations. It is submitted that, as a result, the development of the children involved will be, on balance, somewhat more sound than otherwise, and that society as a whole will benefit.

II. PRESENT LAW AND PRACTICE

A. Statutory Law

Adoption "aims at creating a parent-child relationship—usually biologically accomplished—through the medium of law. . . ."²⁵ Because it was unknown at common law, adoption was at first legal only in those states (notably, Louisiana and Texas) whose law was based on the civil law system, which has made provision for adoption since the Roman era. In 1851, Massachusetts enacted a statute generally recognized as the first adoption law, and the trend towards the enactment of adoption statutes had begun. Today every state has such a statute.²⁶

Adoption law, as the "creature of statute," varies considerably from state to state. Most jurisdictions, however, follow a fairly general procedure which can be briefly summarized.²⁷ The first step in the adoption process is the selection of the child to be adopted. A significant proportion of all adoption proceedings are adoptions by relatives, usually a stepparent. In 1964, 46 percent of the adoption petitions granted in the United States were granted to relatives of the child.²⁸ Most

22. See, *e.g.*, Herzog & Bernstein 17-18.

23. Letter from Charles B. Olds, Executive Director, Children's Home Society of Minnesota, commenting on Herzog & Bernstein in *Readers' Exchange*, 12 *Children* 128 (1965).

24. Letter from Los Angeles County Foster Home Recruitment Director, *id.*

25. 1 Schapiro 12.

26. *Id.* at 17-19.

27. This summary is, except where otherwise noted, based upon M. Leavy, *The Law of Adoption passim* (2d ed. 1954).

28. U.S. Bureau of the Census, *Statistical Abstract of the United States: 1966*, at 308 (87th ed. 1966).

non-relative adoptions—about two-thirds—are arranged by public or private agencies.²⁹ The remainder consists of “independent placements,” which in some jurisdictions are restricted or virtually prohibited to prevent the possibility of unhappy placements by “careless and untrained” persons.³⁰ Bearing upon the selection of a child are state statutes, as well as agency practices and judicial sentiments, regarding “who may adopt” and “who may be adopted.” There are varying requirements in these two areas as to age, race, religion, residence, and other qualifications of the parties.

The legal proceeding is generally begun by the filing of a petition, a “formal demand for the issuance by the court of the adoption order.” The petition must contain certain information required by the state’s adoption statute, and is usually filed in a probate, juvenile, or family court, or other courts of similar functions. Where the child does not reside in the same state as the adopting parents, a venue question may arise: about half the states require that proceedings be brought in the petitioners’ home county, while the other states generally allow a choice between the child’s and the parents’ home county. Consents to the adoption must usually have been obtained from the natural parent(s) or other similarly-interested parties.

After the petition is filed, the case is set for hearing. In most states, an investigation by an agency of the suitability of the adoption is required, and the report that results is considered at the hearing. The court’s guiding principle is “the best interests of the child.” Approval by the court means a temporary or final order of adoption, and the procedure, for most cases, is completed.

Where a court is called upon to determine the custody of children following separation or divorce of their parents, “the guiding shibboleth,” as in adoption, is the child’s best interests. The criteria weighed by the courts include, pre-eminently, the “fitness” of the contestants, while subsidiary factors such as age (and sometimes preference) of the child, and financial standing, race, and religion of the contestants have also been considered. Most jurisdictions give a statutory preference to the mother as a custodian for young children, while the father is sometimes preferred for teen-age children, especially boys.³¹

American jurisdictions treat the factor of race in a variety of ways in their adoption statutes: (1) the statute may expressly prohibit interracial adoption; (2) the statute may mention race as a relevant consideration; (3) the statute may fail to make any mention of race at all.³²

29. *Id.*

30. Foote, Levy & Sander 546.

31. *Id.* at 851-53.

32. The statutes identified *infra* within categories (1) and (2) are referred to in *id.* at 526; M. Cohen, Race, Creed and Color in Adoption Proceedings 3 (1964); and/or J. Greenberg, Race Relations and American Law 399 (1959) [hereinafter cited as Greenberg].

As a means of enforcing their miscegenation statutes, some states also prohibited the adoption of illegitimate children whose parents could not have lawfully married in that state. See, e.g., S.C. Code Ann. § 10-2585 (1962). Mixed illegitimate children were therefore unadoptable by either race in those states. Note, *Adoption in South Carolina*, 9 S.C.L.Q. 210 (1957).

(1) *Statutes Prohibiting Interracial Adoption*

The adoption statutes of two states, Louisiana and Texas, expressly prohibit interracial adoption.³³ The fact that adoption law in these two states is based on the civil law may make this finding less than coincidental. It seems likely that here, in the civil law tradition, codification of this prohibition has occurred, while the legislatures of other states with a similar outlook on this issue have, in the common-law tradition, relied upon the courts to interpret their more generally-worded statutes to produce the same result.

(2) *Statutes Making Race a Relevant Consideration*

Two other states' statutes provide for specific consequences to follow attempts to create an interracial home under certain circumstances, although interracial adoption as such is not expressly prohibited. South Carolina's statute³⁴ makes it unlawful for a white person having custody of a white child to give the child "permanently into the custody, control, maintenance or support of a negro." While this is a misdemeanor, characterized as an "offense against public policy," there is apparently no provision to the contrary, *i.e.*, making unlawful the giving of a Negro child to a white. In Missouri,³⁵ the adoption of a child who proves to be of a race whose members persons of the adopting parents' race are prohibited by law from marrying, can be annulled by the courts. This provision is apparently discretionary and, hinged directly to the Missouri miscegenation law, has probably fallen with it.³⁶

Ten other states require: (a) that the race of the parties be considered either by those making the investigation prepared for the court, or by the court itself;³⁷ or (b) that the race of the child, in some cases the race of the adoptive parents, and occasionally the race of the natural parents, be stated on the petition for adoption.³⁸ The significance of these statutes would appear to be that the agencies and the courts involved in adoption proceedings in these states are made

33. La. Rev. Stat. Ann. § 9:422 (1965): "A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race." Tex. Rev. Civ. Stat. Ann. arts. 46a(8), 46b-1(4) (1959): "No white child (adult) can be adopted by a negro person, nor can a negro child (adult) be adopted by a white person."

A Texas court has recently held its statute unconstitutional "as violative of . . . the Texas Constitution, as well as . . . Amendment XIV of the United States Constitution." The case arose when a Negro Army sergeant, seeking to adopt the white children of his white wife, had his petition for adoption denied solely on the basis of the statute. *Matter of Gomez*, Tex. Ct. of Civ. App., 8th Dist., Nov. 1, 1967 (per curiam), 36 U.S.L.W. 1085, 2339-40 (Dec. 12, 1967)."

34. S.C. Code Ann. § 16-553 (1962).

35. Mo. Ann. Stat. § 453.130 (1956).

36. See Cook & Eppenberger, *Adoption Act*, J. Mo. B. 228 (1948).

37. Ga. Code Ann. § 74-411 (1964); Mass. Ann. Laws ch. 210, § 5A (1958); Mich. Stat. Ann. § 27.3178(545) (1957 Supp.); N.H. Rev. Stat. Ann. § 461:2 (1955); Ohio Rev. Code Ann. § 3107.05E (Page 1953).

38. Fla. Stat. Ann. tit. 6 § 72.12 (1964); Ind. Ann. Stat. §§ 3-115, 3-116 (1946); Okla. Stat. tit. 10, § 60112(1) (c) (1961); Pa. Stat. Ann. tit. 1, § 1(d) (1963); Wash. Rev. Code Ann. § 26.32.060 (1961).

South Dakota's statute, S.D. Code § 14.0406 (1960 Supp.), requires this information on the order of adoption.

aware of the legislative decision that race is a factor which must be considered in the adoptive process. Race is not the only factor pointed out in this fashion, however, and the courts are free to interpret this legislative language as they see fit.

(3) *Statutes Making No Mention of Race*

The adoption statutes in a majority of American jurisdictions make no mention of race. In these states, therefore, whether or not interracial adoption can be accomplished is ultimately determined by the courts—in particular, by each individual judge's own interpretation of the "best interests" of the child. Significantly involved in this process are the public and private adoption agencies in the state. In view of the high incidence of agency-placed adoptions, and the usually high degree of reliance placed on agency recommendations by the courts, the outlook of these agencies may decide—regardless of the attitudes of the judiciary—whether interracial adoption occurs to any substantial extent or (especially where state law prohibits independent placement by other than close relatives) whether it takes place at all.

Statutory provisions concerning custody apparently do not deal specifically with such factors as race but leave the entire decision to the courts under the general "best interests" standard. (Of course, in those states which have prohibited miscegenation up to the present day, a white mother's remarriage to a Negro has been impossible within the state, so the question was unlikely to arise where legislation concerning it might most likely have been anticipated.)

B. *Practice*

(1) *Judicial Practice*

(a) *Adoption*

In the two states where statutes have expressly prohibited interracial adoption, judicial practice has presumably followed the statutory law.³⁹ But what about judicial practice elsewhere? It is difficult to know much about working judicial usage in this area because few reported cases deal with the question of interracial adoption.⁴⁰ Although cases raising the question are not numerous, a

39. The writer has uncovered no cases on this point. *But cf.* Hodge's Heirs v. Kell, 125 La. 87, 51 So. 77 (1910), where a testator's adoption of his illegitimate children by his "colored concubine" was upheld when collaterally attacked, since the parents could have legally married at the time the children were conceived (prior to the enactment of the state's miscegenation statute); the children could therefore have been legitimized by acknowledgment and were consequently adoptable. Annot., 54 A.L.R.2d 905, 909 (1957).

40. Greenberg, noting this at 351, attributes it to the infrequent occurrence of such adoptions, but other contributing factors may be involved. For one thing, petitions for adoption are rarely denied, especially where a licensed agency has made the placement, supervised its consequences for a period of time, and recommended approval of the petition to the court. Where an interracial adoption receives this sort of sanction, probably few judges will ignore the agency's work and decide singlehandedly that the placement is adverse to the child's "best interest."

consideration of racial factors appears to be "standard practice" in most states, even in the absence of any mention of race in their statutes.⁴¹

In the South it is commonplace that many laws which are "fair on their face" in the statute books are quite different when enforced. Thus, while most of the Southern states do not specifically forbid interracial adoption by statute, one authority has written that such adoptions "will rarely, if ever, be approved in the courts. . . ."⁴² Indeed, it would be absurd to imagine that the courts of a state like Mississippi, whose statute calls only for

the material facts upon which the court may determine whether the child is a proper subject for adoption, whether the petitioners or petitioner are suitable parents for the child, whether the adoption is to its best interest, and any other facts or circumstances which may be material to the proposed adoption,⁴³

would enforce that provision to make the creation of an interracial family possible. It is probably safe to say that miscegenation statutes have gone hand in hand with the denial of interracial adoptions in the courts: the policy of the former necessarily precluded the latter as well.⁴⁴

The Southern courts, however, are not alone in reading racial considerations into their adoption laws. It has been noted, for example, that Iowa's statute "contains no restriction relative to race or religion, but these factors are considered by social workers and judges. . . ."⁴⁵ Apparently, as one writer has commented, even in America's more "enlightened" communities, judges, "being . . . very much aware of the importance of skin color in American society, . . . tread lightly in cases involving interracial adoption or custody."⁴⁶ A review of some cases which have been reported in the area may be helpful at this point.

Perhaps the leading case dealing with the question of interracial adoption (although somewhat indirectly) is the 1955 decision of the United States Court of Appeals for the District of Columbia, *In Re Adoption of a Minor*.⁴⁷ In that case a child had been born out of wedlock to a white mother in 1949. In 1951 the mother married a Negro, who later petitioned to adopt the child with the mother's consent. (The white father's whereabouts were unknown.) Although the child lived with his mother's husband since the marriage, and they had "supported and carefully reared the child as their own," Judge Holtzoff denied the petition in the district court, writing:

Ordinarily such an adoption [of a child born out of wedlock] should be not only approved but encouraged. [But in this case a] problem arises out of the fact that the stepfather is a colored man, while the

41. Greenberg 351 n.48. See also M. Leavy, *supra* note 27, at 32; Annot., 54 A.L.R.2d 905, 909 (1957).

42. M. Leavy, *supra* note 27, at 32.

43. Miss. Code Ann. § 1269-05 (1956).

44. For corroboration of this point see *infra* Sec. B(2) pp. 318-25.

45. Uhlenhopp, *Adoption in Iowa*, 40 Iowa L. Rev. 228, 234 (1955).

46. *Are Interracial Homes Bad for Children*, *Ebony*, March, 1963, in *Marriage Across the Color Line* 68 (C. Larrison ed. 1965) [hereinafter cited as Larrison].

47. 228 F.2d 446 (D.C. Cir. 1955) (Bazelon, J.).

