Notre Dame Law Review

Volume 59 | Issue 3 Article 1

1-1-1984

Transracial Adoption: Analysis of the Best Interests Standard

Margaret Howard

Transracial Adoption: Analysis of the Best Interests Standard

*Margaret Howard**

I. Introduction

The child placement system in the United States is governed by the best interests principle: that intervention and placement or other disposition should be carried out only to further the best interests of the affected child. This principle is sometimes stated as the standard for decision—a rule—and at other times as the goal the system is intended to achieve—a policy. The best interests test, however, is unacceptable as either rule or policy. If regarded as a rule, the test is so general and vague that it provides no standard at all, and thus no guidance for decision-making. When stated as the underlying policy, the test actually inhibits real analysis of the competing values in child placement decisions and evaluation of the weight that each of these values should receive.

The best interests concept itself includes several different and competing interests, and using the same phrase to describe all of them obscures this important fact. The effect of this obfuscation is to include in child placement decisions considerations that serve other political and social ends but are unrelated to the best interests of the affected child. Including these interests under the rubric of best interests of the child suggests that concern for the individual child is paramount when in fact the implementation of other social policies is given controlling effect, sometimes at the expense of the individual child's welfare.

Analysis of the best interests of children in the particular circumstances of transracial adoption has suffered from this deficient conceptualization because transracial adoption, like all other adoptions, is governed by the best interests test. All children in need of homes clearly have an identifiable interest in being part of a stable and permanent family. In the context of transracial placement, however, another important and competing interest arises—the child's

* Associate Professor of Law, Vanderbilt University School of Law. A.B., 1969, Duke University; J.D. and M.S.W., 1975, Washington University; LL.M., 1981, Yale Law School. The research for this article was supported in part by a grant from Vanderbilt University School of Law.

interest in his or her cultural identity as a member of a minority group. Heavier weighting of the former encourages transracial placement for a minority child if no in-race home is available. Emphasis on maintaining cultural identity, on the other hand, discourages transracial placement.

Other interests may also be identified in transracial adoption cases. Because child placement agencies are so instrumental in determining whether transracial placements are made, their organizational interests are influential, although these interests should be the least weighty of any. Minority groups whose children may be placed transracially have at least two identifiable interests—an interest in decision-making power and an interest in continuing to exist as discrete groups. Thus they have an interest in the cultural identity of the minority child that closely parallels the child's own interest in his or her cultural identity, because of the impact each child's identity may have on the life of the group.

This article will first review the factors contributing to the rise[1] and ultimate decline[2] of transracial placements of black and Indian children.[3] After discussing the competing interests involved in transracial adoptions and suggesting a normative hierarchy of these interests,[4] this article will examine various fact situations arising in transracial placement cases and propose resolutions in light of that

1 *See* text accompanying notes 6-52 *infra*.

2 *See* text accompanying notes 53-125 *infra*.

3 All transracial adoptions raise issues of cultural identity and group continuity, whether white parents adopt children from American minority groups or non-Americans, such as Asians, brought into the United States for the purpose of adoption. The ramifications of these issues, however, may be different for American minority children than for non-Americans. For example, questions of acceptance by the white majority and realistically available alternatives to transracial placement are different for the two groups. This article, therefore, will not discuss international adoptions, despite the fact that such adoptions are often interracial.

More specifically, this article will focus on the two American minority groups most affected by transracial adoption—blacks and Indians. Blacks are included because they constitute this nation's largest and most visible minority group. They have experienced a unique history of slavery, constitutional amendment, and civil rights struggle. Blacks live in virtually all areas of the country (although they compose a percentage of population that varies from one locality to another). And, nearly all whites have formed attitudes about blacks that might affect their opinions concerning the acceptability of white parents' adoption of black children.

Other minority groups, such as Indians, Asians, and Hispanics, are much more localized. Issues surrounding adoption of these children by white parents are accordingly more localized. Nevertheless, Indians are included in this article because the problem of Indian child placement has been the subject of congressional study and legislation, and because transracial adoption has had a unique and adverse impact on Indian tribes.

4 *See* text accompanying notes 126-210 *infra*.

hierarchy.[5] The various elements encompassed under the best interests label can thereby be traced and cases resolved, if not with more agreement among competing groups, then at least with more analytical clarity on the part of social workers and judges called upon to decide these cases.

II. The Increase in Transracial Placements

A number of factors led to the increased use of transracial placements beginning in the 1950's and 1960's. Their history can be understood only against the background of these forces.

First, the number of children coming into the placement system increased dramatically with identification by the medical profession in the early 1960's of the battered child syndrome[6] and subsequent passage of laws requiring suspected cases of child abuse to be reported.[7] A disproportionate number of these abused children were from poor families and were black or Indian, perhaps because greater surveillance of poor families resulted from their contact with welfare agencies, and because there were no options for poor parents temporarily unable to care for their children.

Second, the deficiencies of the foster care system[8] became increasingly apparent. Despite the theoretically temporary nature of foster care,[9] most children in foster care are there for several years, and substantial numbers of them are never returned to their fami-

5 *See* text accompanying notes 211-40 *infra*.

6 The seminal article was, perhaps, Kempe, Silverman, Steele, Droegemueller & Silver, *The Battered Child Syndrome*, 181 AM. MED. ASSOC. J. 17 (1962).

7 Legislatures responded quickly to publication of these clinical findings. Between 1963 and 1967, all 50 states passed some form of child abuse reporting statute. V. DE FRANCIS, CHILD ABUSE LEGISLATION IN THE 1970S 5 (1974), *quoted in* R. MNOOKIN, CHILD, FAMILY AND STATE: PROBLEMS AND MATERIALS ON CHILDREN AND THE LAW 318 (1978).

8 A great deal of attention has been focused on the foster care system and how it works. This literature is only summarized here; for more extensive discussions see, e.g., R. HUBBELL, FOSTER CARE AND FAMILIES (1981); Mnookin, *Foster Care—In Whose Best Interest?*, 43 HARV. EDUC. REV. 599 (1973); Musewicz, *The Failure of Foster Care: Federal Statutory Reform and the Child's Right to Permanence*, 54 S. CAL. L. REV. 633 (1981); Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623 (1976). Professor Wald's article, perhaps, should be cited only with apologies to that author, who left clear instructions to those who follow him that "[t]his Article will self-destruct in five years." *Id.* at 700. The continued importance of his work, however, is both a recognition of its quality and value and an admission that the more extensive data he hoped for, *id.* at 700 n. 290, is coming in a trickle rather than a cleansing flood.

9 Smith v. Organization of Foster Families, 431 U.S. 816 (1977); Note, *Long-Term Foster Parent and Children Have No Protectable Interest in Their Relationship*, 29 MERCER L. REV. 1137, 1141 (1978).

lies.[10] In addition, many children in foster care are subjected to multiple foster placements,[11] which have particularly detrimental effects on their emotional development.[12] And whatever the negative impacts of the system on children in general, for minority children the system is even worse.[13]

Third, clinical data identifying the effects of maternal deprivation resulting from institutional care on infants' psychological development[14] were reported. The data created an impetus to replace

10 Professor Wald has estimated that between 40 and 80% of children removed from abusive or neglectful homes are never returned to their parents and that the probability of reunion between the child and his or her parents declines markedly after the first year spent in foster care. Wald, *supra* note 8, at 662-63; *see also* Smith v. Organization of Foster Families, 431 U.S. at 835 (1977) (stating the district court's finding of fact to the same effect).

The median time spent in foster care by children in New York is more than 4 years, *Smith*, 431 U.S. at 836, and over 30% of them are in care more than 5 years, Besharov, *State Intervention to Protect Children: New York's Definitions of "Child Abuse" and "Child Neglect,"* 26 N.Y.L. SCH. L. REV. 723, 770-71 (1981). Long-term placement is known to be detrimental to children. *See* N.Y. SOC. SERV. LAW § 384-b(1)(b) (McKinney 1983); Vieni, *Transracial Adoption Is a Solution Now*, 20 SOC. WORK 419, 420 (1975).

11 This fact has been labeled "one of the most severe deficiencies of the existing system." Wald, *supra* note 8, at 645 n.107.

In New York, 60% of the children in foster care have experienced more than one placement, and 28% have experienced three or more placements. *Smith*, 431 U.S. at 837. Even children eventually placed in foster homes may spend some time in a shelter or other institution while a foster home is located, Wald, *supra* note 8, at 631, and 80% of children removed from a foster home go to another foster home rather than back to their families, *Smith*, 431 U.S. at 829 n.23.

12 Multiple placements are detrimental because they subject children "to discontinuities that may impair normal developmental processes" and "may impair the child's ability to form lasting attachments." Wald, *supra* note 8, at 671. It is most important to avoid multiple placements for children under the age of three (and available figures indicate that 43% of children entering foster care in New York are three or under, *Smith*, 431 U.S. at 836 n.38) because of these detrimental effects on developmental needs of children at that age, Wald, *supra* note 8, at 695. Lengthy placement coupled with multiple placements is especially harmful. J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 31-35, 39 (1973) [hereinafter cited as BEYOND THE BEST INTERESTS].

13 Minority children are in foster care in disproportionate numbers. *Smith*, 431 U.S. at 833-34; Macaulay & Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, in 1 RESEARCH IN LAW AND SOCIOLOGY 265, 273 (R. Simon ed. 1978); Wald, *supra* note 8, at 629. This is true for both blacks and Indians, but the situation of Indian children is much more extreme. Indian children have been placed in foster care in Maine at a rate 19 times the rate for non-Indians, in Minnesota at a rate 17 times the rate for non-Indians, and in South Dakota at a rate 22 times the rate for non-Indians. ASSOCIATION ON AMERICAN INDIAN AFFAIRS, INC., INDIAN CHILD WELFARE STATISTICAL SURVEY, July 1976 [hereinafter cited as AAIA Survey], *reprinted in Indian Child Welfare Act of 1977: Hearings on S. 1214 Before the Senate Select Committee on Indian Affairs*, 95th Cong., 1st Sess. 537, 538 (1977) [hereinafter cited as *Hearings*]. When placements for adoption and figures for Indian children attending boarding school are added, Indian children in New Mexico have been separated from their families at a rate 74 times greater than non-Indians. *Id.*

14 BEYOND THE BEST INTERESTS, *supra* note 12, at 17-19, and sources cited therein at 115 n.4.

institutionalization with a foster care system.[15] Maternal deprivation is caused by early separation of an infant from its mother and results in "[a]n inability to form relationships with adults or contemporaries, inadequate intellectual function, apathy and indifference to one's world, and poor physical stamina."[16] These clinical findings, based principally upon the work of child psychiatrists, have more recently supported developmental theories asserting that children need a continuous and stable relationship with an adult caretaker for adequate development. The best known proponents of this position are Joseph Goldstein, Anna Freud, and Albert Solnit, authors of *Beyond the Best Interests of the Child*.[17] Their theories of "continuity of care" and the "psychological parent"[18] are well accepted among child care workers and courts.[19] This clinical work has contributed to the view that fos-

15 Institutionalization was replaced by foster care as the detriments of the former became known. Macaulay & Macaulay, *supra* note 13, at 270. The rate of foster care and institutional placement, however, varies from state to state. Professor Wald found, for example, that 50% of children in placement in Nebraska were in institutions, but that in Utah 99.7% were in foster care. Wald, *supra* note 8, at 630-31 n.30. The record in *Smith*, 431 U.S. at 826 n.13, indicated that 72% of the children under state supervision in New York were in foster homes.

16 B. FLINT, THE CHILD AND THE INSTITUTION xi (1966), *quoted in* Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 356 (1979).

17 BEYOND THE BEST INTERESTS, *supra* note 12.

18 Professor Goldstein and Drs. Freud and Solnit used the phrase "psychological parent" to describe the adult with whom a child has formed the emotional attachments necessary for healthy emotional and psychological growth. *Id.* at 17-20. This relationship is based on daily interaction and "[t]he role can be fulfilled either by a biological parent or by an adoptive parent or by any other caring adult—but never by an absent, inactive adult, whatever his biological or legal relationship to the child may be." *Id.* at 19.

"Continuity of care" and relationships describe the stable and permanent environment a child needs in order to experience normal development. *Id.* at 31-35. "The instability of all mental processes during the period of development needs to be offset by stability and uninterrupted support from external sources. Smooth growth is arrested or disrupted when upheavals and changes in the external world are added to the internal ones." *Id.* at 32. The implication of this guideline is that placements should be permanent, not temporary or conditional. *Id.* at 35.

19 *See, e.g.*, Miller v. Berks County Children & Youth Servs. (*In re* Davis), 465 A.2d 614, 632 (Pa. 1983). Justice Brennan, writing for the majority in Smith v. Organization of Foster Families, 431 U.S. 816 (1977), stated that the briefs filed in the case "dispute at some length the validity of the 'psychological parent' theory propounded" by Goldstein, Freud, and Solnit, and referred to their book as "indeed controversial." *Id.* at 844 n.52. A close reading of the book reviews cited by the Supreme Court, as well as others, indicates that the criticisms leveled at *Beyond the Best Interests of the Child* were generally directed to points other than the authors' psychological parent and continuity of care theories.

For example, the Strausses criticized Goldstein, Freud, and Solnit for their failure to recognize that natural parents (and especially noncustodial parents) have independent rights, for their view of multi-hearing cases as paradigmatic, and for their failure to appreciate the role played by legal rules in planning by lawyers and their clients. The reviewers added, however, that "[t]his criticism, we should stress, does not impair other conclusions bearing on the custody process—in particular, . . . that the principal determinant of the custody award

ter care, originally espoused as preferable to institutionalization, is itself a less attractive alternative than permanent placement, whether such permanence is achieved by leaving the child in his or her home in the first place or by locating an adoptive home.[20]

The weight of current opinion is that a stable family may be the single most important factor in children's healthy emotional development.[21] Thus, children should remain with their parents whenever

---

be the least detrimental alternative, stressing strength and continuity in the psychological relationships the child enjoys." Strauss & Strauss, Book Review, 74 COLUM. L. REV. 966, 1005 (1974) (footnote omitted).

In addition to citing the Strausses' review, the Court also cited Kadushin, *Beyond the Best Interests of the Child: An Essay Review*, 48 SOC. SERV. REV. 508, 508-10 (1974). That reviewer criticized the authors' multiple failures: to consult workers who will be charged with implementing the recommendations; to recognize that continuity now may mean discontinuity later; to justify giving priority to the child's rights instead of the parent's; and their unfamiliarity with the social work literature. The reviewer, however, had the following words of praise:

> The book offers the sponsorship of eminent and respected names to some significant points of view which need the endorsements of such authoritative champions. Among these are . . . the need to recognize the difference between biological and psychological parenthood . . . and the primacy of importance to the child of the psychological parent; the overriding importance of continuity of care for the child . . . .

Id. at 509.

The Court did not cite Dembitz, *Beyond Any Discipline's Competence*, 83 YALE L.J. 1304 (1974), but it is a leading, highly critical review of *Beyond the Best Interests of the Child*. That reviewer, however, referred to the "indisputable value" of continuity of relationships and stated that the authors' "major contribution" is "their emphasis on the child's right to the best 'psychological' parent, regardless of competing adult claims." *Id.* at 1309, 1313.

Beyond the Best Interests of the Child received a reception best described as mixed. Reviewers have been highly critical of several positions taken by the authors, such as their assertion that noncustodial parents should have no legally enforceable right to visit their children, and the authors' reliance on concepts of continuity and psychological parenthood to the exclusion of competing values. *See, e.g.*, Dembitz, *supra* note 19. The theories of psychological parenthood and continuity of care themselves, however, have been well received; *cf.* Crouch, *An Essay on the Critical and Judicial Reception of Beyond the Best Interests of the Child*, 13 FAM. L.Q. 49 (1979).

20 Wald, *supra* note 8, at 671-72; Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFFALO L. REV. 303, 328-29 (1968); Comment, *Adoptions for the Hard-to-Place: The Role of the Court and the Trend Against Matching*, 25 U. MIAMI L. REV. 749, 765 (1971).

21 Commentators and courts alike recognize the significance of a stable family in a child's emotional development, although they phrase it in various ways: Santosky v. Kramer, 455 U.S. 745, 788-89 (1982) (Rehnquist, J., dissenting) ("A stable, loving homelife is essential to a child's physical, emotional, and spiritual well-being."); *Smith*, 431 U.S. at 844 ("Thus the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . . ."); L. GROW & D. SHAPIRO, BLACK CHILDREN—WHITE PARENTS: A STUDY OF TRANSRACIAL ADOPTION 3 (1974) [hereinafter cited as GROW & SHAPIRO I] (reporting that some black adoption workers saw transracial adoption "as a perhaps less-preferable but nevertheless pragmatic means of giving black children the kind of continuing care, nurturance and sense of belonging so important to the child's opti-

possible, because of the developmental importance of the emotional ties between a child and even a "bad" parent.[22] If removal from the home is necessary, the child's developmental needs are least disrupted if contact between parent and child is maintained, and the child is returned quickly.[23] If fairly rapid return is impossible, the child's emotional development is least disrupted if he or she is rapidly and permanently placed with another family. When parental rights are terminated, adoption provides that permanent family setting.[24] As recognition of the importance of a stable family to a child's development grew, pressure built to find adoptive homes for those children in foster care who were available for adoption.

