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TRANSRACIAL ADOPTION IN LIGHT OF THE FOSTER CARE CRISIS: A HORSE OF A DIFFERENT COLOR

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TRANSRACIAL ADOPTION IN LIGHT OF THE FOSTER CARE CRISIS: A HORSE OF A DIFFERENT COLOR

This Note focuses on the convergence of two social concerns: transracial adoption (TRA)[1] and the ever increasing numbers of minority children entering and remaining in the foster care system.[2] While everyone would agree that the latter is a tragedy and needs to be corrected, more divisive opinions surround the role of transracial adoption in child placement.

This Note will address the current status and potential resolution of these often competing concerns. A general background will first be presented regarding the role and treatment of transracial

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[1] "[Although] the term 'transracial adoption' refers to the placement of black children with white families and also encompasses placing white children with black families, transracial adoption, in practice, has been largely a one-way street involving the placement of black children with white families . . . ." Memorandum from Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People to All NAACP Units, National Board Members and NAACP/SCF Trustees 6 (June 3, 1992) (on file with the *New York Law School Journal of Human Rights*). For a discussion of the transracial adoption controversy see Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching In Adoption*, 139 U. PA. L. REV. 1163 (1991) (providing a detailed examination of current racial matching policies and the effect such policies may have on minority adoptions in both legal and social contexts). *See also* Twila B. Perry, *Race and Child Placement: The Best Interests Test And The Cost Of Discretion*, 29 J. FAM. L. 51 (1990-91) (concluding that the traditional approach used to determine child placement is inappropriate where child and potential parents are of different races and finding the "best interests" test allows judges and child placement agencies to make decisions based on questionable attitudes and assumptions about the role of race in child placement).

[2] *See* SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 38-39 (1990) [hereinafter DISCARDED CHILDREN] (percentage of minority children in foster care rose from 41% in 1985 to 46% in 1988, more than twice the percentage of minority children in the national child population).

adoption in recent history.[3] Next, two major events in the area of child placement that occurred almost simultaneously in the mid-1980s will be described and discussed.[4] An analysis of recent transracial adoption cases will attempt to ascertain the role courts are willing to play in the transracial adoption debate.[5] Current adoption and foster care agency practices will be examined in light of the debate surrounding transracial adoption and the crisis in the foster care system.[6] Special attention will be focused toward analyzing new responses to the foster care problems facing minority children and the potential role transracial adoption may have in treating these problems. In conclusion, this Note will examine the effectiveness of the current actions being taken to address the foster care crisis and will attempt to offer constructive suggestions toward correcting the problems.

I. Background

Longstanding and deeply entrenched separation of the races in this country has traditionally permeated attitudes toward transracial adoption.[7] Most states had statutes prohibiting adoption across racial lines.[8] With the arrival of the Civil Rights Movement racially discriminatory legislation came under fire and most of those statutes were repealed or struck down as unconstitutional.[9] The last statutes

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[3] *See infra* notes 7-49 and accompanying text.

[4] *See infra* notes 50-112 and accompanying text.

[5] *See infra* notes 113-76 and accompanying text.

[6] *See infra* notes 177-242 and accompanying text.

[7] See generally Bartholet, *supra* note 1, at 1174-85 for an in-depth discussion of the history of transracial adoption.

[8] Bartholet, *supra* note 1, at 1176. For example, a Louisiana statute in force in the 1960s stated: "A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race." Compos v. McKeithen, 341 F. Supp. 264, 264 (E.D. La. 1972) (quoting LA. REV. STAT. ANN. § 9.422 (West 1965)).

[9] *See, e.g.*, Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972). In *Compos*, the court invalidated a Louisiana statute prohibiting transracial adoption, holding that the statute did not withstand equal protection scrutiny. *Id.* at 268. The court ruled that Louisiana had failed to show the necessity or reasonableness of requiring a parent or parents to be of the same race as the child to be adopted. *Id.* For the text of the statute,

prohibiting transracial adoption to give way to constitutional challenges were those of Texas[10] in 1967, and Louisiana[11] in 1972.

The courts were also influenced by racial bias regarding transracial adoption.[12] There is very little case law directly involving transracial adoption. Many of the cases that are typically cited with reference to transracial adoption fall under the heading of "child placement," mostly child custody suits resulting from divorce, that are analogous to transracial adoption by virtue of their treatment of race. Perhaps the most blatantly racially biased of all child placement decisions involving the issue of race is *Ward v. Ward.*[13] The *Ward* court held that the biracial children of a black man and a white woman should remain with their father, since they appeared black.[14] The court did not assess the fitness of the mother as custodian of the children in its opinion; the inquiry began and ended with the physical characteristics shared by the children and their father.[15]

While *Ward* stands out as a supremely racist example among child placement cases, other courts have revealed similar biases in a less strident fashion. The Court of Appeals for the District of Columbia Circuit reversed the district court's denial of a petition for adoption in *In re Adoption of a Minor.*[16] The district court refused to grant a black man's petition for adoption of his white step-son, in part because the court feared "[t]he boy when he grows up might lose the social status of a white man by reason of the fact that by record his father will be a negro if this adoption is approved."[17] In *Potter*

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see *supra* note 8. *See also In re* Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967). In *Gomez*, the court invalidated a Texas statute reading "[n]o white child can be adopted by a negro person, nor can a negro child be adopted by a white person." *Id.* at 657 (quoting TEX. REV. CIV. STAT. ANN. art. 46a § 8 (Vernon 1959)).

[10] *See In re* Gomez, 424 S.W.2d 656 (Tex. Civ. App. 1967).

[11] *See* Compos v. McKeithen, 341 F. Supp. 264 (E.D. La. 1972).

[12] See generally Bartholet, *supra* note 1, at 1177-78 for a thorough treatment of early transracial child placement cases.

[13] 216 P.2d 755 (Wash. 1950).

[14] *Id.* at 756.

[15] *Id.*

[16] 228 F.2d 446 (D.C. Cir. 1955).

[17] *Id.* at 447 (quoting and reversing unpublished memorandum opinion of District Court of Columbia).

v. Potter[18] the trial court denied a petition for custody modification made by a white mother who had remarried a black man after her divorce from her child's father, a white man.[19] The court proceeded to cast aspersions on the mother's character and mental stability, seemingly on the basis of her interracial marriage.[20] A more detailed examination of other cases reveals similar racial biases permeating child placement cases.[21]

Conversely, some courts of the same era spoke out against the prevalent racist attitudes promoted by society. The United States Court of Appeals for the District of Columbia Circuit reversed the decision of the district court in *In re Adoption of a Minor,*[22] holding that the factor of race alone may not justify the denial of a petition for adoption; race is only one of many considerations to be addressed in the context of an adoption petition.[23] In *Fountaine v. Fountaine,*[24] an Illinois court reversed the court's award of custody of biracial children to their black father, finding that the lower court's decision rested solely on the physical resemblance of the children to their

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[18] 127 N.W.2d 320 (Mich. 1964).

[19] *Id.* at 326. The original custody decree, which granted legal custody of the child to her father and physical custody to her maternal grandparents, was affirmed. *Id.*

[20] *Id.* The dissenting opinion contradicts the dim picture of the mother painted by the trial judge and accepted by the Michigan Supreme Court. The dissent notes:

> From all appearances, life with her mother and stepfather in California will be based upon a bedrock of parental love and cooperation, something hitherto denied her. Her stepfather is a surgeon in a wholesome community where experiences in democratic living are promising. There is a substantial home sustained by adequate income. All this and a full time mother, too.

Id. at 328.

[21] *See, e.g.,* Beazley v. Davis, 545 P.2d 206 (Nev. 1976) (trial court ruled that children should remain with their black father, not their white mother, because of their shared physical characteristics); *In re* Baker, 185 N.E.2d 51 (Ohio 1962) (probate court erred by denying transracial adoption based on rationale that God never intended that the races should be mixed).

[22] 228 F.2d 446, 447 (D.C. Cir. 1955).

[23] *Id.*

[24] 133 N.E.2d 532 (Ill. App. Ct. 1956).

father.[25] Another Illinois court recognized in a subsequent case that "race alone cannot outweigh all other considerations and be decisive" in child placement cases.[26]

In *In Re R.M.G.*,[27] the District of Columbia Court of Appeals remanded the case to the lower court, which had granted adoption to paternal grandparents of a black girl that had been in the foster care of a white family for the majority of her two years.[28] The appellate court articulated a three-part analysis that a trial court should undertake in an inter-racial adoption case where race is a relevant factor.[29] The court instituted this analysis to "assure a reviewing court that the application of [the race] factor, in conjunction with other relevant considerations, was precisely tailored to the best interest of the child."[30] *In Re R.M.G.* is significant not for the three-part test it enunciated, which was later repudiated,[31] but for the court's concern that race not be allowed to transcend other factors in adoption proceedings.

II. A Brief Rise in Transracial Adoptions

In the late 1960s and early 1970s transracial adoption figures rose dramatically, from a record high of 733 in 1968 to 2574 in 1971.[32] There are different explanations for this "phenomenon."[33]

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[25] *Id.* at 534. The court noted that the trial judge "would have awarded the custody of the children to the mother except that they had the appearance of colored children." *Id.*

[26] Langin v. Langin, 276 N.E.2d 822, 824 (Ill. App. Ct. 1971).

