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HAND RULE, NEGLIGENCE AND PUBLIC ADOPTION AGENCIES

Joseph Oluwole[*]

I. INTRODUCTION

I lead my paper with a not too uncommon story of reality. Raymond Bullard was two and a half years old when he was removed from his white foster home to be placed with a black family.[1] He was taken away from the only home and happiness he had known because the Philadelphia Department of Human Services had a policy against long-term *trans*racial foster care and adoption placement.[2] There was no suggestion whatsoever by the Philadelphia Department of Human Services that the removal was due to the quality of care and love provided by Raymond's white foster parents.[3]

A few years later, Raymond was diagnosed as clinically depressed with a speech impediment.[4] He exhibited excessive aggression and preoccupation with death.[5] There are many *Raymonds* today who never even get a chance at a loving, caring home because of the practice of some public adoption agencies to disallow transracial adoption. In metaphorical terms, these children are herded behind the walls of the public adoption agencies as prisoners, in spite of the fact that the child welfare system is in great crisis and financially overstretched.[6] The implicit or explicit policy of public adoption agencies that deny or limit transracial adoption harmed little Raymond and is harming numerous black children today who would otherwise be adopted transracially.[7]

The statistics alone are shocking.[8] Against a backdrop of decreasing availability of foster and adoption placements, the number of children entering the child welfare system has increased 77% since the mid-1990s.[9] Recent statistics released by the United States Department of Health and

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[1] Amanda T. Perez, *Transracial Adoption and the Federal Adoption Subsidy*, 17 Yale L. & Policy Rev. 201 (1998) (citing *McLaughlin v. Pernsley*, 693 F. Supp 318 (E. D. Pa. 1988), *aff'd on other grounds*, 876 F.2d 308 (3d Cir. 1989)).
[2] *Id.*
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] Jim Moye & Roberta Rinker, *It's a Hard Knock Life: Does the Adoption and Safe Families Act of 1997 Adequately Address Problems in the Child Welfare System?* 39 Harv. J. on Legis. 375, 376 (2002).
[7] *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. Pa. L. Rev. 1163 (1991).
[8] *See generally* Moye & Rinker, *supra* n. 6.
[9] *Id.* (citing *Abuse in Foster Care*, St. Petersburg Times 12A (Nov. 26, 2001)).

Human Services ("HHS") show that there were 552,000 children in foster care as of September 2000; 131,000 of those children are awaiting adoption.[10] About 43% of the children will never be able to return to their biological homes.[11] What becomes of these children, many of whom are black? Today, many of these children are wallowing in unstable foster or institutional care rather than being placed in caring homes through transracial adoption.[12] With the alarming rate at which these children are serving *birth-to-life* sentences by languishing in unstable foster or institutional care, the public adoption agencies perpetrating the practice that prevents transracial adoption are liable for negligence under the Hand Rule.

This paper first establishes the background of the Hand Rule. The paper then proceeds in three Subparts, with each Subpart discussing a different component of the Hand Rule and how it leads me to conclude that public adoption agencies are liable in negligence for barring or limiting transracial adoption. Subpart I discusses the probability of the accident or injury occurring (probability is referred to as "P"). Subpart II discusses the gravity of the resulting injury (gravity is referred to as "L"). Subpart III discusses the burden of precautions to prevent the accident (precautions are referred to as "B"). The paper then concludes with an analysis that plugs in my conclusions into the Hand Rule, to show that B<PL, since B<1, as the agencies have failed to take precautions by allowing transracial adoption; therefore, they are liable in negligence.

II. BACKGROUND: THE HAND RULE

This paper argues for the position that public adoption agencies that deny or limit transracial adoption are negligent under the Hand Rule.[13] Judge Learned Hand introduced to the field of law and economics, an economic model based on a cost-benefit analysis to be used in determining negligence.[14] This model involves a nontraditional negligence analysis and has been in use for the past five decades. Legal scholars and judges have used various modifications of the model. The question arises: What is the Hand Rule? Allan M. Feldman and John M. Frost[15] give a very good and succinct synopsis of the Hand Rule, as presented immediately below.

The Hand Rule, according to Allan M. Feldman and John M. Frost,

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[10] U.S. Dept. of Health & Human Serv., *The Afcars Report; Final Estimates for FY 1998 through FY 2002 (12)*, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report12.htm (updated December 12, 2006) [hereinafter *Afcars Report*].

[11] *Id.*

[12] *See generally* Perez, *supra* n. 1.

[13] *Transracial adoption* as used in this paper refers only to the adoption of black children by white adoptive parents I recognizes that the concept of *transracial adoption* encompasses several ethnic groups. However, I have decided to limit this paper to adoption of black children by white adoptive parents. Interracial adoptees are also excluded.

[14] *U.S. v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947).

[15] Allan M. Feldman & John M. Frost, *A Simple Model of Efficient Tort Liability Rules*, 18 Intl. Rev. L. & Econ. 201 (1998).

provides that "if the probability [of an accident or injury] be called P; the injury, L; and the burden [of precaution], B; liability (for negligence) depends on whether B is less than L multiplied by P: i.e. [B<pL]."[16]   In other words, whether or not a party should be held liable in negligence for losses resulting from an accident depends on whether or not the party's cost of preventing the accident (known as the cost of precautions) is less than the expected losses from such accidents.[17]   As Feldman and Frost note, "if accidents are relatively inexpensive to prevent, they ought to be prevented, and those who could have prevented them should be liable if [the accidents] are allowed to occur."[18]   The Hand Rule is a "great step beyond the 'reasonable man of ordinary prudence' standard, because it in effect defines what is reasonable and does so in a rational, cost-benefit fashion."[19] Although the Hand Rule could be criticized as oversimplifying complex negligence issues, that is precisely its essence. The Hand Rule helps convey points that would otherwise be lost in a swarm of legal words; it is breviloquent. Rather than just blindly following black letter law, the Hand Rule also ensures *economic* efficiency by ensuring that a true weighing of costs and benefits is done before imposing negligence liability.