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mother and boy are white people. This situation gives rise to a difficult social problem. The boy when he grows up might lose the social status of a white man by reason of the fact that by record his father will be a negro. I feel the court should not fashion the child's future in this manner.⁴⁸

The appellate court held that denial of the petition was erroneous and ordered that it be granted. The opinion, written by Judge Bazelon, noted that under the District of Columbia statute the court's primary duty was "to determine the best interests of the infant." Denial could not rest

on a distinction between the "social status" of whites and Negroes. There may be reasons why a difference in race . . . may have relevance in adoption proceedings. But *that factor alone cannot be decisive* in determining the child's welfare. It does not permit a court to ignore all other relevant considerations. Here we think those other considerations have controlling weight.⁴⁹

Judge Bazelon noted that the child was happy and receiving loving care in the home—and would continue to live there in any case. Thus, denying the petition for adoption would serve only to deprive him of legitimate status.⁵⁰

Two other recent cases more nearly approach the focal problem of adoption of a nonwhite child by white parents. In one, *Matter of the Adoption of Baker*,⁵¹ a probate court judge in Cleveland, Ohio, denied an adoption petition because of the different racial backgrounds of the parties. The judge reportedly said, "The good Lord created five races and if he intended to have only one, he would have done so. It was never intended that the races should be mixed."⁵² As described by Judge Fess on appeal, the petitioners were a native American Caucasian husband and his naturalized Japanese-born wife. The child, born out of wedlock to a mother of English descent and a Puerto Rican father, had been surrendered to a social agency, which had difficulty placing her in a foster home "because of her mixed nationality background." She was finally placed with the petitioners at about one year of age, and when (upon their filing of an adoption petition) the agency was appointed by the court to investigate the suitability of the adoption, it reported that the child was well and happy, and that her adjustment and development in the home were excellent. The agency described the petitioners as "loving, capable parents" and unqualifiedly recommended allowing the adoption.

Great weight should be accorded this recommendation, said the appellate court. Judge Fess acknowledged that, under Ohio law, the investigating agency must take into account "racial, religious, and cultural backgrounds," and that promotion of the child's welfare must guide the court. But while a child should

48. *Id.* at 447.

49. *Id.* at 448. (Emphasis added.)

50. *Id.*

51. 117 Ohio App. 26, 185 N.E.2d 51 (1962).

52. Larrison 67.

ordinarily be placed in a family with the same background, any other placement, he added, "is not precluded."

In considering the best interests of the subject child, it should not be overlooked that we are dealing here with an unwanted waif whose father is unknown and whose mother is unable to provide a home with . . . love and affection. . . . Prior to placing the child with the petitioners, five other couples seeking children declined to receive the child in their homes. As we view it, the only alternative . . . is to have the child remain an illegitimate orphan to be reared in an institution. Orphanages are all well and good but they do not provide a real home with the attendant care, love and affection incident to the relation of parent and child.⁵³

The court remanded the case to the lower court with directions to grant the petition.⁵⁴

The last case, and the most directly in point, is *Rockefeller v. Nickerson*.⁵⁵ The petitioners, reportedly a "well-to-do white couple of Amityville, Long Island," had applied to adopt a Negro child, "one of the thirty . . . then boarded by the Nassau Welfare Department at the County Home for the Aged."⁵⁶ When the application was refused by the commissioner of welfare, petitioners sought an order to compel acceptance. The Supreme Court of Nassau County upheld the welfare department, holding that the alleged unwritten departmental policy not to accept white foster parents for Negro children was not established by the evidence. The petitioners were not considered, said Justice Meyer, for a number of other reasons—the size of their present family (three natural children, two—one Korean and one Negro—adopted), their physical capability to have children, their adoption of another child a few months earlier, the mother's intention to continue working as a kindergarten teacher.⁵⁷ In light of these circumstances, "the court cannot say that the Department's action . . . was arbitrary or unreasonable." The only evidence to the contrary was the "personal views" expressed by a department official to the petitioners "concerning some of the problems that might arise from interracial adoption."⁵⁸ While the court cited *In Re Adoption of a Minor*, presumably with approval, by simply upholding the department's

53. Matter of the Adoption of Baker, 117 Ohio App. 26, 28, 185 N.E.2d 51, 53 (1962).

54. *Id.*

55. 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962).

56. Larrison 71.

57. *But cf.* People *ex. rel* Portnoy v. Strasser, 303 N.Y. 539, 544, 104 N.E.2d 895, 897 (1952) (Desmond, J.), where in a custody case the court said: "Outside employment and the use of nursery schools by a mother are not things that courts should try to control. . . ." See also Child Welfare League of America, Standards for Adoption Service 37-38 (1959): "Where a woman who is otherwise suitable as a mother for a particular child plans to continue to work, consideration should be given to her capacity to provide the mothering and care that the child needs, and to her ability to make adequate plans for him while she is at work."

58. *Rockefeller v. Nickerson*, 36 Misc. 2d 869, 870, 233 N.Y.S.2d 314, 315 (Sup. Ct. 1962).

exercise of discretion as reasonable it avoided a holding on the question whether or not an adoption may be denied solely on a racial basis.⁵⁹

These three decisions, if representative of current judicial practice in this field (at least on the appellate level), indicate a trend towards the acceptance of interracial adoption under some circumstances—but it is a very shaky trend. The Bazelon opinion's declaration that "a difference in race . . . alone cannot be decisive in determining the child's welfare" in adoption proceedings is stated broadly, but it can be narrowed considerably in another factual situation. That is, while a court may not "ignore all other relevant considerations," the non-racial considerations will not necessarily be given "controlling weight," as they were in the 1955 case. For example, because that case involved adoption by a stepparent, the court pointed out that the child would remain in the same home whether adopted or not. This would rarely be the case in the ordinary adoption proceeding. Even where the petitioners are the child's foster parents, there is a very good chance that the child will be removed from their home sometime in the future. Further, the child in *Minor* had not been "placed" in the home in the usual non-relative adoption manner, but had simply remained with his mother after her remarriage. A court may be far more reluctant to sanction an interracial situation which has not come about so naturally.

The *Baker* decision would be more notable here if one of the parties had been Negro or part-Negro. Nevertheless, it is significant as a precedent leaning strongly in favor of interracial (or "intercultural") adoption, at least when the alternative appears to be institutional care. Its significance is enhanced by the fact that Ohio's adoption statute is one which requires a consideration of "racial background."⁶⁰

The *Rockefeller* decision, although technically correct, would seem to be the least satisfactory, for the reason that, in narrowing its examination to the evidence presented in court which bore on departmental policies regarding interracial adoption, the court failed to consider the practical outcome of the case. Upholding the refusal to accept the petitioners' application to adopt an unwanted child, boarded by the state in an institution, with small hope for a permanent placement in a loving home, the court chose to enumerate the alleged flaws in the petitioners and concluded that the refusal was therefore "not unreasonable." Clearly, this decision cannot be justified as being in the child's best interests. Although the court's citation of the Bazelon opinion suggests that the racial factor was not "decisive" (and there is no way of knowing whether or not the couple might have been permitted to adopt a white child), perhaps in this case it *should* have been. That is, perhaps the agency and the court should have examined the child's realistic prospects—as a Negro—for adoption elsewhere, and then judged the petitioners in light of that sobering outlook. Where a couple are capable of bearing their own children, for example, it may be justified to deny

59. See the discussion of this case in Alexander, *Family Law, 1963 Survey of N.Y. Law*, 15 *Syracuse L. Rev.* 369, 378 (1964).

60. See *supra* note 37 and accompanying text.

them a child for whom many applicants are anxiously competing. But this hardly seems a realistic approach for a child deemed generally undesirable, who will in all likelihood be left homeless. Surely a court's reviewing power can be extended beyond legal niceties to shape a policy more realistic and more responsive to the needs of the child.

(b) *Custody*

Whether or not the courts will sanction the creation or the continued existence of an interracial family has perhaps been at issue more often in custody cases than in cases dealing with adoption.⁶¹ Five recent cases reveal the nature of the problem in this area and their varied treatment by the courts.

In *People ex rel. Portnoy v. Strasser*,⁶² the white mother of a child by her first husband, also white, had upon divorce married a Negro. The child's maternal grandmother subsequently petitioned a New York court to take the child from its mother and grant custody to herself, alleging a number of faults with the mother's character and care of the child, including the fact that she had married a man "of a race and religion different from that of the child."⁶³ The New York Court of Appeals did not allow the requested shift in custody, declaring that only "the gravest reasons" permit a court to transfer a child from its natural parent to any other person.⁶⁴ The Court found "no such proof of neglect as would authorize any court to take an infant from its mother, or interfere in the internal arrangements of family life. . . ."⁶⁵ It is probably significant that the child's white father did not participate in this litigation.

In *Murphy v. Murphy*,⁶⁶ a white mother, upon divorce from her white husband, obtained custody of their young son, while the father was given custody of their daughter. The mother married again, to a Negro, whereupon the father sued to obtain custody of the son. The trial court approved the change, and on appeal its decision was affirmed by the Connecticut Supreme Court. The court balanced one set of considerations (the mother's excommunication from the Catholic Church following her remarriage, her failure to give the boy a religious education, and her alienation of her own parents by her remarriage which had deprived the boy of their "care and good influence") against those which the child's placement with his father implied (the care by his paternal grandmother, the company of his sister, "proper religious training," and visits with his maternal grandparents), and held that the trial court's conclusion that the child's best

61. This may be because divorce followed by interracial remarriage (and the subsequent custody dispute) is more common than interracial adoption, or because, as Greenberg suggests at 352, adoption decrees are inherently different from custody decrees, which can be brought into court for modification whenever there is a change in circumstances.

62. 303 N.Y. 539, 104 N.E.2d 895 (1952) (Desmond, J.).

63. It is reasonable to surmise, with Greenberg, that the underlying ground of the grandmother's complaint, "though not articulated as such, was that the stepfather was a Negro." Greenberg 352 n.52.

64. *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 542, 104 N.E.2d 895, 896 (1952) (Desmond, J.).

65. *Id.* at 544, 104 N.E.2d at 893.

66. 143 Conn. 600, 124 A.2d 891 (1956).

interest would be served by the change in custody was justified. As for the mother's claim that the decision was "based upon the fact that she had married a Negro," the court coolly replied that "such a consideration was not included in those which led the court" to its conclusion.⁶⁷

In *Fountaine v. Fountaine*,⁶⁸ the children involved had been born to a white mother and a Negro father. Upon their divorce, the father obtained custody of both children, who thereafter lived with him and his mother, stepfather, and sisters. When the mother remarried, this time to a white, she set up home with room for the children in a Chicago neighborhood "in which both white and colored people live, in which there are many mixed marriages and both colored and white children attend the same school."⁶⁹ With her new husband's consent, she petitioned for custody. At the hearing, the father claimed that the children had "the outstanding basic racial characteristics of the Negro race" and that they would "make a better adjustment to life if allowed to remain identified, reared and educated with the group and basic stock of . . . their father."⁷⁰ Although the judge found the mother "fit" and her home as suitable for the children as the father's, he denied the change in custody, commenting that if a difference in color had not been involved, he would not have hesitated for "a moment in awarding custody to the mother."⁷¹

On appeal, the mother claimed that the decision, based solely on race, was an abuse of discretion. The appellate court noted that the trial court had wide discretion under the statute in determining custody questions; however, it held that on the record the trial court's conclusion in this case had been reached "solely because of the racial physical characteristics of the children before him. . . ." The court condemned such practice, stating,

the question of race alone [cannot] overweigh all other considerations and be decisive of the question. If this was the sole and decisive consideration, . . . and it so appears from the record . . . , [the trial court's] discretion was not properly exercised. . . .⁷²

The case was therefore remanded to the lower court,⁷³ the standard announced in *In Re Adoption of a Minor* having been applied to a custody dispute: race alone cannot be "decisive."

Potter v. Potter,⁷⁴ a case resembling *Murphy* at both the trial and the appel-

67. *Id.* at 603-04, 124 A.2d at 893.

68. 9 Ill. App. 2d 482, 133 N.E.2d 532 (1956).

69. *Id.* at 484, 133 N.E.2d 532, 534.

70. *Ibid.*

71. *Id.* at 485, 133 N.E.2d at 534.

72. *Id.* at 486, 133 N.E.2d at 535.

73. "Following the issuance of the Appellate Court mandate, the [father] seized both of the children and fled with them to Los Angeles, California, where he is, according to our information, residing with his second wife and both of the children." Letter to the authors from E. P. Taylor, att'y, Dec. 23, 1960, in J. Goldstein & J. Katz, *The Family and the Law* 1074 (1965). This unhappy result cannot fairly be attributed to the appellate court's treatment of the question of race but, rather, more likely reflects the father's unwillingness to give up the custody of his children which he had already held for several years.

