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Crossing the Line of Color: Revisiting the Best Interests Standard in Transracial Adoptions.

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CROSSING THE LINE OF COLOR: REVISITING THE BEST INTERESTS STANDARD IN TRANSRACIAL ADOPTIONS

TANVI NAGARSHETH*

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“Do what you feel in your heart to be right, for you’ll be criticized anyway.”¹

For some couples, adoption is the only way to fulfill their desire to create a family. Adoption agencies give a homeless child a home and an eager couple their new beginning. It is a win-win situation. Or is it? What happens when the child, the adoptee, is of a different race than its adoptive parents? Are children born with awareness or is their racial identity merely a social construct?

When a child is adopted by a couple of a different race, commonly referred to as a transracial adoption, these concerns and others are raised by society and scholars. The objective of an adoption is to place a child in a safe and loving home, but that does not end the debate. Rather, the policy of race matching has been in continuous debate within the adoption field and continues to arise in situations today. The long held practice of race matching in adoptions plays an important role in the adverse reactions of the community and the legal profession when specifically addressing concerns regarding transracial adoptions.

The focus of this comment is on the phenomenon of transracial adoptions and the ambiguity of the best interest standard. Transracial adoptions are defined as placing a child of one race with an adoptive family of a different race.² Part I of this comment outlines the general history of adoption, the process, the various types of adoption, and traces the inception of and defines transracial adoption. Part I further discusses the arguments supporting and opposing transracial adoptions. Part II highlights the legal treatment regarding transracial adoptions by first defining the best interest standard and its application, and then discusses the relevant state and federal legislation. Part III examines the barriers to transracial adoption by revealing the loopholes in the best interest standard as well as in the current state and federal legislation.

This comment argues that existing state and federal legislation lacks definitiveness in its statutory language, which causes inconsistencies in its application. Additionally, this comment focuses on the vagueness of the best interest standard, which has led to unequal treatment in transracial adoption cases, making it imperative that the loopholes be closed. Finally, the conclusion briefly recapitulates the analysis presented in this comment, and provides aspects that may compel further exploration of this important issue.

1. Eleanor Roosevelt, II, *Celebrating Freedom, Eleanor Roosevelt Style*, BUFFALO NEWS, July 5, 2005, at A6.

2. NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERV., *TRANSRACIAL AND TRANSCULTURAL ADOPTION* (1994), http://naic.acf.hhs.gov/pubs/f_trans.cfm (on file with author).

I. HISTORY OF ADOPTION: “ONE OF THE OLDEST AND MOST WIDELY EMPLOYED LEGAL FICTIONS.”³

A. *Conception of Adoption in America*

First and foremost, the distinction between foster care and adoptions must be addressed. Children are placed in temporary foster homes when they are removed from their own homes because of abuse, neglect or other related family problems.⁴ Adoption has been defined as a “means of providing some children with security and meeting their developmental needs by legally transferring ongoing parental responsibilities from their birth parents to their adoptive parents.”⁵ Children in foster care are placed for adoption when efforts to reunite them with their birth parents prove unsuccessful and they agree to terminate their parental rights.⁶ Children in foster care may be adopted by their relatives, the “foster family, or an adoptive family.”⁷

The concept of adoption originated as early as the 1600s, when adopted children were placed with relatives.⁸ Adoption was first practiced in European countries, the Middle East, Asia, and in certain African tribes.⁹ Western tradition favored biological kinship to an adoption of inferior kinship due to a number of factors, one being that the Church disapproved of adoption as a strategy for inheritance.¹⁰ In nineteenth century America, there was little preference for biological kinship, limited practice of adoption, and children were often placed in foster care.¹¹ “This was primarily due to the multifaceted functions of the colonial American family.”¹²

3. Jo Beth Eubanks, Comment, *Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?*, 24 ST. MARY’S L.J. 1225, 1231 (1993) (quoting Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743 (1956)).