[27] 454 A.2d 776 (D.C. App. 1982).

[28] *Id.* at 794.

[29] *Id.*

[30] *Id.*

[31] *In Re* D.I.S., 494 A.2d 1316, 1327 (D.C. App. 1985). "The three-part approach in *R.M.G.* [ ] is unwise primarily because it effectuates a sharp departure from the flexible framework developed in our decisions for determining the best interests of the child." *Id.*

[32] RITA SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTION 29-30 (1977).

[33] Even at its peak, transracial adoptions constituted a minute portion of black and other minority adoptions. Jacqueline Macaulay & Stewart Macaulay, *Adoption for Black Children: A Case Study of Expert Discretion*, 1 RES. IN L. AND SOC. 265, 284-85 (1978).

The Korean War resulted in many mixed-race children, born to black American soldiers and Korean women, who needed families.[34] As Americans began to adopt these children, the concept of white people adopting a black child seemed less alien and even desirable to a liberal generation dedicated to racial harmony.[35]

This brief period of greater acceptance toward transracial adoptions ended in 1972, when the National Association of Black Social Workers (NABSW) denounced transracial adoption as cultural genocide.[36] The organization announced its stance at a meeting in St. Louis and issued a position paper.[37] The stance taken by the NABSW echoes the rise of the Black Power Movement. This period in the early 1970s was characterized by racial self-compartmentalization, rejection of Civil Rights era integrationist principles, and aggressive pursuit of racial justice.[38] The primary objective of the group's firm stance against transracial adoption was to promote black children's awareness of and pride in their heritage,[39] something the NABSW claimed would be impossible if black children were placed in white homes.[40] The group also declared that black children reared in white homes would be unable to deal effectively with the problems faced by blacks in a racist society.[41] The NABSW's unwavering mandate, issued to promote its goals, was that black children must never be placed in white homes under any circumstance.[42] Recruitment and rehabilitation of black families was stressed as the logical and necessary answer to placement of black

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[34] Bartholet, *supra* note 1, at 1178.

[35] *See id.*

[36] *See NABSW Opposes Trans-Racial Adoption*, NAT'L ASS'N OF BLACK SOCIAL WORKERS NEWS (Nat'l Ass'n of Black Social Workers, New York, N.Y.), Apr. 1972, at 1-2 [hereinafter NABSW Position Paper].

[37] *Id.*

[38] *See* ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 62-64 (1992). Hacker offers a description and explanation of the wane of the Civil Rights Movement, the origin of militant black activism, and the effects this transition has had on relations between blacks and whites. *Id.*

[39] NABSW Position Paper, *supra* note 36, at 1-2.

[40] *Id.* at 1.

[41] *Id.* at 2.

[42] *Id.*

children.[43]

Foster care and adoption agencies quickly aligned themselves with the position of the NABSW.[44] Agencies that had actively encouraged transracial placement denounced the policy and began to create new agency rules and practices that would render transracial adoption almost impossible.[45] After the NABSW position was announced, the number of transracial adoptions decreased sharply.[46] Race-matching policies were created that still exist today.[47] The commitment to same-race matching has even resulted in black children remaining in the foster care system while a white family has expressed interest in serving as a foster care or adoptive family.[48] This type of single-mindedness in matching children with families of the same race, often at the expense of the child who must wait longer to join a family, is the biggest criticism of NABSW-spawned prohibitions against transracial adoption.[49]

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[43] *Id.*

[44] *See infra* notes 45-49 and accompanying text.

[45] *Compare* CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE § 4.5 (1973) ("It is preferable to place children in families of their own racial background.") *with* CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE § 4.5 (1968) ("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.").

[46] Transracial adoption figures decreased from 2574 in 1971 to 1056 in 1975. *See* Arnold Silverman & William Feigelman, *The Adjustment of Black Children Adopted by White Families*, 62 SOC. CASEWORK: J. OF CONTEMP. SOC. WORK 529 (1981).

[47] *See, e.g.*, Michael D'Antonio, *Sad Goodbye to Michael*, NEWSDAY (Nassau and Suffolk ed.), Apr. 1, 1988, at 3 (New York State requires that adoption agencies consider matching race, religion, and ethnicity in adoption cases. Going above and beyond state law, Little Flower Children's Services, the largest adoption agency on Long Island, has adopted a policy of strict race-matching in adoptions and does not allow transracial placement except in cases of short term emergency foster care.)

[48] *See* Ilene Barth, *What Does NY Have Against Mixed-Race Adoptions?*, NEWSDAY (City ed.), Mar. 5, 1989, Ideas, at 1, 8. Barth relates the story of a white New York couple who wished to adopt a child from the "Blue Book," a directory of hard-to-place children available for adoption. Blue Book children are difficult to place because they are older, have handicaps, or have siblings. The couple's request to adopt a boy was denied because the child was biracial and the agency in charge of the child's placement followed a strict race-matching policy. The child remained unadopted for two years after the couple's request was denied. *Id.*

[49] Charles A. Radin, *Waiting For A Home*, BOSTON GLOBE, Nov. 30, 1989, at 1, 38.

III. Two Events in the Mid-1980s Regarding Transracial Adoption

A. Palmore v. Sidoti[50]

In 1984 the Supreme Court made a rare foray into the traditionally state-regulated area of child placement. *Palmore* involved a custody dispute between a white divorced couple.[51] The child's mother had been granted custody upon the divorce.[52] The mother lived with a black man, whom she married shortly after the child's father sought custody modification.[53] The lower court awarded custody to the father,[54] finding that the mother had "chosen for herself and for her child, a life-style unacceptable to the father *and to society*"[55] and that the societal pressures the child would feel because she had a mother and stepfather of different races justified a change in custody.[56]

The Supreme Court reversed the decision of the lower court.[57] The Court acknowledged that the "best interests of the child" test used by the lower court was the proper test to determine child placement.[58] The Court determined, however, that the lower court had impermissibly based its decision on the effects of racial prejudice and would have arrived at a different result had the mother remarried a white man.[59] Recognizing that the child might indeed be subject to

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[50] 466 U.S. 429 (1984).

[51] *Id.* at 430.

[52] *Id.*

[53] *Id.* Sidoti sought custody modification on the grounds of changed conditions; namely, that his child's mother was cohabiting with a black man. *Id.*

[54] *Id.* at 431.

[55] *Palmore*, 466 U.S. at 431. The trial court found the fact that Mrs. Palmore had lived with her future second husband without being married to him showed that she "tended to place gratification of her own desires ahead of her concern for the child's future welfare." *Id.*

[56] *Id.*

[57] *Id.* at 434.

[58] *Id.* at 432.

[59] *Id.* "[I]t is clear that the outcome would have been different had petitioner married a Caucasian male of similar respectability." *Id.*

racial biases,[60] the Court nonetheless proclaimed that "[t]he Constitution cannot control such prejudices, but neither can it tolerate them."[61]

Palmore, despite the use of strong constitutional rhetoric, does not provide firm guidelines for the consideration of race in child placement decisions.[62] The decision is encouraging primarily because the Supreme Court found the overt racism contained in the lower court's opinion worthy of intervention, although family matters are usually left to the individual states. While lower courts grapple with the impact of *Palmore* on child placement decisions, the Supreme Court has not heard another case involving race and child placement since.[63]

B. Effect of Palmore on Child Placement

There is disagreement among experts as to the effect *Palmore* has had on child placement decisions where race is a factor.[64]

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[60] *Id.* at 429.

[61] *Palmore*, 433 U.S. at 433.

[62] The language chosen by the Supreme Court in *Palmore* was quite narrow: "The effects of racial prejudice, however real, cannot justify a racial classification removing an infant child from the custody of its natural mother found to be an appropriate person to have such custody." *Id.* at 434 (footnote omitted). Thus, in its narrowest interpretation, *Palmore* can be viewed as a decision pertaining to custody modification suits between natural parents.

[63] *See* J.H.H. and S.C.H. v. O'Hara, 878 F.2d 240 (8th Cir. 1989), *cert. denied*, 439 U.S. 1072 (1990); Drummond v. Fulton County Dep't, 563 F.2d 1200 (5th Cir. 1977) (en banc), *cert. denied*, 437 U.S. 910 (1978).

[64] *See generally* Perry, *supra* note 1, at 52-58. Perry argues that the best interests standard articulated by the Supreme Court in Palmore is ambiguous as a practical matter in child placement cases:

> [I]n child placement decision-making where racial differences are present, the touchstone rule of custody - the best interests rule - does little to assist in analyzing or resolving the different issues often presented. Although the rule is intended to be a multi-factor balancing test, it may often allow race inappropriately to achieve a dominant position. The rule affords a level of discretion by courts and agencies that permits decisions to be made on the basis of personal biases, unsupported assumptions, and incomplete analyses

Palmore did not hold that race may never enter into a child custody decision; rather, it may not be the sole basis for the court's decision.[65] Various critics of this guideline have charged that race continues to dominate child placement decisions, but the practice is often camouflaged by the courts.[66]

The court in *Holt v. Chenault* [67] found that the trial court had erred by taking account of racial biases in its decision to grant a white father's petition for modification of custody of his daughter upon the marriage of his ex-wife, also white, to a black man.[68] The trial court had determined that the mother was a suitable parent, and its modification of the original custody decree was found inconsistent with Kentucky law by the Kentucky Supreme Court.[69] The law regarding modification of a custody decree stated that modification will only be upheld when a change of circumstances is necessary to serve the best interests of the child.[70] The reviewing court found no such change of circumstances.[71]

The court did affirm that the child's emotional reaction to her mother's biracial marriage was a proper factor to be considered in

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> that are often insensitive to the range of children's needs and that ignore other important interests.