74. 372 Mich. 637, 127 N.W.2d 320 (1964).

late level, arose in Detroit, Michigan. Upon the divorce of a white couple, the mother of their infant daughter was granted custody conditioned upon her remaining in Michigan. Shortly thereafter, she left the state with the child and married a Negro. The natural father later brought the child back to the Midwest and left her with his parents in Ohio until a Michigan court ordered her placed temporarily with her maternal grandmother in Detroit. In the custody suit which followed, the trial court held that the child's best interests would be served by her remaining in the physical custody of her grandmother, with legal custody in her father.

In upholding this decision, the Michigan Supreme Court found significant the mother's leaving the state with her child contrary to the original custody order; she was, in the court's view, "a young woman who has been in serious rebellion," lacking "certainty and stability."⁷⁵ Further, the child had since her return to the Midwest been in the home of her maternal grandmother, where she was receiving care and affection. ("That such home is a suitable and proper one for the upbringing of a young child is not open to question," the court asserted, ignoring that the same home had produced the child's "rebellious" young mother.)⁷⁶ Finally, the court noted the mother's "attempt . . . to inject into the case questions of civil rights, under the Fourteenth Amendment to the Federal Constitution, involving racial equality," and responded: "It is obvious . . . that [the trial judge] did not consider such racial differences as significant at the present time. We fully concur in this view."⁷⁷

Dissenting, Judge Smith pointed out as "forgotten" that the child had apparently been "happy, content, and well adjusted with her mother and stepfather in California before abduction and return by the father. . . ." *Both* parents had exercised self-help "for which contempt could lie." But these considerations should not be controlling, in any event. "This child should be returned to her mother" simply because of Michigan's statutory presumption that the mother should have care and custody of children under twelve where, as here, there is no showing of physical cruelty, habitual drunkenness, gross neglect, or moral depravity. He noted what life with her mother and stepfather offered the child: "parental love and cooperation" in "a wholesome community where experiences in democratic living are promising . . . , a substantial home sustained by adequate income . . . a full-time mother . . . ," and concluded (in an obvious reference to the factor of racial difference):

The fears which form the muted thread of this whole proceeding are patently groundless insofar as the present is concerned. If problems should develop in the future, corrective measures can be taken at that time.⁷⁸

75. *Id.* at 647, 127 N.W.2d at 326.

76. *Id.* at 642-44, 127 N.W.2d at 324.

77. *Id.* at 648, 127 N.W.2d at 326.

78. *Id.* at 650-54, 127 N.W.2d at 327-29.

In the most recent case, *Stingley v. Wesch*,⁷⁹ an Illinois appellate court followed the principle of the *Fontaine* opinion in a situation resembling those in *Murphy* and *Potter*. The white parents of an infant son were divorced in 1964. The mother obtained custody of the child, and they lived with her parents until her remarriage in 1965 to a Negro. The child then remained in the home of his maternal grandparents and occasionally made visits to both parents. When in 1966 the natural father (who lived with his own parents) sought custody of the child, both parents testified to wanting custody; both were found fit and their homes suitable, but the court awarded custody to the maternal grandparents, who had also requested it.⁸⁰

On appeal, the award was reversed and a hearing ordered to determine custody *between the parents*, since, according to the court, where parents seek custody and are fit to have it, their rights are superior to those of any other person. The mother's remarriage and relinquishment of the child's physical custody called for a hearing but were not in themselves sufficient for modification of the custody decree. And, the court added, *Fontaine* had held "that in determining the question of custody as between a Negro father or a Caucasian [sic] mother the question of the racial characteristics of the children was not decisive. Clearly, therefore, [the] question of the race of a stepfather would have no significance in this proceeding."⁸¹

These cases permit some tentative conclusions about those custody dispositions where racial differences are involved. It appears that where a mother's custody is challenged by grandparents only, the courts may allow her to retain custody even though she has remarried to a Negro. This is clearly the significance of *People ex rel. Portnoy v. Strasser*. *Stingley v. Wesch*, which also seems to endorse that outcome, implies that where the child's father enters the litigation (as he did not in *Portnoy*), the mother's fight for custody may in fact become more difficult.

Murphy and *Potter* exemplify the difficulties. They seem to indicate that where a white mother and father are contestants in a custody suit, the mother's remarriage to a Negro will lead a court to rely on ordinarily weak arguments to deny her custody of the child. The court will invariably deny that the racial factor is decisive, but such claims are questionable in view of the lack of precedent for some of the arguments which have been used to support these decisions, e.g., the mother's "instability" where no expert testimony has indicated any serious emotional disturbance; the child's deprivation of the attentions of his "alienated" grandparents.

Fontaine is almost unique among the reported cases in that there the white mother, remarried to another white, sought to regain custody from her Negro first husband of their mixed children. Its declaration, however, that

79. 77 Ill. App. 2d 472, 222 N.E.2d 505 (1966).

80. *Id.* at 474, 222 N.E.2d at 506.

81. *Id.* at 476-77, 222 N.E.2d at 507.

race alone cannot be decisive in custody matters, seems to have set a useful precedent for subsequent custody cases of the more conventional sort, such as *Stingley v. Wesch*.⁸²

(2) Agency Practice

The practices followed by social agencies in the field of adoption are influenced, either directly or indirectly, by the particular adoption laws under which they operate. Apparently considerable dissatisfaction exists among agencies with much of current adoption law, both written and enforced. More than three-fourths of the agencies queried in a comprehensive survey of public and private agencies conducted by the Child Welfare League of America in 1954 "indicated that present laws should be revised in one way or another," in many instances because agency thinking is "ahead" of the law.⁸³

The work of the agencies is reportedly "frustrated" by law in a number of ways.⁸⁴ One source of frustration, for at least some agencies, may be statutory or judicially-imposed restrictions upon interracial placements. As already noted,⁸⁵ some states' statutes limit agency freedom to place children with adoptive parents of another race. In other states, the judges handling adoption petitions may choose to limit placements similarly, whether or not statute directs or even suggests that they do.⁸⁶ But even if statutes were silent and judicial neutrality could be assumed, the factor of race would still not be totally ignored in the adoption process because agencies themselves do not wholly ignore it. Indeed, the traditional agency concern with "matching" parents and children often plays a predominant role in discouraging interracial adoptions from taking place with any frequency.

The "matching" process generally involves a consideration by the agency of "[p]hysical, mental, psychological, and religious factors," in an effort to keep the adopted child from differing "too much" from his parents.⁸⁷ Whether or not "matching" is important in good adoption practice "has been the subject of continuing controversy . . . , but there is little doubt that it is a part of the process in most agencies."⁸⁸

Schapiro has reported that most agencies participating in the 1954 survey accepted the principle that similarities in background were more likely to facilitate integration of a child into a family. But, at the same time, there was "no unanimity of opinion on what constitutes sound matching and on whether like-

82. *But cf.* *Ward v. Ward*, 36 Wash. 2d 143, 216 P.2d 755 (1950). In that case, a white mother was found to be unfit to have custody of her children and it was awarded to their Negro father, the court adding (as "another reason") that the "colored" children of the marriage "will have a much better opportunity to take their rightful place in society if they are brought up among their own people," *Id.* at 145, 216 P.2d at 756.

83. 1 Schapiro 12, 90-93.

84. *Id.* at 93-107.

85. *See supra* sec. A pp. 306-09.

86. *See supra* sec. B(1) pp. 309-14.

87. Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 Yale L.J. 715, 722 (1950).

88. Foote, Levy & Sander 502.

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ness should be considered at all in placing children for adoption." While the traditional rationale is that

a child wants to be like his parents, that parents can more easily identify with a child who resembles them, and that the fact of adoption should not be accentuated by placing a child with parents who are different from him,

Schapiro found "wide variance" in this area of agency practice. Some agencies feared "even considering" that there may be people who can accept such differences, or that others can "further develop" their capacity for such acceptance. Nevertheless, according to Schapiro, there is increasing evidence that "matching—in physical appearance, nationality and racial background, and intellectual potential—does not have the weight often given it. . . ." ⁸⁹

An anthropologist who evaluated the concept of nationality and racial matching at the National Conference on Adoption in January, 1955, pointed to the fundamental distinction between genetic and acquired attributes. "Cultural attributes," the characteristics acquired during one's lifetime, are not inherent; and therefore, "no more difficulty would be encountered in a young child learning or acquiring the cultural attributes of the adoptive parents than would a natural child learning from his own parents." Further, while true racial characteristics are genetic in origin, to some extent "the problems of race are those created by the social environment in which we live." For example, specific personality and psychological characteristics are attributed to certain races. "As a consequence, some concern is frequently felt that conflicts on this score might also arise between adoptive parents and child when they are of different racial origins." But while intelligence scores do reveal differences between whites and Negroes on standardized IQ tests, such differences between races subjected to divergent influences, *e.g.*, in education, can be discounted as largely "non-genetic and non-racial." In any event, they are relatively small when compared to the range *within* any race: high and low IQ scores are found in all racial groups. As for personality types, "as far as we can judge, [these] similarly are not restricted to any one race." ⁹⁰ The import of these remarks would appear to be that racial matching has little significance at least in terms of reducing such "disturbing elements in the parent-child relationship" as personality incompatibility and conflicts due to intellectual disparities.

The traditional position is still, however, determinedly argued:

Certainly a black-haired, black-eyed child of south Italian ancestry might be exposed to considerable emotional stress if he were adopted by a Scandinavian couple . . . partly due to the striking physical contrast between him and his foster parents. . . . ⁹¹

89. 1 Schapiro 84.

90. H. Shapiro, *Anthropology and Adoption Practice*, in 2 Schapiro 34-38.

91. R. Cook, *Genetics and Adoption Practices*, in 2 Schapiro 64. Cook's hypothetical adoption is, in reverse, strikingly like the Liuni case, New York's adoption *cause célèbre* of 1966. The Ulster County Welfare Commissioner ruled that the "coloring and ethnic background" of the American-born Liunis, "brunets of Italian descent," made them "unsuitable

Where *inter-nationality* adoption is assumed to create "emotional stress," *inter-racial* adoption would presumably have disastrous consequences.

While the value of "matching" as an abstract principle can be debated indefinitely, adherence to it in agency practice can be measured with somewhat more objectivity. The 1954 survey inquired into the matching factors considered important by adoption agencies. Responding agencies emphasized four factors: level of intelligence and intellectual potential, religious background, racial background, and temperamental needs. Of the 250 agencies, 240 considered racial background important, and Schapiro commented that even though the ten other agencies "reported they did not consider racial background important, we know from practice that agencies are not placing Negro children in white homes or white children in Negro homes." Some agencies placed children of "mixed racial background" in homes where the background of the parents was different, but in most of those cases the children were of Oriental-white or Indian-white, rather than Negro-white, background.⁹²

The 1954 survey data can no longer be considered completely representative of adoption agency attitudes towards racial matching. During the 1950's, a few agencies began to place Negro and part-Negro children in white homes, and although it has been noted that "the majority of adoption workers have not developed the capacity or courage to operate in this controversial area", the trend seems to be gaining increasing acceptance.⁹³ In an attempt to measure this trend, a brief questionnaire was devised and sent in February, 1967, to ninety-one agencies selected in a random fashion from a recent listing of social agencies engaged in adoption services in the United States.⁹⁴ Forty of the total were public agencies, including all thirty-eight state-wide bureaus, plus two metropolitan-county agencies. The fifty-one private agencies included at least one agency in nearly every state and encompassed non-sectarian, Protestant, Catholic, and Jewish agencies, as well as one exclusively Negro institution in the South.

The response rate was high: twenty-eight public (61 percent of the total queried) and thirty-four private (66 percent) agencies returned the questionnaire. The majority of both the public and private agencies which failed to respond were located in the Southern states. Four private respondents indicated that they no longer handled adoption activities. The public agencies were presumably not restricted to any particular racial or religious groups among those in their states. Of the thirty private-agency respondents, five primarily placed

adoptive parents" for a blond, blue-eyed, 4½-year-old child who had been placed with them as a foster child five days after birth. "What's this ethnic background business," Mrs. Liuni asked. "We're all Americans, aren't we?" N.Y. Times, Nov. 5, 1966, at 1, col. 4. The adoption was subsequently approved by the county court. Time, Jan 27, 1967, at 76.

92. 1 Schapiro 84-86.

93. See Shepard, *Adopting Negro Children: White Families Find It Can Be Done*, New Republic, June 20, 1964, at 10; E. Branham, *Transracial Adoptions passim* (mimeographed paper by staff member, Los Angeles County Dep't of Adoptions, undated); Letter from Charles B. Olds, *supra* note 23.

94. C. & H. Doss, *If You Adopt a Child* 219-341 (1957).

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Protestant children; five, Catholic; and two, Jewish; eighteen did not primarily place children of any particular group.