In *U.S. v. Carroll Towing Co.*, the Hand Rule "was applied to the actions (or inactions) of plaintiff Connors Marine Company, owner of the barge Anna C."[20]   In their attempts to "move another barge, defendants Carroll Towing Co. and Grace Line, Inc., respectively owner and charter of the tug Carroll, found it necessary to adjust the Anna C's mooring lines, as no barge attendant was on board the Anna C at the time."[21]   However, they improperly adjusted the moorings, and the Anna C broke away.[22]   "Adrift downriver, [the Anna C] collided with a tanker and sank, harming both the Connors Co. and the owner of the cargo on board, the United States government."[23]   The Hand Rule was applied to the inaction of plaintiff Connors Company.[24]   "Judge Hand found that if plaintiff Connors Co. had had a barge attendant aboard the Anna C on the day of the accident, [even though] Carroll Towing's negligence would have resulted in some damages, [it would not have resulted] in the sinking and the attendant loss of the cargo."[25]   Judge Hand held that the plaintiff was negligent because the cost of precautions (i.e. the cost of having the barge attendant aboard that day) was less than the expected accident costs (PL).[26]   "Plaintiff, therefore, failed

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[16] *Id.* at 201.
[17] *Id.* Note that PL gives *expected* injury, not actual injury since we are dealing with probabilities. *Id.*
[18] *Id.* at 201-02.
[19] *Id.* at 202.
[20] *Id.*
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*

the cost-benefit test."[27]

Many modifications of the Hand Rule typically assume there are two parties: "a (potential) plaintiff and a (potential) defendant, who engage in some activity that creates a risk of injury to the plaintiff."[28] It is assumed that if the defendant takes some precaution, at some cost, the chance of injury can be reduced or eliminated.[29] "In light of the costs of the accidents, the probabilities, [and] the costs of precautions, and the legal rule, [the defendant] choose[s] [his or her] behavior."[30]

One of the modifications of the Hand Rule is that formulated by Allan M. Feldman and John M. Frost.[31] Feldman and Frost present a simple model of tort liability in which precaution is a binary choice, and in which if precaution is taken, the probability of accidents is zero (0). All this paper takes from the Feldman-Frost model is the notion of a binary model of the Hand Rule and the Feldman-Frost assumptions discussed below. Much of the discussion in the Feldman-Frost model involves complex economic analysis that is not applicable to this paper, thus to avoid being sidetracked, it is not necessary to say much more about the Feldman-Frost model.[32]

This paper builds on the *assumptions* of the Feldman-Frost model, with a few of my own modifications. Feldman and Frost, in their model, assume that the defendant can take actions that would prevent accidents.[33] This paper follows suit and assumes the public adoption agency can take actions that would prevent accidents.[34] The Feldman-Frost model assumes that if the defendant in a negligence action had taken precaution, accidents will occur with a given probability.[35] In like manner, I assume that if the public agency takes precaution, accidents that harm black children will occur with a given probability: zero (0), to be precise. In other words, if the public agency takes precaution, accidents will not occur.[36] Thus, the model is a binary *yes/no* model: either accidents happen or they do not happen.[37] To prevent accidents, the public agency must incur a fixed cost of

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[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* Note that the Hand Rule is not based on punitive damages. *Id.*

[31] *Id.* at 202.

[32] *See generally* Feldman & Frost, *supra* n. 15.

[33] *Id.* at 203.

[34] By *public adoption agency*, I mean the state agencies authorized to arrange adoption. I am aware of the fact that as an agency of the state, a public adoption agency might not be subject to a suit, except by its consent due to the doctrine of sovereign immunity. However, this paper does not address the issue of sovereign immunity, since in most cases states have consented to suit by waiving their sovereign immunity. However, even in the absence of consent, the agency workers themselves might be subject to suit when qualified immunity does not apply. When a negligence action is brought against a public adoption agency, I assume usual tort remedies for negligence can be imposed on the agency. However, I do not address the issue of remedies in this paper. The focal point of this paper is to make a case for imposition of negligence liability on public adoption agencies that deny or limit transracial adoption.

[35] Feldman & Frost, *supra* n. 15, at 203.

[36] *Id.*

[37] *Id.*

precaution.[38]

Feldman and Frost acknowledge that their use of a discrete (binary) model, rather than a continuous model, is original in economic theorizing and they proceed to establish its justification.[39] This paper adopts their reasoning. The first reason is that the binary model is simpler and requires fewer mathematical calculations.[40] The second reason is that it is more realistic.[41] Feldman and Frost illustrate the binary model with very helpful examples: "[I]n U.S. v. Carroll Towing Co., the issue was whether Connors Co. should have had a bargee on board or not? In fact, much of the legal system is of a yes/no nature: Are you guilty or innocent? Did you breach the contract or not."[42] Similarly, with respect to the public agency transracial adoption issue, the question should be: Should the adoption agency have allowed transracial adoption or not? The choice is often yes or no.

Simply stated, the Hand Rule posits that negligence liability exists if B<PL. The question then arises: What is the *accident* or *injury*? For purposes of this paper, the *accident* or *injury* is the languishing in foster or institutional care of black children who would otherwise be adopted through transracial adoption.[43]

As mentioned earlier, this paper builds on the Feldman-Frost model, with a few of my own modifications. For simplicity, and to fit our binary model, which uses 0/1 (yes/no), we assume B can vary along a continuum between zero (0) and one (1), because the *burden* of precaution by the agency is likely to be variable rather than fixed. In other words, we assume, $1 \geq B \geq 0$.[44] For purposes of this paper, the *precaution* is the agency allowing transracial adoption. *Either* the agency allows it or it does not.