Fourth, the number of healthy white infants available for adoption declined dramatically. A number of trends resulted in this decline, including increased availability of contraceptives and, later, the legalization of abortion.[25] Also, reduced social stigma surround-

---

mum physical, emotional, and social development"); Grossman, *supra* note 20, at 331-32 ("The most significant element in a child's development, according to most authorities, is the environment in which he spends his early years . . . . The role of the family in this process is, of course pervasive."); Comment, *Matching for Adoption: A Study of Current Trends*, 22 CATH. LAW. 70, 72 (1976) [hereinafter cited as Comment, *Matching for Adoption*] (There is "unanimous agreement among child experts that a stable home life with its attendant security and continuity is essential to a child's emotional and psychological well-being."); Comment, *The Interracial Adoption Implications of Drummond v. Fulton County Department of Family and Children Services*, 17 J. FAM. L. 117, 151 (1978) [hereinafter cited as *Drummond* Comment] (Psychological parent-child relationships are accorded "paramount importance . . . by the most eminent sociologists, psychologists and psychiatrists of our time."); Note, *supra* note 9, at 1148 ("Psychologists and sociologists are almost unanimous in recognizing that a stable environment is a major element of a healthy, happy childhood."); Comment, *supra* note 20, at 766 ("What is important is not that there is a large degree of identity between the adoptive parents and the child, but rather that the child is placed in a loving home with an atmosphere conducive to healthy and normal development.").

22 BEYOND THE BEST INTERESTS, *supra* note 12, at 19; Wald, *supra* note 8, at 639-40, 644.

23 Wald, *supra* note 8, at 672-73, 676.

24 If parental rights have not been terminated and the child cannot be returned to his or her parents in the foreseeable future (which, arguably, is in itself a ground for termination, J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEFORE THE BEST INTERESTS OF THE CHILD 29-51 (1979) [hereinafter cited as BEFORE THE BEST INTERESTS]), then foster care with tenure is the closest analogue to a permanent family that can be provided. *Id.* at 49; Wald, *supra* note 8, at 699-700; Macaulay & Macaulay, *supra* note 13, at 290. Subsidized adoption is one way to encourage less affluent families to adopt. *See* note 216 *infra*.

25 R. SIMON & H. ALTSTEIN, TRANSRACIAL ADOPTION 11 (1977) [hereinafter cited as SIMON & ALTSTEIN I]; Barsh, *The Indian Child Welfare Act of 1978: A Critical Analysis*, 31 HASTINGS L.J. 1287, 1299 (1980).

A series of Supreme Court opinions was instrumental in the beginning of this development: Roe v. Wade, 410 U.S. 113 (1973) (holding unconstitutional a statute criminalizing all abortions except those to save the mother's life and barring state regulation of abortions performed during the first trimester); Eisenstadt v. Baird, 405 U.S. 38 (1972) (holding unconstitutional a statute permitting distribution of contraceptives only to married persons); and

ing out-of-wedlock births encouraged many mothers to keep their children rather than release them for adoption.[26] And finally, the popularization of zero population growth as a societal goal encouraged couples wanting to increase their families to do so through adoption rather than childbirth.[27]

Two writers have asserted that transracial adoption would never have gained momentum but for the dearth of healthy white adoptable infants.[28] This argument necessarily leads to the conclusion that transracial adoption primarily serves the interests of white families, not the interests of waiting black children.[29] Professional adoption workers, on the contrary, did not promote transracial adoption as serving the interests of childless white couples, but as a solution for black children needing homes.[30] It is perhaps not unduly cynical, however, to surmise that the demands of white families prompted agencies to look again at the question of what is in the best interests of black children and at the concept of "matching" that hindered or prevented transracial placement.

Matching—which calls for placement of children with parents to whom they might have been born, i.e., parents with physical,

---

Griswold v. Connecticut, 381 U.S. 479 (1965) (reversing conviction for giving contraceptive information to married persons).

26 GROW & SHAPIRO I, *supra* note 21, at 3.

27 *Id.* at 4, 67.

28 SIMON & ALTSTEIN I, *supra* note 25, at 46, 165. This explanation is much too simplistic because of its failure to recognize the necessary and simultaneous contributions of the other factors discussed in the text.

29 Transracial adoption was defined originally not as a program to salvage black children from the effects of foster placement or institutionalization, but as a way of fulfilling the needs of childless white couples, given the dwindling availability of white children. Thus it was seen as a white enterprise instituted for the advantage of the white community.

SIMON & ALTSTEIN I, *supra* note 25, at 46 (footnotes omitted); *see also* Macaulay & Macaulay, *supra* note 13, at 286: "At first, the main criticism [of transracial adoption] was that it primarily benefited white families and only served to divert attention from the needs of the larger number of black children who would not be adopted by whites in any event." (citations omitted).

30 Grow and Shapiro interviewed adoption workers who had made transracial placements and found that the workers were "appropriately concerned with finding a good home for a child, not with finding a child acceptable to adoptive parents." L. GROW & D. SHAPIRO, TRANSRACIAL ADOPTION TODAY: VIEWS OF ADOPTIVE PARENTS AND SOCIAL WORKERS 89 (1975) [hereinafter cited as GROW & SHAPIRO II]. Similarly, Macaulay and Macaulay found in a review of the professional adoption literature that "transracial adoption had to be justified as being in the best interest of the black child—not the white family or society in general." Macaulay & Macaulay, *supra* note 13, at 284. Marmor stated that acceptable applicants for transracial adoption "have to be people . . . whose focus is on what they can do for the child rather than on what the child will do for them." Marmor, *Psychodynamic Aspects of Transracial Adoptions*, 1964 SOC. WORK PRAC. 200, 207.

mental, racial, and religious characteristics like theirs, on the premise that they will adjust more easily to such parents[31]—was a major obstacle to transracial placements. Decline of the social work profession's adherence to it was a fifth factor important in the increased incidence of transracial adoption. Although matching has never been proved to be important,[32] it remains a part of child placement ideology[33] in diluted form. For constitutional reasons, racial similarity between adoptive parents and adopted children may not be a determinative factor in the placement decision, but race may be considered as one factor among others.[34] Matching is currently re-

31 Grossman, *supra* note 20, at 318-19; Comment, *supra* note 20, at 750, 765.

32 Macaulay & Macaulay, *supra* note 13, at 285. Even when social workers accepted in principle that matching facilitates adjustment of the child into the family, the practice varied widely, and workers did not agree on precisely what constituted "sound matching." Grossman, *supra* note 20, at 318.

Some evidence, in fact, suggests that racial matching is not important. Grow and Shapiro, in their study of black children adopted into white families, found that

> children perceived by their parents as obviously black do better than those described as not obviously black. . . . This indicates that the less-well "matched" children do better than the better "matched," for whom denial of difference is easier. This in turn may mean that parents who acknowledge openly the child's difference may also have the ego strength to deal competently with the problems of child rearing in general. Conversely, parents who deny the child's difference may also tend to use this defense mechanism more generally and with negative consequences.

GROW & SHAPIRO I, *supra* note 21, at 236. The researchers also found that children not meeting the intellectual expectations of their parents, whether for average or above average intelligence, did not score as well on certain of the researchers' measures. They concluded, therefore, that matching for intelligence, although more difficult than matching for race, may be more important. *Id.* at 236-37.

In a study of Indian children adopted by white parents, Fanshel also found good overall adjustment, further refuting the importance of racial matching. D. FANSHEL, FAR FROM THE RESERVATION: THE TRANSRACIAL ADOPTION OF AMERICAN INDIAN CHILDREN (1972).

33 Comment, *Race as a Consideration in Adoption and Custody Proceedings*, 1969 U. ILL. L.F. 256, 259-60; *see also* Wamser, *Child Welfare Under the Indian Child Welfare Act of 1978: A New Mexico Focus*, 10 N.M.L. REV. 413, 418 (1980).

34 Statutes prohibiting transracial adoption are undoubtedly unconstitutional. Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978); Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972) (three-judge court); *In re* R.M.G., 454 A.2d 776, 786 (D.C. Ct. App. 1982) (dictum); *In re* Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967). Agency or judicial policy to deny placement solely on the basis of race is equally unconstitutional despite the absence of a statute. *In re* Adoption of a Minor, 228 F.2d 446 (D.C Cir. 1955); Commonweath *ex rel.* Lucas v. Kreischer, 221 Pa. Super. 196, 289 A.2d 202 (1972) (Hoffman, J., dissenting), *rev'd*, 299 A.2d 243 (Pa. 1973).

The cited authorities agree that race is one of the factors that may be taken into consideration in determining the best interests of the child. *See also* Miller v. Berks County Children & Youth Servs. (*In re* Davis) 465 A.2d 614, 622 (Pa. 1983). How that consideration operates is, however, a matter on which the courts disagree. *In re R.M.G.*, on the one hand, provides an extensive discussion of the constitutionality of such a racial consideration, and asserts that this factor cannot favor either party.

garded, at most, as an ideal that must give way when its application would result in non-adoption or delay in adoption of a particular child.[35] This approach has the advantage of allowing the benefits of

---

There is, however, an important caveat: if race is to be a relevant factor, the court cannot properly weight it, either automatically or presumptively—*i.e.*, without regard to evidence—for or against cross-racial adoption. To do so would add a racially discriminatory policy to evaluation of the child's best interest. As a consequence, in an adoption contest, petitioners of a particular race would receive a head start . . . .

The question thus becomes: whether statutory authority to consider race among the factors relevant to adoption, without preference for the race of any party, can ever be "necessary" for a determination of the child's best interest.

454 A.2d at 787. Contrary to the court's position, the reason for considering race as a factor is to favor applicants of the same race as the child. Race must be used to give intraracial applicants "a head start," or its use should be barred entirely. It is the constitutionality of this "head start" that the court should have addressed.

The *Drummond* court, on the other hand, took a much more realistic view of the proper role of racial factors in adoption decisions:

First, consideration of race in the child placement process suggests no racial slur or stigma in connection with any race. It is a natural thing for children to be raised by parents of their same ethnic background.

. . . .

Finally, adoption agencies quite frequently try to place a child where he can most easily become a normal family member. The duplication of his natural biological environment is a part of that program.

563 F.2d at 1205.

This is not to suggest that consideration of race should raise the presumption that applicants of the same race as the child prevail, for that comes dangerously close to the unconstitutional proposition that placement be decided solely on the basis of race. Rather, the "presumption" should place a checkmark in the same-race applicants' column, which is then weighed along with the results on the other factors (e.g., age, economic circumstances, emotional maturity, and stability) in deciding between in-race and cross-race applicants. Thus, this writer disagrees with the concurring judge in *In re R.M.G.* who stated that "a presumption based solely upon the race of competing sets of would-be parents has no place in adoption proceedings." 454 A.2d at 795 (Mack, J., concurring). Constitutional fault arises when a case is decided solely upon a presumption based on race, not when a presumption based solely on race is one of the factors considered. *Cf.* 454 A.2d at 805 (Newman, C.J., dissenting) (stating that a "preference" for intraracial adoption is permissible).

One risk of using race as a factor is that adoption agencies may place undue emphasis upon it but obscure the grounds for decision under other, constitutionally unobjectionable considerations. Allegations to this effect were raised by white prospective adoptive parents, and rejected by the courts, in *Drummond*, *supra*, and in Rockefeller v. Nickerson, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962). The court in *In re R.M.G.* recognized the risk that racial factors may be used discriminatorily and required the trial court to articulate its analysis in detail. 454 A.2d at 788.

35 Comment, *Matching for Adoption*, *supra* note 21, at 86; Note, *supra* note 16, at 355, 362-63; *see also* Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D. La. 1972) (three-judge court), which held unconstitutional a state statute precluding interracial adoption:

To justify the racial classification in Louisiana's adoption statute, the defendants must convince the Court that under all circumstances it is against the child's best interests to have racially different parents or a racially different parent. The defendants argue only that it cannot be regarded as unreasonable to require that a

matching, whatever they are, to be achieved in appropriate cases without otherwise-avoidable harm resulting to an individual child when efforts to match would delay or block his or her adoption.

One cannot say whether matching buckled under the pressure to make transracial placements, or whether transracial placements simply began to occur after the policy of matching became less widely accepted. Clearly, however, transracial placement could not occur as long as adoption and foster care agencies strictly adhered to the policy of matching.

Sixth, an insufficient number of minority homes were available for minority children in need of adoptive placement.[36] This problem, although not new, became increasingly acute as more minority children came into the system, and clinical data describing the damaging aspects of both institutional and foster care became available. The folk wisdom that blacks do not adopt has been discredited to some extent. Black families do adopt, although frequently informally, without resort to agencies and courts. They often adopt relatives,[37] and any disparity that may exist between black and white adoption rates disappears when socioeconomic class is held constant.[38] Nevertheless, a smaller percentage of black children is adopted than white,[39] and efforts to recruit black families have not met the need.[40]

Agency standards and practices are often blamed for the fact that a shortage of minority homes exists. Agencies have been criticized for failing to take affirmative steps to recruit black families,[41] including informing the black community of the need for adoptive

---

child have a "natural" family, that is, racially matched parents. They do not urge, nor could they successfully do so, that given the alternatives of institutional life, foster home care or an interracial family home, the institutional life or foster home care would prevail in all instances over the interracial family in serving the best interests of the child.

36 *E.g.*, Comment, *Matching for Adoption*, *supra* note 21, at 72.

37 Chimezie, *Transracial Adoption of Black Children*, 20 SOC. WORK 296, 297 (1975); Aldridge, *Problems and Approaches to Black Adoptions*, 23 FAM. COORDINATOR 407, 407 (1974).

38 When socioeconomic class is held constant, blacks adopt through agencies at a slightly higher rate than whites. Macaulay & Macaulay, *supra* note 13, at 279.

39 Note, *supra* note 16, at 336.

40 GROW & SHAPIRO I, *supra* note 21, at 2; Macaulay & Macaulay, *supra* note 13, at 279; Wamser, *supra* note 33, at 418 (regarding Indian children).

41 *E.g.*, Note, *supra* note 16, at 355. Grow and Shapiro found that transracially placed black children averaged less than four months of age at placement, thus refuting the prevalent view that in-race homes are available for black infants and leading those researchers to conclude that additional efforts are needed to recruit adoptive homes for even very young black children. GROW & SHAPIRO II, *supra* note 30, at 41.

families,[42] cutting the time and red tape involved in adopting,[43] sending black social workers into black communities,[44] and eliminating intrusive questions, especially from white workers, regarding fertility and mental health.[45]

Even more important than such practices are agency standards imposed on families seeking approval as adoptive placements. Traditionally, social and economic criteria imposed by adoption agencies have been so high that fewer black and Indian families can meet them than white families.[46] Such standards also serve to discourage minority families from applying in the first place, since they may anticipate rejection.[47] Thus, efforts to recruit minority families will be unavailing as long as standards are imposed that minority families are less likely to meet. This truism requires the social work profession to make difficult determinations of which standards for prospective adoptive families have a necessary relationship to the adoptive child's future well-being, thus justifying retention, and which standards carry culturally and racially discriminatory effects that are not outweighed by benefits to the child. Meanwhile, the effectiveness of such standards in screening out minority prospective placements contributed to a rising number of transracial placements.

Finally, the change in social attitudes towards racial integration in the 1960's contributed to the willingness of families to adopt transracially and of social workers to make transracial placements.[48] This factor is related to, but separable from, the issue of social or integrationist motivations for adopting transracially and the impact of such motives on the children affected.[49] Suffice it to say here that the in-

42 Aldridge, *supra* note 37, at 409.

43 *Id.*

44 Macaulay & Macaulay, *supra* note 13, at 289.

45 *See generally* Aldridge, *supra* note 37, at 409.

46 H.R. REP. NO. 1386, 95th Cong., 2d Sess. 11, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 7530, 7533 [hereinafter cited as H.R. REP. NO. 1386]; Aldridge, *supra* note 37, at 409; Chimezie, *supra* note 37, at 297; Macaulay & Macaulay, *supra* note 13, at 275, 279; Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RTS. REV. 1, 45 (1979).

47 TASK FORCE FOUR, REPORT ON FEDERAL STATE AND TRIBAL JURISDICTION, [hereinafter cited as TASK FORCE FOUR REPORT], *printed in* S. REP. NO. 597, 95th Cong., 1st Sess. 45 (1977) [hereinafter cited as S. REP. NO. 597].

48 Macaulay & Macaulay, *supra* note 13, at 277-78, Marmor, *supra* note 30, at 202; *cf.* Comment, *supra* note 33, at 266.

49 These parents appear to adopt, in the first place, for reasons expected of any adopting families: they love children and want a child or another child in the family but are infertile or fearful of another pregnancy, or they are concerned about homeless children generally, or they wish not to contribute to the worldwide population problem. GROW & SHAPIRO I, *supra* note 21, at 67. Twelve percent of these parents were unable to obtain a white child and

fluence of the early civil rights movement was to encourage integration as society's goal and, thus, to encourage transracial placement as part of this movement.[50] Although viewpoints later changed,[51] this

---

adopted a non-white child as a second choice, finding that alternative more acceptable than childlessness. *Id.* at 71. Although it might be expected that acceptance of a child as a second choice would jeopardize that child's future development, Grow and Shapiro speculated that the parents' ability to admit this fact "augurs well for their acceptance of racial differences and their willingness to assist their child in maintaining his or her racial identity." GROW & SHAPIRO II, *supra* note 30, at 41.

Motivations fundamentally more questionable, such as adopting transracially out of a sense of guilt over the treatment of minorities in this society, have been advanced as positive reasons for transracial adoptions. For example, one of the social workers involved in the Indian Adoption Project, discussed in the text accompanying notes 72-74 *infra*, wrote:

> When the Indian Adoption Project first came to the attention of the Children's Bureau of Delaware in the fall of 1958, our reactions were essentially positive. I believe all Americans feel a certain sense of guilt about our country's treatment of the Indian, and so we were glad of the chance to do something concrete to offset our nebulous sense of shame.