The agencies were asked first about the number of Negro children they handled in a year. Nearly two-thirds reported handling from 1 to 25. One third of the public agencies indicated that they serviced more than 50 (no private agency did); four private agencies handled none (no public agency did). The distribution of the Southern agencies favored the lower end of the scale (TABLE I).

TABLE I
NUMBER OF NEGRO CHILDREN SERVICED ANNUALLY

	Total Responding	None	1-25	25-50	More than 50
Public	27	0	15 (56%)	3 (11%)	9 (33%)
Private	30	4 (13%)	21 (70%)	5 (17%)	0
Total	57	4 (7%)	36 (63%)	8 (14%)	9 (16%)

The agencies were then asked: "Has your agency ever placed, or does it place" Negro children in white or mixed homes? An overwhelming majority reported that they had (several indicated "mixed only"; this may have been true for most), but the proportion among the public agencies was considerably higher (TABLE II). Percentages or figures, where supplied, were very low.

TABLE II
PLACEMENT OF NEGRO CHILDREN IN WHITE OR MIXED HOMES

	Total Responding	Yes	No
Public	28	23 (82%)	5 (18%)
Private	30	18 (60%)	12 (40%)
Total	58	41 (72%)	17 (28%)

Were white children ever placed in Negro or mixed homes? A relatively small number of both public and private agencies reported such placements, although the incidence among public agencies was somewhat higher. Many commented that the need to find other than white homes for white children was minimal, but some said they would consider making such placements where the need arose. The Southern agencies uniformly answered "no" (TABLE III).

TABLE III
PLACEMENT OF WHITE CHILDREN IN NEGRO OR MIXED HOMES

	Total Responding	Yes	No
Public	28	4 (13%)	24 (87%)
Private	30	1 (3%)	29 (97%)
Total	58	5 (9%)	53 (91%)

Were mixed children ever placed in white or Negro homes? About nine out of ten agencies answered "yes" to this query, public agencies somewhat more often than private. Private Southern agencies were the most hostile to the idea. (TABLE IV). Percentages and figures here, while still low, were higher than those for Negro placements in white or mixed homes.

TABLE IV
PLACEMENT OF MIXED CHILDREN IN WHITE OR NEGRO HOMES

	Total Responding	Yes*	No
Public	28	26 (93%)	2 (7%)
Private	30	25 (83%)	5 (17%)
Total	58	51 (88%)	7 (12%)

* (3 of these indicated "Negro only"; 2 indicated "white only")

Whether or not the agency made such placements, its views of interracial adoption were solicited. About one third of the total were "strongly in favor" of it (none of these was a Southern agency). Another third found it "inappropriate to generalize," while the remainder was largely "neither in favor nor opposed" or "somewhat in favor" of the idea. Two Southern agencies were the only respondents either "somewhat" or "strongly opposed." Public agencies were far more "strongly in favor" than private agencies: it was the former's most popular choice. (Table V).

TABLE V
AGENCY VIEWS OF INTERRACIAL ADOPTION

Total Responding (in Parentheses)	Public (27)	Private (29)	Total (56)
Strongly in Favor	12 (44%)	7 (24%)	19 (34%)
Somewhat in Favor	3 (11%)	2 (7%)	5 (9%)
Neither in favor nor Opposed	1 (4%)	9 (31%)	10 (18%)
Somewhat Opposed	1 (4%)	0	1 (2%)
Strongly Opposed	1 (4%)	0	1 (2%)
Inappropriate to Generalize	9 (33%)	11 (38%)	20 (36%)

Last, the agencies were asked, "What should be the law's position in this area?" No respondent agency believed that the law should prohibit all interracial adoption, choice (a), and only one chose (b), the somewhat vague "Allow interracial adoption but only where it is unavoidably necessary." The majority (two-thirds) split almost evenly between allowing interracial adoption "in all cases where it is desired by the otherwise-qualified parents" (d), and allowing it under those circumstances when there is, additionally, "a showing that the child will be accepted in the parents' community" (c). The remaining one-third was evenly divided between (e), encouraging interracial adoption, "perhaps even modifying standards for adoptive parents where they are willing to adopt Negro or other

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minority-group children," and (g), where "other" comments could be written in. Predictably, no agency chose (f), which would "require prospective adoptive parents either to take a child of another race under certain circumstances, or take no child at all." Private agencies showed a more "liberal" streak here than elsewhere, favoring (d) and (e) to a greater degree than did their public counterparts (TABLE VI).

TABLE VI
POSITION OF LAW PREFERRED BY AGENCIES

(Total Responding) Choice	Public (28)	Private (29)	Total (57)
(a)	0	0	0
(b)	1 (4%)	0	1 (2%)
(c)	10 (36%)	9 (31%)	19 (33%)
(d)	9 (32%)	11 (38%)	20 (35%)
(e)	3 (11%)	5 (17%)	8 (14%)
(f)	0	0	0
(g)	5 (18%)	4 (14%)	9 (16%)

It is interesting to trace the views most favorable to interracial adoption—those "strongly in favor" in TABLE V and those "encouraging" it in TABLE VI—to the agencies who chose them. Among the public agencies, these responses were made by agencies in three Eastern urban areas and by a number of agencies in the Western part of the United States. Midwestern and Southern agencies are notably absent from this group. Among private agencies, the most favorable position was taken by four agencies in fair-sized cities in the Midwest; the others were agencies in New York City, Portland, Oregon, and Bangor, Maine. None of the Catholic agencies asserted a strongly favorable position; one Protestant and one Jewish agency were, however, included in this group.

The comments made by many agencies proved to be illuminating. First, a number indicated that they faced legal barriers to interracial placements. The Louisiana state agency's spokesman referred to its statute prohibiting interracial adoption and commented: "I do not think this state is ready for a change in the law." A Georgia agency similarly referred to the requirement in that state that race be considered by the investigating agency in determining the adoption's suitability: according to this agency, the report to the state department's "specifically asks" if the child's race is similar to the adoptive parents. The same agency also noted the relevance of the state's miscegenation statute (then valid):

Our laws prohibit interracial marriage. A child reared in a home with parents of a different race will be apt to meet and want to marry a person of his or her parents' background, not his own.

In Missouri, where miscegenation was also prohibited, the courts were indicted as "not honoring" such placements; in an Indiana city, an agency reported, the judge "who has final authority . . . refuses to legalize such adoptions." And in

Florida, a private agency indicated that it faced opposition, if not from the law, from its governing board:

We would place more such children if our Board were in agreement.
Being Southern, it refuses to realistically face these areas of concern.

Several agencies expressed concern with pressures, tradition, and generally conservative sentiments in their communities, or with the complications that might accompany the child's adolescence:

Interracial adoption presents "more than ordinary risks and difficulties, so long as there remains so much prejudice."

Acceptance by the community is "highly important."

The adoptive couple must consider "ramifications, friends, relatives, church, neighbors, own children, community."

We are strongly opposed because of "tradition, community unable to accept such placements generally, fear of repercussions."

The placement of a colored child in a white home would lead to many complications," especially "when he reaches adolescence [sic]."

Other agencies noted that they were engaged in large-scale efforts to place Indian and other non-Negro minority-group children, and that in general it was easier to find homes for them than for Negro children. Many emphasized the "individual needs" of each child and indicated that they were guided in every case by that consideration and no others:

We try not to let race enter into the decision whenever possible. . . .

The best available home should be selected for a child. Color is only one factor.

Finally, a significant number of agencies expressed sentiments favorable to interracial adoption:

Placement of Negro child in white home should be encouraged where parents . . . are found to be well-motivated. . . . This may well be the child's only opportunity for a permanent home.

Our experience in trans-racial adoptions has been a positive one. . . .

We do not believe in using a child as a tool to solve a social injustice. We are strongly in favor of good interracial adoptions because we have seen them work to the great benefit of the children involved.

Living with a loving family, emotional and personality compatibility is more important to both child and family than the matching of physical characteristics, including race.

The law should allow interracial adoption without reservations. Agencies should encourage [it]

Although this questionnaire contained many inadequacies, to a large extent it served its purpose of bringing to light the current practices of a large number of public and private adoption agencies. The results seem to show that (1) there is

increased acceptance of the principle of interracial adoption in recent years, and (2) a considerable number of interracial placements—relatively speaking—have actually been made. While many agencies still express reluctance to move into this area and fear unhappy consequences for those who do, a sizable number of their colleagues lean strongly in favor of this once-heretical idea. As one agency of the latter persuasion phrased it, "Parenthood means rearing a child—not matching races."

III. THE ROLE OF SOCIAL AND PSYCHOLOGICAL CONSIDERATIONS

The social and psychological considerations which underlie those adoption and custody decisions where racial differences are involved deserve careful examination. The critical question here must be: Do these considerations ever justify making the difference in race either a significant element or a controlling one in the process of decision?

In the area of custody, the question has generally been raised by white relatives who protest the existence of a white child in a home with a Negro stepfather. In the adoption area, the question is largely one of the placement of Negro or part-Negro children in white homes.⁹⁵ Thus the two areas of inquiry present two rather different situations. In one, a white child may be growing up in an interracial home with his own mother but with a Negro as his "father" for most daily purposes. In the other, a Negro child grows up in a home with white parents and white (or nonwhite, or both) siblings.⁹⁶ Both of these settings must be sanctioned by the courts—in custody cases, where the mother's custody is challenged after her remarriage; in adoption cases, where the first hurdle of placement has been met. One writer has called both kinds of cases "delicate and explosive," noting wide adherence to the theory that it is harmful to expose children to parent-figures of a different race.⁹⁷ What precisely are the competing considerations?

95. The scope of this paper does not permit consideration of the question of adoption of white children by Negro couples, but, in any event, it is something of an academic question. The placement of white children does not present the social problem that the placement of Negro children does, since there are apparently a sufficient number of white homes for the white children needing them (with the possible exception of handicapped or other children with special needs). Nevertheless, it would seem reasonable, at least in the absence of evidence to the contrary, to place white children in Negro homes where, all other factors, e.g., income, considered, such a placement was in the child's best interest. While some might protest that a white child in a Negro home will be identified as a Negro and will therefore lose his "social status" as a white man (*see* text accompanying note 48 *supra*) that alone, where assumed to be valid, does not render such a placement adverse to the child's total interest. Further, it is possible that a white child in a Negro community would be subjected to fewer difficulties than the Negro child in a white one. Bernard suggests that Negroes tend to be more tolerant of racial intermarriage, than whites. J. Bernard, *Marriage and Family Among Negroes* 88 (1966). Such tolerance would presumably carry over to an adopted child.

96. Of course, other mixtures than this are possible, but they are not considered here because they do not present the question so starkly. Thus, it will be assumed that any arguments made for the adoption of a Negro child by a white couple are that much stronger when applied to a "mixed" (Negro-white) child or a "mixed" couple.

97. Larrison 72.

Custody

The custody disputes in this area have generally involved the weighing of two conflicting interests: first, the usual presumption (in many states, embodied in statute) in favor of custody in the mother, at least where the children are young and especially where they are girls, in the absence of a demonstrable lack of fitness; and second, the reluctance on the part of many judges to allow a white child to grow up in a home with a Negro stepfather. Where the question arises, is there any social or psychological basis for denying the usual presumption, where it would otherwise determine the outcome, solely because of the stepfather's race?

Although the father in the *Potter* custody case alleged that his white daughter would be "rejected, shunned and avoided by children of both races, and as a result her entire life could...be adversely affected," the trial judge concluded that there is "no legal authority that living in an interracial home which is otherwise favorable is injurious to a minor child." Asserting that his decision against custody in the mother was based on other grounds, he noted:

We have been exhibited no authoritative studies in the behavioral sciences that indicate hurt or injury to a child in an interracial home which is happy and stable.⁹⁸

Psychologist Kenneth Clark has concurred, saying that child reared in an interracial home would not be damaged emotionally "just by the fact of his being in an interracial home." The problem, "if there is a problem, is related to specific qualities in the parents. And each case must be judged on its own merits."⁹⁹

On the other hand, if custody in the mother is denied, the alternative frequently is physical custody in a grandmother or grandparents who often display hostility towards the mother. This would appear to be potentially far more damaging to the child than the injury claimed to result from a home's interracial make-up.¹⁰⁰

Another advantage to the child of remaining with his mother is that he may be raised in an integrated community. A Detroit psychiatrist called as a witness at the *Potter* hearing weighed the relative merits of Riverside, California, the integrated community where the mother and stepfather lived, and Detroit, where the white father and grandmother lived, and found Riverside a more favorable setting for a child. Although he did not consider the neighborhood "as crucial in a pre-school child's psychological development as the immediate home situation," he viewed the multi-racial Riverside community as "better for the child than the Detroit neighborhood which is fraught with anxiety about property values and unresolved conflicts about race."¹⁰¹

Thus, while not much is actually known about the problems a white child

98. *Id.* at 70-71.