With respect to P—probability—since we are using a binary model, we assume that the probability of an accident occurring is zero (0) if precaution is taken by the public adoption agency; if precaution is not taken, the probability of the accident occurring is one (1). In line with our binary model, it is an *either/or* model since *either* the children will languish in foster or institutional care *or* they will not.

With respect to L—gravity of resulting injury—we assume that if precaution is not taken, the gravity of the resulting injury is one (1), while if

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[38] *Id.*
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.*
[43] Sometimes, children denied transracial adoption languish in foster or institutional care for years. In many instances, they end up never getting adopted. This paper assumes there is a pool of waiting white adoptive parents available to adopt black children. *See* Bartholet, *supra* n. 7, at 1188.
[44] To avoid complicated mathematical calculations, I have chosen to use a simple model. Also, I use this simple model to avoid complications that may arise through use of the sparse statistics available, and to convey my points and support my proposition.

precaution is taken, the gravity of the resulting injury is zero (0). Thus, it is binary. Expected losses (PL) when the agency does not take precaution will therefore be one (1), because P=1 and L=1 when precaution is not taken by the agency, i.e. [PL= (1X1)=1]. If precaution is taken, then under my model, because P=0 and L=0 when precaution is taken, expected loss (PL) is therefore zero (0). B being greater than PL when precaution is taken, no negligence liability should be imposed on the agency, otherwise there will be inefficiency since we would be forcing the agency to provide precaution even though the expected loss is zero (0).

On the other hand, when B<PL the agency is not providing enough precautions. Thus there is inefficiency and negligence liability should be imposed on the agency to compel it to provide optimal precaution. When B=PL, either when both B and PL are zero (0) or both B and PL are one (1), equilibrium—the optimal level of economic efficiency—is established and negligence liability should not be imposed on the agency.

A. Subpart I: Probability of the Accident Occurring (P)

The probability of black children, who would otherwise be adopted through transracial adoption, languishing in foster care if precaution is not taken is one (i.e. P=1). As discussed earlier, *precaution* is the agency permitting transracial adoption.

There are many non-white children waiting in foster and institutional care who are unavailable for adoption solely because of adoption agency insistence that they not be placed transracially.[45] Yet, there are many more black children waiting to be adopted than can be placed with black families.[46] In 2000, 43% of the children awaiting adoption were black, a figure that well outstrips that of other races.[47] Still, black children are pouring into the already overburdened foster care system at a dramatic rate.[48] It is simple economics; the supply of black prospective adoptees exceeds the demand by black prospective adoptive parents. Therefore, if only black families adopt black children, then black children are less likely to be adopted.

The general understanding is that a very high percentage of waiting prospective adoptive parents is white. However, the public adoption agencies have led many of these waiting white prospective parents to believe that there are only a limited number of children, black or white,

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[45] Bartholet, *supra* n. 7, at 1166. The Department of Health and Human Services notes that there is only very sparse national data available anywhere. *Id.*

[46] *Id.* at 1175. Note that the adoption of some black kids by black families does not pose a challenge for the binary model. As discussed in the paper, there are just too few black families to adopt black children, thus the scarcity of black families helps make the point of the binary model that black children are more likely to languish in foster care due to the agency policies that deny or limit transracial adoption. *Id.*

[47] *See Afcars Report, supra* n. 10.

[48] Bartholet, *supra* n. 7, at 1173.

available for adoption.[49] Thus, many of the white prospective parents end up not putting their names on waiting lists for the available black children.[50] Therefore, these black children are less likely to be adopted by the available pool of white prospective parents.

Race matching policies currently in use by many of these agencies generally prohibit the immediate placement of black children available for adoption with white families.[51] These policies end up precluding such placements, either implicitly or explicitly, for periods ranging from six to eighteen months to several years or longer.[52] In many situations, the policies preclude placement altogether.[53] Therefore, there is a very high probability that black children, who would otherwise be adopted by white adoptive parents transracially, will end up languishing in foster or institutional care.

One of the race matching policies used implicitly by public adoption agencies is the *holding* policy.[54] Holding policies typically involve *holding* black children in foster or institutional care for significant lengths of time after they are or could be free for adoption if no black prospective adoptive parents can be found.[55] During such periods, no consideration whatsoever is given to available white families.[56] It is important to keep in mind that during this whole period, the children remain in foster or institutional care. Adoption workers do not even begin the process of freeing a child for adoption until and unless a black prospective adoptive family is available, if ever.[57] Again, during this entire time those black children languish in foster or institutional care. Therefore, holding policies make it more certain that black children will languish in foster care.

The delay or denial of adoption caused by holding policies often leads to more delay. Assuming that the agency eventually finds a black prospective adoptive family for a waiting black child, it may take an additional several years before the child *can* actually be placed,[58] not to

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[49] *Id.*

[50] *Id.*

[51] *Id.* at 1188.

[52] *Id.*

[53] *Id.*

[54] It is likely that public adoption agencies no longer explicitly use the *holding* policy, especially after passage of the Adoption and Safe Families Act ("ASFA"). However, the practice of the adoption agencies suggests they do use the *holding* policy implicitly or covertly. Research for this paper reveals that no study has been done recently to show that the agencies have ceased the practice of *holding* policies. Recent articles continue to discuss the *holding* policy.

[55] Bartholet, *supra* n. 7, at 1193. The policies adopted by public adoption agencies involve both written and unwritten rules. It is the unwritten rules, however, that come into play more often. These sometimes *unofficial* rules make race not simply a factor, but an overwhelmingly important factor in the placement process. Some states, in fact, have laws mandating intraracial adoption as the preferred method of adoption. This paper, however, assumes that there is no state law in place mandating intraracial adoption as the preferred method of adoption. *See generally Id.*

[56] *Id.*

[57] *Id.* at 1194.