Davis, *One Agency's Approach to the Indian Adoption Project*, 40 CHILD WELFARE (no. 6) 12 (1961); *see also* Marmor, *supra* note 30, at 202. On the other hand, Grow and Shapiro asked parents who had adopted transracially what advice they would give to a friend interested in transracial adoption. "Most frequently mentioned as persons who they felt should *not* undertake such adoptions were individuals who might be adopting out of guilt or a sense of duty." GROW & SHAPIRO I, *supra* note 21, at 57 (emphasis in original).

Given the significance of race in our society, transracial adoption is inevitably an affirmative social act, regardless of the parents' private motivations. Few parents, however, name a desire to promote integration as an element moving them to adopt transracially. *Id.* at 67. Rather, they warn against adopting on the basis of social motivations. SIMON & ALTSTEIN I, *supra* note 25, at 105-06. Social workers, too, reject the service of integration as an appropriate goal for transracial adoption. Macaulay & Macaulay, *supra* note 13, at 284.

Parents who adopt transracially might be expected to have more "liberal" political and social views than other adoptive parents. The available data, however, are inconclusive on this point. *Compare* GROW & SHAPIRO I, *supra* note 21, at 237 *and* SIMON & ALTSTEIN I, *supra* note 25, at 77, *with* D. FANSHEL, *supra* note 32, at 321 *and* Marmor, *supra* note 30, at 206. Fanshel provided an interesting impressionistic view of white parents who adopted Indian children:

> Going beyond the formal data, let me identify what comes through to me. . . . Repeatedly, the element that has been most noteworthy in the self-descriptions of the subjects has been a certain independence, often self-referred to as a "stubborn streak". . . . While far from being nonconformists, they do have an independence of mind and do not appear easily led into accepting orientations which are basically alien to them. This may explain their ability to accept the child who, by entrance into their home, may place a distinctive stamp upon them and cause them to be viewed as different from other families. It is not that they would not care what their neighbors think, it is rather that they would not allow themselves to be guided in their actions by such considerations.

D. FANSHEL, *supra* note 32, at 322. Marmor described a group of parents who adopted early in the transracial adoption movement as sharing "common characteristics of self-confidence, self-awareness, and what has been described as 'a light touch.'" Marmor, *supra* note 30, at 204.

50 *See* Grossman, *supra* note 20, at 333.

51 *See* text accompanying notes 57-63 *infra*.

attitudinal factor was important and probably necessary to the increase in transracial placements, given their social significance.[52]

Without the convergence of at least these seven factors, the number of transracial adoptions would not have risen to any significant level. But these forces did come together in the 1950's and 1960's, and transracial placement of both black and Indian children in white homes began to occur with increasing frequency.

III. Recent Policy Changes

Adoption is governed by the best interests principle, and most adoption statutes make no mention of race.[53] Although the general thrust of the statutes and governing principles has not changed over the last three decades, actual practice under them has changed dramatically.[54] Transracial placements for both black and Indian children simultaneously began, peaked, and declined. The decline was due to changing social attitudes towards the practice, stimulated by growing minority group opposition.[55]

A. *Changing Attitudes in the Social Work Profession*

The social work profession, which controls the course of actual adoption practice,[56] states its formal views toward transracial adoption in the Standards for Adoption Service of the Child Welfare League of America ("CWLA"), the preeminent association of adoption professionals. In 1958, before the boom in transracial adoptions, the Standards stated that, while racial characteristics should not be determinative in placing a child for adoption, "children placed in adoptive families with similar racial characteristics, such as color, can become more easily integrated into the family group and community."[57] The Standards also stated, however, that "[p]hysical resemblances should not be a determining factor in the selection of a home,

52 D. FANSHEL, *supra* note 32, at 29.

53 Comment, *supra* note 33, at 259. See, e.g., N.Y. DOM. REL. LAW §§ 112-117 (McKinney 1977), which does not mention race and specifically states the best interests standard. *Id.* §§ 114, 115-a(4), 116(4).

54 Macaulay & Macaulay, *supra* note 13, at 266.

55 *E.g.*, SIMON & ALTSTEIN I, *supra* note 25, at 2, 44-45. For discussion of the views of the National Association of Black Social Workers, see text accompanying note 62 *infra*.

56 Macaulay & Macaulay, *supra* note 13, at 266.

57 CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE § 4.6 (1958) [hereinafter cited as CHILD WELFARE LEAGUE], *quoted in* Macaulay & Macaulay, *supra* note 13, at 281.

with the possible exception of such racial characteristics as color."[58] Thus, the Standards reflected the profession's view that matched placements were generally more likely to succeed and that racial matching was critically important.

By 1968, the CWLA had changed its position dramatically. Again the Standards asserted that racial background should not be determinative. But the Standards then provided:

> It should not be assumed by the agency or staff members that difficulties will necessarily arise if adoptive parents and children are of different racial origin. . . . In most communities there are families who have the capacity to adopt a child whose racial background is different from their own. Such couples should be encouraged to consider such a child.[59]

The proviso emphasized above was also eliminated from the Standard asserting that "[p]hysical resemblances of the adoptive parents, the child or his natural parents, should not be a determining factor in the selection of a home."[60]

In 1972 the National Association of Black Social Workers ("NABSW") condemned transracial adoption in terms so militant that transracial adoption fell by 39 percent in a single year.[61]

> [W]e have taken the position that Black children should be placed only with Black families whether in foster care or for adoption. Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.
>
> Our position is based on:
>
> 1. the necessity of self-determination from birth to death, of all Black people.
> 2. the need of our young ones to begin at birth to identify with all Black people in a Black community.
> 3. the philosophy that we need our own to build a strong nation.

---

58 *Id.* § 4.11 (1958), *quoted in* Macaulay & Macaulay, *supra* note 13, at 281 (emphasis added).

59 *Id.* § 4.5 (1968), *quoted in* Macaulay & Macaulay, *supra* note 13, at 283-84.

60 *Id.* § 4.9 (1968), *quoted in* Macaulay & Macaulay, *supra* note 13, at 284.

61 There were 2,574 black-white adoptions in 1971 and 1,569 in 1972. By 1974 the number was down to 1968 levels, when 733 black-white adoptions took place. Macaulay & Macaulay, *supra* note 13, at 288. In 1975, there were 831 transracial adoptions. R. SIMON & H. ALTSTEIN, TRANSRACIAL ADOPTION: A FOLLOW-UP 55 (1981) [hereinafter cited as SIMON & ALTSTEIN II].

> The socialization process for every child begins at birth. Included in the socialization process is the child's cultural heritage which is an important segment of the total process. This must begin at the earliest moment; otherwise our children will not have the background and knowledge which is necessary to survive in a racist society. This is impossible if the child is placed with white parents in a white environment.
>
> . . . .
>
> We the participants of the workshop have committed ourselves to go back to our communities and work to end this particular form of genocide.[62]

Facing the condemnation of black social work professionals, the CWLA again changed its Standards. The 1972 Standards provide: "While we specifically affirm transracial adoptions as one means of achieving needed permanence for some children, we recognize that other things being equal in today's social climate, it is preferable to place a child in a family of his own racial background."[63]

Although the CWLA Standards, perhaps somewhat defensively, continued to approve of transracial placement for "some" children, the organized and vociferous opposition of the NABSW had the effect noted above of dramatically reducing the number of transracial placements made. Available evidence suggests that wholesale adoption by whites of black or mulatto children has never occurred.[64] Current figures are hard to locate,[65] but only a small number of transracial placements are still being made.[66] Since no data suggest that more black homes have become available, the inevitable conclusion is that adoptable black children remain in foster homes and institutions.[67]

B. *Assimilation and Indian Placements*

The history of transracial placements of Indian children, al-

62 NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER (Apr. 1972), *quoted in* SIMON & ALTSTEIN I, *supra* note 25, at 50, 52.

63 CHILD WELFARE LEAGUE, *supra* note 57, § 4.5 (1972), *quoted in* Chimezie, *supra* note 37, at 296.

64 *See* note 61 *supra*.

65 The then-named Department of Health, Education, and Welfare stopped keeping nationwide adoption figures in 1975. SIMON & ALTSTEIN II, *supra* note 61, at 76 n.5.

66 GROW & SHAPIRO I, *supra* note 21, at 5-6; SIMON & ALTSTEIN I, *supra* note 25, at 4; Macaulay & Macaulay, *supra* note 13, at 292. On the other hand, there is some evidence that the number of transracial adoptions may be increasing again. Jane Erickson of the Black Child Development Institute reported to the author her impression, based upon meetings with adoption and foster care workers in state agencies, that transracial adoption is becoming more popular. Telephone interview with Jane Erickson (June 30, 1983).

67 *Drummond* Comment, *supra* note 21, at 151 n.143; Note, *supra* note 16, at 355.

though also guided by the CWLA Standards, has been somewhat different. Transracial placements of Indian children have been strongly affected by congressional policy toward Indians generally. Although that policy stressed tribal sovereignty in the early years,[68] in the 1880's the policy turned to assimilation aimed at "submerging the distinct identity and culture of tribal Indians in the melting pot of American society."[69] Part of assimilationist policy involved removing Indian children from their homes and sending them to boarding schools operated by the Bureau of Indian Affairs.[70] Na-

68 Note, *The Indian Child Welfare Act of 1978: Provisions and Policies*, 25 S.D.L. REV. 87, 99 (1980).

69 Note, *Indian Child Welfare: A Jurisdictional Approach*, 21 ARIZ. L. REV. 1123 (1980).

70 TASK FORCE FOUR REPORT, *supra* note 47, at 44; AMERICAN INDIAN POLICY REVIEW COMM'N, FINAL REPORT, *printed in* S. REP. NO. 597, *supra* note 47, at 39. The Indian Child Welfare Act, 25 U.S.C. § 1961(a) (1982), asserts that "[i]t is the sense of Congress that the absence of locally convenient day schools may contribute to the breakup of Indian families." Subsection (b) of § 1961 required the Secretary of the Interior to report to Congress by Nov. 8, 1980, on the feasibility of providing Indian children with schools near their homes. 25 U.S.C. § 1961(b) (1982).

The report, entitled "A Day School Opportunity for all Indian Children: A Feasibility Study," was prepared by the National Indian Training and Research Center of Tempe, Ariz. (A copy of the draft submitted to the Bureau of Indian Affairs ("BIA") Division of School Facilities in Dec. of 1980 was loaned to this writer by Frank Latta, Chief of the School Facilities Staff, P.O. Box 2147, Albuquerque, N.M. 87103. His accompanying memorandum, dated Aug. 9, 1983, indicated that the final report did not differ from the draft).

The report found that approximately 20,000 of the total 200,000 reservation Indian school children are enrolled in BIA boarding schools or boarding dormitories, the latter of which provide residential care for students enrolled in local public schools. *Id.* at i (Foreword). Enrollment of Indian boarding students in BIA schools and dormitories peaked in 1971, *id.* at 3, and the decline shows not only population decrease but also a "sustained and definite trend" toward day schools, *id.* at 4.

Indian children enroll in boarding schools for a variety of reasons. Unlike some estimates that 40 to 60% of Indian children enroll in boarding schools for "social welfare" reasons — *i.e.*, as a result of social services placements — the report found that only 12.1% of the elementary and high school boarding students are there for that reason. *Id.* at 19. In addition, the report found that 21.8% of all boarding students are there because of personal or parental choice. The report stated, furthermore, that *"Definitive data collected at the school level show a much higher percentage of Indian boarding students now have a day school opportunity but attend boarding schools on a preference basis."* *Id.* at 21 (original emphasis).

The report failed to find that lack of convenient day schools is a substantial factor in the number of Indian children who board, the "sense of Congress" to the contrary notwithstanding. In Areas other than the Navajo, only 5% of boarding elementary school students are there because of isolation; in the Navajo Area, the figure is 47%. *Id.* at 20. The report found that of the Navajo elementary students now without access to a day school, 39% are in boarding schools with a high potential for increasing day school capacity, and 27% are in boarding schools the expansion of which would compete with public schools; only 34% have no access to day schools in the near future due to isolation and lack of all-weather roads. *Id.* at 62.

The report concluded that the lack of day school opportunity is almost exclusively a problem of the Navajo Area and that boarding schools are *not* being misused "as a substitute for providing adequate social services to Indian families." *Id.* at 3, 6 (Exec. Summ.).

tional policy has again swung toward tribal sovereignty,[71] but the legacy of assimilation remains in the form of the Indian child welfare crisis.

A study conducted in 1957 found that almost 1,000 Indian children, available for adoption, were living in foster homes and institutions. In response to this finding, the BIA and the CWLA began a jointly sponsored demonstration project called the Indian Adoption Project.[72] Between 1958 and 1967, when the Project was succeeded by the CWLA's Adoption Resource Exchange of North America (ARENA), the Project placed 395 children in mostly non-Indian homes.[73] By 1972, the Project and ARENA had together placed 650 Indian children, again mostly in non-Indian homes.[74]

Simultaneously, the traditional child welfare system was functioning with the combined effect noted above[75] that by the mid-1970's the adoptive and foster care placement of Indian children in non-Indian homes had reached a level described as "alarming,"[76] "shocking,"[77] and a "crisis . . . of massive proportions."[78] The causes for this crisis lay in the insensitivity of the traditional child welfare system to Indian culture and child-rearing practices.[79]

In the traditional system, intervention and placement are in the hands of social workers, social service agencies, and courts. Congress, in its investigation of the Indian child placement crisis, found both social workers and judges ignorant of Indian cultural patterns and, therefore, likely to see neglect and abandonment through culturally biased eyes.[80] In particular, Congress charged that courts and agen-

---

71 Note, *supra* note 68, at 99-100.

72 Davies, *Implementing the Indian Child Welfare Act*, 16 CLEARINGHOUSE REV. 179, 181 (1982); *see also* Davis, *supra* note 49; Hostbjar, *Social Services to Indian Unmarried Mothers*, 40 CHILD WELFARE 7 (no. 5) (1961); Lyslo, *The Indian Adoption Project*, 40 CHILD WELFARE 4 (no. 5) (1961).

73 Davies, *supra* note 72, at 181.

74 Goodluck & Eckstein, *Indian Adoption Program: An Ethnic Approach to Child Welfare*, *cited in Hearings*, *supra* note 13, at 414, 415.

75 *See* text accompanying notes 8-13 *supra*.

76 Indian Child Welfare Act § 2(4), 25 U.S.C. § 1901(4) (1982).

77 AAIA Survey, *supra* note 13, at 538.

78 H.R. REP. NO. 1386, *supra* note 46, at 9.

79 *See generally* Comment, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUM. RTS. L. REV. 529 (1975).

80 Two studies found that 99% of the removals of Indian children from their homes were based on "neglect" or similar grounds. H.R. REP. NO. 1386, *supra* note 46, at 10. These grounds are the most subjective and, therefore, the most susceptible to cultural bias. Santosky v. Kramer, 455 U.S. 745, 762 (1982); Smith v. Organization of Foster Families, 431 U.S. 816, 834 (1977); Wald, *supra* note 8, at 640-41.

Courts have shown sensitivity toward Indian cultural differences in a few cases. *See, e.g.*,

cies do not understand the cultural differences in Indian child-rearing practices. Primarily these cultural differences revolve around the extended family or kinship group:

> An Indian child may have scores of, perhaps more than a hundred, relatives who are counted as close, responsible members of the family. Many social workers, untutored in the ways of Indian family life or assuming them to be socially irresponsible, consider leaving the child with persons outside the nuclear family as neglect by the parents and thus grounds for terminating parental rights.[81]

Furthermore, in the Indian culture young children are given responsibility earlier than in white society, by being left unsupervised or being placed in charge of younger children.[82] And finally, Indian children are raised more permissively than are white children.[83] These cultural patterns may give the appearance to a judge or social worker that Indian parents are not providing proper supervision. In addition to these differences in child-rearing practices, excessive use of alcohol is often given as a reason for removal of Indian children.[84] The legislative history indicates that when rates of problem drinking are the same for Indians and non-Indians, Indians are more likely to lose their children because "cultural biases frequently affect decision-making."[85] Several observers, Congress stated, "have argued that there are important cultural differences in the use of alcohol," but that "non-Indian social workers draw conclusions about the meanings of acts or conduct in ignorance of these distinctions."[86]

Wisconsin Potowatomies v. Houston, 393 F. Supp. 719 (W.D. Mich. 1973); Carle v. Carle, 503 P.2d 1050 (Alaska 1972); Alvardo v. State, 486 P.2d 891 (Alaska 1971).

81 H.R. REP. NO. 1386, *supra* note 46, at 10; *see also* Comment, *Custody Provisions of the Indian Child Welfare Act of 1978: The Effect on California Dependency Law*, 12 U.C.D. L. REV. 647, 652 n.31 (1979). Ironically, Professor Wald noted that foster care placement with relatives is frequently preferred on the grounds "that relatives often are more committed to the child and more willing to accept a child who behaves badly or exhibits special problems." Wald, *supra* note 8, at 697.

82 *See* Comment, note 81 *supra*.

83 *Id.; see also* H.R. REP. NO. 1386, *supra* note 46, at 10.

84 H.R. REP. NO. 1386, *supra* note 46, at 10; *see also* Davis, *supra* note 49, at 15.

85 H.R. REP. NO. 1386, *supra* note 46, at 10. This observation is troubling. If the law is being unequally applied, perhaps the appropriate solution is to remove white children from alcoholic parents more readily rather than to stop removing Indian children from such parents.