99. *Quoted in id.* at 74.

100. *See* testimony of child psychiatrist at *Potter* trial as described in *id.* at 70.

101. *Id.*

in this position might face, there seems to be little support for denying custody to a mother in a dispute of this nature. Unless the mother is found to be unfit for one of the reasons generally recognized by the law, *e.g.*, gross neglect or habitual drunkenness, the normal presumption in her favor should apply. This is especially true where the alternative is placement with grandparents, since parental rights should generally prevail against those of any other party.¹⁰² But even where the father (a parent, too) has remarried and can provide the child with a stepmother and a satisfactory home life, he should perhaps be required to prove the mother's general lack of fitness or some adverse effect on the child's development by virtue of his being in an interracial home, in order to obtain a shift in custody. There is no need to upset the continuity in the child's home-life pattern unless something detrimental in his situation can be shown. Merely assuming that a Negro stepfather—regardless of his personal qualities, his educational and income level, and his feelings towards the child—is a liability to a white child to be avoided at all costs, is clearly an assumption no court is qualified to make.

Adoption

The focus in this area is upon the Negro child and the consequences of his placement in a white home. In deciding whether or not such a placement is appropriate, social agencies and the courts must begin by examining the various alternatives available to the child.

(a) First, the child may remain with his mother. (Of course, the mother must want to relinquish her child before any *other* alternatives can be considered.) If he is an illegitimate child, he will probably have a less than optimal upbringing, though this is far from certain. Some studies have shown that unwed mothers who keep their illegitimate children tend to have unfavorable personality characteristics and often appear to be unsatisfactory mothers, but where they are Negro, this is not so clearly the case.¹⁰³ This difference, if it exists, may reflect the finding that unwed motherhood (while far from being totally accepted) does not have the stigma attached to it in the Negro community that it does in the white community,¹⁰⁴ as well as the fact that adoptive homes for Negro children are in relatively short supply, and therefore, more Negro mothers who keep their children may do so out of necessity than because of some neurotic need.¹⁰⁵

The unwanted Negro child will probably be brought up in a home without a father. A host of factors tend to discourage Negro men, far more than white

102. See *People ex rel. Portnoy v. Strasser*, 303 N.Y. 539, 104 N.E.2d 895 (1952), and *Stingley v. Wesch*, 77 Ill. App. 2d 472, 222 N.E.2d 505 (1966). But cf. *Painter v. Bannister*, 140 N.W.2d 152 (Iowa 1966), *cert. denied*, 385 U.S. 949 (1966).

The simple statement made in the text belies the many complexities which may arise in a custody dispute. While only a minority of jurisdictions adhere to the "parental right" theory, many other jurisdictions apply the free-wheeling "welfare of the child" standard along with a presumption in favor of the parents. For a description of the problems in this area, see Comment, *Alternatives to "Parental Right" in Child Custody Disputes Involving Third Parties*, 73 Yale L.J. 151 (1963).

103. See Foote, Levy & Sander 144-45.

104. J. Bernard, *supra* note 95, at 50-55.

105. See *supra* sec. I pp. 303-06.

men, from remaining in a family unit and from taking a great interest in fatherhood.¹⁰⁶ Thus the mother's prospects for a stable marriage or for any other means of providing a stable father-figure for her child are relatively poor. Pettigrew has noted recent psychological research exploring the personality effects upon children of being raised without a father. According to one study, children whose fathers are absent seek "immediate gratification" far more than children whose fathers are present in the home. This trait has "serious implications," since children who manifest it have also shown decreased "social responsibility" and orientation toward achievement and are more prone toward delinquency. Two psychologists have in fact concluded that "the inability to delay gratification is a critical factor in immature, criminal, and neurotic behavior."¹⁰⁷ Another personality effect may be "unusual difficulty in differentiating between male and female roles," an effect traced in boys as they grow older to an exaggerated masculinity and a "strongly-felt need for power." Present data thus suggest at least some link between the father's absence and the child's proclivity towards juvenile delinquency, crimes against persons, and schizophrenia.¹⁰⁸

Where the child remains with his mother, another problem may arise out of the "kinship assistance" common among lower-income groups. Bernard reports that most nonwhite children live in large, often multigenerational families; and, an illegitimate child probably stands a better chance than others of growing up in such a household. The result may be severely crowded conditions. The child finds himself "competing with a number of siblings and relatives for care and desired responses;" and, at the lowest income levels, he competes "for sheer survival." Other adverse results have been traced to crowded living conditions, among them sexual maladjustment and a lack of self-sufficiency.¹⁰⁹

(b) If the mother is unwilling or unable to keep her child, one alternative for the child is an institution; another is foster-home care. Both foster-home care and institutional care are less than ideal for child development, and both have received harsh criticism in recent years. Foster care is currently favored because, in theory, it provides a "family" setting for a child. However, many children in foster care spend their childhood "moving through a series of families without continuing close ties to any adult." Where a child is not unadoptable because of unsevered ties to his parent or parents, these two alternatives should generally be

106. T. Pettigrew, *A Profile of the Negro American 16-17 (1964)* [hereinafter cited as Pettigrew]. Even legitimate Negro children suffer much more from "father-absence" than do whites.

107. *Id.* at 17.

108. *Id.* at 17-22. That still another form of anti-social behavior may result from this situation has been noted in a study of the riots which took place in Detroit, Michigan, during the summer of 1967. Dr. Elliot Luby, a psychiatrist, found that among persons arrested in the rioting "the most impressive statistic is the dramatically small number of arrestees who have lived in a home with a father. Less than half enjoyed the kind of parental support . . . which only a father can provide. Even more devastating was the fact that over one-fourth lost their father before the age of 2 . . ." Kondracke, *Detroit Negroes Still Hoping For Reform*, *Chicago Sun-Times*, Oct. 21, 1967, at 26, col. 1.

109. J. Bernard, *supra* note 95, at 130-32.

viewed as a poor second-best to adoption.¹¹⁰ For as one social scientist has written, "... it is a very serious thing to condemn a child to be parked in an endless succession of foster-homes or to be brought up in an institution when there are long waiting lists of suitable parents wishing to adopt children..."¹¹¹

(c) The final alternative for the child is adoption. Tradition points to a Negro home for a Negro child. But even if tradition is indulged "when practicable" (to use the standard applied under "religious protection" statutes¹¹²), there are currently not enough Negro homes available for all Negro children who might be adopted. There is, however, another possibility: placements of Negro children in white homes.

The problems created by such placements must be conceded. First, because of persistent housing patterns in American cities, most neighborhoods have either predominantly white or predominantly Negro populations.¹¹³ As a corollary, the public schools in those neighborhoods, at least where busing or other schemes to correct "racial imbalance" are not yet employed, are similarly segregated. This means that many prospective white adoptive parents would welcome Negro children into communities where the child not merely was one of a distinct minority but might actually be the single nonwhite member. Would this be in the child's "best interest"?

Where the alternatives are a neglected, unwanted existence in an economically hard-pressed environment, or an institutional or foster-parent upbringing, a strong argument can be made that it is, indeed, in the child's "best interest." This argument must first, however, deal with two nagging questions. The first involves the notion that the members of an interracial family face "intolerable community pressures," *i.e.*, children and parents in an interracial home inevitably suffer from harassment and other forms of pressure from neighbors and others in the community. That such harassment has occurred is established fact.¹¹⁴ However, it is hardly inevitable.¹¹⁵ Even if some sort of pressure is assumed, it is reasonable to assume further that it exists to varying degrees in different communities. Moreover, there appear to be a number of families with the strength and independence to withstand these pressures, where they do exist.

If it is supposed, then, that the white family which adopts a Negro child is prepared to cope with pressures from the community, and does indeed cope with

110. See Foote, Levy & Sander 143 n.158, 460-64.

111. H. Bowlby, *Maternal Care and Mental Health* (1952), in *id.* at 150-53.

112. See *infra* sec. IV(A)(1).

113. K. Taeuber & A. Taeuber, *Negroes in Cities* 2-8 (1965).

114. *E.g.*, N.Y. Times, March 24, 1966, at 28: "A minister and his wife, both white, will give up a 2-year-old Negro boy they adopted a year ago because they have been 'harassed, humiliated and threatened' by persistent telephone callers." Many calls threatened the couple's four other children, according to the Rev. Albert Cohen of Fullerton, California. "We have to give up," he said. "We thought we could stand up and be counted but we just don't have the personal strength."

115. See Shepard, *supra* note 93, at 12, asserting that the parents involved in interracial adoptions in Minnesota reported no "racial crises." "Perhaps the neighbors who disapprove keep their opinions to themselves." Parents "have a hard time recalling any unpleasant incidents."

them satisfactorily, the question remains: What is the impact of such an adoption on the child? It might be argued that the child will be the victim of rejection and discrimination at the hands of neighboring white children. But, at least during childhood, the Negro child is unlikely to receive any more discriminatory treatment from his peers than the redheaded child who is covered with an inordinate number of freckles or the child who must wear glasses at an early age. Children are aware of physical differences and will comment on them, but they attach little significance to those differences unless adults do it for them.¹¹⁶ Here, of course, is where the real difficulty lies. Adults often attach prejudices to color differences, and these are frequently communicated to their children. But perhaps it is not overly optimistic to predict that where a Negro child is brought into a white community, the children's exposure to each other will go far to minimize the weight white youngsters give to their parents' prejudices.

Adolescence presents more significant problems. There is great anxiety on the part of many white parents over the results of interracial friendships as their children grow older and begin to date and marry. (One writer has referred to this as the "puberty argument."¹¹⁷) This anxiety has in fact been found to create tensions between Negro and white teenagers. According to a 1955 study of a voluntary-organization group made up of 22 Negro and 17 white adolescents of both sexes, all from stable middle-class homes in a Northern city, interracial opposite-sex friendships were found to create emotional conflict among the white members. This conflict was traced largely to parental disapproval, although rejection by age-peer acquaintances and strangers' reactions to interracial gatherings were also indicated as disturbing influences. The researcher concluded that this finding revealed a problem which "cannot be ruled out as a possible major source of tension in many types of interracial settings." If the whites' conflict is communicated to the Negroes in the group, he added, it is "a likely source of Negro insecurity in social relations with whites."¹¹⁸ It can be argued that these tensions are lessening as interracial settings become more common and win greater acceptance among the younger members of our society, if not among their parents. However, it is unrealistic to say that parental disapproval of interracial dating has diminished to the point where it fails to influence a large number of young people, and it will undoubtedly continue to influence them for some time to come. One social worker has maintained that this problem need not "completely devastate" a Negro youngster,¹¹⁹ but it surely remains as one of the largest emotional hurdles he will face.

The second nagging question in this area: Will the Negro child have significant "identity" problems if he is raised in a white community? Indeed he may.¹²⁰

116. See O. Ritchie & M. Koller, *Sociology of Childhood* 247 (1964).

117. Larrson 72-73.

118. I. Katz, *Conflict and Harmony in an Adolescent Interracial Group passim* (1955).

119. H. Fricke, Project Coordinator, *Parents to Adopt Minority Youngsters*, quoted in Shepard, *supra* note 93, at 12.

120. Compared with the problems he might face in developing his "self-identity" within the Negro community, these problems shrink in significance; he may actually come

Thirty-five years ago, the child of a mixed Negro-white marriage was said to have "psychological problems" because he belonged to neither the white nor Negro community. Idealizing the "culturally dominant" white group, seeking "recognition from and admission to it," he was nevertheless "branded socially by his Negro characteristics."

He is, in consequence, a man of divided loyalties. . . . The mixed blood's hysterical and insistent knocking at the white man's door is a familiar sound in every bi-racial situation.¹²¹

Despite the value-laden language, it is likely that there is some truth in this analysis. One can at least say that a Negro child raised in a white community, like some mixed children perhaps, may want to identify with one group and will be confronted with two largely disparate groups between which he must choose. There is, therefore, some merit in leaving the Negro child in his own community. Along these lines, some have postulated the significance of "socialization as a Negro" for the Negro child, who must (according to this theory) learn how to assume "the Negro role," *e.g.*, by developing protection against a hostile environment.¹²² This has questionable validity today, in view of recent thinking which stresses instead the need for Negroes to learn "the role of the equal citizen."¹²³ Still, this has been called "a time to be black."¹²⁴ Trends in recent years suggest "heightened group identification" among Negroes; and, as Rose has predicted, "group identification may become so strong that Negroes . . . may not want full integration."¹²⁵ Perhaps it is presumptuous, especially in the light of increasing racial consciousness on the part of many Negroes, for the white community to assume that any child brought into one of its homes is going to reap enormous advantages at the risk of losing little. The "new Negro" may even be unnerved at the thought of Negro children being raised by white parents, possibly in a predominantly white community. As James Baldwin has pointedly asked: "Do I really *want* to be integrated into a burning house?"¹²⁶

Assuming that these problems do exist and confront the white family and the Negro child it wishes to include within its home: Are they sufficient to dismiss the prospect of interracial homes? Do they, in particular, provide law-makers with a valid justification for making the existence of such homes illegal, or even merely suspect? It is submitted that they do not.