Id. at 51. James Bowen concludes that the best interest standard does allow for consideration of race in child custody contexts, by restricting Palmore's holding to its particular facts of custody modification between former spouses. According to Bowen, *In re R.M.G.* provides the proper utilization of the race factor in those cases where two potential adoptive families, one black and one white, possess equivalent adoptive qualifications. James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 521 (1987-88).

[65] Palmore v. Sidoti, 466 U.S. 429, 434 (1984).

[66] Perry, *supra* note 1, at 54 n.121.

[67] 722 S.W.2d 897 (Ky. 1987).

[68] *Id.* at 898.

[69] *Id.*

[70] KY. REV. STAT. ANN. § 403.340(2) (Michie 1991). The statute provides that a court, in deciding custody modifications "shall retain the custodian appointed pursuant to the prior decree unless: . . . (c) The child's present environment endangers seriously his physical, mental, moral, or emotional health, and the harm likely to be caused by a change of environment is outweighed by its advantages to him." *Id.*

[71] *Holt*, 722 S.W.2d at 898.

determining the child's best interests.[72] The child was extremely upset by the racial slurs of her classmates and expressed a strong desire to live with her father.[73] Thus the Kentucky court, in effect, took racial biases into account[74] -- contrary to its bold assertion that consideration of race in child custody cases was impermissible.[75]

More positive, or perhaps less confusing, post-*Palmore* decisions include *Petition of D.I.S.*[76] and *McLaughlin v. Pernsley*.[77] The District of Columbia Court of Appeals in *Petition of D.I.S.* affirmed the trial court, which had granted a petition for adoption of a neglected black child by her natural grandmother instead of the white foster family that she had lived with almost exclusively since she was an infant.[78] The court did not focus solely on race in arriving at its decision;[79] much attention was paid to the psychological bonding that had occurred between the child and the foster mother,[80] the large support network provided by the child's natural grandmother and relatives,[81] and a change in circumstances of her foster family.[82] The Court of Appeals affirmed the trial court's decision to grant the adoption petition of the child's natural grandmother only after a thorough analysis of all the factors involved.[83] The decision was a true example of the "best interests" standard strictly applied without undue emphasis placed on race.[84]

In *McLaughlin v. Pernsley*,[85] a neglected black infant was

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[72] *Id.*

[73] *Id.*

[74] *Id.*

[75] *Id.* ("We hold that the trial court erred by giving effect to private racial biases.").

[76] 494 A.2d 1316 (D.C. App. 1985).

[77] 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989).

[78] *Petition of D.I.S.*, 494 A.2d at 1327.

[79] *Id.* at 1323-24.

[80] *Id.* at 1324.

[81] *Id.*

[82] *Id.*

[83] *Id.* at 1323-24.

[84] From the perspective of transracial adoption proponents, the court's emphasis on "the trauma [the child] would face in adolescence in searching for her roots if placed with [her foster family]" is problematic. *See infra* notes 200-216 and accompanying text.

[85] 693 F. Supp. 318 (E.D. Pa. 1988).

placed for emergency foster care with the McLaughlins, a white couple.[86] The child remained with the family for two years, until he was removed by the Philadelphia Department of Human Services and placed with a black foster care family.[87] Although the caseworker in charge of the placement had consistently evaluated the placement positively,[88] agency policy was to place children in same-race homes.[89] The District Court for the Eastern District of Pennsylvania found that removal of the child violated both the McLaughlins' and the child's equal protection rights,[90] that the child's best interests mandated that he be returned to the McLaughlins' care,[91] and that both the child and the McLaughlins would suffer irreparable injury if the child was not returned.[92]

Most notably, the court in *McLaughlin* applied strict scrutiny to the actions of the Department of Human Services.[93] Determining that the agency had removed the child from the McLaughlins' care solely on the basis of racial considerations, the court declared that the removal must serve a compelling governmental interest and be narrowly tailored to achieving that interest.[94] The court found that the state's interest in providing a long-term foster care placement that takes into account a child's racial and cultural needs, in keeping with the child's best interests, is indeed a compelling governmental interest.[95] The court, however, did not agree that the means used to achieve the governmental interest in question was sufficiently narrowly tailored to survive a strict scrutiny analysis.[96] The court concluded that "[t]he use of race alone in making long-term foster care placements is not necessary nor appropriate to accomplish those

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[86] *Id.* at 321-22.

[87] *Id.* at 321.

[88] *Id.* at 326-27 (citing Plaintiffs' Exhibit No. 1 at trial).

[89] *McLaughlin*, 693 F. Supp. at 324.

[90] *Id.* at 332.

[91] *Id.* at 353.

[92] *Id.*

[93] *Id.* at 330.

[94] *Id.* The strict scrutiny standard of review originated in Korematsu v. United States, 323 U.S. 214 (1944) (holding that the governmental interest behind the statute in question must be compelling to pass the strict scrutiny standard of review).

[95] *McLaughlin*, 693 F. Supp. at 331.

[96] *Id.*

salutary governmental objectives stated above."[97] Since the same-race placement policy did not pass constitutional muster, the court held that the Department of Human Services' decision to remove the child from the McLaughlins' care on the basis of race alone violated the equal protection rights of the McLaughlins and the child.[98]

McLaughlin is an encouraging decision in the area of child placement. Same race placement policies were not allowed to eclipse what should always be the primary concern of those charged with handling child placement; the child's best interests. Also significant was the court's use of equal protection analysis in an area that most courts are reluctant to handle at all.[99]

In striking contrast with the decision in *McLaughlin* is the extremely narrow interpretation of the *Palmore* holding by the Eight Circuit in *J.H.H. and S.C.H. v. O'Hara*.[100] Plaintiffs were a white couple licensed by the state of Missouri as foster care providers.[101] The couple filed suit against the Missouri Division of Family Services under 42 U.S.C. Section 1983 for monetary damages, claiming a violation of their equal protection rights.[102] The couple claimed that the Division of Family Services' decision not to return two black foster children to their care was based solely on race.[103] The district court dismissed the plaintiffs' claim on grounds of qualified

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[97] *McLaughlin*, 693 F. Supp. at 332.

[98] *Id.* at 327.

[99] *See, e.g., In re* D.L., 486 N.W.2d 375, 379 (Minn. 1992) (refusing to address the equal protection issue because "statutes are presumptively constitutional" and should be declared unconstitutional "when absolutely necessary and with extreme caution."); J.H.H. and S.C.H. v. O'Hara, 878 F.2d 240 (8th Cir. 1989), *cert. denied*, 439 U.S. 1072 (1990) (deciding case on qualified immunity grounds, rendering constitutional analysis of plaintiff's equal protection claims unnecessary).

[100] 878 F.2d. 240, 245 (8th Cir. 1989).

[101] *Id.* at 241. Plaintiffs held a provisional Foster Family Group Home license. *Id.*

[102] *Id.* at 240.

[103] *Id.* The children were removed from the plaintiffs' home so the Division of Family Services could investigate a hot-line report alleging abuse by plaintiffs of other of the plaintiffs' foster children. Subsequent investigation by a juvenile officer supported the allegation, but the perpetrator of the abuse was not identified in the investigation report. Upon removal from plaintiffs' home, the children were placed with a black foster family, where they remained after the child abuse investigation had concluded. However, two white foster children were returned to plaintiffs' care. *Id.* at 241.

immunity,[104] and the Court of Appeals affirmed, finding that the claim was not based on a clearly established constitutional right.[105]

The plaintiffs relied on *Palmore* for the proposition that race may not play any role in child placement cases, whether in custody modifications or in foster care placements.[106] The plaintiffs argued that the decision in *McLaughlin v. Pernsley* buttressed this extension of the *Palmore* holding into the area of foster care placement.[107] The Eighth Circuit factually distinguished *McLaughlin* from the case before it.[108] One major difference between the two cases, according to the court, was that the actions by the foster care agency in *McLaughlin* was removal of the foster child, as opposed to in the instant case the factor was the failure to place children with the same family that they were placed with originally.[109]

The court of appeals likewise found the reliance on *Palmore* misplaced, claiming "[w]e decline to read *Palmore* as a broad proscription against the consideration of race in matters of child

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[104] *J.H.H.*, 878 F.2d at 240. The defense of qualified immunity protects government officials who perform their discretionary duties in good faith. "[O]fficials performing discretionary functions [ ] generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1981). Using this standard, the district court determined that the plaintiffs failed to show that the Division of Family Services' decision was made in bad faith when it acted according to Missouri Division of Family Services regulations. The district court granted the Division's motion for summary judgment without prejudice, however, to enable plaintiffs to reopen the case in order to seek equitable remedies. *J.H.H.*, 878 F.2d at 243.

[105] *J.H.H.*, 878 F.2d at 240.

[106] *Id.* at 244. "Plaintiffs find a factual correspondence between *Palmore* and the instant case in the State's common policy objective: in foster care placement determinations, as in custody determinations, the standard applied is the best interests of the child." *Id.*

[107] *See id.*

[108] *Id.* at 245.