86 *Id.* The committee report fails to explain what these cultural differences are or how they justify leaving an Indian child with a parent whose drinking has impaired his or her ability to care for the child. The report may be implying either of two possibilities: that social workers tend to see impaired parenting ability when none exists (which fits comfortably with Barsh's observation that white caseworkers tend to stereotype Indians as alcoholics,

Whether or not Congress accurately cast the blame,[87] the fact of wholesale removal of Indian children from their families and placement, generally, in non-Indian homes was well documented. The effect on the tribes was severe; loss of such large numbers of their children threatened the very existence of tribes as identifiable cultural entities and represented "ultimately an unjustified coerced assimilation into the larger society."[88]

C. *The Indian Child Welfare Act*

Congress responded by passing the Indian Child Welfare Act of 1978.[89] The Act proceeds from the premise that the best interest of

---

Barsh, *supra* note 25, at 1295); or that acts or omissions constituting an impaired ability to parent, sufficient to justify removal of the child from the home, differ from culture to culture.

87 The congressional reports identify state welfare agencies and courts as the "cause and culprit" of the shockingly high rates of Indian placements. Wamser, *supra* note 33, at 414. This one-dimensional approach led the committee to see the foster care system "not as a haven for the neglected child but as a great hazard to which the child is exposed." *Id.* at 415. Wamser noted that the attack on state child welfare systems was not effectively answered in the reports, *id.* at 416, and concluded that "[t]he reports clearly evidence a bias which far exceeds the statistical and testimonial base," *id.* at 416 n.26. Finally, he asserted:

> The [Indian Child Welfare] Act does not contemplate such serious abuse to the child as to require removal before remedial measures are applied. Nor does the Act consider abandonment situations where questions of the effect of continued custody are irrelevant. It is clearest in these provisions that the Act was drafted with the assumption that "Indian abuse" is solely a matter of cultural perception. The lack of child welfare expertise is evident.

Id. at 426.

88 Guerrero, *Indian Child Welfare Act of 1978: A Response to the Threat to Indian Culture Caused by Foster and Adoptive Placements of Indian Children*, 7 AM. INDIAN L. REV. 51, 53 (1979).

89 Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901-1963 (1982). The court in *In re* Guardianship of D.L.L. & C.L.L., 291 N.W.2d 278 (S.D. 1980), upheld the Act against several state and federal constitutional challenges: 1) that the Act unconstitutionally ceded the state's jurisdiction over domestic relations cases to the federal courts; 2) that the Act violated a compact with the federal government contained in the state constitution; and 3) that the Act denied equal protection and due process to Indians by barring their access to state courts.

For more detailed discussion of the Act, see Davies, *supra* note 72; Guerrero, *supra* note 88; Wamser, *supra* note 33; Note, *Conflict of Laws: The Plurality of Legal Systems: An Analysis of 25 U.S.C. §§ 1901-63, The Indian Child Welfare Act*, 8 AM. INDIAN L. REV. 333 (1980) [hereinafter cited as *Conflicts* Note]; Note, *Legislation: Cooperation as the Key to Effectuation of the Indian Child Welfare Act*, 8 AM. INDIAN L. REV. 387 (1980) [hereinafter cited as *Legislation* Note]; Note, *In re D.L.L. & C.L.L., Minors: Ruling on the Constitutionality of the Indian Child Welfare Act*, 26 S.D.L. REV. 67 (1981); Note, *supra* note 68; Comment, *supra* note 81; Comment, *The Indian Child Welfare Act—Tribal Self-Determination Through Participation in Child Custody Proceedings*, 1979 WIS. L. REV. 1202 [hereinafter cited as Comment, *Tribal Self-Determination*].

Consider also the approach advanced in Comment, *The American Indian Child-Welfare Crisis: Cultural Genocide or First Amendment Preservation*, 7 COLUM. HUM. RTS. L. REV. 529 (1975-76), in which the writer argues that a right to cultural preservation is found in the first amendment.

the Indian child is to stay with his or her tribe,[90] and employs jurisdictional and procedural means to achieve the substantive goal of reducing the placements of Indian children with non-Indians.[91] It allocates jurisdiction to decide a child custody matter between state and tribal courts, with provisions "designed to limit and check the state's ability to act in traditional child welfare areas, thereby preventing Indian children from even coming into state custody."[92] The Act seeks to limit the opportunity for state courts and agencies to intervene in Indian child custody cases in the first instance, since the substance of the criticisms of the Indian child placement process pointed toward the negative part played by state agencies.[93] Tribes are given exclusive jurisdiction over a child custody proceeding[94] involving an Indian child[95] residing on or domiciled in the reservation,[96] except when an Indian child temporarily off the reservation is in danger of "imminent physical damage or harm" and the state has emergency jurisdiction under otherwise applicable state law.[97] If an Indian child subject to a child custody proceeding is not residing on or domiciled within the reservation, the state court must, upon petition by the child's parent, Indian custodian,[98] or tribe,[99] transfer the

90 Note, *supra* note 68, at 115; *cf.* 25 U.S.C. § 1902 (1982):

> The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

91 Although the primary focus of this article is on adoption, foster care placements of Indian children pose similar threats to the tribe's existence. Provisions of the Act addressed to foster care placement are therefore relevant.

92 Wamser, *supra* note 33, at 416 n.26.

93 *Id.; see also* Barsh, *supra* note 25, at 1300-01.

94 Defined in 25 U.S.C. § 1903(1) (1982).

95 Defined in 25 U.S.C. § 1903(4) (1982).

96 25 U.S.C. § 1911(a) (1982). This subsection provides an exception for cases in which "such jurisdiction is otherwise vested in the State by existing Federal law" such as Public Law 280. *See* Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (codified as amended in scattered sections of 18 and 28 U.S.C.). Public Law 280 permits states to assume jurisdiction over Indian reservations in specified circumstances with (in the statute's present version) Indian consent. See 25 C.F.R. §§ 13.1 to 13.6 (1983), which sets out procedures for a tribe over which the state asserts any jurisdiction to reassume jurisdiction over child custody proceedings.

97 25 U.S.C. § 1922 (1982). This provision has been characterized as a "loophole for state placement without notice or other safeguards." *Conflicts* Note, *supra* note 89, at 350 n.61. *But see* Wamser, *supra* note 33, at 426.

98 Defined in 25 U.S.C. § 1903(6) (1982).

99 Defined in 25 U.S.C. § 1903(5) (1982).

proceeding to the jurisdiction of the child's tribe, unless there is good cause not to do so, the child's parent objects, or the tribe declines the transfer.[100] If the state court continues to have jurisdiction over a case, the child's Indian custodian and tribe have a right to intervene at any point in the proceeding.[101]

Procedurally, the Act attempts to ensure that Indian cultural and social standards will be given appropriate consideration. The tribe and the child's parent or Indian custodian have a right to receive notice of any involuntary foster care or termination proceeding in state court.[102] Counsel must be appointed for an indigent parent or Indian custodian, and the court has discretion to appoint counsel for the child if that would be in the child's "best interests."[103] No foster care placement or termination of parental rights may be ordered until the court is satisfied "that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful."[104] Additionally, the Act establishes evidentiary standards. An order for foster care placement must be sup-

100 25 U.S.C. § 1911(b) (1982). This subsection has been called the "heart" of this portion of the Act because Indian parents or custodians can transfer a state proceeding into a tribal court and "have their cases judged by their peers and by a court system which is aware of the socioeconomic and cultural pressures on the family." Davies, *supra* note 72, at 189.

The Bureau of Indian Affairs' guidelines define good cause to the contrary to include the following cases: the child is over 12 years old and objects to the transfer; the petition to transfer is not filed promptly after notice of the state proceeding is received and that proceeding is in an advanced stage at the time of petition; evidence necessary to decide the case cannot be adequately presented to the tribal court without undue hardship to the parties or witnesses; and the parents of a child over 5 years old are unavailable and the child has had little or no contact with the tribe or its members. Guidelines for State Courts: Indian Child Custody Proceedings, 44 Fed. Reg. 67,584, 67,591 (1979).

Tribal initiative in seeking to exercise jurisdiction or to intervene and participate in state court proceedings is necessary if the Act is to succeed in reducing the number of placements of Indian children in non-Indian homes. Tribal initiative, however, cannot overcome the objection of parents to the involvement of the tribe when a child is not domiciled or living on the reservation. In *In re* S.Z., 325 N.W.2d 53 (S.D. 1982), both Indian parents stipulated that they did not want the neglect and dependency proceeding transferred to the tribal court. Parental rights were terminated by the state court, but the termination was set aside when the parents argued that insufficient notice was sent to the tribe and then requested transfer of the case. The appellate court reversed, finding notice sufficient and holding that jurisdiction of a case involving a child not domiciled or living on the reservation cannot be transferred to a tribal court over a knowing, voluntary parental veto. *See also In re* Adoption of Baby Boy L., 231 Kan. 199, 643 P.2d 168 (1982).

101 25 U.S.C. § 1911(c) (1982).

102 25 U.S.C. § 1912(a) (1982).

103 25 U.S.C. § 1912(b) (1982); *see In re* M.E.M., 635 P.2d 1313 (Mont. 1981) (holding that appointment of counsel for an indigent Indian parent is mandated by the Act); 25 C.F.R. § 23.13 (1983) (designating who pays for the attorney's services).

104 25 U.S.C. § 1912(d) (1982).

ported by clear and convincing evidence "that continued custody . . . by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child."[105] And an order terminating parental rights must also be supported by evidence beyond a reasonable doubt that such damage is likely to occur.[106]

The most important procedural provisions of the Act are placement preferences. In the absence of good cause to the contrary,[107] and unless the child's tribe varies the statutory preferences,[108] preference for adoptive placement of an Indian child is given to a member of the child's extended family,[109] other members of the child's tribe,[110] and other Indian families[111] in that order.[112] Preference for foster care or pre-adoptive placement is given to a member of the child's extended family; a foster home licensed, approved, or specified by the child's tribe; an Indian foster home licensed or approved by an authorized non-Indian agency; and an institution approved by a tribe or operated by an Indian organization.[113] Thus, the Act tries to ensure that an Indian child is placed within the Indian community whenever that is possible, but without in every case precluding placement with a non-Indian family.[114]

The tribe may not be able to prevent placement elsewhere if the parent objects to tribal involvement. In *In re Adoption of Baby Boy L.*,[115] for example, the non-Indian mother of a part-Indian illegitimate child consented to his adoption by specified individuals and adamantly resisted tribal intervention in the proceedings. In light of her position, the appellate court held that the trial court's refusal to allow intervention was harmless error, if error at all, since the mother promised to revoke her consent and retake custody (as the Act al-

105 25 U.S.C. § 1912(e) (1982).

106 25 U.S.C. § 1912(f) (1982); *cf.* Santosky v. Kramer, 455 U.S. 745 (1982).

107 Good cause for placement contrary to the preference list is defined in Recommended Guidelines for State Courts—Indian Child Custody Proceedings, 44 Fed. Reg. 24,000, 24,002 (1979).

108 25 U.S.C. § 1915(c) (1982).

109 Defined in 25 U.S.C. § 1903(2) (1982). The need for this provision is illustrated by E.A. v. State *ex rel.* C.A. & V.A., 623 P.2d 1210 (Alaska 1981), in which Eskimo children were placed for adoption following termination of their mother's parental rights without any information being given by the state agency to their grandparents. The case arose before the effective date of the Indian Child Welfare Act.

110 Defined in 25 U.S.C. § 1903(5) (1982).

111 Defined in 25 U.S.C. § 1903(3) (1982).

112 25 U.S.C. § 1915(a) (1982).

113 25 U.S.C. § 1915(b) (1982).

114 H.R. REP. NO. 1386, *supra* note 46, at 23.

115 231 Kan. 199, 643 P.2d 168 (1982).

lows[116]) if the Act's placement preferences were followed.

Although it is too early to gauge the success of the Indian Child Welfare Act in reducing placements of Indian children in non-Indian homes,[117] there is evidence that jurisdiction and placement preferences are not enough.[118] One reason for the heavy involvement of state courts and agencies in the first place was the lack of child protective services operated by tribal governments.[119] The Act's success ultimately depends, therefore, upon development of Indian child and family programs designed to prevent the initial breakup of Indian families and to license Indian foster and adoptive homes, since without Indian facilities children will continue to be placed in the non-Indian environments Congress found so detrimental.

The tribes cannot play a role in developing programs designed

116 See text accompanying notes 226-31 *infra*.

117 Cases such as *In re* M.E.M., 635 P.2d 1313 (Mont. 1981), raise doubts. The state petitioned for custody of an Indian child residing off the reservation, alleging neglect and abuse by the mother. When the tribe requested transfer of jurisdiction, the agency indicated that it would oppose transfer "unless the Tribal Court's 'plans for the disposition of the case' were first stated." *Id.* at 1315. Clearly, the agency was attempting to control the substance of the tribal court's action and, by its effort to exercise prior approval, the agency dramatically illustrated the cultural biases that made the Act necessary. The dissent to *In re M.E.M.* suggests that the trial court may have been similarly culpable. The dissenting judge stated that the trial court refused to transfer jurisdiction because it was not satisfied (apparently on socio-economic grounds) with the persons on the reservation to whom the court expected custody would be given. *Id.* at 1318-19 (Sheehy, J., dissenting).

Cases interpreting the Act restrictively also raise doubts about its ultimate effectiveness. In *In re* Bertelson, 617 P.2d 121 (Mont. 1980), a part-Indian child was informally placed with her Indian parental grandparents by her non-Indian mother. The grandparents refused to return the child upon the mother's request and obtained a temporary custody order from the tribal court without notice to the mother. The mother filed a habeas corpus petition in state court, which then ordered the grandparents to return the child to her mother. The Montana Supreme Court vacated, holding that the tribal court had jurisdiction. On the mother's petition for rehearing, the Court remanded for the lower court to develop a record regarding jurisdiction.

In the course of its opinion remanding the case, the Montana Supreme Court held that the Indian Child Welfare Act did not apply because "[t]he issue here is not which foster or adoptive home or institution will best 'reflect the unique values of Indian culture. . . .' Rather, the present case involves an internal family dispute between the mother and the paternal grandparents over the custody of the child." *Id.* at 126. Because the mother was not an Indian, however, the dispute did implicate the child's identity as an Indian and the future of the tribe. To conclude that the Act is intended only "to preserve Indian culture values under circumstances in which an Indian child is placed in a foster home or other protective institution," *id.* at 125, is to read the Act too narrowly. Compare A.B.M. v. M.H. & A.H., 651 P.2d 1170 (Alaska 1982), *cert. denied sub nom.* Hunter v. Maxie, 103 S. Ct. 1893 (1983), finding the Act applicable to a dispute between an Indian mother and prospective adoptive parents, who were her sister and brother-in-law, and expressly declining to follow *Bertelson*. *Id.* at 1173 n.6.

118 *Legislation* Note, *supra* note 89, at 387, 388, 393.

119 Barsh, *supra* note 25, at 1293.

to assist Indian children and families, for which the Act provides,[120] without adequate funding.[121] Ironically, the money allocated for these programs may not be adequate.[122] An even greater flaw is the lack of a monitoring and reporting system that would indicate whether the Act effectively decreases the transracial placement of Indian children.[123] And finally, although the success stories of efforts to reunite children in foster care with their biological parents is not altogether discouraging,[124] such programs have generally had little success.[125]

IV. Competing Interests Within the "Best Interests" Standard

Hidden in the maze of the transracial placement issue, and the child welfare system that deals with it, are several groups of competing interests and values. All of them are encompassed by the best interests rubric. These competing interests can be isolated, however,

120 25 U.S.C. §§ 1931-1934 (1982). For administrative regulations pertaining to these grants, see 25 C.F.R. § 23.21 to 23.81 (1982).

121 Congress recognized that jurisdictional and preference provisions were insufficient if unaccompanied by "adequately funded, tribally controlled family development programs." S. REP. NO. 597, *supra* note 47, at 12. Furthermore, the committee specifically found that a national child welfare bill then before Congress was inadequate to replace the ICWA because Indian children need specially tailored programs.

122 The programs have been funded for the past three years at $5.6 million, $9.6 million, and $9.7 million. Telephone interview with Zokan-Vellas Reyes of the Bureau of Indian Affairs (June 27, 1983). Nonetheless, these funding levels have been called inadequate. Davies, *supra* note 72, at 196; Wamser, *supra* note 33, at 418. Professor Wald has argued that the lack of services

> does not necessarily lead to the conclusion that we ought not to remove children or terminate parental rights unless the service system is adequately funded. The problem must be considered from the child's perspective as well. Are we prepared to say that an endangered child should not be removed because the state has not provided services that might have kept the family intact, when such services do not exist? Are we going to deny a child in foster care a permanent home because the state has not helped her parents regain custody, thereby consigning the child to impermanent foster care?
>
> These alternatives are unacceptable.

Wald, *supra* note 8, at 696 n.269.

123 The Bureau of Indian Affairs maintains records required by 25 U.S.C. § 1951 to enable an Indian child to locate his or her tribe and become eligible for the rights and benefits of tribal membership. The Bureau has no records that would indicate whether the incidence of transracial placement of Indian children is diminishing in response to the Indian Child Welfare Act. Telephone interview with Zokan-Vellas Reyes of the Bureau of Indian Affairs (June 27, 1983). Apparently the success or failure of the Act cannot be evaluated unless independent researchers undertake to collect the necessary empirical data.