[58] *Id.*

mention, *is* actually placed. The court process terminating the biological parents' rights can take two to four years.[59] Plus, the prospective family has to go through home study investigations before placement can occur.[60] The longer these processes are drawn out, as is usually the case, the more time these black children wallow or languish in foster or institutional care.[61] Therefore, delay leads to more delay, making it certain that black children will languish in foster care.

While the months and years go by and as black children get older and accumulate damaging experiences in foster or institutional care, they fall deeper into the "hard to place" category.[62] Therefore, the likelihood that these black children will be denied placement altogether, increases each year.[63]

What do all the facts and insights discussed above point to? Simply put, they point to the fact that under the Hand Rule, probability of black children languishing in foster care is one (1) when precaution is not taken. In other words, when agencies deny or limit transracial adoption, the likelihood of black children, who would otherwise be adopted transracially, languishing in foster care, is certain. It does not matter if the children languish in foster care for just one more day or a year longer than they otherwise would if agencies allowed transracial adoption. To reiterate, languishing is languishing is languishing, regardless of the length of time. Thus, applying the Hand Rule, P=1 when agencies deny or limit transracial adoption.

Therefore, as we have established that the probability of languishing (P) equals one (1) when agencies deny or limit transracial adoption, we turn now to look at the gravity of the resulting injury (L), when agencies deny or limit transracial adoption.

B.   Subpart II: The Gravity of the Resulting Injury (L)

Gravity of the resulting injury refers to the gravity of the injury that results when public adoption agencies deny or limit transracial adoption. As mentioned in the Hand Rule discussion of the gravity of resulting injury (L),[64] for purposes of the binary model of the Hand Rule we assume that if precaution is not taken the gravity of the resulting injury is one (1), while if precaution is taken, the gravity of the injury is zero (0). In other words, *either* there is grave injury or there is no grave injury. In the following paragraphs, this part of the paper will attempt to show there is gravity of injury when public adoption agencies deny or limit transracial adoption.

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[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *Id.* at 1204.
[63] *Id.*
[64] *See supra* § II.

Since there is gravity of injury, I conclude that under the binary model of the Hand Rule, L=1. Thus, in building up to this conclusion, the following paragraphs together paint a collage of grave injuries resulting from agency policies that deny or limit transracial adoption.

It is highly unsettling to see the statistics on the outcomes of children who have languished in the foster or institutional care system.[65] A University of Wisconsin study on the gravity of resulting injury to children, regardless of race, languishing in foster or institutional care, found that after "aging out"[66] of foster or institutional care, 27% of males and 10% of females were incarcerated within twelve to eighteen months.[67] This is a grave injury.

Furthermore, the University of Wisconsin study found that 50% of the former foster care children were unemployed, 37% did not graduate from high school, 33% were living on public assistance, and 19% of the females had children of their own.[68] In fact, 47% of these children were receiving some form of counseling or medication for mental health problems before "aging out" of foster or institutional care, and that number merely dropped to 21% after they left the system.[69] About 33% of the children who languished in foster or institutional care have been diagnosed with three or more psychiatric problems.[70] These are grave injuries.

The gravity of injury resulting from the policy of public adoption agencies against transracial adoption is also evident in the bitter stories told by white parents who have given a healthy home to a black child having a very poor physical or psychological condition.[71] Having nursed the child through difficult times, the child forms a strong attachment to them.[72] However, in spite of the progress the child has made, the agency comes in and takes the child from the white family once they express an interest in adopting the child.[73] Where is the child headed? The child is placed in foster or institutional care, where he or she might not get as much care and love as he or she had with the white foster parents who had nurtured the child through difficult times. Experts say there is a destructive impact on

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[65] Moye & Rinker, *supra* n. 6, at 377. Note that the University of Wisconsin study does not account for children who were not in foster care. Thus, it might be difficult to know whether the factors considered by the study were comparable to the rest of the population. However, that does not undermine the point of the study, which is to point out that grave injury results when children languish in foster care. Also, the study transcends all racial groups and shows that regardless of a child's race, languishing in foster care is harmful to the children. *Id.*

[66] *Id.* (citing Barbara Vobeja, *It's Sink or Swim*, 18 Wash. Post A1 (July 21, 1998)).

[67] *Id.* (quoting statistics compiled by Mark Courtney and Irving Pliavin as part of a study conducted at the University of Wisconsin School of Social Work. Susan DosReis et al., *Mental Health Services for Youths in Foster Care and Disabled Youths*, 91 Am. J. Pub. Health 1094 (2001)).

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *See* Bartholet, *supra* n. 7, at 1191–92.

[72] *Id.* at 1192.

[73] *Id.*

these black children by virtue of the disruption of the only stable relationship the child has known.[74] Disruption of these relationships is a grave injury.

In fact, the race matching and holding polices of the public adoption agencies lead to a bleak situation in which these black children, who would otherwise be adopted transracially, end up losing some or all of their childhood in foster or institutional care, even though there are white prospective parents waiting to adopt.[75] In fact, due to the agency policies against transracial adoption, these black children will inevitably languish, even if only for a day. This is evidenced by the fact that public adoption agencies do not recruit white families for waiting black children, even for those black children for whom there seems little prospect of ever finding black adoptive families.[76] Older black children with serious mental or physical disabilities have even a harder time from the agencies, and yet they are made to languish in foster care.[77] Having to languish in foster care and the attendant loss of childhood are grave injuries.