[109] *Id.* This is a very puzzling distinction, since the net result in both *McLaughlin* and *J.H.H.* was that the plaintiffs were denied the chance to continue in their roles as foster parents by the agencies in charge of the placements. The court also distinguished *McLaughlin* by noting that the plaintiffs in that case sought a preliminary injunction, as opposed to the plaintiffs in *J.H.H.*, who were seeking monetary damages under 42 U.S.C. § 1983. *Id.*

custody and foster care placement."[110] Hypothesizing that even if *Palmore* could be extended to apply to foster care placement decisions, the court found that "at most, the precedent establishes that race may not be the sole factor in determining the best interests of the child."[111] Emphasizing that because the plan for the foster children was eventual reunification with their natural father, the court found an application of *Palmore* to prevent consideration of race in determining the best interests of the children singularly inappropriate.[112]

IV. Recent Cases Involving TRA

In re D.L.[113] involved a custody battle between D.L.'s grandparents, who were black, and the white foster parents who cared for her since shortly after her birth.[114] At trial, the judge granted the maternal grandparents' petition for adoption, pursuant to a statutory preference for family members in minority adoptions.[115]

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[110] *J.H.H.*, 878 F.2d at 245.

[111] *Id.*

[112] *Id.*

[113] 486 N.W.2d 375 (Minn. 1992).

[114] *Id.* at 377. D.L.'s mother had provided false information to the foster care and adoption agency, who were thus unable to locate any of D.L.'s extended family. D.L.'s mother also refused to tell her parents of D.L.'s birth until two months after her birth. Her maternal grandparents were unable to locate D.L. until she was a year old. One month later, the Hennepin County Juvenile Court terminated the parental rights of both of D.L.'s parents, leaving D.L. a ward of the state in the custody of her foster parents. At this time the maternal grandparents informed the county that they wished to adopt D.L. *Id.*

[115] *Id.* at 376. MINN. STAT. § 259.28 subd. 2 (1990) provides the statutory preference for family members in minority adoptions:

> The policy of the state of Minnesota is to ensure that the best interests of children are met by requiring due consideration of the child's minority race or minority ethnic heritage in adoption placements. . . . In the adoption of a child of minority racial or minority ethnic heritage, in reviewing adoptive placement, the court shall consider preference, and in determining appropriate adoption, the court shall give preference, in the absence of good cause to the contrary, to (a) a relative or relatives of the child, or, if that would

On appeal, the court of appeals ruled the statute unconstitutional on equal protection clause grounds.[116] However, the court went on to affirm the trial court's decision granting the grandparents' petition, finding that the reasoning used by the trial court was sound even absent its application of the statute.[117]

The Minnesota Supreme Court affirmed the decisions of both lower courts, ruling that D.L. should be placed for adoption with her grandparents.[118] The court held that placement with relatives is presumptively in a child's best interest, without addressing the constitutional issue raised in the court below.[119] Finding that "a strong family preference exists for all child placements, without regard to race or ethnic heritage,"[120] the court declined to invade the province of the legislature by weighing the validity of the statute.[121]

The most troubling aspect of *D.L.*, from the perspective of transracial adoption advocates, is that the Minnesota Supreme Court affirmed the procedure used by the trial court for application of the family placement presumption.[122] In light of the presumption, the trial court considered only the adoption petition of the grandparents.[123] The Minnesota Supreme Court upheld this practice, noting that "[w]hen a presumption exists in favor of one petitioner over another, and there is no reason to believe that the favored

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> be detrimental to the child or a relative is not available, to (b) a family with the same racial or ethnic heritage as the child . . . .

In re D.L., 486 N.W.2d at 376.

[116] *In re* D.L., 479 N.W.2d 408, 413 (Minn. Ct. App. 1991). The appellate court ruled that the statute's racial classification failed a strict scrutiny analysis, since the classification was not necessary to achieve the goals of the legislature. "The heritage of minority children can be protected without the classification by making the preferences for relatives applicable to all children, as the legislature has directed in related statutes." *Id.*

[117] *Id.* at 415-16.

[118] *In re* D.L., 486 N.W.2d 375, 377 (Minn. 1992). "[T]he trial court did not employ the exact analysis we have set out today, but after a careful review of the record we find substantial support for the trial court's conclusions." *Id.* at 381.

[119] *Id.* at 379.

[120] *Id.*

[121] *Id.*

[122] *Id.* at 380.

[123] *In re D.L.*, 486 N.W.2d at 380.

petition will not prevail, judicial time and litigants' resources can be conserved by a single proceeding."[124]

The dissenting judge on the court of appeals sharply criticized this practice, noting that "by preliminarily barring evidence in support of appellants' [the foster parents] petition, the trial court rendered it impossible to make a reasoned determination of D.L.'s best interests based on all of the relevant evidence."[125] The dissent found this loss of evidence particularly significant since additional evidence on the harms that may occur when the primary caretaker bond is broken might have influenced the court's ruling on the amount of weight to accord the possibility of such damage, influencing the determination of D.L.'s best interests.[126]

In Re D.L. is an extremely conservative opinion when contrasted with *McLaughlin v. Pernsley*.[127] The distinguishing characteristic between the two cases is that the constitutional issue in *D.L.* involved a statute,[128] while the challenge in *McLaughlin* was based on an agency policy.[129] Thus, the presumption that statutes are constitutional[130] might explain the different outcomes of the two

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[124] *Id.* at 381. The court allowed the foster parents to intervene in the proceeding, but any evidence they were permitted to introduce was limited to the issue of good cause. *Id.*

[125] *In re* D.L., 479 N.W.2d 408, 416 (Minn. Ct. App. 1991) (Schumacher, J., dissenting).

[126] *Id.* At trial, the experts called by both the grandparents and the foster parents agreed that removing D.L. from her foster parents would cause her intense pain in the short-term. The trial court agreed with the grandparents' expert, however, that over time, in a warm family environment, D.L.'s pain would heal. *Id.* at 414. Joseph Goldstein, an expert in the field of child custody, would vigorously contest the dismissal of the pain D.L. would feel upon removal from her foster parents, especially since D.L. was quite young at the time of the proceedings. *See* JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD, 31-32 (1973) [hereinafter BEYOND THE BEST INTERESTS]. *See also infra* notes 220-22 and accompanying text.

[127] 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989). For a discussion of *McLaughlin*, see *supra* notes 85-99 and accompanying text.

[128] *In re* D.L., 486 N.W.2d 375, 376 (Minn. 1992).

[129] *McLaughlin*, 693 F. Supp. 318, 319 (E.D. Pa. 1988), *aff'd*, 876 F.2d 308 (3d Cir. 1989).

[130] The Supreme Court has stated that it

> has the power to declare an act of Congress to be repugnant to the Constitution and therefore invalid. But the duty is one of great

cases. Yet there is something troubling about the Minnesota Supreme Court's opinion. As the dissenting justice on the court of appeals noted, the procedural posture of the case did seem to limit the court's inquiry of D.L.'s best interests.[131] Intuitively it makes sense to examine both the circumstances of the grandparents and the foster parents to determine as best as possible what arrangement would be most beneficial to D.L.

In *Gloria G.* the black adoptive mother of a biracial child filed a personal injury action on behalf of the child for damages that she claimed were caused by the Kansas City Department of Social and Rehabilitation Services' (Department) removal of the child from a foster care home.[132] The child, A., had lived with foster families for most of his life,[133] and with the Goza family, who was white, for the longest period of time -- four years.[134] After 16 months with the Gozas, severance of the parental rights of A.'s biological parents became final, thus freeing A. for adoption and enabling the Department to develop plans for permanent placement for A.[135]

The Department's goals for A. and his brother were adoption

> delicacy, and only to be performed where the repugnancy is clear, and the conflict irreconcilable. Every doubt is to be resolved in favor of the constitutionality of the law.

Mayor v. Cooper, 73 U.S. 247, 250 (1868). *See also* Sinking Fund Cases, 99 U.S. 700, 719 (1878) ("every possible presumption is in favor of the validity of a statute.").

[131] *In re* D.L., 479 N.W.2d 408, 416 (Minn. Ct. App. 1991) (Schumacher, J., dissenting).

[132] Gloria G. v. State Dept. of Soc. and Rehabilitation Servs., 83 P.2d 979, 980 (Kan. 1992).

[133] A., along with his older biological brother, was removed from the custody of his abusive and neglectful biological parents at the age of 11 months. *Id.* at 981.