124 Davies reports that the Blackfoot have significantly reduced the number of children in placement by focusing child protective services on preventive treatment. Davies, *supra* note 72, at 195.

125 Wald, *supra* note 8, at 663, 665.

and the best interest test can thereby be given some content that will foster greater analytical clarity in making decisions in transracial adoption cases. These interests can be grouped as those belonging to child welfare agencies, minority groups, and the affected children themselves.

A. *Interests of Child Welfare Agencies*

The institutional interests of child welfare agencies, whether state or private, are among both the most powerful and arguably the least important of all the competing interests.

Only someone unfamiliar with the child placement system can be unaware that agencies are very powerful in child placement matters.[126] The system allows agencies a great deal of discretion, and courts often defer to the views expressed by agencies in specific cases.[127] In its least defensible aspect, this agency power reflects a purely self-centered institutional interest in continuing to play the role of a power-broker within the child welfare system. Their monopoly over the adoption system, reflected in social workers' criticisms of independent adoptive placements[128] and in a few states by statutes prohibiting such placements,[129] could be viewed as a reflection of such empire-building. Cases in which agencies have taken positions arguably detrimental to the interests of affected children may also be best explained as efforts to maintain the agencies' power to decide.[130]

---

126 *E.g.*, Macaulay & Macaulay, *supra* note 13, at 273; *Drummond* Comment, *supra* note 21, at 151; Note, *supra* note 16, at 353-54.

127 *But see In re* Adoption of Baker, 117 Ohio App. 26, 185 N.E.2d 51 (1962), in which the trial court ignored the agency's recommendation and reached an objectionable result in the process. A white husband and Japanese-American wife sought to adopt their English and Puerto Rican foster child. The trial court denied the adoption although five other couples had refused foster placement because of the child's mixed nationality, the agency unqualifiedly recommended that adoption be allowed, and there were no appearances in opposition. The appellate court reversed:

> As we view it, the only alternative, if the judgment be affirmed, is to have the child remain an illegitimate orphan to be reared in an institution. Orphanges [sic] 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. With all due respect for the learned trial judge's conclusion, we differ therewith . . . .

Id. at 28, 185 N.E.2d at 53.

128 *See* R. MNOOKIN, CHILD, FAMILY AND STATE 621 (1978), and sources cited therein; Macaulay & Macaulay, *supra* note 13, at 270.

129 CONN. GEN. STAT. § 45-63 (1979); DEL. CODE ANN. tit. 13, § 904 (1975); KY. REV. STAT. § 199.470 (1982); R.I. GEN. LAWS § 15-71-1 (1981).

130 Child placement agencies, for instance, may define the foster relationship in contractual terms and require the foster parents to agree not to try to adopt their foster child. See, *e.g.*, *In re* Jewish Child Care Ass'n, 5 N.Y.2d 222, 156 N.E.2d 700, 183 N.Y.S.2d 65 (1959),

Undoubtedly such an interest exists, but as a matter of articulated policy, agencies (and probably any self-respecting child welfare worker) justify their role in terms of expertise. In other words, social workers and social agencies are allowed a great deal of discretion, and deference is given to their decisions, because they are the experts in the field of foster care and adoption:[131]

> In theory, the authority to approve petitions for any type of adoption is judicial power. In practice, power is exercised by the social work profession in the name of the adoption agency. Historically, the courts have recognized that they do not possess the requisite evaluative expertise and have relegated to social work the task of determining whether potential adoptive parents are fit to serve in that capacity, but they have retained their (seldom used) prerogative to deny an agency's recommendation. Thus, in most cases, it was the quality of social work's assessment of what was deemed to be in a child's best interests, as recommended to and interpreted by the court, that marked the legal status of adoption, specifically of transracial adoption. The court's position was one of response rather than initiation.[132]

Discretion is not unlimited; it is ostensibly confined by the requirement that placement decisions be made in the child's best interests.[133] Yet the best interests test does not impose any genuine

---

which is the best-known case illustrating this point. Such agreements may or may not be enforced by courts. *Compare Jewish Child Care and* Huey v. Lente, 85 N.M. 585, 514 P.2d 1081 (Ct. App. 1973) (holding that efforts by foster parents who had signed an agreement not to try to adopt violated both the agreement and their fiduciary obligation to the biological mother and that the order terminating her parental rights be reversed and the case remanded), *rev'd on other grounds*, 85 N.M. 597, 514 P.2d 1093 (1973), *with* Knight v. Deavens, 259 Ark. 45, 531 S.W.2d 252 (1976) (denying specific performance of agreement by foster parents not to attempt to adopt, but refusing to declare the agreement void). Apart from the issue of enforceability, these agreements represent a frame of reference explaining why children are removed from foster homes despite the emotional ties that have formed. Smith v. Organization of Foster Families, 431 U.S. 816, 837 (1977); Wald, *supra* note 8, at 699; *see also In re* Harshey, 45 Ohio App. 2d 97, 341 N.E.2d 616 (1975) (reversing trial court, which refused adoption because it would allow the adopting parents to circumvent the agency's waiting list).

131 Social work expertise in child welfare matters may be a myth. Not only are caseloads and staff turnover high, Macaulay & Macaulay, *supra* note 13, at 272, 293, but Professor Wald reported that most workers are young and inexperienced, with little college or in-service training. Wald, *supra* note 8, at 640. Even more troubling, however, is his report "that even very experienced social workers, given a specific set of facts, come to quite different conclusions regarding the need for removal [of the child from his or her home] in the given case." *Id.*

132 SIMON & ALTSTEIN I, *supra* note 25, at 17-18 (footnotes omitted).

133 Smith v. Organization of Foster Families, 431 U.S. 816, 860 (1977) (Stewart, J., concurring in judgment) ("This is not to say that under the law of New York foster children are the pawns of the State, who may be whisked from family to family at the whim of state officials. . . . But the protection that foster children have is simply the requirement of state law that decisions about their placement be determined in the light of their best interests.").

limitation. It is notoriously vague,[134] and that vagueness is an invitation to courts to defer to social workers' views.[135]

If social work professionals indeed have an expertise worthy of deference, the course of transracial adoption history becomes difficult to explain. First there is the vacillation of CWLA Standards:[136]

> How could professionals, whose control over adoption process rests on their standing as experts, swing so widely in their judgments about transracial adoption in the short space of twenty years? In 1957, it was almost unthinkable to allow whites to adopt blacks; in 1968, transracial adoption was the progressive policy enshrined in the Child Welfare League of America's Standards; in 1972, transracial adoption was cultural genocide; and, in 1977, while transracial adoption is generally disapproved by the professionals, it all depends on where you are and whom you ask.[137]

Social workers, despite their central importance to the transracial placement issue, have shown a marked tendency to permit their professional judgment to be influenced by shifting political winds. Not only have their formal professional opinions, embodied in the CWLA Standards, been malleable, so also has actual practice, reflected in the ebb and flow of transracial placement's history. Thus, the profession may have defaulted on the question of expertise and lost any credible claim that its determinations should be granted special deference in placement decisions.

B. *Interests of Minority Groups*

Minority groups have two identifiable interests separable from interests of the affected child. They have, first, an interest in deciding whether children of that minority group are adopted by non-group members, and second, an interest in maintaining their racial and cultural identity.

Blacks and Indians, as groups, arguably have an interest akin to an inherent racial right to decide the fate of their children, without

---

134 Despite Justice Stewart's optimistic view of the limitations on discretion imposed by the best interests standard, *see* note 133 *supra*, he joined Justice Blackmun's opinion for the majority in Santosky v. Kramer, 455 U.S. 745, 762 (1982), which observed that "[p]ermanent neglect proceedings employ imprecise substantive standards that leave determinations unusually open to the subjective values of the judge." Justice Blackmun cited *Smith* as authority for this proposition. *See also* H.R. REP. NO. 1386, *supra* note 46, at 19; Wald, *supra* note 8, at 649-50.

135 *See* Macaulay & Macaulay, *supra* note 13, at 269.

136 *See* text accompanying notes 56-63 *supra*.

137 Macaulay & Macaulay, *supra* note 13, at 294.

regard to the substantive merits of those decisions.[138] On this point, however, the racial group interests of blacks and Indians need to be distinguished. Blacks, on the one hand, do not appear to have reached a consensus on the issue of transracial adoption for children who lack realistic opportunities for in-race placement in the immediate future.[139] Indians, on the other hand, seem to agree that transracial adoption is unacceptable, if the legislative history to the Indian Child Welfare Act is to be believed.[140] Certainly the policy of the Act, achieved primarily through the allocation of jurisdiction, is to let Indian people decide Indian child welfare questions.[141]

The second interest of blacks and Indians is in their very continuity as identifiable groups with cultural patterns that set them apart from other groups in society. Recognition of minority groups' interests in cultural identity is a political stance, but it probably reflects values shared by minorities and the white majority alike. Because transracial adoption removes children from their racial and ethnic groups, it poses some threat to the groups' interests in continuity.

Recognition of this interest is justified because both national and international policy embrace the value of continued racial and

138 "Just as natural parents take a major role in decision-making when a child lacks the necessary experience or knowledge, so it seems appropriate that blacks collectively as parents should speak for the black child in matters touching transracial adoption." Chimezie, *supra* note 37, at 297-98; *see also* D. FANSHEL, *supra* note 32, at 341-42:

> It is my belief that only the Indian people have the right to determine whether their children can be placed in white homes. . . . Indian leaders may decide that some children may have to be saved through adoption even though the symbolic significance of such placements is painful for a proud people to bear. On the other hand, even with the benign outcomes reported here, it may be that Indian leaders would rather see their children share the fate of their fellow Indians rather than lose them in the white world. It is for the Indian people to decide.

139 Chimezie, *supra* note 37, at 298; Macaulay & Macaulay, *supra* note 13, at 287.

140 S. REP. NO. 597, *supra* note 47, at 12.

Fanshel cautioned that although Indian representatives assented to the adoption of Indian children by whites through the Indian Adoption Project, these assents were given over a decade ago and tribal attitudes may have changed. D. FANSHEL, *supra* note 32, at 25, 341. Some insight into these assents can be gleaned from Hostbjar, however:

> We need to recognize here that members of the group [*i.e.*, Indian tribe] can accept interpretation regarding children's needs, and we have not had strong negative reactions or concern regarding the children who have been released for adoption outside of the group. However, if we ask one of the members how he feels about this, his initial reaction is usually disapproval.

Hostbjar, *supra* note 72, at 9. It appears, then, that even assents to transracial adoption given a decade ago were given only because of the tribes' recognition of the even less desirable alternatives and, all too possibly, only after "interpretation" by white workers.

141 *See* text accompanying notes 92-101 *supra*; *see also*, Comment, *Tribal Self-Determination*, *supra* note 89, at 1210.

ethnic diversity. National policy is clearly seen in the Indian Child Welfare Act, which seeks to preserve the tribes and asserts the importance of children to tribal preservation.[142] And international policy, contained in the Report of the International Law Commission to the United Nations, condemns the intentional destruction of racial and ethnic groups and explicitly recognizes the importance to these groups of maintaining contact with their children.[143]

It is doubtful that transracial adoption of black children was ever a "diabolical scheme" to pass thousands of black children into the white community, as some opponents of transracial adoption apparently thought.[144] Although the NABSW charged that transracial adoption of black children amounted to cultural genocide,[145] the charge in this context is simply specious—so few black children have been placed in white homes[146] that no genuine threat exists to the continuance of blacks as a cultural, racial, or ethnic group.[147]

The former federal policy of assimilation and termination, however, supports a contrary conclusion where Indians are concerned. The rate of placement of Indian children has been so high[148] that Indians as an identifiable group have been genuinely threatened. The interest of Indians in maintaining their cultural identity is thus weightier than that of blacks in the context of transracial adoption. The cultural identities of blacks and Indians are equally valuable,

142 Among the findings in the Indian Child Welfare Act are the findings "that Congress . . . has assumed the responsibility for the protection and preservation of Indian tribes and their resources" and "that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." 25 U.S.C. § 1901(2)-(3) (1982).

143 Article 2 of the International Law Commission's Draft Code of Offenses Against the Peace and Security of Mankind states:

> The following acts are offenses against the peace and security of mankind:
>
> . . . (10) Acts by the authorities of a State or by private individuals committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group as such, including:
>
> . . . .
>
> (v) Forcibly transferring children of the group to another group.

Report of the International Law Commission, 35th Sess., to the General Assembly, 38 U.N. GAOR Supp. (No. 10) at 14-15, U.N. Doc. A/38/10 (1983).

While transracial adoption does not constitute an offense because of the intent requirement, the policy recognizing that discrete racial and ethnic groups have an interest in continuity is clear.

144 SIMON & ALTSTEIN I, *supra* note 62, at 3.

145 *See* text accompanying note 62 *supra*.

146 *See* note 61 *supra*.

147 This issue is analytically separable from the question of the impact on the individual child of loss of cultural identity, which is discussed in the text accompanying notes 174-210 *infra*.

148 *See* text accompanying note 13 *supra*.

but the threat posed by transracial adoption to this group interest is much more serious in the case of Indians.

C. *Interests of the Individual Child*

Ultimately, the individual child is most directly and strongly affected by a decision to make a transracial placement or to leave him or her to whatever alternative the system can provide. Given the paramount importance of a family in children's emotional development,[149] one identifiable interest of affected children is placement in a stable and permanent family setting. Transracial adoption provides such a setting. The issue of transracial placement, however, must be addressed in the context of the available alternatives,[150] and possible detrimental consequences of transracial placement to the individual child must be weighed against the advantages of the stable family that transracial placement would provide.

Transracially-placed children may face unique stresses, such as

149 *See* text accompanying notes 14-24 *supra*.

150 Professor Goldstein and Drs. Freud and Solnit have suggested the use of a least detrimental alternative standard, rather than the best interests standard, in the general context of child placement. BEYOND THE BEST INTERESTS, *supra* note 12, at 53-64. The least detrimental alternative standard could highlight for courts and social workers that their task is not to search for some nonexistent "ideal" solution. Comment, *supra* note 20, at 767. Rather, they should pragmatically examine the choices immediately and actually available, recognizing the limitations and risks of each, and choose the one that poses the least risk of harm to the child.

Failure to approach the problem in these terms led to the agency's decision in Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978). The agency removed a two-and-a-half year-old mixed-race child from the white foster home in which he had lived since his second month, because "what we're trying to do is look at the child and . . . what would be best for him for his whole life." Brief for Appellant at 61. He was placed with black adoptive parents in the belief that they could help him develop the "survival skills" necessary for later dealing with problems caused by his race. The workers should have viewed the issue in terms of what alternative was least detrimental, rather than as an opportunity to create an ideal world for the child. The agency's actions and the courts' decisions allowing the child's removal have been criticized. *See* Palmer, *supra* note 46; *Drummond* Comment, *supra* note 21.

In Rockefeller v. Nickerson, 36 Misc. 2d 869, 233 N.Y.S.2d 314 (Sup. Ct. 1962), the court apparently ignored the alternatives for the child and denied efforts by white foster parents to adopt their black foster child. The welfare department had rejected their application because, the court found, they already had three natural and two adopted children, they were not infertile, their second adopted child had been adopted recently, and the mother intended to continue to work outside the home. The court decided that the application had not been rejected on the grounds of unwritten departmental policy to prohibit transracial placements, as the parents alleged. Apparently the child was institutionalized and had no other prospects for adoption, although these facts do not appear from reading the opinion. For this reason, the case has been severely criticized. *See* Grossman, *supra* note 20, at 313; Comment, *supra* note 33, at 261; Comment, *supra* note 20, at 752. If adoption is better for children than institutionalization, this decision clearly failed to serve the child's best interests.

the probability of being the only nonwhite child in their neighborhood,[151] and possible rejection by their peers[152] and the wider community.[153] The primary concern, however, is that transracial placement is in itself damaging to the affected children. The possible damage posed to the transracially-placed child takes two forms, one "internal," or emotional and psychological maladjustments, and the other "external," or destroyed racial and cultural identity.[154] If transracial placements injure children in either of these ways, then such placements are not "successful"[155] and, arguably, should not occur.

---

151 Simon and Altstein, as well as Grow and Shapiro, found that most whites who adopt transracially live in all-white or predominately-white neighborhoods. SIMON & ALTSTEIN I, *supra* note 25, at 77-78. But Grow and Shapiro also found no correlation between racial composition of the neighborhood and any of their measures of the child's adjustment, although parents living in integrated neighborhoods were more likely to report that they were satisfied with the adoption. GROW & SHAPIRO I, *supra* note 21, at 166-67.

152 *Compare* Chimezie, *supra* note 37, at 300 (asserting that these possibilities are "documented in the literature," but citing only the popular press) *and* Comment, *Tribal Self-Determination*, *supra* note 89, at 1204-05, *with* Grossman, *supra* note 20, at 330 *and* Note, *supra* note 16, at 361.

Grow and Shapiro found that parents reporting that their children had experienced cruelty from other children also reported significantly fewer problems in relationships with other children. The researchers offered two possible explanations for this paradox. On the one hand, these parents, who were most prepared to deal with race problems, might be less likely to deny the existence of such incidents and might be more likely to encourage their children to report them. On the other hand, parents whose children have been treated cruelly by other children might have a defensive need to stress that their child's relationships with other children are, nevertheless, good. GROW & SHAPIRO I, *supra* note 21, at 177-79.