The most significant element in a child's development, according to most authorities, is the environment in which he spends his early years: "the earliest

out ahead. There are indications, however, that this identity problem within the Negro community is undergoing drastic change.

121. S. Reuter, *Racial Mixture* 214-16 (1931).

122. See J. Bernard's treatment of the analysis by E. Frazier in J. Bernard, *supra* note 95, at 144-49.

123. See Pettigrew 161-68.

124. Detwiler, *A Time to Be Black*, *New Republic*, Sept. 17, 1966, at 19.

125. A. Rose in *Postscript Twenty Years Later* at xxxi-xxxii in G. Myrdal, *supra* note 1.

126. J. Baldwin, *The Fire Next Time* 108 (1964).

experiences of an individual form the basis for all that develops in later life."¹²⁷ The role of the family in this process is, of course, pervasive.

Family life and satisfactory relationships between parents and child create the natural setting in which wholesome personality development of children takes place. To attain his maximum potentiality, every child must have the security and affection of a family. . . . A child needs a close and continuing relationship with a mother and father who love him and whom he can love. . . .¹²⁸

Thus, the home life experienced by a child is critical in determining his ego-strength and his ability to cope with the pressures he will face as an adult. Where a child, therefore, will otherwise have an unsatisfactory developmental environment, placement in a home where he will receive love and acceptance would seem to override almost any objection raised because of mere racial differences. Indeed, the significance of a "warm, supportive home" may be even greater for a Negro child than for a white. According to Pettigrew, considerable research has indicated that young Negro children tend to experience identity problems in their own community because of the "unique and socially-defined inferior" status of Negro Americans which they encounter at an early age. Many Negro children develop symptoms of "self-hate" and problems of self-esteem because they accept, consciously or unconsciously, assertions of their inferiority. Further, for much the same reasons, they may develop a tendency to view the world "as a hostile, threatening place."¹²⁹ While the thinking which produces these results has been undergoing a process of change, its effects will most likely be felt for some years ahead. It would seem that being raised in a home—white or black—where there is affection and acceptance of himself as a valuable member of the family might help the Negro child to develop a stronger ego and to deal more successfully with the pressures which will face him. As Pettigrew notes, social scientists have come to emphasize "the stability and structure of the home as crucial factors in counteracting the effects of racism upon Negro personality." The type of home life a Negro enjoys as a child assumes special significance when he becomes aware of the "social devaluation" of being a Negro, usually at adolescence: just how he "bears up" under this severe emotional stress is largely a function of the degree of ego-strength that he has developed in his earlier, family-centered years.

The ego-strong Negro, nurtured in a stable and complete family . . . maintains his self-respect as a unique and worthwhile human being apart from the position of inferior being that the racists insist he assume.¹³⁰

For similar reasons, adoption by older couples (a practice generally frowned upon) has been endorsed by one student of Negro adoptions:

The harsh reality remains that as long as there is a dearth of adoptive homes for Negro youngsters, the placement of a child with an older

127. O. Ritchie & M. Koller, *supra* note 110, at 3.

128. Child Welfare League of America, Standards for Adoption Service 4 (1959).

129. Pettigrew 6-11.

130. *Id.* at 22.

ADOPTION AND CUSTODY

[Negro] adoptive parent at least affords him an experience in the formative years which may provide a firm foundation for later personality development.¹³¹

That white families can also provide such a supportive home life for a Negro child is not only arguable in theory but has, in fact, been discovered by those adoption agencies which have participated in interracial adoptions. The Los Angeles County Bureau of Adoptions, for example, has reported: "The white family that can accept and love a Negro child is more inner-directed and emotionally independent, and for this reason is considered, by our agency, as one of our best families."¹³² An analysis of the 28 families which had adopted 34 Negro children through the Bureau showed that, for the most part, "their level of maturity has been high, as has been their capacity for frustration tolerance." Well-educated, often with high-status occupations, they were "found to be warm, giving and non ethnocentric people, . . . certainly not . . . of marginal eligibility; that is, falling within the group of families that agencies at one time would not accept."¹³³ Although there is some concern on the part of many agencies over the motivations of the white parents interested in adopting Negro children, those who actually adopt appear to have done so with success. As one agency has written, "We are strongly in favor of good interracial adoptions because we have seen them work to the great benefit of the children involved."¹³⁴

Besides the significance of the home in a child's development (and perhaps especially in a Negro child's development), there is a second reason for endorsing interracial adoptions even in the face of the tensions they may produce. American society is currently struggling with an agonizingly difficult "race problem." Although visible signs do not all point in the same direction, the goal ahead appears to be greater acceptance of racial integration in many areas of American life. Individuals who are in the vanguard of this social movement as it goes along its jolting, jarring way, should be encouraged, not deterred. As one writer has asked, is it "good public policy to require people who have no prejudices to conform to the standards of the prejudiced. . . ? [I]s it wise to require the socially healthy to keep step with the socially ill?"¹³⁵ Those white individuals who want to bring a Negro child into their home should not therefore be limited by community thinking—unless, for some reason, the child himself will suffer more in that home than he would otherwise, *i.e.*, in the available alternatives.

The last question is, in fact, raised by the situation which presently exists in the South. The discussion thus far has largely been predicated on the kind of situation that predominates in the urban North.¹³⁶ But it must be asked: What

131. D. Fanshel, *supra* note 13, at 34.

132. E. Branham, *supra* note 93, at 1.

133. *Id.* at 4-5.

134. Shepard, *supra* note 89, at 10-11; Letter from Stuart R. Stimmel, State Dir., The Boys and Girls Aid Soc. of Ore., to author, March 3, 1967.

135. Larrison 73.

136. There is, of course, the happy possibility in the urban north that the family may already be living in an integrated neighborhood. Where this is the setting, most of the arguments against interracial adoption lose much of whatever strength they have.

about the South, where many Negroes continue to live and where the circumstances calling for the adoption of unwanted infants may also exist?

Interracial adoption presents a far more difficult question in the South because of the continued hostility of the Southern white towards any sort of interracial social activity.¹³⁷ The intensity of this hostility is manifested by the laws forbidding marriage between Negroes and whites which have only recently been declared unconstitutional.¹³⁸ As a Southern adoption agency has indicated, "A child reared in a home with parents of a different race will be apt to meet and want to marry a person of his or her parents' background, not his own." So, at least in those states where anti-miscegenation laws persisted into the 1960's, interracial adoption seems likely to receive a reaction similarly hostile to that accorded interracial marriage.

In the face of such intense hostility, it perhaps becomes unfair to place a child in a situation where he is likely to suffer for the decision of others. It has been pointed out that the defenders of anti-miscegenation statutes may have had their strongest argument in "the likelihood that children of [mixed] marriages will suffer economically and socially."¹³⁹ The argument is strong because, while adults may rationally consider the implications of their decision before making it, the children they bear (or adopt) clearly have no chance to weigh the competing considerations and yet must face whatever consequences result. In the South, these could be disastrous. Does this possibility ever justify the refusal to allow the creation of an interracial home?

One commentator on miscegenation laws wrote in 1966 that solving the problem of the children of mixed marriages by simply forbidding those marriages was "about as 'reasonable' as prohibiting child labor by eliminating children." Instead of making mixed marriages illegal, he argued, those who cause the children of those marriages to suffer should be punished for any acts of violence or discrimination they perpetrate, and programs to educate these hostile members of society in hopes of changing their attitudes should be promoted.¹⁴⁰

This may indeed be an appropriate response in the case of the children of miscegenous marriages, for outlawing those marriages merely to prevent injustices to unborn children—injustices which should themselves be eradicated—represents an outrageous solution and one unacceptable to the Supreme Court. But the argument is not nearly so strong when it is applied to adoption, because adoption presents a rather different case. Adoption is not the natural process by which children are added to a family, but the deliberate placement of someone else's child into a new home. Thus where adoption is involved, the basic concern must be the child's welfare, and for that reason it may be so unwise to put a Negro child into a white home in the South (assuming, of course, that a home desiring

137. As one Southerner has recently remarked to the author, "Whites don't even have Negroes as guests in their homes in the South."

138. See *infra* sec. IV(A)(1).

139. Seidelson, *Miscegenation Statutes and the Supreme Court: A Brief Prediction of What the Court Will Do and Why*, 15 *Cath. U.L. Rev.* 156, 166 (1966).

140. *Id.* at 166-70.

him exists) that it should not, in perhaps a majority of cases, be counseled.¹⁴¹

Of course, it is possible that tensions in this area will lessen in the South, as elsewhere, over time. One factor which may contribute in that direction is judicial approval of interracial marriage (now a *fait accompli*) and interracial adoption,¹⁴² for law represents "an ethical norm" which most people are inclined to follow.¹⁴³ However, until tensions are substantially lessened, it would seem that sentiments in the South on this subject were largely summed up by a South Carolina attorney when he wrote:

In view of the grave psychological and social problems involved, the racial similarity between the adopting parents and child should be a condition precedent to considering other aspects of the child's welfare.¹⁴⁴

IV. QUESTIONS OF CONSTITUTIONALITY

The statutes and the practices of adoption agencies and courts already described demand examination from a constitutional point of view.

A. *The Statutes*

(1) *The Statutes Prohibiting Interracial Adoption*

The statutes which forbid interracial adoption in express language (and probably the statutes which attach harsh consequences to attempts at it, as well) are of dubious constitutionality. They can be challenged, first, on the ground of vagueness of application because of vagueness in statutory definition. A statute must be definite to be valid,¹⁴⁵ and it can be argued that the meaning of the terms, "race," "Negro," and "white," is so unclear as to make the statutes employing them invalid. This argument has been put forward on occasion where such terms have been used in other statutes,¹⁴⁶ and it is fortified by the statements of anthropologists that the use or definition of these terms is, in many cases, wholly arbitrary.¹⁴⁷ Where definitions exist, they are generally in terms of blood, ancestry, appearance, or all three;¹⁴⁸ and the adequacy of determinations made under such standards would seem doubtful. But a statute is not unconstitutionally vague "merely because clearer and more precise language might have been used; the Constitution . . . does not require more than that the language

141. "Approval" in the sense of holding their prohibition by statute to be invalid. See *infra* Section IV(A) pp. 335-41.

142. A blanket prohibition is still not justified, however; determinations must be made individually. There may well be communities where an interracial home would be in a child's best interest, e.g., in a university community.

143. See the discussion of the effect of law on prejudice in Greenberg 2-4, 24-29; see also G. Allport, *The Nature of Prejudice* 469-477 (1954); A. Rose, *Race Prejudice and Discrimination* 554-55 (1951).

144. Pope, *Interracial Adoption*, 9 S.C.L.Q. 630, 632 (1957).

145. 16 Am. Jur. 2d *Constitutional Law* § 552 (1966).

146. See M. Cohen, *supra* note 32, at 9.

147. See letter from Margaret Mead to M. Cohen, *id.* at 10.

148. Note, *An Appraisal of the Legal Tests Used to Determine Who Is A Negro*, 34 Cornell L.Q. 246, 247 (1948).

convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices."¹⁴⁹ Perhaps "common understanding and practices" in the South adequately define who is a Negro and who is not, for the purposes of these statutes, and therefore validate them as sufficiently precise. But this is not altogether clear.¹⁵⁰ The void-for-vagueness argument here is not strong, but if adoption can be maintained as "a fundamental right," then a certain precision may be deemed essential in statutes which regulate it.¹⁵¹

More significant objections to these statutes can be grounded upon the due process and equal protection clauses of the fourteenth amendment.¹⁵²

Due Process

It is generally stated that to invoke the due process clause, "one must have a right that has been abused or infringed."¹⁵³ This necessitates a consideration of whether or not such "rights" are involved in adoption. The argument that childless married couples have a right to adopt a child has never been recognized by the courts, and many workers in the field insist that it is a privilege.¹⁵⁴ But this view was originally formulated when few children were available for adoption and agencies could be very selective in choosing among applicants for parenthood. If, as the Supreme Court stated in *Meyer v. Nebraska*,¹⁵⁵ "Without doubt, [the liberty guaranteed by the Fourteenth Amendment] denotes . . . the right of the individual to . . . marry, establish a home and bring up children . . .," it can be argued that where there are children available for adoption in excess of the number of parent-applicants, any married couple who wants to adopt should have the right to do so. After all, if a couple meet the state's requirements for marriage, they are presumed to be capable of raising their own children. Merely because they are biologically unable to produce children themselves, it perhaps should not follow that an agency of the state may deny them the opportunity to adopt a child, at least one who would otherwise remain in institutional or foster care. (An exception would, of course, be made for those couples shown to be unfit for parenthood.) This view has strong support in the assertions of sociologists that family life "provides the major source of emotional security" for adults as well as children in contemporary American society.¹⁵⁶

149. 16 Am. Jur. 2d *Constitutional Law* § 552 (1966).