4. TEX. DEP’T OF FAMILY AND PROT. SERVS., FOSTER CARE AND ADOPTION (2002), http://www.dfps.state.tx.us/adoption_and_foster_care/pdf/2004FosterAdoptBrochure.pdf.

5. MIRIAM REITZ & KENNETH W. WATSON, ADOPTION AND THE FAMILY SYSTEM 11 (1992).

6. FOSTER CARE AND ADOPTION, *supra* note 4.

7. *Id.*

8. Andrew Morrison, *Transracial Adoption: The Pros and Cons and the Parents’ Perspective*, 20 HARV. BLACKLETTER L.J. 167, 177 (2004).

9. E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 3 (1998).

10. *Id.* at 5.

11. *Id.* at 5.

12. *Id.* at 5.

The adoption of non-related children came about in the United States in the 1920s.¹³ As adoption became an acceptable means of handling homeless children, the social work system contemporaneously evolved into a widely recognized, yet unregulated discipline.¹⁴ During the 1920s, social workers were hesitant to permanently place children in homes “because they were skeptical of [a family’s] ability to love non-birth children.”¹⁵ Social workers would therefore observe the children during the preliminary months for health and character issues in order to determine their suitability for adoption.¹⁶

The practice soon changed after World War II. Social workers then supported permanent placement due to the influx of homeless children from the war.¹⁷ Adoption was highly unregulated until World War II but soon came under state supervision.¹⁸ In the 1940s, due to state regulation, social workers deemed adoption as an adequate solution for illegitimate babies and unwed mothers.¹⁹ Although social workers have long supported adoptions, generally, the practice has increasingly changed over the last century.²⁰

B. *Types and Processes of Adoption*

Presently, there are several types of recognized adoptions: public, private, independent, kinship, and international.²¹ Children in the public welfare system are placed in homes by public or private adoption agencies.²² For a private adoption, the children are placed in homes through agencies licensed by that particular State.²³ The main difference between

13. Morrison, *supra* note 8, at 177 (citing Jennifer K. Ruark, *What Makes a Family?: A Historian Traces the Rise and Fall of Adoption in America*, CHRON. HIGHER EDUC., Oct. 25, 2002, at A12).

14. See RITA J. SIMON & HOWARD ALTSTEIN, *ADOPTION, RACE, & IDENTITY: FROM INFANCY TO YOUNG ADULTHOOD 1* (Transaction Publishers 2002) (1992).

15. Morrison, *supra* note 8, at 177 (citing Jennifer K. Ruark, *What Makes a Family?: A Historian Traces the Rise and Fall of Adoption in America*, CHRON. HIGHER EDUC., Oct. 25, 2002, at A12).

16. *Id.*

17. *Id.* at 174.

18. BARBARA MELOSH, *STRANGERS AND KIN: THE AMERICAN WAY OF ADOPTION* 106 (2002).

19. Morrison, *supra* note 8, at 178 (citing Jennifer K. Ruark, *What Makes a Family? A Historian Traces the Rise and Fall of Adoption in America*, CHRON. HIGHER EDUC., Oct. 25, 2002, at A13).

20. *Id.*

21. NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERV., *ADOPTION: NUMBERS AND TRENDS* (2000), http://naic.acf.hhs.gov/pubs/s_number.cfm (on file with author).

22. *Id.*

23. *Id.*

the agencies is that public agencies are funded by the federal government, which stipulates their compliance with federal regulations, whereas private agencies are funded by the state and monitored by the state in a like manner.²⁴ This difference has partly fueled private agencies' same race matching practices, discussed in more detail *infra*.