153 This possibility has been repeatedly acknowledged, Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D. La. 1972) (three-judge court); Chimezie, *supra* note 37, at 299-300; Grossman, *supra* note 20, at 329, but it may be nothing more than speculation. Simon and Altstein found that parents who adopted transracially perceived their friends and neighbors "as having little interest in or reaction to their adopted child," and only 10% reported negative feedback concerning the adoption. SIMON & ALTSTEIN I, *supra* note 25, at 95. Similarly, the Macaulays stated that "two of the most common problems transracial parents reported were the discomfort of facing attributions of sainthood and moral superiority and the child-raising problem of gushing relatives and neighbors." Macaulay & Macaulay, *supra* note 13, at 285-86 (citation omitted).

154 The court in *In re* R.M.G., 454 A.2d 776, 787 (D.C. Ct. App. 1982), similarly elaborated components of "identity" relevant to adopted children: "(1) a sense of 'belonging' in a stable family and community; (2) a feeling of self-esteem and confidence; and (3) 'survival skills' that enable the child to cope with the world outside the family. One's sense of identity, therefore, includes perceptions of oneself as both an individual and a social being."

155 It is, of course, impossible to define "success" or to measure whether it is accomplished, or to define "cultural identity" or to determine whether it is lost. *See* GROW & SHAPIRO I, *supra* note 21, at 89-90; Macaulay & Macaulay, *supra* note 13, at 295-96. Any researcher investigating transracial adoption must face this problem, and all of the available data can be attacked on this point. *See, e.g.*, *In re* R.M.G. 424 A.2d 776, 797 n.5 (D.C. Ct. App. 1982) (Newman, C.J., dissenting). These are the only data we have, however, and must be relied on for whatever they are worth. *But see* Chimezie, *supra* note 37, at 300-01.

When stated so simply, however, the issue is misleading. If such damage does occur, one might argue that only in-race placements should be made, or in other words, that transracial placement is second best. All the commentators appear to agree that in-race placement is better for children,[156] despite data suggesting that transracially adopted children adjust as well as in-racially adopted children.[157] In-race placements have advantages in that they avoid the problems of cultural identity and emotional adjustment that inhere in transracial placements, and provide the benefits of matching and placement in a stable family environment. The fact is, however, that in-race homes are not available in sufficient numbers.[158] Thus arguments about the preferability of in-race as opposed to transracial placement are irrelevant.[159]

The alternative to transracial adoption for available children is not in-racial adoption but non-adoption, i.e., continued institutional or foster care. The pertinent question, therefore, is whether children are better served by transracial adoption or by no adoption at all.[160]

Evaluating the adjustment of transracially adopted children provides only half the answer. The other half lies in a comparison of that emotional adjustment with the emotional adjustment of non-adopted children. If such a comparison were to establish that transracially-placed children experience better emotional adjustment than children raised in foster homes and institutions, then the case for transracial placement would be decidedly advanced. Evidence on both halves of this question is available. The weight of clinical data and psychological opinion supports the conclusion that foster care and institutionalization are seriously detrimental to the emotional development of affected children,[161] and evidence is available concerning the adjustment of blacks and Indians raised in white homes.[162] No study, however, directly compares the emotional ad-

156 D. FANSHEL, *supra* note 32, at x (Foreword by Joseph H. Reid, Executive Director of the Child Welfare League of America, stating the League's position); SIMON & ALTSTEIN I, *supra* note 25, at 44; Chimezie, *supra* note 37, at 296.

157 *See* notes 167-68 *infra* and accompanying text.

158 *See* text accompanying notes 36-47 *supra*.

159 *But see* SIMON & ALTSTEIN I, *supra* note 25, at 49; R. MCROY & L. ZURCHER, TRANSRACIAL AND INRACIAL ADOPTEES: THE ADOLESCENT YEARS (1983).

Similarly, the relevant comparison is not between children adopted in-racially and those not adopted at all. Data establishing the importance of a stable and nurturing family, *see* text accompanying notes 14-24 *supra*, are sufficiently persuasive that no doubt exists about the relative merits of in-racial adoption versus non-adoption.

160 *But see* Chimezie, *supra* note 37, at 297-98.

161 *See* text accompanying notes 14-24 *supra*.

162 *See* text accompanying notes 167-72 *infra*.

justment of transracially adopted and non-adopted children in a controlled fashion, so conclusions about the relative benefits or detriments of transracial adoption vis-a-vis non-adoption are necessarily inferential and intuitive.

Despite the fact that studies of transracially-adopted children have not drawn comparisons with a control group of non-adopted children and are thus of limited utility,[163] they provide some insight into the major areas of emotional adjustment and cultural identity. Only three such studies have been made, one focusing on black children adopted by white parents,[164] one on Indian children adopted by white parents,[165] and one on both.[166]

The studies indicate that transracially adopted children, generally speaking, experience good emotional development. Grow and Shapiro found that twenty-three percent of the families in their study were "in trouble,"[167] and that race was a factor in those problems for only about half of them.[168] Thus, the child's racial identity was a factor contributing to the researchers' categorization of the family as "in trouble" in less than thirteen percent of the families studied. Although this figure is in itself fairly low, two caveats must be added. First, although race may have been a factor in the problems experienced within the family, no post-adoption difficulties can be viewed independently of the foster care received by the child before adop-

163 The dissenting opinion in *In re* R.M.G., 454 A.2d 776, 797 n.5 (D.C. Ct. App. 1982) (Newman, C.J., dissenting), catalogues other shortcomings of the available empirical research.

164 GROW & SHAPIRO I, *supra* note 21. *But see* R. MCROY & L. ZURCHER, *supra* note 159, at 138.

165 D. FANSHEL, *supra* note 32.

166 SIMON & ALTSTEIN I, *supra* note 25. These researchers did a follow-up study seven years later. SIMON & ALTSTEIN II, *supra* note 61.

167 Grow and Shapiro combined the scores their study families achieved on 15 different measures, including test scores, teacher evaluations, and interviewer ratings, into a single score for overall success. On the basis of the combined results they identified 29 of their 125 families as "in trouble," giving an overall "success" rate of 77%. This rate, the researchers found, is approximately the same as the success rate for traditional white infant adoptions and for nontraditional racially-mixed and older-child adoptions. GROW & SHAPIRO I, *supra* note 21, at 102-03, 224-25.

Although Simon and Altstein's study was not directly concerned with the success of transracial adoptions, SIMON & ALTSTEIN II, *supra* note 61, at 28-29, those researchers identified only 25 of the 133 families participating in their follow-up study (19%) as problem families. (This characterization was based on parents' satisfaction with the adoption and their view that negative elements outweighed the positive.). *Id.* at 28-29; *see also* D. FANSHEL, *supra* note 32, at 322-23, 339.

168 GROW & SHAPIRO I, *supra* note 21, at 102; *cf.* R. MCROY & L. ZURCHER, *supra* note 159, at 117-23.

tion.[169] Minority children spend longer periods of time in foster care and experience more frequent moves.[170] The social work profession's reluctance to make transracial placements and the reputation of minority children as hard to place[171] also contribute to the likelihood of longer placements. These children may be expected, therefore, to carry emotional scars from that experience into their adoptive placements.

Second, there is some evidence that minority children in general experience problems with self-esteem and emotional adjustment due to the effects of prejudice and racism.[172] To the extent that these problems persist despite the development of an increasingly positive sense of group identity and pride within minority groups, then evidence that race is a factor contributing to the problems of adoptive families in trouble is less informative than it otherwise might be. In other words, if a transracially placed child is experiencing problems related to his or her racial identity, we cannot know whether these problems were caused by the transracial placement or whether the child would experience them anyway.[173]

---

169 There is a relationship, however, between the race of the adopted child and the proportion of parents who acknowledged that they had had difficulties with the child. For example, 18 percent of the parents who had adopted a white child as their first adopted child said that they had had problems with him or her, in contrast to 39 and 47 percent of the parents who had adopted black and Indian or Asian children, respectively. *But among all three categories, the explanation most often given for the difficulties was problems had developed as a result of the foster care the child had received prior to the adoption and not because of the child's race.*

SIMON & ALTSTEIN I, *supra* note 25, at 89 (emphasis added).

170 *See* note 13 *supra*.

171 Aldridge argued that agencies have projected their own failure to find permanent homes for black children onto the black community and the children themselves by labeling them hard to place. Aldridge, *supra* note 37, at 407. Apparently, Indian children are no longer hard to place, D. FANSHEL, *supra* note 32, at 44, *quoting* letter of Edgar Fautsenheiser, social worker for Bureau of Indian Affairs in Aberdeen; SIMON & ALTSTEIN I, *supra* note 25, at 174. Although these authorities do not so indicate, apparently they mean only that homes can be found for Indian children, not that these homes are in-race placements. This reading reconciles Wamser's apparently contradictory report that the New Mexico agency could not find enough Indian homes despite considerable efforts. Wamser, *supra* note 33, at 418.

172 *See* H.R. REP. NO. 1386, *supra* note 46, at 12; SIMON & ALTSTEIN I, *supra* note 25, at 126, 148, 161; Grossman, *supra* note 20, at 332; *cf.* Brown v. Board of Education, 347 U.S. 483, 494 (1954) ("To separate them [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone.").

173 The court in Miller v. Berks County Children & Youth Servs. (*In re* Davis), 465 A.2d 614 (Pa. 1983), was apparently unaware of this possibility. In that case, an elderly white couple, the Millers, sought to become foster parents of Shane, a mixed-race illegitimate child. The Millers had raised Shane's mother, Betty, since she was abandoned on their farm by her black migrant-worker parents at the age of two. Shane lived with the Millers most of his first four-and-one-quarter years, and remained in contact with them thereafter. When he was

Critics of transracial adoption are concerned that affected children will lose their identity as blacks or Indians and suffer adjustment problems as a result. They argue that white parents, no matter how hard they try, simply cannot provide an environment in which the child can retain or develop his or her black or Indian identity.[174] Many commentators are ready to concede that transracially placed children may experience identity problems,[175] but the little available evidence is not clear-cut. Grow and Shapiro found that one-fourth of the children in their study had some negative feelings about being black,[176] but the researchers provided no data comparing that finding to black children of similar age raised in black families.[177] Adoptive parents reported to those researchers that one-third of the children were aware of their black heritage and were proud of it, but forty-four percent of the parents either did not know their child's attitude toward his or her black heritage or reported that the child was indifferent toward it.[178]

In their 1972 study, Simon and Altstein found that while seventy-nine percent of parents who had adopted a white child said that the child considered himself or herself white, only thirty-two percent of parents who had adopted a black child and thirty-six percent of parents who had adopted an Indian, Asian, or other child said that the child identified with that group. Thirty-eight and thirty percent of parents who had adopted a black or Indian, respectively, said the child was too young to have acquired a racial identity, but only seven percent of parents adopting a white child said so.[179] The researchers concluded that parents adopting non-white children were less sure of their children's racial identity than parents adopting white children,

---

five-and-one-half, Betty's husband murdered her. The state agency planned to place Shane with black foster parents, rather than with the Millers. *Id.* at 617. The trial court failed to consider race in ruling against the Millers, but the Pennsylvania Supreme Court found the error harmless, given that consideration of the racial factor would support the judgment below. *Id.* at 622. In the course of discussing race, the court referred to evidence that Betty was biased against blacks and had low self-esteem, which a caseworker attributed to Betty's lack of racial identity. *Id.* at 628. Neither the court nor, apparently, the witnesses noted that these problems cannot be conclusively linked to Betty's childhood in a white home.

174 SIMON & ALTSTEIN I, *supra* note 25, at 2-3.

175 *E.g.*, Comment, *supra* note 20, at 766.

176 GROW & SHAPIRO I, *supra* note 21, at 188.

177 *Id.* at 181-82. McRoy and Zurcher provided such a comparison, with nonrandomly-selected study groups, and found that transracially-adopted black children who lacked everyday interaction with black people were less likely to develop a positive black racial identity than inracially-adopted or transracially-adopted black children who had such interaction. R. MCROY & L. ZURCHER, *supra* note 159, at 124-37.

178 *Id.* at 188.

179 SIMON & ALTSTEIN I, *supra* note 25, at 100.

despite the fact that the age ranges of the white and non-white children did not differ. The researchers' follow-up study in 1979 showed a major change in this respect, however. Seven years later, none of the parents reported that the child was too young to have developed a racial identity, and only three percent said that they did not know with which racial group their children identified.[180] The parents reported that forty-five percent of the children identified themselves as black, and twenty-three percent held a mixed black-white identity.[181] The follow-up study showed that sixty percent more parents felt that their children perceived themselves as black or partly black at the time of the second study than seven years earlier.[182]

Simon and Altstein also found that the majority of adoptive parents were trying to foster identity with the minority group of which their children were a part. In 1972, seventy-five percent of the parents reported that they made such efforts, chiefly through bringing books, toys, music, and the like into their homes and by providing opportunities for their child to play with other non-white children.[183] A third of the families did little or nothing in this regard, however, and twelve percent stated that "[t]heir main objective is to bring the child into their life-style" and that they intended "to live as they would have if they had not adopted a child of a different race."[184] The results were much the same in 1979.[185]

Obviously some of these children will experience cultural confusion or a complete loss of black or Indian identity. Critics of transracial adoption go even further than this, however. The NABSW, for example, argued that one consequence of loss of cultural identity is loss of "the background and knowledge which is necessary to survive in a racist society."[186] Chimezie phrased this concern most

180 SIMON & ALTSTEIN II, *supra* note 61, at 13-14.

181 *Id.* at 14.

182 *Id.* at 13-14.

183 SIMON & ALTSTEIN I, *supra* note 25, at 102-03; *see also In re* R.M.G., 454 A.2d 776, 797 (D.C. Ct. App. 1982) (Newman, C.J., dissenting) (testimony of white prospective adoptive mother as to efforts to cultivate black identity of child previously adopted). The majority in *In re R.M.G.* considered these efforts in connection with the first analytical step it required in such cases—namely, "how each family's race is likely to affect the child's development of a sense of identity, including racial identity." *Id.* at 791; *see also* Miller v. Berks County Children & Youth Servs. (*In re* Davis), 465 A.2d 614, 628 (Pa. 1983) (noting that white prospective adoptive parents were not in a position to inculcate a sense of black identity into the mixed-race child).

184 *Id.* at 104.

185 SIMON & ALTSTEIN II, *supra* note 61, at 17-18.

186 NATIONAL ASSOCIATION OF BLACK SOCIAL WORKERS, POSITION PAPER (Apr. 1973), *quoted in* SIMON & ALTSTEIN I, *supra* note 25, at 50.

dramatically:

> Having never been black, the white adoptive parents might not have been subjected to the kinds of discriminatory treatment that have been the lot of black people. Therefore, they might not have needed to maintain in their cognitive and psychic makeup the expectation of probable oppressive treatment by whites. Nor would they have needed to develop perspicacity in divining when a white person was lying to a black one or to become aware of areas in which oppressive treatment was likely.
>
> . . . When white adoptive parents are unable to transmit to the black adoptive child the tendency toward doubt and the temporary suspension of trust, especially when dealing with white persons, they are failing to satisfy the "psychosurvival" need of the black child.
>
> Blacks need to have an inclination toward doubt of white persons as a basic attribute in the fight against racism. . . . This doubt—call it "black paranoia" or what you will—is an important and necessary aspect of black culture.[187]

Rejoinder to rhetoric at such a level is difficult. Simon and Altstein, however, found that both white and non-white children raised in mixed-race families were less likely to have pro-white attitudes or to associate "white" with positive and desirable characteristics than were both white and non-white children generally.[188] Thus, the practice of transracial adoption attacked as destroying "psychosurvival skills" of black children may in itself contribute to such a change in attitudes that those skills become superfluous. Indeed, those skills might actually handicap the child's ability to learn "the role of the equal citizen."[189]

If an internal identity crisis arises for the transracially adopted child, it is expected to occur at adolescence.[190] The majority of parents who have adopted transracially gave this problem some thought before adopting,[191] so they would be prepared to help their children cope with any problems that arise. Some of these parents expressed the hope that American society would change sufficiently before their child reached adolescence, that he or she would not have

187 Chimezie, *supra* note 37, at 299; *see also In re* R.M.G., 424 A.2d 776, 802-03 (D.C. Ct. App. 1982) (Newman, C.J., dissenting) (discussing black children's need to develop "survival skills").

188 SIMON & ALTSTEIN I, *supra* note 25, at 126, 161.

189 Note, *supra* note 16, at 362.

190 *See* D. FANSHEL, *supra* note 32, at 269; Grossman, *supra* note 20, at 330; Macaulay & Macaulay, *supra* note 13, at 286; Palmer, *supra* note 46, at 44-45; Comment, *supra* note 33, at 265; Note, *supra* note 16, at 361-62.

191 SIMON & ALTSTEIN I, *supra* note 25, at 98-99.

problems with interracial friendship and dating.[192] Some commentators dismiss this issue by saying that time is on the side of the mixed-race family.[193] Such optimism, although commendable, may be a naive answer to this so-called "puberty argument."[194] No ready answers appear, however. Adolescence is often a difficult time for any family,[195] and the puberty argument itself seems to be nothing more than conjecture, so perhaps no further answer is necessary.