150. The problems that may arise where the need exists to make such definitions are illustrated by *Green v. City of New Orleans*, 88 So. 2d 76 (La. App. 1956). A child was born to an unwed white mother, was recorded as white, but with the passage of time began to exhibit Negro physical characteristics. An anthropologist refused to say that the child definitely had any "Negro blood," leaving the court to postpone designation of the child's race until a time "when the child was more developed and mature."

151. *Cf. Perez v. Lippold*, 32 Cal. 2d 711, 728-31, 198 P.2d 17, 27 (1948).

152. The equal protection argument has been suggested in Comment, *supra* note 87, at 722-23 n.36.

153. Applebaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 Geo. L.J. 49, 67 (1964) [hereinafter cited as Applebaum].

154. Foote, Levy & Sander 508.

155. 262 U.S. 390, 399 (1923). That "the freedom to marry" is "one of the vital personal rights necessary to the orderly pursuit of happiness by free men" was more recently articulated in *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

156. J. Udry, *supra* note 2, at 10, 18.

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Even if no parental right to adopt a child can be maintained, perhaps—where there are prospective adoptors—the unwanted child has a “right” to be adopted. That is, every child, insofar as possible, is entitled to the security and other advantages of a home and family. As one authority has written, the family, more than any other single institution, “determines what kind of life a child will grow into and what his chances will be to amount to something or nothing.”¹⁵⁷ Where a child is deprived of a stable family life, he does not undergo “the socialization which only a family can provide” and his personality development and his adjustment to society are “handicapped.”¹⁵⁸ Perhaps such deprivation can be viewed as deprivation of a right, at least where the possibility of a family life for the child is kept from him solely by statute.

Even if these “rights” are not deemed fundamental, the concept of due process nevertheless has been held to impose certain requirements of basic fairness on state legislation.¹⁵⁹ To meet the standards of due process, legislation must have a reasonable basis and be reasonably related to a legitimate legislative purpose.¹⁶⁰ There must, therefore, be a legislative finding that it is reasonable, in deciding a child’s future, to believe that racial matching bears some relationship to the welfare of the child. Further, even where such a finding has been made, it must be shown to be reasonable to give that factor controlling weight.¹⁶¹ While it is undeniable that race may reasonably be considered important in the placement of a child, it is *not* conclusive that identity of race between parent and child should be the overriding consideration.¹⁶² Where its application as such an overriding factor results in a placement less satisfactory in terms of the child’s overall welfare, or in no placement at all, due process would seem to have been violated.

Equal Protection of the Laws

The equal protection standard is more concrete; and also somewhat more relevant where racial classifications are involved. Its test, like that of due process, is essentially one of reasonableness.¹⁶³ The equal protection clause requires the states to “exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation.”¹⁶⁴ The question is, therefore, whether or not the statutory classification is reasonable. There are arguments which would seem to support a determination of reasonableness, *e.g.*, that a child in an interracial home will face difficulties, and where it appears that there may be some rational basis for state

157. *Id.*

158. E. Frazier, *quoted in* *The Negro Family* 48.

159. Applebaum 68.

160. *Bolling v. Sharpe*, 347 U.S. 497, 499-500 (1954).

161. *Cf. List, A Child and a Wall: A Study of “Religious Protection” Laws*, 13 *Buffalo L. Rev.* 9, 49-50 (1963).

162. *See supra* sec. III pp. 325-35.

163. *Id.* at 51.

164. *Railway Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring).

legislation, a presumption ordinarily operates in favor of its validity.¹⁶⁵ However, these statutes involve a *racial* classification, and such statutes have come to be treated differently by the courts. Indeed, the presumption is shifted, and the state is required to prove the reasonableness of the classification. A recent case exemplifying this approach is *McLaughlin v. Florida*,¹⁶⁶ where the Supreme Court declared a Florida statute invalid under the equal protection clause because it punished interracial couples for cohabitation in situations where other couples were not so punished. According to Mr. Justice White's majority opinion, judicial inquiry under the equal protection clause requires that the courts decide "whether the classifications drawn in a statute are reasonable in light of its purpose." Normally "the widest discretion is allowed the legislative judgment," but a classification based upon the race of the participants deserves special examination. Because the "central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States," racial classifications are "'constitutionally suspect,' and subject to the 'most rigid scrutiny,' and 'in most circumstances irrelevant' to any constitutionally acceptable legislative purpose."¹⁶⁷ Because the Court could find nothing to justify different treatment for interracial couples, it held such statutes as Florida's "invalid as a denial of the equal protection of the laws guaranteed by the Fourteenth Amendment."¹⁶⁸

More recently, in *Loving v. Virginia*,¹⁶⁹ the Court announced that statutory schemes adopted by a state to prevent marriages between persons solely on the basis of racial classifications "cannot stand consistently with the Fourteenth Amendment."¹⁷⁰ Referring to *McLaughlin*, the Court noted that where "we deal with statutes containing racial classifications, . . . the fact of equal application [to both races] does not immunize the statute from the very heavy burden of justification which the Fourteenth Amendment has traditionally required of state statutes drawn according to race."¹⁷¹ If racial classifications are ever to be upheld,

they must be shown to be necessary to the accomplishment of some permissible state objective, independent of the racial discrimination which it was the object of the Fourteenth Amendment to eliminate.¹⁷²

The Court concluded that "patently no legitimate overriding purpose independent of invidious racial discrimination" justified the racial classification in the Virginia miscegenation provisions under examination. "There can be no doubt

165. Applebaum 78-85.

166. 379 U.S. 184 (1964).

167. *Id.* at 191-92. (Footnotes omitted).

168. *Id.* at 184.

169. 388 U.S. 1 (1967).

170. *Id.* at 2.

171. *Id.* at 9.

172. *Id.* at 11.

that restricting the freedom to marry solely because of racial classifications violates the central meaning of the Equal Protection Clause."¹⁷³

The *McLaughlin* and *Loving* decisions may have special relevance here. Statutes governing adoption can be likened to those governing marriage and marriage-like relationships, since they all focus upon social units in which the state has a legitimate interest. The Supreme Court has said in *McLaughlin* that the general purpose of the Florida statute—"to prevent breaches of the basic concepts of sexual decency"—did not require separate or different treatment for interracial couples.¹⁷⁴ Similarly, it can be argued that the purpose of any adoption statute must be to benefit the welfare of the individual child, and since every child is unique—his uniqueness is not determined solely or even predominantly along racial lines—separate treatment of an adoption merely because it involves different racial backgrounds is neither required nor proper.

There is a further argument. In declaring racial segregation in the public schools a denial of equal protection,¹⁷⁵ the Supreme Court premised its decision in part on the "importance of education to our democratic society":

It is the very foundation of good citizenship . . . a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.¹⁷⁶

Surely these roles—as well as others—are played by the family, usually to a greater extent than by the school. Since the Court went on to say in *Brown* that "where the state has undertaken to provide [such an opportunity, it] is a right which must be made available to all on equal terms,"¹⁷⁷ it can also be argued that providing homes for those children who need them must be done on equal terms as well. The equal treatment of the races, moreover, is not enough: each individual child must be treated equally.¹⁷⁸

Arguments to the contrary are not decisive. The contention that racial tension may be heightened is probably insufficient to sustain a statute: "It would permit the majority race to maintain a racial restriction simply by threatening violence if the restriction were removed."¹⁷⁹ Injury to the child's personality development where interracial adoption takes place may be predicted by some, but it is equally easy to predict a more healthy development, at least along certain lines. Harm to the family is not inevitable, and where its nature permits, such harm should be in any case prevented by legal means.

The shift in presumption generally made in this area may not even be necessary, if, as one writer maintains, statutes "with racial categories, even under the

173. *Id.* at 11-12.

174. 379 U.S. at 193.

175. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

176. *Id.* at 493.

177. *Id.*

178. *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948). See also *McLaughlin v. Florida*, 379 U.S. 184 (1964), and *Loving v. Virginia*, 388 U.S. 1 (1967).

179. Applebaum 77 and cases cited.

rational-basis test, can still be struck down if they are shown to be either a stamp of inferiority upon a particular race or to be based upon racial hostility."¹⁸⁰ Hints of this argument are evident in the *Loving* decision. Regardless of its merits, the presumption is, in fact, against reasonableness, and it must be met by more conclusive arguments than those noted here if it is to be overcome.

It may be useful at this point to compare the treatment of the statutes found in a related area of law: adoption statutes containing "religious protection" provisions. These provisions, when strictly interpreted, are analogous to the statutes prohibiting interracial adoption. In the absence of statutory provision, religious "matching" of parents and child appears to be the common practice, although there is considerable flexibility. A number of statutes mention the religion of the parties (sometimes along with race) as a factor to be considered in judging an adoption's suitability.¹⁸¹ Finally, eleven states require religious matching "when practicable." This phrase is given three interpretations: it is given no real significance; it is interpreted liberally; or—notably in New York and Massachusetts—it is interpreted strictly.¹⁸² This last, mandatory interpretation, which requires religious matching in virtually every case, causes these statutes to resemble the statutes requiring racial matching, and, like them, they raise a constitutional question.

"Religious protection" in adoption¹⁸³ is both more and less objectionable than required racial matching. It is more objectionable in that (1) it may involve a violation of the first amendment, as well as the fourteenth; (2) imputing a religion to a child at birth is an artificial procedure, and restricting a child's possibilities of placement by such an imputation may be an unwarranted interference with his best interests, while a child's race or color at birth is a fact and an immutable one (at least where he has distinctive racial characteristics of any sort); (3) America's diverse religious groups far more commonly engage in intermarriage and other shared activities in the society than do the different racial groups; tensions between religious groups are not very great when compared with racial tensions; and in general, the significance allotted to religion in American society does not approach that allotted to race.

"Religious protection" is at the same time less objectionable than required racial matching in that it appears to have a relatively less adverse impact on any particular child's chances for adoption. While a Catholic child, for example, may have somewhat more difficulty in being placed in a Catholic home than he would have in being placed if Protestant and Jewish homes were also open to him, his difficulty pales beside that faced by the Negro child who can only be placed in a Negro home. The result is that a much higher proportion of Negro

180. Applebaum 86 and cases cited.

181. Race appears to be mentioned with less frequency in these statutes but given greater weight in practice.

182. List, *supra* note 161, at 21-24.

183. See the discussion of these provisions in List, *supra* note 161, and Ramsey, *The Legal Imputation of Religion to an Infant in Adoption Proceedings*, 34 N.Y.U.L. Rev. 649 (1959).

children are shunted off into institutions or foster homes, with all of their attendant consequences. Further, drawing racial distinctions in a statute implies, far more than "religious protection" ever can, that one of the races (the one which has made the law) considers itself superior to the other. This has been inherent in such legislation since the first "Jim Crow" law, and as one commentator has written of miscegenation statutes:

Anti-amalgamation laws are caste laws. They clearly imply that the Negro [and other nonwhite persons] are inferior peoples with whom association on an intimate level is anathema.¹⁸⁴

The inspiration for laws prohibiting interracial adoption can hardly have been much different.

Although the argument made against the constitutionality of religious protection laws is strong, the Supreme Court has refused to review a case which clearly presented the issue.¹⁸⁵ The court's reluctance to rule on such a question would perhaps trigger a refusal to consider the constitutionality of mandatory racial matching as well. In any case the actual significance of holding the statutory prohibition of interracial adoption unconstitutional would be minimal, at least initially, because practice in this area would be slow to change.¹⁸⁶

(2) *The Statutes Making Race a Relevant Consideration*

Those statutes which, without prohibiting interracial adoption, in some way point to race as a relevant factor cannot easily be said to be unconstitutional. Although these statutes, by suggesting that racial considerations be given some weight by court or agency, "raise the possibility that an unconstitutional criterion is sought to be applied,"¹⁸⁷ this alone does not seem to be enough to condemn them as *a fortiori* invalid. After all, "the intimacy and emotion involved in . . . adoption proceedings can properly justify" the consideration of such factors as race, religion, or national origin, since—wisely or not—these may be (and are) viewed by some as bearing a reasonable relation to the ends sought by adoption.¹⁸⁸ Race is not singled out in these statutes as the sole criterion on which decisions must be based, and the ordinary presumption in favor of state legislation is therefore probably applicable. Nevertheless, if it can be shown that race alone is looked to as a basis for differentiation (and that all other factors are largely ignored), the argument is tenable that these statutes are, in effect, applied like those which expressly prohibit interracial adoption, and are therefore, like them, of doubtful constitutionality.