Along with public and private adoptions, an independent adoption, also known as a "non-agency adoption,"²⁵ involves the direct placement of children into a home by the birthparents utilizing the services of a "facilitator, certified medical doctor, member of the clergy,"²⁶ or in some instances by an attorney.²⁷ A kinship adoption occurs when the children are put in a relative's home, which may be achieved by using a public agency.²⁸

Finally, international adoptions occur when U.S. families adopt children from foreign nations.²⁹ International adoptions have also experienced a dramatic increase over the years and fall under the umbrella of transracial adoptions.³⁰ Statistics show that states with higher numbers of adoptions are those that have larger populations, such as Texas, which creates the inference that adoption rates correlate to populations, yet there is no empirical data to prove the direct correlation exists.³¹

Parents may choose to adopt for a variety of reasons, such as infertility or to aid in decreasing the number of children in the child welfare system. Once adoption became regulated by state and federal legislation, subsidies and tax credits were available to adoptive families. State subsidies are available for "reimbursement of non-recurring adoption"³² including attorney fees and court related costs.³³ Families are entitled to federal assistance if the child was eligible prior to the adoption.³⁴ The children that are not eligible for federal assistance may receive state subsidies provided it is negotiated before the finalization of the adoption.³⁵ Additionally, in 2001, "tax law increased the adoption tax credit for all adoptions to \$10,000."³⁶ In 2002, adoptive families were allowed to claim a \$10,000

24. *Id.*

25. *Id.*

26. ADOPTION: NUMBERS AND TRENDS, *supra* note 21.

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. ADOPTION: NUMBERS AND TRENDS, *supra* note 21.

32. EVAN B. DONALDSON ADOPTION INSTITUTE, COSTS OF ADOPTION, <http://www.adoptioninstitute.org/FactOverview/costs.html> (last visited Oct. 20, 2005).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

tax credit, per child, in relation to certain adoption expenses such as court costs.³⁷ Some employers also provide adoption benefits such as financial reimbursement and paid leave.³⁸

In correlation to the governmental assistance afforded to adoptive families the rate of adoption increased. Six out of every ten Americans have encountered adoption either personally or through a close friend who was affected by adoption.³⁹ A survey taken in 1997 showed that fifty-eight percent of Americans are friends with someone who was adopted, has adopted a child or has given a child up for adoption.⁴⁰

Although they are a frequently debated topic, the statistics and numbers for transracial adoptions are lower than one might expect. In 1986, approximately 104,000 children were adopted in the United States, 53,000 of which were family related adoptions and 51,000 were to unrelated households.⁴¹ In 1987, transracial adoptions made up for “only one percent of all adoptions.”⁴² This low percentage may be largely due to the National Association of Black Social Worker’s strong opposition to transracial adoptions, issued in 1972, and discussed *infra*. The United States Census Bureau states that more than one out of six adopted children have racially dissimilar adoptive parents.⁴³

Moreover, states with larger populations tend to have a higher rate of adoptions. In 1992, Texas had third highest number with 8,325 adoptions, behind California with 14,722 and New York with 9,570.⁴⁴ In 1998, the United States Department of Health and Human Services reported that “15 percent of 36,000 adoptions or foster care placements”⁴⁵ were transracial and the numbers are on the rise.⁴⁶ The rise may be due to many factors, such as the increase of child abuse and international adoptions, although no study has stated any particular reason.

37. EVAN B. DONALDSON ADOPTION INSTITUTE, *supra* note 32.

38. *Id.*

39. NAT’L ADOPTION INFO. CLEARINGHOUSE, U.S. DEP’T OF HEALTH & HUMAN SERV., ADOPTION: NUMBERS AND TRENDS (2000), http://naic.acf.hhs.gov/pubs/s_number.cfm (on file with author).

40. EVAN B. DONALDSON ADOPTION INSTITUTE, OVERVIEW OF ADOPTION IN THE UNITED STATES, <http://www.adoptioninstitute.org/FactOverview.html#head> (last visited Oct. 17, 2005).

41. ADOPTION: NUMBERS AND TRENDS, *supra* note 39.

42. Maureen McManus, Issues in Transracial Adoption, <http://userpages.umbc.edu/~mmcman1> (last visited Sept. 24, 2005).

43. Allison Keyes, *Foster Care, Part 4: Cross-Racial Adoptions*, National Public Radio May 27, 2004, <http://www.npr.org/templates/story/story.php?storyId=1912338>.