The transracial adoption studies have not followed the children through adolescence, so they cannot provide definitive answers. But they do provide some interesting hints. Grow and Shapiro found that the longer children were in placement, the more likely they were to have higher scores on the researchers' measure for personal adjustment. This was true despite the fact that children in placement longer were more likely to be in or approaching adolescence than were children who had been in placement a shorter length of time.[196] Grow and Shapiro also found that low scores on the measure for social adjustment correlated not with the age of the child (as the puberty argument would predict), but with the length of time in placement.[197] Finally, children in placement the longest, who were therefore the oldest, had the smallest proportion of low scores on the researchers' neurotic symptoms measure.[198] These results suggest that the expectation of adjustment problems in adolescence may be overblown.[199]

Despite this lack of empirical research, repetition of the "pu-

192 *Id.*

193 Comment, *supra* note 33, at 265; Note, *supra* note 16, at 362.

194 The phrase was apparently coined in *Are Interracial Homes Bad for Children*, MARRIAGE ACROSS THE COLOR LINE 72-73 (C. Larsson ed. 1965), and repeated by other writers; Grossman, *supra* note 20, at 330; Note, *supra* note 16, at 361.

195 Palmer, *supra* note 46, at 46.

196 GROW & SHAPIRO I, *supra* note 21, at 117-18.

197 Children in placement three to four years had the most low scores on this measure; the proportion of low scores fell for children in placement five to eight years, and then rose again for children in placement nine years or longer. *Id.* at 120-21.

198 *Id.* at 138.

199 Simon and Altstein's follow-up study found that 85% of parents reported that their children had had no trouble making friends and belonging to groups. The oldest of the children were young teenagers; they were, however, too young to date. SIMON & ALTSTEIN II, *supra* note 61, at 12.

McRoy & Zurcher's study of nonrandomly-selected adoptees is the first to follow transracially-adopted black children into adolescence. The researchers found that the children experienced some racial rejection from potential white dates, but that the adoptees "generally have some successful interracial dating relationships." R. MCROY & L. ZURCHER, *supra* note 159, at 82.

berty argument" has instilled in it a life of its own. In *In re R.M.G.*,[200] for example, the trial court found it "interesting that all the experts who appeared in this matter agreed that not enough work has been done on the subject [of race] as it pertains to adoption" and expressed concern "that little medical or scientific attention has been devoted to this problem."[201] Yet the trial court noted that "*[i]t would seem, however, entirely reasonable* that as a child grows older the ramifications of this problem would increase."[202] The dissent was even more straightforward, acknowledging that "lack of empirical data is especially acute as regards the crucial adolescent years."[203] Yet the dissent repeated the trial court's finding of *fact* that " 'severe questions of identity arising from the adoption and race most probably would evolve' " later and stated that "[t]he trial court's finding that such risks exist is more than amply supported by trial testimony."[204] Thus, social science speculation is elevated to social science fact. And the "puberty argument" remains speculative, even though its correspondence with our intuitive guess and supposition may lead us to overlook the lack of supporting empirical data.

The adjustment of Indian children should be mentioned separately because of the attention given to this issue in the legislative history of the Indian Child Welfare Act. That history is replete with references to problems faced by Indians raised in non-Indian homes:

> Cultural disorientation, a person's sense of powerlessness, his loss of self-esteem—these may be the most potent forces at work [in the high rates of Indian family breakdown]. They arise, in large measure, from our national attitudes as reflected in long-established Federal policy and from arbitrary acts of Government.
>
> One of the effects of our national paternalism has been to so alienate some Indian patents [sic] from their society that they abandon their children at hospitals or to welfare departments rather than entrust them to the care of relatives in the extended family. Another expression of it is the involuntary, arbitrary, and unwarranted separation of families.[205]

Clinical evidence received by the congressional committee to support these conclusions, however, did not factor out the injury caused by

200 454 A.2d 776 (D.C. Ct. App. 1982).

201 *Id.* at 782 (brackets added).

202 *Id.* (emphasis added).

203 *Id.* at 797 n.5 (Newman, C.J., dissenting).

204 *Id.* at 799, 802.

205 H.R. REP. NO. 1386, *supra* note 46, at 12; *accord*, S. REP. NO. 597, *supra* note 47, at 12.

foster care in general from that caused by *interracial* care.[206] The detrimental effects of institutional and foster care are well known, and Indian children have been subjected to foster care and institutionalization in large numbers. The problems in identity and emotional development experienced by Indians may be caused as much by the type of care received as by the fact that that care was given primarily by non-Indians. Certainly, mere documentation of problems experienced by Indians is insufficient to support the conclusion that the interracial nature of care is the causative factor. Furthermore, at least one of the problems experienced by Indians—an impaired ability to parent—is strikingly symptomatic of maternal deprivation and can be attributed to institutionalization and the instabilities of foster care,[207] rather than to interracial care provided in a stable home. Finally, the small amount of empirical evidence available, provided by Fanshel, indicates that Indian children who are adopted by white parents adjust well, especially when contrasted with the probable alternatives:

> First, the results of my research thus far support the view that the placement of Indian children in white homes appears to represent a low level of risk for the children with respect to safeguarding their physical and emotional well-being. The repeated interviews with the adoptive parents left the interviewers with the strong impression that the children were, by and large, very secure and obviously feeling loved and wanted in their adoptive homes. Even if the adjustment of the children proves to be somewhat more problematic as they get older—particularly during adolescence when the factor of racial difference may loom larger—the overall prospect for their futures can be termed as "guardedly optimistic." When one contrasts the relative security of their lives with the horrendous growing up experiences en-

206 Testimony of Dr. Joseph Westermeyer and a report by Drs. Mindell and Gurwitt, which was adopted as an official paper by the American Academy of Child Psychiatry, were the major sources of this clinical evidence. Both of these sources reported that Indian children removed from their families and placed in non-Indian homes were at risk in their later emotional and intellectual development. *Indian Child Welfare Program: Hearings Before the Subcomm. on Indian Affairs of the Senate Comm. on Interior & Insular Affairs*, 93d Cong., 2d Sess. 49 (1974); *Hearings*, *supra* note 13, at 114.

207 Warren Weller, director of the Indian Child Abuse and Neglect Center in Tulsa, Oklahoma, has noted that a significant factor in Indian child abuse and neglect incidents is the fact that a large number, perhaps 25 percent, of Indian children in the past have been raised in institutional settings. The institutionalization process has deprived these children of both parental role models and the experience of living in a family. As a result, when they mature, they often do not know how to properly care for a child, interpret a child's actions in a nonhostile manner, and deal with the stresses of family life.

Davies, *supra* note 72, at 195; *accord*, Barsh, *supra* note 25, at 1290-91.

> dured by their mothers—well documented in the summaries . . . received from agencies referring the children—one has to take the position that adoption has saved many of these children from lives of utter ruination.[208]

Thus, despite the strong evidence that Indians, both children and adults, are experiencing problems in social and emotional adjustment caused by the child-rearing practices to which they have been exposed, it is possible that the problems are due to the instability of those experiences rather than to their interracial nature.

In one respect, interracial care *is* clearly taking a toll. Indians raised in non-Indian homes, even in loving and secure homes, are unable to return to the reservation and live in Indian society because they lack "skills useful for life on the reservation, such as hunting, fishing, and wild rice harvesting."[209] Indian children raised in white families may be emotionally secure individuals, but the price they pay may well be the loss of their cultural identity as Indians.[210]

To summarize, black and Indian children have at least two identifiable interests—an interest in a stable, loving family and an interest in cultural identity as a black or Indian. If an in-race family is not available, these interests operate at cross-purposes and would lead to opposite results. The interest in a stable family calls for permanent placement in any suitable available family, regardless of

---

208 D. FANSHEL, *supra* note 32, at 339. That author cautioned, however, that the children he studied were still very young.

209 Comment, *Tribal Self-Determination*, *supra* note 89, at 1204-05. The problem is not a new one. In 1744, following a treaty signing, representatives of the Maryland and Virginia colonies invited the Indians to send boys to the College of William and Mary. The Indians declined:

> We know that you highly esteem the kind of learning taught in those Colleges, and the Maintenance of our young Men, while with you, would be very expensive to you. We are convinced, that you mean to do us Good by your Proposal; and we thank you heartily. But you, who are wise must know that different Nations have different Conceptions of things and you will therefore not take it amiss, if our Ideas of this kind of Education happen not to be the same as yours. We have had some Experience of it. Several of our Young People were formerly brought up at the Colleges of the Northern Provinces; they were instructed in all your Sciences; but, when they came back to us, they were bad Runners, ignorant of every means of living in the woods . . . neither fit for Hunters, Warriors, nor Counsellors, they were totally good for nothing. We are, however, not the less oblig'd by your kind Offer, tho' we decline accepting it; and, to show our grateful Sense of it, if the Gentlemen of Virginia will send us a Dozen of their Sons, we will take Care of their Education, instruct them in all we know, and make Men of them.

DRAKE, 1 BIOGRAPHY AND HISTORY OF THE INDIANS OF NORTH AMERICA, ch. 35, 27 (3d ed. 1834), *quoted in* Guerrero, *supra* note 88, at 51 (omission in original).

210 If they cannot fit into the white world either, they may float between white and Indian society and be part of neither. *See* Comment, *Tribal Self-Determination*, *supra* note 89, at 1205.

race, and the interest in cultural identity calls for placement only inracially, even if the child has to wait.

V. A Suggested Normative Heirarchy of Interests in Transracial Adoptions

A. *Determining the Hierarchy*

The best interests standard fails to identify all of these often-conflicting interests, and thus does not provide sufficient guidance for social workers and judges faced with placement decisions. Despite its vagueness, however, the best interests test does begin to provide some guidance for resolution of these conflicts by emphasizing the individual child's interests, rather than those of adoptive children in general[211] or the institutional interests of minority groups or adoption agencies. Resolution of competing interests in transracial placement cases should continue that focus, absent the most compelling of interests, for several reasons. First, the well-entrenched legal habit established by the best interest standard is to focus on the affected child. Indeed, the problem with the standard is not its effort to focus on the child, but its inability to provide the specificity necessary to guide decision-makers. Continuation of that focus has the practical advantage of acceptability. Second, child-centered analysis is also normatively preferable.[212] As Professor Wald has stated, "[n]ot only is the child a helpless party but the parents should suffer the consequences of their inadequacy rather than the child."[213] But the justification goes further. The child is both the one most vulnerable and most deeply affected by placement decisions.[214] If the children are our future, then the social policy that serves all of us is that policy centered around the needs of the child whose placement is in issue.

One consequence of a child-centered focus is that social goals independent of the child's interest, but which can be served by policies governing child placement, must be discounted. For example, one social goal independent of an individual child's interests is to

211 *Cf.* Comment, *supra* note 20, at 764-65.

212 Professor Wald stated that "[t]here has been very little adequate analysis of why children should be favored," and cited *Beyond the Best Interests of the Child* with the signal "*See*." Wald, *supra* note 8, at 638 n.76. One cannot tell whether Professor Wald is citing the work of Goldstein, Freud, and Solnit as an example of inadequate analysis to which he referred, or as a bright spot of adequacy in an otherwise inadequate literature.

213 *Id.* at 638.

214 The effect on the child's family may also be profound. Removal of a child may cause the parents to withdraw, become depressed, lose self-esteem, and begin or resume heavy drinking. Comment, *supra* note 81, at 654.

increase the number of black and Indian potential adoptive homes. That goal might be served by a policy prohibiting transracial placements, designed to build pressure to find minority homes by increasing the number of waiting minority children. To argue that transracial placement should stop until agencies redesign their standards and procedures,[215] however, is to elevate the value of accomplishing such reform, which at best will benefit children coming into the child welfare system in the future, above the interests of children waiting now. Such a social goal is not congruent with the interests of currently waiting children and, therefore, is not an interest appropriately considered under a child-centered policy.

Furthermore, a child-centered focus also requires that difficult questions surrounding transracial adoption not be ducked by arguments concerning related but peripheral issues. Additional recruitment of black and Indian potential adoptive homes is such an issue. Another is subsidized adoption,[216] which might enable more minority families to adopt. A third is reevaluation of the standards for initial intervention into families and removal of children from their biological parents,[217] which might reduce the number of children

215 *See generally* Chimezie, *supra* note 37, at 297; *see also* text accompanying notes 41-47 *supra*.

216 Subsidized adoption provides payments to adoptive parents after the child has been placed, thus altering the usual practice under which adopting parents assume complete financial responsibility for the child. These subsidies allow adoption by parents, otherwise qualified, who do not meet an agency's income guidelines and also enhance adoption opportunities for children with special needs. Several jurisdictions have passed subsidy statutes. *See, e.g.*, CAL. WELF. & INST. CODE §§ 16115-16123 (West 1980 & Supp. 1984); D.C. CODE ANN. § 3-115 (1981); MICH. COMP. LAWS ANN. § 400.115f (West Supp. 1983); N.Y. SOC. SERV. LAW §§ 450-458 (McKinney 1983 & Supp. 1983); *see also* Adoption Assistance and Child Welfare Act of 1980, 42 U.S.C. §§ 670-676 (Supp. V 1981).

Subsidized adoption will reduce the need for transracial adoption only to the extent that minority couples do not adopt at all, or do not adopt a particular child, for financial reasons. Social agencies historically have imposed non-economic criteria that were more difficult for non-white than white couples to meet, *see* note 46 *supra* and accompanying text, and subsidy programs will not alleviate that aspect of the screening process.

For a general discussion of subsidized adoption, see Katz & Gallagher, *Subsidized Adoption in America*, 10 FAM. L.Q. 1 (1976).

217 Standards for initial intervention are closely related to adoption policy since many minority children have become available for adoption as a result of state-initiated termination of parental rights. The issue of appropriate standards, which is not directly pertinent to this article despite its importance to the child welfare system as a whole, has received thorough and careful attention elsewhere. *See, e.g.*, BEFORE THE BEST INTERESTS, *supra* note 24; Wald, *supra* note 8.

The issue of standards for intervention is addressed in the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1982), which was passed in response to Congress' findings that state agencies and courts charged with making intervention decisions were imposing culturally biased interpretations of neglect and abandonment upon Indian families. *See* notes 79-86 *supra*

coming into the child welfare system. All of these efforts are laudable and attention to them might render unnecessary the policy balancing this article discusses. But until these efforts produce a closer correlation between the number of waiting minority children and the number of available minority adoptive homes, child-centered policy demands that the dilemmas of transracial adoption not be avoided.

To focus on the child is not sufficient, however, because children have two interests—an interest in a stable family and an interest in cultural identity. Additionally, child-centered decision-making does not take other interests into account. One of them—Indian tribes' institutional interest in their very existence—presents the one circumstance in which value preferences seem weighty enough to override an individualistic, child-centered approach. Whether there is a societal interest in the continuity of minority groups, apart from the group's own interest, is a broader, chiefly political issue. In the case of Indian tribes, which are the only minority groups literally threatened with extinction, alteration of federal policy from termination and assimilation to self-determination established that cultural and ethnic heterogeneity is a desirable social goal. When a child placement decision may remove the child from the tribe, therefore, the tribe's interest in its own continued existence must also be weighed.

B. *Application of the Heirarchy of Interests to Some Fact Situations*

Several different fact patterns arise in transracial adoption cases,

---

and accompanying text. Congress found "that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies." 25 U.S.C. § 1901(4) (1982). The Act provides that no foster care placement or termination of parental rights may be ordered unless continued parental custody "is likely to result in serious emotional or physical damage to the child." 25 U.S.C. § 1912(e)-(f) (1982). In addition, for foster care placement, this finding must be supported by clear and convincing evidence, 25 U.S.C. § 1912(e)-(f) (1982); for termination of parental rights, the finding must be supported by evidence beyond a reasonable doubt, 25 U.S.C. § 1912(f) (1982); *cf.* Santosky v. Kramer, 455 U.S. 745 (1982) (holding that due process requires proof by clear and convincing evidence before a state may terminate parental rights).

Substantive changes in intervention standards and reallocation of responsibility for applying those standards should help reduce the incongruence between the number of adoptable minority children and the number of minority adoptive homes. Focus on the intervention phase alone, however, is not sufficient because it ignores the plight of children already in the system and, unless we are prepared to argue that all interventions and removals are the result of cultural bias, the plight of children who will come into the system in the future. Thus, the problem of transracial adoption may be diminished by changes at the intervention stage, but those changes cannot be expected to make questions concerning transracial adoption policy go away.

which may be decided under the interests analysis presented here: a minority child is in institutional or foster care and a white adoptive family is available; adoption is sought by white foster parents of the minority child in their care; and a step-parent seeks adoption of a mixed-race step-child with whom the step-parent is living. The variations on each of these fact patterns will be discussed in turn.

The interests of the child and his or her minority group are incongruent when a child is free for adoption and no in-race adoptive parents are available.[218] Resolution of such a case depends on which interests are deemed foremost, and that, in turn, requires normative selection of the primary value to be served by the placement decision. If the goal is to maximize the possibility of healthy emotional growth, then our best information tells us that a stable family is of paramount importance, and the transracial placement should be made. If, however, cultural identity is more important, then transracial adoption should not be permitted.