The delay of adoption that results from agency policies against transracial adoption leads to even more delay. While the months and years go by, black children waiting for adoption are pushed deeper into the "hard-to-place" and "never-be-placed" categories, as they grow older and accumulate damaging experiences in foster or institutional care.[78] Therefore, delay puts the child at risk of even *more* delay and inevitably, the denial of placement altogether.[79] The increased delay in adoption that results from agency policies against transracial adoption is grave injury to these black children.

The gravity of resulting injury from agency policies denying or limiting transracial adoption is also evident because we know that many minority children never receive adoptive homes.[80] We also know many white prospective adoptive parents are interested in adopting black children.[81] There is no doubt that by denying or limiting white parents from adopting black children, the race matching policy of the public adoption agencies in some cases totally denies adoptive homes to some black children.[82] By denying homes to these black children who would otherwise be adopted transracially by white adoptive parents, the agency policies in effect lead to a situation where some of these children never get adopted. Total denial of adoption, even of one black child, is grave injury visited by

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[74] *Id.*
[75] *Id.* at 1188.
[76] *Id.* at 1197.
[77] *Id.*
[78] *Id.* at 1204.
[79] *Id.*
[80] *Id.* at 1205.
[81] *Id.*
[82] *Id.* at 1206.

the agency policy on that child.

In addition, the use of race matching policies in efforts to deny or limit transracial adoption means that black children who are placed intraracially go to families that are in a significantly different socio-economical group than the typical white adoptive families, or rate significantly lower according to parental screening criteria.[83] In an attempt to place black children with black families, these children are being placed with families for whom the limited adoption subsidies available are a necessary precondition for adoption.[84] Failure to release these children to homes where they will have the best quality of life and proper parenting as determined by traditional parental screening criteria, results in adopted black children often being brought up under substandard conditions that may even be worse than foster or institutional care.[85] Sometimes, these intraracial adoptive parents have no genuine interest in adopting the children, but because of the subsidies available to these people in real financial need, they adopt a child.[86] These are grave injuries to these black children.

Elizabeth Bartholet references a research study conducted by William Feigelman and Arnold Silverman designed to answer the question whether "race difference and racial isolation in an alien community pose a more potent determinant for a child's adoptive adjustment than the discontinuities or hazards associated with delay placement."[87] Their study, which involved "both black and white children placed with white parents, found that age at time of placement was by far the most significant factor in explaining variations in adjustment measures."[88] Bartholet notes that Feigelman and Silverman concluded:

> Data . . . suggests that the deleterious consequences of delayed placement due to race matching policies are far

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[83] *Id.* Concerns can be raised as to whether allowing transracial adoption under these circumstances is not a way of selling these black babies to the highest bidder. I recognize that baby selling is a controversial issue and is a topic on its own. This paper does not address baby selling, however.

[84] *Id.* at 1206.

[85] *Id.*

[86] *Id.*

[87] *Id.* at 1224 (citing William Feigelman & Arnold Silverman, *Chosen Children: New Patterns of Adoptive Relationships* 92–93 (Praeger 1983) (comparing the significance of the race-matching factor to the significance of delay in placement). Bartholet sums up the evidence presented by Feigelman and Silverman as follows:

> The desirability of early, permanent placement is generally accepted as axiomatic within the social work profession … It is well documented by Alfred Kadushin that the later the child is placed, the more serious and lasting the adjustment problems that accompany adoption. In David Fanshel's study … of Native American children adopted by white families, he found that a child's adjustment was negatively correlated with the age at placement. His research also indicates why delayed placement may be so significant for the child's ultimate well-being. Not only is it a matter of disruption and discontinuity but, with delayed placement, the child is more likely to suffer from a hazardous environment.

Id.

[88] *Id.* at 1224.

more serious than the [consequences] of transracial adoption. The findings imply that when a choice must be made between transracial placement and continued foster care, transracial placement is clearly the option more conducive to the welfare of the child."[89]

Yet, the agencies continue their harmful policies.

By continuing to deny or limit transracial adoption, these agencies are likely to condemn to significant and lasting psychological harm those children who cannot be placed in black homes.[90] For example, when two-year old Raymond was removed from his white foster parents and placed with a black foster family, he became clinically depressed and his speech development suffered a setback.[91] The psychological harm likely to result from agency policies denying or limiting transracial adoption,[92] is grave injury.

Looking at all the grave injuries discussed above, a collage has been painted that shows there is grave injury to black children who, but for the agency policy against transracial adoption, would otherwise be adopted by white adoptive parents. Under the binary model of the Hand Rule, as I have modified it, we know that if precaution is not taken (i.e. the agency does not allow transracial adoption) there will at least be gravity in the resulting injury. Taken together, the discussion above shows that there is at least grave injury that results when agencies deny or limit transracial adoption.

Therefore, applying my binary model of the Hand Rule, $L=1$ when the agency does not allow transracial adoption because grave injury results to black children affected by public adoption agency policies against transracial adoption.

Having established the gravity of resulting injuries when agencies deny or limit transracial adoption as one (1), we now turn to look at the burden or cost of precaution (B).

C. Subpart III: The Burden or Costs of Precaution (B)

What is the precaution in this paper? As mentioned earlier,[93] for purposes of this paper, the precaution is the agency allowing transracial adoption. For simplicity of our binary model, because we are using zero (0) and one (1), we assume B can vary along a continuum between zero (0) and one (1) (i.e. $1 \geq B \geq 0$). Therefore, this makes B compatible with the binary model of the Hand Rule as I have modified it. This Subpart of the paper will argue that the burden of precaution is low.

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[89] *Id.*
[90] *Id.* at 1225.
[91] Perez, *supra* n. 1.
[92] Bartholet, *supra* n. 7, at 1225.
[93] *See supra* n. 34.