44. ADOPTION: NUMBERS AND TRENDS, *supra* note 39.

45. Michelle Miller, *Adopt Heritage with Child*, COMMERCIAL APPEAL, May 23, 2004, at B3.

46. *Id.*

C. *The Color of Desire: Transracial Adoptions Defined*

Transracial adoption is defined as the placement of a child in an adoptive family of a different ethnic background.⁴⁷ Originally, this term referred to the placement of black children, or children from another country, with a white adoptive family.⁴⁸ But with today's expanding cultures, it covers all ethnicities. Transracial adoptions emerged in the 1940s, after World War II ended.⁴⁹ That war left many children homeless all over the world.⁵⁰ As a result, the frequency of transracial adoptions grew in the mid-1950s and fluctuated heavily thereafter.⁵¹

Families chose to adopt transracially for a variety of reasons. "Social changes regarding abortion, contraception and reproduction reduced the number of white children available for adoption, leaving nonwhite children as the largest available source."⁵² "Between 1968 and 1972, approximately 50,000 black and biracial children were adopted by white adoptive parents."⁵³ Traditionally geared towards same race matching, the adoption agencies were forced to reevaluate their concept of matching.⁵⁴

During the 1970s, an increase in the number of black children in foster care and a shortage of black adoptive families necessitated the "adoption of black children by white families."⁵⁵ As transracial adoptions gained popularity in the 1970s, the practice was heavily criticized by the National Association of Black Social Workers.⁵⁶ The National Association of Black Social Workers (NABSW) issued their formal position against transracial adoptions, shocking the world with their strong views. The NABSW referred to the practice of transracial adoptions as unnatural and stated that such placements compromised the child's racial and cul-

47. Adoption.com, Transracial Adoption, <http://adopting.adoption.com/child/transracial-adoption.html> (last visited Sept. 24, 2005).

48. *Id.*

49. SIMON & ALTSTEIN, *supra* note 14, at 1-2.

50. *Id.*

51. *Id.*

52. *Id.*

53. Public Broadcast Service, Adoption History: Transracial Adoption - A Brief Overview, <http://www.pbs.org/pov/pov2000/firstpersonplural/historical/transracial.html> (last visited Sept. 24, 2005).

54. SIMON & ALTSTEIN, *supra* note 14, at 2.

55. Public Broadcast Service, *supra* note 53.

56. *Id.*

tural identities.⁵⁷ Additionally, their statement claimed that the practice “amounted to a form of cultural genocide.”⁵⁸

Specifically, the NABSW expressed that “[o]nly 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.”⁵⁹ The NABSW further suggested that adoption agencies were failing to locate black adoptive families and actually preferred white adoptive couples.⁶⁰ Subsequently, there was a significant “drop in the amount of transracial” adoptions.⁶¹

In response to the NABSW’s position, policy makers began implementing laws and guidelines requiring same race matching for adoptions.⁶² Indeed, the preliminary statutes regarding adoptions stated that race should be a factor.⁶³ However, it should be noted that “in 1994 the NABSW softened their position”⁶⁴ by stating that transracial adoption would be acceptable only after adoption agencies provided evidence of a fruitless attempt to locate a same race family, all of which had to be reviewed by the African-American community.⁶⁵

Moreover, another ethnic group was simultaneously affected by transracial adoptions. Within the Native American community, ninety percent of children were removed from their homes and placed in white households.⁶⁶ In contrast to the situation with the black children, the removal of Native American children stemmed from the nation’s failure to comprehend Native American child-rearing practices.⁶⁷ On occasion, these children were taken fraudulently, and the parents were often misled as to the reasons for their removal.⁶⁸ Even so, “[t]he adoption of Native American children by white families raised similar concerns as those

57. See National Association of Black Social Workers, *Position Statement on Transracial Adoption* (1972), <http://darkwing.uoregon.edu/~adoption/archive/NabswTRA.htm> (arguing that parents have to be “unnaturally” taught how to raise black children).