The resolution proposed here is something of a compromise. If no in-race adoptive parents are available, black children should be placed with immediately-available white families, but Indian children should wait for a reasonable time while an Indian family is sought. This proposal is based on the difference in circumstances between blacks and Indians and on the normative preference that placement decisions should enhance the individual child's emotional development unless their result would be to threaten the minority group's very existence; if so, then the group's interest in survival becomes paramount. Although all children suffer equally from foster and institutional care, the decimation of Indian populations caused in large part by transracial placement of Indian children mandates that such placement be avoided if at all possible. An equally compelling countervailing consideration is not present in the transracial adoption of blacks. Black children, therefore, should not suffer the

218 Whether the child is black or Indian, transracial adoption should not take place if in-race adoptive parents are available and the placement does not pose an added threat to continuity of the child's care (as it would if the child were removed from white foster parents who were also seeking to adopt). In-race adoption is always preferred, not because of some vague notions of matching, but because of the importance of ethnic identity in this heterogeneous society and out of deference to the wishes of many leaders of minority opinion. *Cf. In re* R.M.G., 454 A.2d 776, 798 (D.C. Ct. App. 1982) (Newman, C.J., dissenting) ("While there is a debate among social scientists about the viability of interracial adoption, no one—including the parties herein and their expert witnesses—contends that such adoptions tend to be *superior* to intraracial adoptions, all other factors equal.") (emphasis in original) (footnote omitted). Furthermore, placement in-race poses no threat to the child's emotional development in these cases, since the child faces no delay in or denial of adoption.

emotional damage of continued foster care. The cost each black child pays individually is not offset by a greater gain to the group or to society as a whole, as it arguably is in the case of Indian children.[219]

If no Indian adoptive family is likely to become available, or if a reasonable time has passed and no Indian adoptive family has been found, the appropriate course of action depends upon the situation in which the Indian child then lives. If the child is institutionalized, transracial adoption should be allowed. The detriments of institutionalization are so great and the chances of socialization as an Indian so small, that the child's need for a stable family weighs most heavily. If the child is in non-Indian foster care and a white adoptive home is available, then no advantage in terms of enhanced cultural identity as an Indian, either for the child or the tribe, is realized by denying adoption. Allowing adoption will, on the other hand, permit the child to enjoy the benefits of a stable family.

A difficult case arises if the Indian child is in Indian foster care and white adoptive parents are available. Continued foster care has simultaneously the disadvantage of impermanence and uncertainty, with the added risk that the child may become increasingly hard to place for adoption as he or she grows older, and the advantage of preserving Indian cultural identity. Adoptive placement, conversely, has the advantage of permanence and security. The dilemma should be resolved by leaving the child in Indian foster care.[220]

---

219 Although this article addresses transracial adoption of only black and Indian children, *see* note 3 *supra*, an interested reader can easily apply this policy proposal to other minority groups, such as Asians or Hispanics. If the continued existence of such a minority group is genuinely threatened by transracial adoption of their children (which, as far as this writer knows, is not the case with Asians and Hispanics), then these adoptions should not take place. Otherwise, the interest of the child in a stable and permanent home should outweigh the potential loss of cultural identity.

220 A similar fact situation arose in Oregon *ex rel.* Juvenile Dep't, Multnomah County v. England, 292 Or. 545, 640 P.2d 608 (1982) (en banc), although the opinion does not indicate where the child was placed following removal from her Indian foster mother. In that case, the state agency took legal custody of an Indian child and placed her in the foster care of her Indian maternal aunt. A hearing was held at which it was decided to remove the child from her aunt's custody; the natural mother received notice of the hearing, but the aunt received neither formal nor actual notice. She moved for reconsideration, arguing that she had "legal custody" and thus was an "Indian custodian," entitled to notice under the Indian Child Welfare Act, 25 U.S.C. § 1903(6) (1982). The court rejected her argument, concluding that the Act used the phrase "legal custody" as a term of art, and therefore, that legal custody rested with the state agency.

This case is difficult to evaluate under the guidelines proposed here because the alternatives available for the child are not known. It does appear, however, that the result is contrary to the purposes of the Indian Child Welfare Act, as the dissent argued, 640 P.2d at 614 (Tongue, J., dissenting). Extension of procedural protection to the maternal aunt in this case

Clearly, preference for the interests of the tribe is at the expense of the child's emotional development. If best interests means a placement most conducive to healthy psychological growth, this result is contrary to it. In this case, the child pays the price for the tribe's welfare.

The result that the Indian Child Welfare Act mandates, which is consistent with the proposal offered here, is appropriate for the reasons stated in this article. The Act can be criticized, however, for failing to articulate the value preferences it embodies. It is predicated on the assumption that the "best interest" of the affected child is to remain with the tribe.[221] Granted that the tribes have a strong interest in maintaining contact with and even control over Indian children, but it does not follow, as one commentator has asserted, that "[s]ince Indian children are crucial to the continued existence of Indian tribes and culture, the best interest of the Indian child is also the best interest of the Indian tribe."[222] This viewpoint fails to recognize the inherent conflict between the child's and tribe's mutual associational interests and the child's interest in stability and permanency. The Act does purport to further the mutual associational interest, but it may in fact serve to exacerbate the instability and impermanence to which Indian children have been subjected. That consequence may be necessary in order to preserve the tribes, but the Act should make that policy choice clear.

The Act increases instability and impermanence for Indian children in several ways. Congressional reports laid the blame for the shockingly high rates of Indian child placement on the insensitivity of state child welfare agencies and courts to Indian culture, and identified the state-run foster care system as seriously harmful to Indian children.[223] It is ironic, then, that once an Indian child is in foster care the Act may operate to leave him or her there because of the "beyond a reasonable doubt" standard required to terminate parental rights, and thus to free the child for adoption.[224] If parental

---

would have served the values of continuity and, possibly, of cultural identity and tribal association (if the alternative placement was with a non-Indian or non-tribe member family). Furthermore, extension of procedural protection would not have prevented the agency from making, nor the court from approving, an alternative placement, 640 P.2d at 617 n.7; it merely would have increased the likelihood that evidence favorable to the aunt and, perhaps, to the Indian culture generally would be introduced.

221 *See* note 90 *supra* and accompanying text.

222 Note, *In re D.L.L. & C.L.L., Minors: Ruling on the Constitutionality of the Indian Child Welfare Act*, 26 S.D.L. REV. 67, 74 (1981).

223 *See* notes 80-87 *supra* and accompanying text.

224 H.R. REP. NO. 1386, *supra* note 46, at 46 (Dissent of Rep. Marlenee, quoting Recom-

rights cannot be terminated, but the child's home situation is such that he or she cannot be returned, then the child will remain "adrift" in the "limbo"[225] of foster care. The Act permits further instability by allowing a parent who has voluntarily consented to foster care to withdraw that consent at any time; and a parent who has consented to termination of parental rights or to adoption may withdraw consent for any reason at any time before a final decree of termination or adoption is entered.[226] In both cases, withdrawal of consent allows the parent to recover custody of the child, thus subjecting the child to discontinuity of care.

Two illustrative cases have arisen. In *A.B.M. v. M.H. & A.H.*,[227] an unmarried Indian mother consented to adoption of her child by her sister and brother-in-law. A final decree of adoption was entered when the child was seven months old, but the decree was vacated due to procedural irregularities. The natural mother then attempted to withdraw her consent and obtain custody of the child. The trial court refused to permit withdrawal of consent and, applying state law standards, determined that adoption was in the best interests of the child. The Alaska Supreme Court reversed, holding the Indian Child Welfare Act applicable. Under the Act, the court must grant a biological parent's petition for return of custody after a final adoption decree is vacated, unless a showing is made, supported by evidence beyond a reasonable doubt, that return is likely to result in serious emotional or physical damage to the child.[228] Because the hearing granted by the trial court did not meet this standard, the

---

mendations of the Social Services Committee of the National Council of State Public Welfare Administrators); Wamser, *supra* note 33, at 426.

But see *In re* J.L.H. & P.L.L.H., 316 N.W.2d 650 (S.D. 1982); *In re* R.M.M. III, 316 N.W.2d 538 (Minn. 1982); *In re* Fisher, 31 Wash. App. 550, 643 P.2d 887 (1982); and *In re* S.R., 323 N.W.2d 885 (S.D. 1982), holding that the evidence established beyond a reasonable doubt that an Indian parent's continued custody would likely result in serious emotional or physical damage to the child. These cases may indicate that the standard will not be nearly as difficult to meet in practice as it seems to be in theory.

Although *In re S.R.* did hold that the standard was met, the case may not be good authority for the proposition that the standard as applied has eroded. In that case, both parents were Indians, and the child was living with her father. Termination of the mother's rights, therefore, amounted to little more than a permanent bar to custody claims by the mother; the child's association with her tribe and the continuity of her care were unaffected.

225 These are favorite words to describe the foster care system. *See* Smith v. Organization of Foster Families, 431 U.S. 816, 836 (1977); Macaulay & Macaulay, *supra* note 13, at 273, 293.

226 25 U.S.C. § 1913(b)-(c) (1982).

227 651 P.2d 1170 (Alaska 1982), *cert. denied sub. nom.* Hunter v. Maxie, 103 S. Ct. 1893 (1983).

228 25 U.S.C. §§ 1912, 1916 (1982).

Court reversed and remanded. The child was then two and one half years old.

The Indian child in *In re Appeal in Pima County Juvenile Action*[229] was also subjected to substantial discontinuity because of the Act. The Indian mother withdrew her consent to adoption when the child was seven months old, and before entry of a final decree of adoption. The prospective adoptive parents refused to relinquish the child, however, and petitioned for termination of parental rights on grounds of abandonment. The tribe requested transfer of jurisdiction, but the trial court denied the request and severed parental rights. The appellate court reversed under the Indian Child Welfare Act,[230] thus returning the child to a biological parent he had never known.

By allowing a parent to withdraw consent to termination or adoption at any time before entry of a final decree, the Act makes placement for adoption more difficult, since "[f]ew families, Indian or non-Indian, will risk the emotional commitment necessary to adopt a child when that child can be summarily removed. Once again the child runs the risk of being left in extended foster care."[231] Adding the irony of underfunded and unmonitored family development programs,[232] the cumulative effect of the Act may be to leave Indian children in non-Indian foster care in the name of cultural identity and at the cost of the child's emotional development.

Frank recognition of this "tragic choice"[233] may be necessary if the Act is to gain the support of social workers and judges who will ultimately be responsible for its implementation and, therefore, its success or failure. For example, the social worker involved in *In re Appeal in Pima County Juvenile Action*[234] recognized that the Act may

229 130 Ariz. 202, 635 P.2d 187 (Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982).

230 The court held that the child's legal domicile was on the reservation with his mother, thus giving the tribe exclusive jurisdiction under the Indian Child Welfare Act. 635 P.2d at 191. In the alternative, the court held that if the child was not domiciled on the reservation, the tribal court had concurrent jurisdiction and that no good cause to deny transfer was present. *Id.* at 191-92. Finally, the court held that even if the state court properly refused to transfer the case, the termination was not supported by evidence beyond a reasonable doubt, as the Act required. *Id.* at 192-93.

231 Wamser, *supra* note 33, at 427; *see also Hearings*, *supra* note 13, at 479-503 (letters sent to the Committee).

Wamser argued that the state adoption act, which allows withdrawal of consent to adoption only if that consent was obtained by fraud or duress, will avoid the problem of revocable consent. Wamser, *supra* note 33, at 427-28. He did not, however, recognize or address possible supremacy clause difficulties with his argument.

232 *See* notes 118-25 *supra* and accompanying text.

233 *Cf.* G. CALABRESI & P. BOBBITT, TRAGIC CHOICES (1978).

234 130 Ariz. 202, 635 P.2d 187 (Ct. App. 1981), *cert. denied*, 455 U.S. 1007 (1982).

adversely affect the emotional well-being of children. In that case, as discussed above, an Indian mother withdrew her consent to adoption when the child was seven months old. The prospective adoptive parents refused to return the child, although the biological mother was within her rights under the Indian Child Welfare Act. The adoption worker testified on behalf of the adoptive parents at the hearing on their motion to terminate the mother's parental rights:

> I feel that the child's security in the home would be in jeopardy if the child were moved.
>
> I felt also frankly that the law is unfair, that it does not specifically acknowledge the best interests of the child. And I had serious reservations as to what was now prompting this young woman [the biological mother] to change her decision.[235]

When white foster parents of a black or Indian child seek to adopt, then the child's interest in a stable family takes on enhanced significance. Not only is he or she offered a permanent home, but that home represents continuity of care. Presumably no in-race foster parents were available at the time of placement or transracial foster placement would not have been made initially. But what if in-race foster parents are now available, so that the choice is between transracial adoption and in-race foster care? Following the value preferences stated above, transracial adoption should be allowed for the black child, but the Indian child should be moved to the Indian foster home in which he or she can enjoy the benefits of a family with Indian cultural ties, despite the discontinuity of care to which he or she will be subjected. Adoption should be granted to the white foster parents of the black child, however, even if a black adoptive home is immediately available.

This was the situation in the well-known case of *Drummond v. Fulton County Department of Family and Children's Services*.[236] Timmy, a mixed-race child, was placed with the Drummonds when he was one month old. Within a year, the Drummonds expressed an interest in adopting him. When Timmy was fifteen months old, caseworkers told the Drummonds that the agency planned to find a black adoptive family for Timmy. An agency staff meeting was held when Timmy was two years old and a final decision was made to remove him from the Drummonds. They filed suit simultaneously in state

235 635 P.2d at 192 (brackets added). The court responded, with some insensitivity, that "[a]ny potential emotional trauma to the child if the contemplated adoption is aborted was engendered by the conduct of the adoptive parents not adhering to the mandates of the Act." *Id.* at 193.

236 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978).

and federal court,[237] but both suits were dismissed.[238] During the appeals, Timmy was removed from the Drummond's home. He was then thirty months old.

Concededly, ethnic identity will be diminished, even when white parents are willing to accept help from the child welfare agency in building their black child's racial identity. But the known damage caused by discontinuity is powerful enough that the least detrimental alternative, from the child's point of view, is transracial adoption. Arguably, the balance should shift if the black child has not been in the home long enough to form psychological ties to the white foster parents; the detrimental effects of discontinuity are lessened, and the child could be moved to an available black adoptive home. On the other hand, even though full-blown psychological parenthood has not yet developed, some discontinuity would result from moving the child to the black adoptive home.[239] Given the large number of black children available for adoption, another black child should be placed in the home. Only if a black adoptive home would otherwise be unutilized should a child be moved from a home in which he or she is already settled.

---

237 The Drummonds sought a preliminary injunction in both courts barring removal of Timmy from their home, appointment of a guardian ad litem for him, and an adjudication that the agency unconstitutionally used race in denying their request for adoption. In addition, in the state suit the Drummonds requested an order requiring the agency to consent to their adoption of Timmy. *See* note 238 *infra*.

238 Dismissal of the state suit was upheld by the Georgia Supreme Court, 228 S.E.2d 839 (Ga. 1976), *cert. denied*, 432 U.S. 905, *reh'g denied*, 434 U.S. 881 (1977). A panel of the Fifth Circuit reversed dismissal of the federal suit, 547 F.2d 835 (5th Cir. 1977), but the full court then reversed the panel decision, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978).

239 The risk of discontinuity is exacerbated by trial and appellate courts that "lumber along at their typical snail's pace," Miller v. Berks County Children & Youth Servs. (*In re* Davis), 465 A.2d 614, 632 (Pa. 1983). If a child is left during appeal with white foster parents who lost at trial, affirmance of the trial court's decision raises the spectre of removing the child from a home to which he or she is only the more firmly attached by passage of time. This led the *In re Davis* court to remand for further proceedings, rather than to order summary transfer of the child to a black foster home. *Id.* at 632-33; *see also In re* R.M.G., 454 A.2d 776 (D.C. Ct. App. 1982). In that case, a black child, D., was placed with white foster parents in Jan., 1978, at the age of three-and-one-half months. When they sought to adopt, their petition was opposed by D.'s black paternal grandmother and step-grandfather. *Id.* at 780. Petitioners lost at trial, but D. remained in their home pending appeal. *Id.* at 782. The appellate court reversed and remanded in Dec., 1982, and the matter is currently pending on remand. D. remains with her foster parents. Telephone interview with Julian Karpoff, attorney for petitioner-appellants (Feb. 10, 1984).

On the other hand, if the child is removed from white foster parents upon their loss at trial, then reversal on appeal subjects the child to two wrenching transfers. *See, e.g.*, State *ex rel.* Portage County Welfare Dep't v. Summers, 38 Ohio St. 2d 144, 155-56, 311 N.E.2d 6, 13 (1974) (Herbert, J., concurring in part and concurring in the judgment).

The final category of cases arises when adoption is sought by a white step-parent with whom a black or Indian child and his or her biological parent has been living. Adoption should be granted, because the biological parent's presence assures the requisite ties to ethnic heritage. If the child is of mixed race, however, and the biological parent who is present is white, the child may lose the ties to his or her minority heritage. But this loss would occur even without the step-parent adoption. Adoption, therefore, would legitimize the child in the home in which he or she would continue to live anyway,[240] and it would have no independent effect on the child's opportunities for cultural identity.

VI. Conclusion

There is very little to recommend transracial adoption—except that the alternatives are so often worse. Being raised by parents who share their child's racial, cultural, and ethnic heritage has value, and this deserves recognition. But the preservation of ethnic identity is a social goal separate from the goals of the adoption system, and that system should not be subverted into the service of other social goals save for the most pressing of reasons. Preservation of discrete ethnic and social groups, however, is such a normatively superior goal.

Even if a different normative hierarchy is preferred, the best interests concept should be broken down analytically into its component parts. Only in this way can social workers, and the judges who must review their decisions, clarify the policies to be served and work toward results that enhance the emotional growth of children without unduly harming cultural diversity.

240 The court followed this reasoning in *In re* Adoption of a Minor, 228 F.2d 446, 448 (D.C. Cir. 1955). See also *In re* Gomez, 424 S.W. 2d 656 (Tex. Civ. App. 1967), in which the court, in addition to the "legal considerations," noted that granting the adoption would allow the children to receive benefits as dependents of their serviceman-stepfather. *Id.* at 659.