In a position paper introduced at its 1972 convention, the National Association of Black Social Workers ("NABSW") took a strong position against the adoption of black children by white adoptive parents.[94] Since then, it appears as though the position paper has defined what constitutes the burden of precaution. Public adoption agencies and the NABSW have blindly relied upon the position paper to support their view that the burden of precaution (i.e. the burden of allowing transracial adoption) is high and that, consequently, transracial adoption should not be allowed.

The position of the NABSW[95] has a number of facets to it. First, the NABSW states that black children *physically* belong in black families. The organization believes that because black children placed in white adoptive homes will not physically resemble their white family, black children placed with white adoptive families will suffer harm.[96] This is the *physical dissimilarity* burden or cost of transracial adoption. The NABSW believes physical dissimilarity is a high burden or cost of allowing transracial adoption.

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[94] Rita J. Simon & Howard Altstein, *Transracial Adoption* 50–52 (Wiley-Interscience 1977) [hereinafter Simon & Altstein, *Transracial Adoption*] (reprinting a portion of a 1972 Position Paper developed at the National Association of Black Social Workers Conference in Nashville, TN). Recent changes to the Multi Ethnic Placement Act ("MEPA") has likely had an impact on agencies' explicit endorsement of the positions taken by the National Association of Black Social Workers ("NABSW"). However, due to the fact that black children continue to be denied transracial adoption placements, it seems the agencies still implicitly endorse the positions of the NABSW. The positions endorsed by the NABSW may be so entrenched in agency practices that they have not divorced themselves from these positions. Since the recent changes to the MEPA went into effect, no study has been done assessing the impact of these changes on the agencies' endorsements of the NABSW positions. Therefore, it is very difficult to know what impact, if any, these changes have had on agencies' endorsement of the NABSW positions. *Id.*

[95] The NABSW position paper states in pertinent part:

> The National Association of Black Social Workers has taken a vehement stand against the placement of Black children in white homes for any reason. We affirm the inviolable position of Black children in Black families where they belong physically, psychologically and culturally in order that they receive the total sense of themselves and develop a sound projection of their future. Black children in white homes are cut off from the healthy development of themselves as Black people, which development is the normal expectation and only true humanistic goal. Identity grows on the three levels of all human development; the physical, psychological and cultural and the nurturing of self identity is a prime function of the family. The incongruence of a white family performing this function for a Black child is easily recognized. The physical factor stands to maintain that child's difference from his family. There is no chance of his resembling any relative. One's physical identity with his own is of great significance.
>
> In our society, the developmental needs of Black children are significantly different from those of white children. Black children are taught, from an early age, highly sophisticated coping techniques to deal with racist practices perpetrated by individuals and institutions. Only a black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society. Our society is distinctly black or white and characterized by white racism at every level. We repudiate the fallacious and fantasized reasoning of some that white adopting Black children will alter that basic character.

Id.
[96] *Supra* n. 94.

Second, the NABSW posits that in order for black children to develop self-esteem they need to be placed with black families. The NABSW believes that black children placed with white adoptive families do not develop a total sense of self, nor do they have a sound projection of the future.[97] This is the *self-esteem* burden or cost of allowing transracial adoption. The NABSW believes lack of self-esteem is a high burden or cost of allowing transracial adoption.

Third, the NABSW holds the position that placing black children with white adoptive families creates a racial identity crisis for those black children.[98] This position states that black children placed with white adoptive families do not develop a strong sense of black identity or racial pride.[99] According to the NABSW, black children in white homes are cut off from the healthy development of themselves as black people.[100] This is the *racial identity* burden or cost of allowing transracial adoption. The NABSW believes racial identity is a high burden or cost of allowing transracial adoption.

Fourth, The NABSW states that black children placed with white adoptive families have difficulties adjusting or integrating into their white families.[101] This underlying theory is that black children adopted transracially have problems developing a sense of belonging.[102] This is the *difficulty of familial adjustment* burden or cost of allowing transracial adoption. The NABSW believes difficulty of familial adjustment is a high burden or cost of allowing transracial adoption.

Fifth, the NABSW also holds the position that black children placed with white adoptive families lack the ability to cope with or survive racism or have difficulties doing so.[103] According to the NABSW, our society is characterized by racism at every level.[104] The NABSW believes that only a black family is capable of transmitting "emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society."[105] This is the *ability to cope with racism/surviving racism* burden or cost of allowing transracial adoption. The NABSW believes this is a high burden or cost of allowing transracial adoption.

Finally, the NABSW holds the position that black children placed with white adoptive families suffer psychological and social adjustment developmental problems.[106] The NABSW believes that black children

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[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*

psychologically, culturally, and socially belong with black families and that it is incongruent for a white family to help a black child develop socially or psychologically. This is the *psychological/social adjustment* burden or cost of allowing transracial adoption. The NABSW believes this adjustment is a high burden or cost of allowing transracial adoption.

This Subpart of the paper will argue that the burden or costs of allowing transracial adoption (B) are low. I will make this argument by showing that the burden or costs of transracial adoption espoused by the NABSW and public adoption agencies is low. A few of the arguments advanced in support of the NABSW's position that the burden of precaution (B) is high are rebutted, in no particular order.[107]

The NABSW and the public adoption agencies have stated their positions but they are merely *positions*. They are mere rhetoric only supported by anecdotal evidence. They have failed to present any research studies supporting their positions.[108]

A number of research studies have been conducted to assess how well transracial adoptions work from the viewpoint of the adoptees and their adoptive families. These studies have analyzed factors such as: adoptee adjustment, self-esteem, racial identity, as well as integration into the family and the community.[109] The studies provide overwhelming support for transracial adoption.[110] The studies were done by a diverse group of researchers that included blacks and whites, as well as critics and supporters of transracial adoption.[111] Despite the concerns raised by the NABSW and public adoption agencies about the *high* burden or costs of allowing transracial adoption, the children are doing well in terms of achievement, racial identity, adjustment, and self-esteem.[112] They are fully integrated into their white adoptive families and communities, yet they have maintained strong senses of racial identity.[113] Believe it or not, they are doing well in relative comparison to black children adopted intraracially and black children raised by their biological parents.[114]

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[107] I believe the NABSW and the public adoption agencies are pushing a political agenda rather than making the focus the best interests of the children. The NABSW may be promoting Black Nationalism at the expense of the children. It is not clear if the NABSW requires its members to adopt these black children. If it does not and yet it keeps trying to block transracial adoption, it is doing a great disservice to these children.