184. C. Larrson, *Preface to Marriage Across the Color Line* at viii (C. Larrson ed. 1965).

185. *Matter of Goldman*, 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied*, 348 U.S. 924 (1955).

186. See the discussion of this practice in *infra* subsec. (B) pp. 342-47.

187. Comment, *supra* note 87, at 722-23 n.36.

188. List, *supra* note 161, at 52.

B. *The Practices*

Within the category of practices belong the practices of social agencies in handling adoptions, judicial decisions made under non-prohibitory adoption statutes, and judicial decisions in the area of child custody. As in the above discussion of statutes, the focus here will be upon the constitutionality of these practices under the due process and equal protection clauses of the fourteenth amendment.

The fourteenth amendment provides that:

no State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.¹⁸⁹

To maintain a claim under these clauses, therefore, "state action" is required. One clear instance of state action is a state statute. Action by an agency of the state or by an individual, such as a state officer, supported by state authority also constitutes state action.¹⁹⁰ Public, state-supported social agencies providing adoption services are clearly within this category. Similarly, "the action of state courts and of judicial officers in their official capacities is . . . regarded as action of the State within the meaning of the Fourteenth Amendment."¹⁹¹ Under this view, judicial decisions in the area may also be covered.

The sole remaining category is that of the private agencies which handle adoptions. There are two approaches by which their activities may, like the others, be viewed as "state action."

(1) A line of Supreme Court decisions has found state action in certain "private" activities where the state has become involved to a "significant extent." This line of cases includes *Marsh v. Alabama*,¹⁹² where a company-owned town was held subject to the same constitutional restraints regarding free speech as a public body; *Terry v. Adams*,¹⁹³ where the primary election activities of a private political organization were required to meet fifteenth amendment standards; *Burton v. Wilmington Parking Authority*,¹⁹⁴ where exclusion of a Negro from the restaurant of a state agency's lessee was deemed discriminatory state action; and Mr. Justice Douglas's concurring opinion in *Lombard v. Louisiana*,¹⁹⁵ which argued that state licensing and surveillance of a business serving the public makes it "an instrumentality of the State since the State charges it with duties to the public and supervises its performance."¹⁹⁶ Perhaps the trend of these cases has been summarized in *Evans v. Newton*,¹⁹⁷ where Mr. Justice Douglas, writing for the Court, stated,

189. U.S. Const. amend. XIV, § 1. (Emphasis added.)

190. Civil Rights Cases, 109 U.S. 3, 13 (1883).

191. *Shelley v. Kraemer*, 334 U.S. 1, 14 (1948).

192. 326 U.S. 501 (1945).

193. 345 U.S. 461 (1953).

194. 365 U.S. 715 (1961).

195. 373 U.S. 267 (1963).

196. *Id.* at 282-83.

197. 382 U.S. 296 (1966).

. . . when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations.¹⁹⁸

The *Evans* decision is far from sweeping, however; it calls for both a "public character" in the undertaking and some involvement by the state in its operation (in the past, if not in the present).¹⁹⁹

The work of a private adoption agency can arguably be fitted within this doctrine. Typically, the agency is licensed by the state and, in addition, performs a number of functions in the adoption process for the state: it cares for neglected children, it makes investigations of and reports on the "suitability" of an adoption for the courts, and so on. Its own placements must be reported to the state child welfare agency and are supervised by the courts. Very much like the private political party in *Terry v. Adams*, the agency's activities are geared into state processes; like the private trustees of the park in *Evans v. Newton*, it is exercising functions of a public nature.

It can, of course, be argued that the private agency stands in the place of the child's parent—especially where the mother has surrendered her child to a particular agency and has authorized it to place the child for her. Since a parent is deemed to have unrestricted control over the child's disposition, so also, the argument runs, should the agency. One writer has responded to this contention by saying that the agency does not stand fully *in loco parentis*, with the mother's power to give or withhold consent, because a child in the custody of an agency is under the *parens patriae* power of the state. "Agencies, whether public or 'private,' are *in the adoption proceedings* creatures of statutory law" and subordinate to the courts, wherein the *parens patriae* power is vested.²⁰⁰ Under this view, the mother might be required to make explicit any restrictions she desires; in the absence of these, even private agencies might then be forbidden from using racial classifications in this area.

On the other hand, extension of the *Evans v. Newton* doctrine into an area so intensely personal as adoption services seems questionable. "[T]he fact that government has engaged in a particular activity does not necessarily mean that an individual entrepreneur or manager of the same kind of undertaking suffers the same constitutional inhibitions."²⁰¹ Like private schools, private adoption agencies may—at least for the present—remain free from such inhibitions.

(2) *Shelley v. Kraemer*²⁰² held that the public endorsement (by court enforcement) of a private restriction based on race was a denial of equal protection of the laws. That doctrine could perhaps be extended to cover the judicial sanction of a private agency's refusal to make interracial placements. However,

198. *Id.* at 299.

199. *Id.* at 302.

200. Ramsey, *supra* note 183, at 687. (Emphasis in original.)

201. *Evans v. Newton*, 382 U.S. 296, 300 (1966).

202. 334 U.S. 1 (1948).

Shelley involved a willing buyer and a willing seller, both prevented from fulfilling their transaction by court enforcement of a restrictive covenant. The situation may be somewhat different where parent-applicants are willing to adopt a child of another race but the child's willingness to the adoption is not determinable. In any event, the Court has not indicated any enthusiasm for extending the *Shelley* doctrine in recent years;²⁰³ reliance upon the first approach, if any, would therefore seem preferable.

If, then, there is state action at all these levels in the adoption process (at least arguably where private agencies are involved), can it also be maintained that such action denies due process or equal protection when the factor of race is given controlling weight? Maintaining such an argument is difficult, in light of the two highly-generalized standards recognized as the guidelines in this area. It has already been noted that the courts generally adhere to the criterion of the "best interests" or the "welfare" of the child in making adoption and custody decisions. Adoption agencies, for their part, have traditionally followed the principle of "matching" in making their placements. The question therefore becomes: When can these standards be challenged as masking an unconstitutional exercise of discretion?

In the case of the agencies, "matching" has been upheld by the courts even where a court has felt that another outcome might be preferable.²⁰⁴ It appears that, whether or not an agency wishes to adhere to matching as a guiding precept, there is a general reluctance on the part of the courts to override agency decisions. Even where applicants believe that race was the decisive factor in refusing them a desired child, where the agency which has refused them denies that race was decisive, a court is unlikely to order the agency to make the requested placement.²⁰⁵ As a result, it is largely a function of *agency initiative* whether their standards of child placement undergo any change or not. In this spirit, Schapiro has urged that social agencies "help courts arrive at good decisions."²⁰⁶ But how they choose to do this depends, of course, upon what they view as a "good decision." Those agencies influenced by the prejudices in their communities will presumably decide differently from those preferring to follow other influences. Public agencies may have more freedom to disregard the matching mystique in a community where the pressures of prejudice are not great and, in particular, where a statute supports that disregard, while private agencies are perhaps more free to innovate than their public counterparts in communities dominated by prejudice.²⁰⁷

What about judicial decisions? As a recent commentator has pointed out,

203. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), is one case where the court might have extended *Shelley* but did not.

204. *Crump v. Montgomery*, 220 Md. 515, 154 A.2d 802 (1959), 224 Md. 470, 168 A.2d 355 (1961).

205. *See Rockefeller v. Nickerson*, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962).

206. 1 Schapiro 106.

207. *See* analysis in G. Allport, *supra* note 143, at 461-62. To some extent, the questionnaire results, *supra* pp. 321-23, bear out this thesis.

a difficulty with relying exclusively on the "welfare of the child" standard arises "when the parents' political or religious beliefs or racial characteristics are claimed to be contrary to the child's best interest. It would seem that in most cases these factors are irrelevant to the child's emotional well-being."²⁰⁸ However, when a decision is couched in terms of the child's "best interest," it is difficult to prove that race was given undue consideration—unless the judge himself articulates that it has been the decisive factor. Perhaps judges who want a decision based upon race to stand will take their cues from a case like *Fontaine v. Fontaine*²⁰⁹ (especially if they compare it with *Murphy* or *Potter*²¹⁰) and will *not* articulate that race was the controlling consideration. A more optimistic prediction is that judges may heed *Fontaine*-like decisions (at least in those jurisdictions where they are made) and actually cease to use race as the governing criterion.

Fontaine may well mark the trend of future decisions. One who considers himself the victim of a decision based solely upon race certainly can appeal to it as precedent, along with *Matter of the Adoption of Baker*²¹¹ and *In Re Adoption of a Minor*.²¹² Of course, no one should be compelled to adopt a child of another race where he does not wish to; discriminations made by prospective parents are appropriate because they are highly relevant to the parents' relationship with the child. At the same time, the courts of a state must not interfere unduly where parents affirmatively want to adopt a child of another race.

The rule enunciated in *In Re Adoption of a Minor*, *i.e.*, that race may be a relevant factor in determining where a child's welfare lies, but "that factor alone cannot be decisive," may be, Greenberg suggests, "assimilated to" a constitutional rule.²¹³ Despite the possible unconstitutionality of using race as a decisive consideration in both adoption and custody proceedings, the Supreme Court will almost unquestionably avoid entering this area of decision to formulate its own rule for some time. The Court's refusal to review a recent controversial custody determination,²¹⁴ a case presenting the issue of "religious protection" laws,²¹⁵ and, until 1966, several cases challenging miscegenation statutes²¹⁶ seems to indicate a high degree of reluctance to move into the area of family law, one area where the states' sovereignty not only is highly cherished, but also, to a considerable degree, remains intact.

V. CONCLUSION

A brief conclusion may serve to tie together some of the different threads running through this article. First, it is maintained that interracial adoption

208. 79 Harv. L. Rev. 1710, 1714-15 (1966).

209. See *supra* p. 315.

210. See *supra* pp. 315-16.

211. See *supra* pp. 311-12.

212. See *supra* pp. 310-11.

213. Greenberg 353.

214. *Painter v. Bannister*, 140 N.W.2d 152, *cert. denied*, 385 U.S. 97 (1966).

215. *Matter of Goldman*, 331 Mass. 647, 121 N.E.2d 843 (1954), *cert. denied*, 348 U.S. 942 (1955).

216. See *supra* p. 338.

should nowhere be illegal under statute. Racial discrimination in an adoption statute is as fully unconstitutional as any other form of racial discrimination given statutory expression. At the same time, it is recognized that interracial placements may, for social reasons, be slow to come about, particularly in the South. The ultimate standard must always be the child's "best interest," and where that standard would not be met in an interracial home, practice under the statute should (and probably will) be geared to make the wisest decision for each individual child.

The preferred statute, of course, would be one making no mention of race. This is, in fact, the form of both the Uniform Adoption Act and the model adoption act proposed by the United States Children's Bureau.²¹⁷ Under such an act, agencies and courts are free to act on behalf of the welfare of the child without statutory restrictions. A suggested standard: the rule of *In Re Adoption of a Minor*, interpreted as liberally as social considerations in the community will allow.

One solution for the unwanted Negro children who face a substantially more hostile reception from the white community in the South than that faced elsewhere may be that proposed by Schapiro in 1957 and apparently underway ten years later: a National Adoption Resource Exchange, a national "clearing house" to facilitate the placement of children from areas of the country where they are unwanted to those where they are welcomed.²¹⁸ Even in the North, however, wholesale adoption of Negro children by white parents is unlikely—and, indeed, is probably unwise. While race should clearly not be the sole, decisive factor in the placement of a child, adoption may be one of those very few areas where race should not be totally disregarded either. There will always be cases where differences in race should, perhaps *must* be considered if the "best interest of the child" is to prevail.

The problems in this area are evident. If law supports the creation of interracial homes through adoption and custody arrangements, it may encourage the establishment of more such homes and may have a benevolent influence upon attitudes towards them. Still, interracial placements—unless undertaken on a massive scale (and perhaps even then)—stand little chance of having any significant impact on America's racial difficulties. A Negro essayist has written that the Negro is "the most despised creature in his country" and that

there is simply no possibility of a real change in the Negro's situation without the most radical and far-reaching changes in the American political and social structure.²¹⁹

Nevertheless, if even one child in an interracial home finds love and acceptance

217. Greenberg 399; U.S. Children's Bureau, Pub. No. 394-1961, Legislative Guides for the Termination of Parental Rights and Responsibilities and the Adoption of Children 49-56 (1961).

218. 3 Schapiro 46; N.Y. Times, June 19, 1966, at 72, col. 2.

219. J. Baldwin, *supra* note 126, at 99.

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where he might have found neither, and if he grows to a sounder maturity as a result, then interracial adoption and custody placements will have served a useful purpose in American society.