[134] *Id.* A. was born in January 1975. After being removed from his parents at the age of 11 months, A. was placed in the custody of the Department of Social and Rehabilitation Services. A.'s first foster family, the Nelsons, kept him for six months. A. was placed with another foster family, and then returned very briefly to his biological mother's care. A. was again removed from his mother, suffering from child abuse. A. was hospitalized as a result of multiple injuries. After his release from the hospital A. was placed with the Gozas, at the end of July 1976, removed for a month in August, and returned to the Gozas, where he remained for four years. These events all took place before A.'s sixth birthday. *Id.*

[135] *Id.* A.'s brother, who was placed with another foster family, was also freed for adoption. *Id.*

by a biracial or African-American two-parent family, preferably outside the Kansas City metropolitan area, where the boys' biological family continued to reside.[136] Both the Gozas and the black foster mother of A.'s brother wished to adopt both boys.[137] The Department found both potential adoptive families to be inappropriate[138] and continued to search for an adoptive family.[139] The boys were referred to various black adoption agencies over the next two years without success.[140] At this point, the Department planned to pursue adoption by the boys' foster parents, pending completion of adoptive home studies.[141]

Before the Goza home study was completed, however, the Department removed A., after Mrs. Goza reported an incident of sexual manipulation involving A. and the Goza's 12 year-old daughter.[142] The Department's Protective Services Unit investigated the report and concluded that sexual abuse had occurred.[143] At the time of his removal from the Goza home, A. was five years old and had lived with the family for four years.[144]

Three months after removal from the Gozas A. was placed with Gloria G., a single African-American woman, who formally adopted A. in March of 1982.[145] In November 1985, Gloria G. filed an action for damages against the Department, claiming that the Department had not disclosed A.'s emotional and behavioral problems

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[136] *Gloria G.*, 833 P.2d at 981.

[137] *Id.*

[138] The Department's reasoning was that the Gozas, besides being white, did not wish to adopt both boys. D.'s foster mother, while willing to adopt both boys, lived in Kansas City, within a few blocks from the boys' biological parents. *Id.*

[139] *Id.*

[140] *Id.* at 982.

[141] *Id.*

[142] *Gloria G.*, 833 P.2d at 982.

[143] *Id.* The trial court found that "sexual abuse," as defined in the Department's Manual of Services to Children and Youth, could not have occurred. The definition reads, in pertinent part, "An act of commission by a *parent or caretaker* which is not accidental and harms or threatens to harm a child's physical or [sic] health or welfare." *Id.* at 983 (emphasis added). The trial court determined that the acts of the Gozas' daughter were not the acts of a parent or caretaker, and that the finding of sexual abuse was inconsistent with the Department's regulation. *Id.*

[144] *Id.* at 981.

[145] *Id.*

prior to his placement and adoption.[146] Two years later she amended her petition, adding a claim on behalf of A.[147]

The Department filed a motion to dismiss the claims, arguing that its acts were immune from suit under Kansas statute section 75-6104(e), the discretionary function exception to the Kansas Tort Claims Act.[148] The trial court denied the summary judgment motion, noting that a reasonable inference could be drawn that the Department had relied solely on race in making its decision not to place A. with the Gozas, constituting impermissible racial discrimination.[149] Addressing A.'s claim that the Department's removal of A. from the Gozas resulted in A.'s injuries, the trial court found the Department's actions to be mechanical, rather than discretionary -- removing the Department's acts from the protection of the discretionary function exception.[150]

Both Gloria G.'s and A.'s claims went to trial, with the jury finding the Department at fault on both claims,[151] and apportioning damages accordingly.[152] The Department filed a motion for a new trial and an amended judgment, claiming in part that the trial court had failed to instruct the jury on the discretionary function immunity issue.[153] The trial court denied the Department's motions, noting that

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[146] *Gloria G.*, 833 P.2d at 983.

[147] *Id.* Gloria G., on behalf of A., alleged that A.'s emotional damage was caused by the Department. She alleged that the Department had a duty to protect A.'s best interests and had breached the duty by: "(1) denying the Gozas, based on race, the possibility of adopting A.; and (2) removing A. from the Gozas [sic] home because of an unsubstantiated report of sexual abuse." *Id.*

[148] *Id.* Discretionary function immunity is the equivalent of qualified immunity, discussed *supra* note 104.

[149] *Gloria G.*, 833 P.2d at 983.

[150] *Id.*

[151] *Id.* The jury ruled on Gloria G.'s claim that Gloria G. and the Department were each 50% at fault. On A.'s claim the jury found the Department 30% at fault (fault was assessed at 60% for A.'s biological parents, the Gozas at 5%, and their daughter at 5%). *Id.*

[152] *Id.* A.'s damages were assessed at $625,000, encompassing future medical expenses, non-economic loss to date, and future economic and non-economic loss. The trial court entered judgment against the Department for $187,000. (The appellate court noted that 30% of $625,000 is actually $187,500, an error that remained uncorrected at the time of the appeal). *Id.*

[153] *Gloria G.*, 833 P.2d at 984.

the governmental immunity argument had been raised and addressed in the Department's motion for summary judgment, and that the discretionary function immunity issue was one for the court -- not the jury -- thus, the immunity instruction was properly denied.[154]

On appeal the Supreme Court of Kansas reversed the trial court, holding that the Department was immune from suit under the discretionary function exception.[155] The Department claimed on appeal that its decision to remove A. from the Gozas was based on its confirmation of the incident of sexual abuse, and not because of race.[156] The Department asserted that the decision to remove A. was discretionary, and thus entitled to immunity.[157]

A. raised two arguments on appeal, claiming that the Department had not shown its entitlement to discretionary function immunity.[158] A.'s first claim regarding the Department's fault was that the Department had denied his adoption by the Gozas on the basis of race.[159] Secondly, A. contended that the Department was negligent in removing A. from the Gozas, knowing that emotional harm to A. would result.[160] On the basis of these two arguments, A. claimed that the Department was not entitled to discretionary function immunity.[161]

The appellate court engaged in a lengthy analysis of discretionary function immunity,[162] concluding that "generally, adoption placement involves the type of policy judgment inappropriate for judicial review."[163] Addressing A.'s claim that the Department's sole consideration in A.'s adoption placement was race, the court declared "race was not [the Department's] only consideration; race

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[154] *Id.*

[155] *Id.* at 988.

[156] *Id.* at 984.

[157] *Id.*

[158] *Id.*

[159] *Gloria G.*, 833 P.2d at 984.

[160] *Id.*

[161] *Id.* A. claimed that the denial of adoption and the removal from the Gozas were not discretionary acts, since the first act was a violation of a legal duty, and the second was performed in spite of obvious harmful consequences. *Id.*

[162] *Id.* at 984-88.

[163] *Id.* at 986.

was considered in A.'s best interest."[164] Regarding the Department's removal of A. after the incident of sexual manipulation, the court was "not persuaded that the authority of [the Department] to act was limited to those situations found in its guidelines defining sexual abuse."[165] Noting that the Department's responsibility was to act in the best interests of the children it was charged with protecting, the court determined that the Department must be able to carry out its responsibilities without regard to satisfying definitional criteria contained in its guidelines.[166]

Gloria G. is a very disappointing decision in terms of the transracial adoption controversy. The Department's same-race matching plan for adoption of A. and his brother is troubling, even absent other information. But the effect promoted by the race-matching in the case of A. poses serious questions that should be addressed. The ramifications of race-matching policies affect countless children -- children that will suffer far into the future as a result of the agenda of the NABSW and courts that decline to invade the province of foster care and adoption decision-makers. A.'s story is quite troubling; while placement with an African-American or biracial family was undoubtedly the optimal placement for the boys, being subject to removal from the Department after having spent four years as part of the Goza family cannot realistically be viewed as a move in A.'s best interests.

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[164] *Gloria G.*, 833 P.2d at 986. The court noted the other factors that the Department considered in forming adoption plans for the child: placing A. and his brother together, outside the Kansas City area, with biracial or African-American parents. The court also emphasized that the sexual manipulation incident involving the Gozas' daughter led to A.'s removal, after adoption placement with the Gozas was underway. *Id.*

[165] *Id.* at 987.

[166] *Id.*

V. *Influx of Minority Children Into the Foster Care System*

The most tangible development of the mid-1980s affecting the transracial adoption controversy was the number of minority children that began to flood the foster care systems.[167] The best figures available indicate that an estimated 400,000 children are currently in out-of-home placement; forty percent more than there were in 1982.[168] This dramatic increase can be attributed to the rise of drug and alcohol abuse, poverty, homelessness, and the inability of social service programs to address growing demands on the system.[169]

A large portion of the increasing foster care population is comprised of minority children.[170] Currently these children represent roughly half of the total foster care population.[171] This ratio is extremely disproportionate with the general population in this country;[172] approximately sixteen percent of the population is made up of minorities and eighty-four percent is white.[173] Highlighting the plight of black children in need of homes is the much larger number of white families who wish to adopt compared with the number of black families,[174] though actual figures are difficult to substantiate.[175]

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[167] *See* Bartholet, *supra* note 1, at 1173 and accompanying footnotes. *See also* Jerry Thomas, *59 Black Babies to be Adopted, But Potential Parents Scarce*, CHI. TRIB., Apr. 30, 1991, at 1; Radin, *supra* note 49, at 1.

[168] Bartholet, *supra* note 1, at 1173 and accompanying footnotes.

[169] *See* Celia W. Dugger, *Troubled Children Flood Ill-Prepared Care System*, N.Y. TIMES, Sept. 8, 1992, at A1 ("New York City's child welfare system, like many others across the nation, has been flooded with thousands of emotionally traumatized children, products of families ruined by crack, AIDS, and homelessness."); Howard W. French, *Rise In Babies Hurt By Drugs Is Predicted*, N.Y. TIMES, Oct. 18, 1989, at B1, B2 (discussing causes of rise in number of infants in need of special services); Charisse Jones, *Drugs Cited as Cause of Crisis; Pleas Made for Adoptive Homes for Black Children*, L.A. TIMES, May 21, 1989, at 1. Adoption officials say that drug abuse is particularly problematic for black children, because it serves to debilitate the extended family network that has traditionally stepped in to care for them in times of need. *Id.*

[170] *See* DISCARDED CHILDREN, *supra* note 2, at 38.