[108] In my research for this paper, I did not come across any research studies in support of the assertions in the NABSW position paper. In fact, all the evidence that provided any support for these assertions were anecdotal evidence. However, there is some research that contradicts the NABSW assertions and that is what this paper tries to set out. In fact, it seems more from rhetoric that the NABSW launches its fight against hard statistical data. It should be obvious that until the NABSW can produce hard statistical data in support of its position, rhetoric should not prevail over available statistical data.

[109] Bartholet, *supra* n. 7, at 1207.

[110] *Id.* at 1208 (citing various studies).

[111] *Id.* at 1209.

[112] *Id.*

[113] *Id.*

[114] *Id.*

The *self-esteem* and *difficulty of familial adjustment* burdens and costs, which agencies claim are high, are actually very low, if at all existent. They appear to be zero (0). Two of the most significant studies assessing adjustment, or adoptive success, were conducted by Ruth G. McRoy and colleagues, as well as by Rita J. Simon and Howard Altstein.[115] The McRoy study compared a group of black adolescents adopted by white families to a group of black adolescents adopted by black families.[116] The two groups were roughly comparable in terms of age, placement, and socio-economic level, with some differences in parents' education and employment levels.[117] The study found that there were no differences whatsoever in the overall self-esteem and psychological development between the transracially and the intraracially adopted children.[118] In addition, the self-esteem level of the adoptees was as high as that reported in the general population.[119] This suggests that positive self-esteem can be generated as effectively among black children in white adoptive families as in black adoptive families.[120] Therefore, the *self-esteem* burden or cost of allowing transracial adoption (B) is zero (0).

The *difficulty of familial adjustment* burden or cost of allowing transracial adoption is very low, if at all existent. Simon and Altstein have conducted the major longitudinal study of transracial adoptees.[121] Their study looked at the long-range impact of transracial adoption on black adoptees and their white siblings.[122] It found the transracial adoptees had fully integrated into their families as effectively as white adopted and white biological children.[123] The transracial adoptees see themselves as having the same type of relationship with their family as the other children; consequently, they had a strong sense of belonging.[124] Therefore, the *difficulty of familial adjustment* burden or cost of allowing transracial adoption espoused by the NABSW and the public adoption agencies is very low, if at all existent. In fact, it seems to be zero (0).

The *racial identity* burden or cost of allowing transracial adoption is zero (0). Research clearly shows that transracial adoptees develop as strong a sense of black identity and racial pride as other black children.[125] Some

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[115] *Id.* at 1212–13 (citing various studies).

[116] *Id.* at 1213 (citing Ruth G. McRoy et al., *Self-Esteem and Racial Identity in Transracial and Inracial Adoptees*, 27 Soc. Work 522, 524–26 (1982)).

[117] *Id.*

[118] *Id.*

[119] *Id.*

[120] *Id.*

[121] *Id.* at 1214–15 (citing Rita J. Simon & Howard Altstein, *Transracial Adoptees and Their Families: A Study of Identity and Commitment* (Praeger 1987); Rita J. Simon, *Transracial Adoption: A Follow Up* (Lexington 1981); Simon & Altstein, *Transracial Adoption, supra* n. 94)).

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.* at 1217 (citing William M. Womack & Wayne Fulton, *Transracial Adoption and the Black Preschool Child*, 20 J. Am. Acad. Child Psych. 712 (1981)).

evidence indicates that transracial adoption may even have a positive impact in terms of black childrens' sense of comfort with their racial identity.[126] In their study, Simon and Altstein found the black adoptees exhibited no racial preference or bias.[127] There is no evidence that black parents do a better job than white parents of raising black children with a sense of pride in their racial culture and heritage.[128] In fact, transracial adoptees see themselves as black and think well of black culture.[129] Additionally, they feel relatively more at ease with the white community than blacks raised intraracially.[130] Therefore, as black adoptees have a strong sense of black identity, despite being transracially adopted, the *racial identity* burden or cost of allowing transracial adoption (B) is zero (0).

The *ability to cope with racism/surviving racism* burden or cost of allowing transracial adoption is very low, if at all existent. Studies show that transracial adoptees are surviving racism very well,[131] even though the NABSW and public adoption agencies have argued that transracial adoption prevents black children from developing the survival skills necessary for life in a racist society. These opponents of transracial adoption claim that such skills can only be taught by black parents.[132] However, there is no evidence to support this position. An equally compelling argument could be made that white adoptive parents are in the best position to teach black adoptees how to cope in the "white worlds of power and privilege."[133] White parents are as capable as black parents to teach their children strategies to cope with racism.[134] Coupled with their own condemnation of racism, this ability is one of the strongest coping strategies that white parents can impart to their children for fighting racism.[135] Therefore, since white adoptive parents are as able as black parents to instill survival/coping strategies in black adoptees, the *ability to cope with racism/surviving racism* burden or costs of allowing transracial adoption is very low, if at all existent.

The *psychological/social adjustment* burden or cost of allowing transracial adoption is zero (0).[136] Empirical evidence uniformly shows that black adoptees adopted by white parents perform as well as black children

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[126] *Id.*

[127] *Id.* at 1214-15.

[128] *Id.* at 1220.

[129] *Id.* at 1225.