[171] *Id.*

[172] *Id.*

[173] *Total Population by Race: 1960 to 1989, in* U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 12 (111th ed. 1991).

[174] *See* Radin, *supra* note 49, at 1 ("[Black] children are being born into a society in which there are not enough black families waiting to care for them.").

It is this inverse proportion of same-race children and same-race families that has drawn increasing attention to transracial adoption policies in recent years.[176]

A. Has the Numbers Increase Created any Changes Regarding TRA?

Current foster care and adoption agency policies have not shifted in response to the rise of minority children who need placement.[177] Same-race matching policies remain a fundamental tenet in child placement,[178] often, as many argue, to the detriment of black and other minority children.[179] Most child placement agencies have policies governing transracial placement.[180] Generally, black

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[175] *See* Bartholet, *supra* note 1, at 1187 and accompanying footnotes. Many adoption and foster care experts feel that the amount of black families willing or able to adopt is higher than figures show. Some reasons offered for the discrepancy in numbers are the bureaucratic red tape involved in adoption that serves to discourage many blacks, and agency criteria for adoptive parents that are aimed at white, middle class America and disinclude many worthy black families. *See infra* notes 239-42 and accompanying text. Additionally, "[b]lack adoption has, historically, been a matter of . . . 'informal' adoption, whereby, a child is taken into a home [and] reared as one's own child, except that it is never legalized in the courts." *Preserving Black Families: Research and Action Beyond the Rhetoric*, NAT'L ASS'N OF BLACK SOCIAL WORKERS ACTION LETTER (Nat'l Ass'n of Black Social Workers, New York, N.Y.), Feb., 1986, at 33 [hereinafter Preserving Black Families].

[176] *See, e.g.*, Jerry Thomas, *Adoption Isn't As Simple As Black, White*, CHI. TRIB., June 2, 1991, at 4 [hereinafter *Adoption Isn't As Simple*]; Radin, *supra* note 49, at 4; D'Antonio, *supra* note 47, at 3, 27.

[177] *See* Radin, *supra* note 49, at 1 ("[B]lack social workers are adamantly, and effectively, preventing their adoption into white families.").

[178] *See* Bartholet, *supra* note 1, at 1183.

[179] Radin, *supra* note 49, at 39. *See also* Jennifer Allen, *The Controversy Surrounding Rainbow Families*, NEWSDAY (Nassau and Suffolk ed.), Oct. 7, 1990, Magazine, at 12, 14.

[180] *See, e.g.*, Nancy Stancill, *The Baby Market; Policy of Racial Matching In Adoptions Attacked*, HOUS. CHRON., Nov. 10, 1991, at C1 (discussing Texas Department of Human Services' policy, which asserts that the Department "prefers placement of children with adoptive parents whose race or ethnicity is the same as the child's"); Barth, *supra* note 48, at 8 (discussing New York State requirement that an agency "make an effort to place each child in a home as similar and compatible with his or her ethnic, racial, religious, and cultural background as possible.").

and minority children cannot be placed in white families until all other possibilities have been exhausted; i.e., until the agency recognizes that there is no minority family available to adopt the child or provide long term foster care.[181] Usually this decision is reached only after the child has spent considerable time in institutions or has been shuttled from one short term foster family to another.[182]

Many agencies have a policy that gives first preference to a family that has cared for a child for at least twelve months if the child becomes adoptable.[183] When it is a white family caring for a black child, however, it is common for an agency to step in and remove the child before the twelve month mark can be reached.[184] Such a practice relieves the agency from allowing the white family to exercise the option to adopt, in keeping with strict agency opposition to transracial adoptions.

While some agencies lack formal, written prohibitions against TRA or preferences for same-race placement, firm unwritten agency rules promote the same effects.[185] Often, child placement caseworkers will actively discourage TRA, telling a white family that they cannot adopt a black child, even when the child has been in the white family's foster care for a considerable time or when there is no other option for the child.[186] In one case, a white Chicago couple had a black baby girl in their care and had been told they would be able to adopt her.[187] Caseworkers removed the baby after a few months and placed her with a black foster care family.[188] This occurred at a time when there were almost sixty black infants in Chicago needing

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[181] *See, e.g.*, Radin, *supra* note 49, at 38.

[182] *Id.* at 39.

[183] *See, e.g.*, Thomas, *supra* note 167, at 4 (describing Chicago policy); Allen, *supra* note 179, at 14 (discussing New York State policy); Ilene Barth, *Another Child Torn From Those Who Love Her*, NEWSDAY (City ed.), Mar. 12, 1989, Ideas, at 8 (discussing New York state policy) [hereinafter *Child Torn*]; Barth, *supra* note 48, at 1 (discussing New York state policy).

[184] *See* Barth, *supra* note 48, at 8; *Child Torn*, *supra* note 183, at 8.

[185] *See* Bartholet, *supra* note 1, at 1183 and accompanying footnotes.

[186] *See Adoption Isn't As Simple*, *supra* note 176, at 1, 4; Radin, *supra* note 49, at 4.

[187] *Adoption Isn't As Simple*, *supra* note 176, at 1.

[188] *Id.*

homes.[189] Examples like this illustrate how unyielding caseworkers and agencies can be regarding same-race placement, and why it is difficult for a white couple to adopt a black child.

The only situation where racial matching of families and children has been suspended is in the area of emergency foster care.[190] "Boarder babies," as they have been tagged, are infants whose parents cannot care for them due to drug abuse, poverty, or illness.[191] In an effort to keep these babies out of hospitals where they had remained for long periods of time, foster care agencies began instituting emergency programs in which the babies were placed with families for short term care.[192] Problems have arisen when short term care stretches into long term care. Families grow attached to the infants and often seek to keep them, either in their continuing foster care or via adoption.[193] Due to the policies of most agencies, these requests are routinely denied when the family is white and the baby is black.[194]

The rigid stance most agencies continue to take against TRA and foster care has come under fire in the media, with headlines proclaiming: "Another Child Torn From Those Who Love Her"[195] and "Sad Goodbye to Michael."[196] Agencies defend their same-race matching policies by relying on the arguments of the NABSW and other black organizations, whom they are loath to offend.[197] The

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[189] *Id.* at 4. *See also* Thomas, *supra* note 167, at 1.

[190] *See* D'Antonio, *supra* note 47, at 3 (discussing Long Island's Little Flower Children's Services' program).

[191] *Id.* The boarder baby epidemic appears to be worsening. According to a study conducted by the Child Welfare League of America and the National Association of Public Hospitals, 43 hospitals in New York City together held an average of 300 boarder babies per month in the first quarter of 1992. Moreover, 88% of the 607 boarder babies studied in 12 major cities were exposed to drugs or alcohol in utero, an increase of 17% from a study performed one year earlier. *See* "Boarder Babies' Running Up Big Tabs At Hospitals, THE ATLANTA J. AND CONST., June 24, 1992, at A4.

[192] D'Antonio, *supra* note 47, at 3.

[193] *See, e.g.*, Barth, *supra* note 48, at 8; D'Antonio, *supra* note 47, at 3.

[194] *See, e.g.*, D'Antonio, *supra* note 47, at 3.

[195] *See* Barth, *supra* note 48, at 8.

[196] *See* D'Antonio, *supra* note 47, at 3.

[197] *See, e.g.*, Sonia L. Nazario, *Identity Crisis: When White Parents Adopt Black Babies, Race Often Divides*, WALL ST. J., Sept. 12, 1990, at 1; Radin, *supra* note 49, at 39-40.

NABSW tenaciously adheres to its twenty year-old policy which declares transracial adoption unnecessary and harmful to black children,[198] contending that it is the child welfare system and not opposition to transracial adoption that is responsible for the problems facing black children in foster care.[199]

In addition to claims that black children placed with white families are cut off from their cultural heritage and fail to learn coping mechanisms for dealing with a racially biased society, agencies focus on potential problems a black child may encounter in a white family upon reaching adolescence.[200] TRA opponents argue that the teenage years bring confusion, a sense of isolation, and anger for black children that are adopted by white families.[201] Evidence of such problems, however, is not supported by any systematically collected data.[202] Foster care and adoption experts tend to rely instead on anecdotal evidence and their own perceptions of what happens in transracial child placement.[203]

Many recent studies indicate the exact opposite of what transracial adoption opponents contend -- that black children raised in white families are no more troubled than children raised inracially.[204] Transracially adopted children have a level of self-esteem comparable to that of inracially adopted children and the general population.[205] The children deal well with their adoptive families and perceive their relationships with their families no differently than other children.[206] The third stage of a longitudinal

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[198] In a 1986 action paper the NABSW acknowledged the controversy engendered by its position, yet went on to proclaim "[n]evertheless, NABSW herewith reaffirms its position against transracial adoption and continues to take a vehement stand against the placement of Black children in white homes." Preserving Black Families, *supra* note 175, at 31.

[199] "The current system is weighted by an urgency to remove children from their biological families, particularly Black children." *Id.*

[200] *See* Nazario, *supra* note 197, at 1.

[201] *Id.*

[202] *See* Radin, *supra* note 49, at 40.

[203] *Id.*

[204] See Bartholet, *supra* note 1, at 1207-26 for a thorough discussion of the major studies undertaken to date.

[205] *Id.* at 1211-12.

[206] *Id.* at 1215.

study by Simon and Altstein indicates that the crisis transracial adoption detractors predict will occur in adolescence is not grounded in any evidence.[207] The study found that the percentage of families with large-scale problems corresponds with figures reported for all adoptive families.[208]

Studies have shown that transracially adopted children have positive attitudes toward race.[209] Contrary to the predictions of the NABSW and adherents to its position, transracially adopted children have as strong a sense of racial identity and pride as inracially adopted black children.[210] The children are reported as having better relationships with whites than inracially raised black children and are comfortable living a racially integrated lifestyle.[211] This ability to deal with the white world sets transracially adopted children apart from their inracially adopted counterparts and accounts for many of the concerns that transracial adoption opponents have.[212]

The ability of these children to function well in a predominantly white society has prompted a barrage of criticism from opponents of transracial adoption.[213] Some charge that the children live in an insulated world and will be unprepared to deal with the problems that attend their racial identity as they enter adulthood.[214] Another concern is that the advancement of blacks via a strong,

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[207] *Id.* at 1215 n.139 (reporting on research contained in RITA SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 108-09 (1987)).

[208] Bartholet, *supra* note 1, at 1211-16.

[209] *See generally id.* at 1216-21. Shireman and Johnson instituted a longitudinal study of transracially adopted children which compares various adjustment indicators for transracially adopted black children with those of black children raised by single black parents and traditional two-parent black families. The researchers report that at eight years old, transracially adopted children "are maintaining their early good sense of racial identity, but this identity is not intensifying as is that of the children in black homes." Joan F. Shireman & Penny R. Johnson, *A Longitudinal Study of Black Adoptions: Single Parent, Transracial, and Traditional*, J. SOC. WORK, 172, 175 (May-June 1986).

[210] Bartholet, *supra* note 1, at 1219-20.

[211] *Id.*

[212] *See* Radin, *supra* note 49, at 38-39.

[213] *See* Bartholet, *supra* note 1, at 1215-20.

[214] *Id.* The National Association of Black Social Workers has asserted that "[a]lthough many white families applying to adopt Black children probably can provide loving homes and parenting skills, none of them can fulfill Black children's need to feel positive about their Black identity." Preserving Black Families, *supra* note 175, at 36.

politically involved and cohesive black community is threatened by the facility of transracially adopted children to deal effectively and naturally with whites.[215] The fear is that assimilation into white culture undermines a powerful black coalition dedicated to changing racial inequality in our society.[216]

Those that view transracial adoption positively point out that transracially adopted children have unique advantages not shared by inracially raised children, black or white.[217] The transracially adopted children tend to feel comfortable in both black and white communities.[218] They have achieved what most people would agree should be a goal for all children; the ability to deal with others regardless of race. One young adult who was transracially adopted as a baby echoes the sentiments of many when discussing what it was like to be raised in an interracial family: "I felt like I had the best of two worlds."[219]

Advocates of transracial adoption focus heavily on the psychological damage that occurs when young children are deprived of early parent-child bonding.[220] Experts are in accord regarding the importance of a stable and continuous relationship between parent and child in healthy child development.[221] Proponents of transracial adoption argue that undue concern with race matching can inhibit a young child's development where the child remains in institutional care over a long period or is frequently moved from one foster family

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[215] Preserving Black Families, *supra* note 175, at 36.

[216] *Id.*

[217] Bartholet, *supra* note 1, at 1215-20.

[218] *Id.*

[219] Nazario, *supra* note 197, at 1.

[220] Radin, *supra* note 49, at 39.

[221] *See* BEYOND THE BEST INTERESTS, *supra* note 126, at 31-32. In this well respected work the authors contend that "[c]ontinuity of relationships, surroundings and environmental influence are essential for a child's normal development." *Id.* The authors focus on the importance of the psychological parent-child relationship for the healthy growth of a child. It is noted that a psychological parent does not have to be a biological parent; adoptive parents or any other adult may fill this role in a child's life. *Id.*

to another.[222]

Early and permanent child placement has been determined to be essential to a child's adjustment to adoption.[223] Current policies against transracial adoption severely hinder adoption or placement in long term foster care for many black children,[224] which a majority of child placement experts agree is more problematic for a child than interracial family placement.[225] While there is near unanimous accord regarding same race placement as optimal, proponents of transracial adoption argue than racial considerations should not be allowed to interfere with a child's healthy development.[226]

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[222] *See, e.g.*, Radin, *supra* note 49, at 39; *see also* BEYOND THE BEST INTERESTS, *supra* note 126, at 45. Goldstein proposes that "a child's placement be treated by agency and court as a matter of urgency which gives consideration to a child's sense of time by granting such cases a high priority by dealing with them rapidly, and by accelerating the course of review and final decision." *Id.*

[223] *See* Allen, *supra* note 179, at 14.

[224] *See* Radin, *supra* note 49, at 39; Allen, *supra* note 179, at 14.

[225] Allen, *supra* note 179, at 14.

[226] *See e.g.*, Barth, *supra* note 48, at 8; D'Antonio, *supra* note 47, at 27. Interestingly, the National Association for the Advancement of Colored People (NAACP) disavows the stance taken by the NABSW. The NAACP's official policy regarding TRA is as follows:

> If there are black families available and suitable under the criteria of advancing the "best interest of the child," black children should be placed with such black families.
>
> If black families are not available for placement of black children, transracial adoption ought to be pursued as a viable and preferred alternative to keeping such children in foster homes.

Memorandum from Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People to All NAACP Units, National Board Members and NAACP/SCF Trustees 7 (June 3, 1992) (on file with the *New York Law School Journal of Human Rights*).

B. New Developments in Agency Treatment of Transracial Adoption

While large-scale changes in agency policy regarding transracial adoption and foster care have not occurred, important steps are being taken to address the problems faced by minority children in an overcrowded foster care system. National attention has been focused on recruitment of black adoptive families.[227] The One Church, One Child program is a successful example of this expanded emphasis on recruitment.[228] Begun as a partnership between the state of Illinois and black churches within the state, the program uses churches as a vehicle to communicate the need for adoptive families to the black community.[229] The program has branches across the nation and many other organizations have been created to spread the word and offer support and encouragement to potential black adoptive families.[230]

In Chicago, where there is a very large number of children flooding the foster care system,[231] more intensive state involvement is being planned to address the problem.[232] Money has been set aside by the state specifically for the recruitment of black families.[233] The state is considering hiring black families that have adopted children

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[227] *See, e.g., Wanted: Parents for Black Children Conference Held to Seek Solutions*, THE ATLANTA J. AND CONST., Aug. 21, 1992 at A3 (discussing series of conferences sponsored by the U.S. Department of Health and Human Services to which members of the black community were invited to "develop strategies and plans to go back to their communities and increase the awareness of all the African-American children waiting to be adopted"); *County Launches Billboard Adoption Campaign*, UPI, Nov. 8, 1991, *available in* LEXIS, Nexis Library, UPI File (discussing Los Angeles County ad campaign aimed at finding homes for children in need of adoption, particularly minority children).

[228] *See* James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 503 (1987-88).

[229] *Id.* at 503.

[230] *See, e.g.*, Perry Lang, *More Children, Fewer Homes: Crack Feeds Foster-Care Crisis*, S.F. CHRON. (final ed.), May 31, 1991, at A1.

[231] *See* Thomas, *supra* note 167, at 7 (estimating 23,000 children aged 2 to 18 in the Illinois foster care system, 52% of whom are black).

[232] *Id.*

[233] *Id.*

to help with recruiting other black families to do the same.[234] Advertisements aimed at encouraging black families to adopt are also scheduled.[235] Chicago's Department of Children and Family Services has instituted an ombudsman's program, where people can report problems with city-run child placement programs.[236]

In addition to recruitment of black adoptive families, keeping existing black families intact has become a priority for child welfare agencies.[237] Often this involves counseling parents with problems while their children are placed in the temporary custody of a child welfare agency.[238]

Many child placement experts agree that the traditional screening criteria used to assess the fitness of a potential adoptive family operates to the distinct disadvantage of blacks.[239] Agency bureaucracy has also been targeted as intimidating potential black adopters.[240] With the increasing number of black children needing placement and the national push to recruit black families, agencies have been altering their criteria to facilitate inracial placement.[241] Single parents, older people, and lower socio-economic level adults are now being allowed to adopt black children, exactly the categories that have traditionally been avoided in child placement.[242]

VI. Legislative Responses to Current Problems

Another incentive for black families to adopt are subsidies available in most states to those who adopt "special needs" children, which includes minority children, as well as the handicapped and

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[234] *Id.*

[235] *Id.*

[236] *Adoption Isn't As Simple*, *supra* note 176, at 4.

[237] *Id.* *See also* Radin, *supra* note 49, at 38.

[238] *See, e.g.*, *Adoption Isn't As Simple*, *supra* note 176, at 4.

[239] *See, e.g.*, Jerry Thomas, *Should White Parents Adopt Black Children?*, CHI. TRIB., June 23, 1991, at 2.