[130] *Id.*

[131] *Id.* at 1219.

[132] *Id.*

[133] *Id.* at 1222.

[134] *Id.*

[135] Jehnna Irene Hanan, *The Best Interest of the Child: Eliminating Discrimination in the Screening of Adoptive Parents*, Golden Gate U. L. Rev. 167, 199 (1997) (citing Kim Forde-Mazrui, *Black Identity and Child Placement: The Best Interest of Black and Biracial Children*, 92 Mich. L. Rev. 925, 954–55 (1994)).

[136] I include this because it shows that there is no difference in the social or psychological development of intraracially and transracially adopted black children. It helps me refute the NABSW's rhetoric to the contrary.

raised intraracially with regard to psychological and social adjustment.[137] Therefore, the *psychological/social adjustment* burden or cost of allowing transracial adoption is zero (0).

The *physical dissimilarity* burden or cost of allowing transracial adoption is very low, if at all existent. The NABSW and public adoption agencies contend that the physical dissimilarity of a black adoptee to his or her white adoptive family is a high burden or cost of transracial adoption, detrimental to the child's development. However, the child's visible dissimilarity may remind his or her white parents of their child's biological "otherness," encouraging them to make greater efforts to explore their child's distinct culture.[138] Likewise, the physical dissimilarity can serve as a visible reminder to the child that he or she was deliberately chosen to be a part of the family,[139] fostering a sense of belonging. Furthermore, the physical dissimilarities may encourage the child to value his or her unique attributes, also encouraging him or her to have a greater tolerance for diversity and differences in others.[140] Therefore, because the physical dissimilarity establishes little, if any, disadvantage to the black adoptee, the *physical dissimilarity* burden or cost of allowing transracial adoption is very low.

In sum, the above discussions on the burden or costs of allowing transracial adoption (i.e. the burden of precaution (B)) show that the burden of allowing transracial adoptions is very low, if at all existent.

III. CONCLUSION

Some criticisms could be raised against the binary model of the Hand Rule. It could be argued that the binary model is over simplistic. Concededly, one could conceive of many cases where one may be faced with more than a simple *yes/no* choice. However, the simplicity of the binary model helps drive home the same point as a continuous model without getting lost in a cloud of econometrics and complex black letter law.

Second, unlike a continuous model, the binary model used in this paper does not account for contributory negligence. However, the model is especially fitting for the discussions in this paper, because the contributory negligence of black children is not at issue in the determination of whether or not public adoption agencies are negligent in denying or limiting transracial adoption.

Third, it could be argued that the binary model fails to take account

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[137] Bartholet, *supra* n. 7, at 1255.

[138] Jennifer Swize, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interest of Adopted Children*, 88 Va. L. Rev. 1079, 1100 (2002).

[139] *Id.* at 1104 (citing *Smith v. Org. of Foster Families for Equal. and Reform*, 431 U.S. 816, 834 (1977)). Although this sounds like rhetoric, it is as plausible as any assertion made by the NABSW. In fact, since a court made it, it likely carries more weight than the NABSW assertions.

[140] *Id.* at 1105 (citing *Smith*, 431 U.S. at 826-27).

of punitive damages. The binary model could be expanded to deal with punitive damages but that would complicate the analysis. A goal of the binary model is to keep the analysis simple. Additionally, the introduction of punitive damages into the binary model would lead to inefficiency,[141] as it would result in agencies allowing transracial adoption even when it is clearly inefficient to do so. Such will be the case where the burden or costs of allowing transracial adoption is clearly greater than the expected losses from denying or limiting transracial adoption (i.e. when B>PL).

It is crucial to keep in mind that the Hand Rule provides that if B<PL, then negligence liability should be imposed. In other words, if the burden or costs of allowing transracial adoption is less than the expected losses from denying or limiting transracial adoption, then negligence liability should be imposed on agencies that deny or limit transracial adoption. As has been discussed above, expected losses (PL) are one (1) under the binary model of the Hand Rule, as I have modified it, when the agency does not allow transracial adoption. As previously mentioned, for purposes of this paper,[142] precaution is the agency allowing transracial adoption. Thus, if the agency denies or limits transracial adoption, the agency has failed to take precaution. As a result and as concluded in Subparts I and II,[143] under the binary model of the Hand Rule, P=1 and L=1. Inserting these figures into the Hand Rule yields [PL= (1X1)] = 1. In other words, expected losses (PL) are certain to occur when agencies deny or limit transracial adoption.

As mentioned above,[144] to maintain simplicity of the binary model, which uses zero (0) and one (1) for P and L, we assume the burden or costs of allowing transracial adoption (B) varies only between zero (0) and one (1). Based on my model, we have 1≥B≥0. The discussion in Subpart III above shows that the burden or cost of allowing transracial adoption (B) is either very low or zero (0); regardless, it is definitely less than one (1). In other words, the burden or cost of allowing transracial adoption is closer to zero (0) than to one (1). Therefore, under this model, 1>B≥0. The Hand Rule holds that negligence liability should be imposed if B<PL; here, expected losses is one (i.e. PL=1) as pointed out in the previous paragraph. As the burden or cost of allowing transracial adoption is closer to zero (0) than to one (1), the burden of allowing agency adoptions is less than the expected losses if agencies deny or limit transracial adoption. Using these figures in accordance with the Hand Rule results in B<PL.

As we know, Judge Hand said if B<PL, negligence liability should be imposed. Therefore, negligence liability should be imposed on the public

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[141] Feldman & Frost, *supra* n. 15.
[142] *Supra* § II, at 254.
[143] *Supra* § II, at 7-13.
[144] *Supra* § II, at 6.

adoption agencies that deny or limit transracial adoption because the burden of allowing transracial adoption (B) is less than the expected losses from the adoption of a pro-transracial adoption policy by the agency.