[240] *See* Thomas, *supra* note 167, at 7.

[241] *See* Allen, *supra* note 179, at 15.

[242] Bartholet, *supra* note 1, at 1199-1200.

sibling groups.[243] These subsidies are matched by the federal government and are continued until a child reaches maturity.[244] Federal reimbursement subsidies toward the cost of adoption are also available in states with qualifying subsidy programs.[245] Subsidy programs have proven successful in raising black adoptions.[246] Often a black foster family wishes to adopt a child, but without the foster care stipend they receive they would be unable to afford to care for the child.[247] Adoption subsidies help bridge this gap in finances and have become an important inducement to adoption.

The NABSW has proposed the Afro-American Child Welfare Act,[248] modeled after the Indian Child Welfare Act of 1978.[249] Designed to address the plight of black children who need family placement, the proposed Act was created "[t]o establish standards for the placement of Afro-American children in foster or adoptive homes, to prevent the breakup of Afro-American families, and for other purposes."[250] A central feature of the Act is its provision that preferred placement of Afro-American children is with families of the same racial heritage.[251] Other provisions include establishing minimum federal standards for removing black children from their families in order to preserve the existence of black families.[252] The Act calls for federal funding for child and family service programs to help Afro-American families who need assistance[253] and establishment of an Afro-American Child Welfare Commission to review cases where removal of black children from their biological parents has been recommended.[254]

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[243] *Id.* at 1198.

[244] *Id.*

[245] *Id.* at 1198 n.88.

[246] Allen, *supra* note 179, at 15.

[247] Bowen, *supra* note 228, at 524.

[248] AFRO-AMERICAN CHILD WELFARE ACT OF 1988 (proposed working draft), *reprinted in* Bowen, *supra* note 228, at app.

[249] 25 U.S.C. §§ 1901-1963 (1988).

[250] AFRO-AMERICAN CHILD WELFARE ACT OF 1988 (proposed working draft), *reprinted in* Bowen, *supra* note 228, at app.

[251] *Id.* at Tit. I, § 105(a).

[252] *Id.* at § 3.

[253] *Id.* at Tit. II, § 202.

[254] Bowen, *supra* note 228, at 523.

A recent bill introduced in Congress, titled the Omnibus Adoption Act of 1991,[255] is a unique piece of bipartisan legislation aimed at removing financial impediments to adoption and promoting its wider use.[256] While the bill does not specifically target the black community, many of the Act's features will help with the problems that black society faces when trying to adopt.[257] The Act provides refundable tax credits covering certain amounts of adoption expenses for families, at certain income levels[258] and benefits for federal employees and military personnel who wish to adopt.[259] Under the Act a National Advisory Council on Adoption would be established[260] and an adoption data collection service would be instituted.[261]

Among the proposed Act's more unusual provisions are those focusing on education programs,[262] including the establishment of fellowships for graduate students in social work concerning the effects of adoption[263] and funds to be allocated to states for creating adoption education programs.[264] The Act would also aid pregnant women by providing for maternal health care[265] and by allocating money to be used to rehabilitate existing structures for use as maternal housing facilities.[266]

According to Rep. Christopher Smith (R-N.J.), the bill's sponsor, the Act will make "adoption more acceptable, more available and more affordable."[267] By focusing on education, the bill is hoped to promote positive images regarding adoption.[268] The Omnibus Adoption Act is receiving bipartisan support in Congress,

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[255] H.R. 1753, 102d Cong., 1st Sess. (1991).

[256] Joan Beck, *A Bill That Would Give Adoptions A Welcome Boost*, CHI. TRIB. (North Sports Final Ed.), July 11, 1991, at 25.

[257] *Id.*

[258] H.R. 1753, 102d Cong., 1st sess. Tit. V (1991).

[259] *Id.* at Tit. IV.

[260] *Id.* at Tit. I.

[261] *Id.* at Tit. II.

[262] *Id.* at Tit. III.

[263] *Id.* at Tit. III.

[264] H.R. 1753, 102d Cong., 1st sess. Tit. III (1991).

[265] *Id.* at Tit. VI.

[266] *Id.* at Tit. VII.

[267] Beck, *supra* note 256, at 25.

[268] *Id.*

but has not yet been voted on.[269]

VII. A Fresh Perspective on Transracial Adoption by Some Courts

The judiciary has begun to express more willingness to accept transracial adoption. As increasing numbers of foster families are fighting to adopt black children they have cared for and come to love,[270] the courts have started focusing on the psychological bonds that have formed between foster parents and foster children and are paying less attention to racial issues.[271] *McLaughlin v. Pernsley* [272] is a primary example of the emerging openness of courts in dealing with transracial adoption. In another case, a Houston court awarded custody of a ten month old black baby to her white foster parents, who had cared for her since she was four days old.[273] A black professional couple had been approved by the county to adopt the baby, but the court found that the psychological trauma of removing the baby from her foster family was of greater concern than potential problems she might encounter later as a black child raised by white parents.[274]

Some courts are also addressing the special needs of transracially adopted children by fashioning unique terms as a condition to granting a petition for adoption. An Ohio Family Court referee ordered that a white couple who wished to adopt their black foster child undergo counseling and take courses in black culture

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[269] Bill status information, *available in* LEXIS, LEGIS library, BLTRCK file (Nov. 11, 1992).

[270] *See, e.g.*, Allen, *supra* note 179, at 14-15. As of March 1992, the U.S. Department of Health and Human Services' Office of Civil Rights was investigating 27 cases brought by white couples who alleged discrimination based on race or ethnicity in foster care and adoption placements. Lynne Duke, *Couples Challenging Same-Race Adoption Policies*, WASH. POST, Apr. 5, 1992, at A1.

[271] *See generally* BEYOND THE BEST INTERESTS, *supra* note 126, at 30.

[272] 693 F. Supp. 318 (E.D. Pa. 1988). *See supra* notes 85-99 and accompanying text.

[273] Allen, *supra* note 179, at 15.

[274] *Id.*

before their petition for adoption was approved.[275] The novel terms of the referee's order were part of a plan developed by the Hamilton County, Ohio Department of Human Services to help white parents foster a sense of black identity in their adopted children.[276]

A Milwaukee court approved a black mother's request that two of her children be placed in a white middle-class foster family instead of with the inner-city black family approved by the county.[277] This is a clear departure from traditional initial foster care placements, where preference is unwaveringly given to a same-race family.

VIII. Conclusion: Are We Headed In The Right Direction?

The prospects for minority children in the foster care system today are grim. The children typically spend considerable time in the system before they are adopted or placed in long-term foster care;[278] some children remain in the system until they are released upon reaching eighteen.[279] A concerted effort is needed to place these children more quickly, in order to prevent them from growing up with developmental and emotional problems that will effect their adult lives.

The resurgence of interest in transracial adoption is a natural outgrowth of an increasing number of black children needing homes and not enough black families in a position to adopt them.[280] Traditional opposition to transracial adoption has not abated.[281] Alternatives like black recruitment and preservation of black families

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[275] *Court Sets Terms For Whites Adopting Black*, N.Y. TIMES, Aug. 10, 1990, at A13.

[276] *Id.*

[277] *Id.*

[278] Allen, *supra* note 179, at 14.

[279] *Id.* at 16.

[280] *See* Radin, *supra* note 49, at 39.

[281] The weekly news program 60 Minutes recently devoted a segment to the transracial adoption controversy. *60 Minutes: As Simple as Black and White* (CBS television broadcast, Oct. 25, 1992). See also Nazario, *supra* note 197, for a fairly negative view of transracial adoption.

continue to be advocated and are receiving community support.[282]

Transracial adoption is slowly gaining more acceptance as the foster care crisis continues. While few endorse the practice as a panacea for the problem, the viability of transracial adoption as a measure to fill in the gaps between the large number of black children in the foster care system and the inadequate number of black families available to take them is being realized.

The more public support and outrage that is generated toward solving the foster care crisis, the faster the problem will be corrected. Media stories, both in periodicals and on television, increase the chances that the suffering of these children will be recognized. The proposed Omnibus Adoption Act of 1991 is also extremely positive; even more so because of its focus on adoption education and subsidies.

Adoption and foster care agencies are taking steps to solve the problems of black children that need placement. There are signs that more attention is being directed at placing children in a good home rather than only in a good same-race home. Increased state funding in the form of subsidies and allocations for the recruitment of black adoptive families have also helped.

Thoughtful judicial decisions in the area of transracial adoption, along with innovative implementation orders, may prove to be models for a compromise involving transracial adoption. Collective and cohesive action will be needed to stem the problems of black children in foster care. It will take time before the number of black adoptive families procured through recruitment efforts is sufficient to fill the needs of all the black children in the system. While obviously of primary importance, since most experts agree inracial placement for children is optimal, transracial adoption should not be dismissed as an interim, stop-gap measure to alleviate the problem.

Studies show that transracial adoption is not harmful to children and does have positive, unique aspects.[283] White families willing to take in children in need should not be denied the opportunity when a black family is not available. Prohibiting transracial adoption across the board and relying solely on black

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[282] *See, e.g.*, Bowen, *supra* note 228, at 503.

[283] *See supra* notes 204-226 and accompanying text.

recruitment efforts to find homes for black children in the foster care system is not a good response to the problem and is not in the best interests of the children involved.

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