58. Public Broadcast Service, *supra* note 53 (comparing the concerns raised in position statement issued by NABSW with similar concerns on the adoption of Native American children). See generally National Association of Black Social Workers, *supra* note 57 (asserting that only black families can provide the cultural foundation a black child needs).

59. National Association of Black Social Workers, *supra* note 57.

60. Public Broadcast Service, *supra* note 53.

61. *Id.*

62. *Id.*

63. See MINN. STAT. § 260C.193(3)(d) (2004) (providing an example of how the Minnesota statute includes race as a factor in adoption).

64. Samiya A. Bashir, *The Best Interest of the Child*, COLORLINES, Winter 2002/2003, at 15.

65. *Id.*

66. Public Broadcast Service, *supra* note 53.

67. *Id.*

68. *Id.*

raised by NABSW.⁶⁹ Congress responded to the Native Americans' concerns, discussed *infra*, leaving the NABSW to continue to fuel the debate on transracial adoptions.

Despite the ongoing concerns of NABSW, one study conducted in 1995 found that transracial adoption was not troublesome for the adoptee in any major aspect.⁷⁰ The study indicated that the adoptee did not suffer from issues involving adjustment, self-esteem, scholastic achievement, or peer and adult relationships.⁷¹ Other studies have also supported the contention that the interracial aspect of the adoption does not have a major impact on the adoptee.⁷² So why the opposition to transracial adoption? If there is no permanent damage, then it appears that transracial adoption is in the best interest of a child when there are no same race families available.

D. *Do We Live in a Color Blind Society? Views on Transracial Adoptions*

Transracial adoptions are comparable to other forms of adoptions, except for the function that race plays in the process.⁷³ The nature of transracial adoptions calls for a reevaluation of the importance of a child's identity as an individual against her identity within a group.⁷⁴ Race can be viewed as a two-fold concept.⁷⁵ First, the race a child is born into, which predates an individual's life.⁷⁶ Second, race exists as part of the mental process in personal identity struggles, and the concepts have the common theme of trying "[t]o know thyself."⁷⁷ Although not the only attributable aspect of identity, race continues to play an overblown role in transracial adoptions.

69. Public Broadcast Service, *Adoption History: Transracial Adoption - A Brief Overview*, <http://www.pbs.org/pov/pov2000/firstpersonplural/historical/transracial.html> (last visited Sept. 24, 2005).

70. Adoption.com, *supra* note 47 (citing A.R. Sharma et al., *The Emotional and Behavioral Adjustment of United States Adopted Adolescents: Part I. An Overview*, 1996 CHILDREN & YOUTH SERV. REV., Vol. 18, at 83.).

71. *Id.*

72. *See, e.g.*, SIMON & ALTSTEIN, *supra* note 14, at 124-170 (describing the results from a study conducted over a span of ten years of the impact of the transracial adoption for the parents and adoptee).

73. Rita J. Simon & Howard Altstein, *The Relevance of Race in Adoption Law and Social Practice*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 171, 173 (1997).

74. Barbara Bennett Woodhouse, "*Are You My Mother?*": *Conceptualizing Children's Identity Rights in Transracial Adoptions*, 2 DUKE J. GENDER L. & POL'Y 107, 110 (1995).

75. *See* Hawley Fogg-Davis, *A Race-Conscious Argument for Transracial Adoption*, 6 B.U. PUB. INT. L.J. 385, 387 (1997) (describing the best interest approach for adoption of black children as "a two-tiered conceptualization of race").

76. *See id.* (referring to the structural variable).

77. *See id.* (referring to the ideological factor).

Advocates of transracial adoptions contend that it is a desirable alternative to foster care.⁷⁸ One obvious solution allows for placement of black children into homes of white families, however, “the controversy over race-mixing has kept thousands of black children in foster care, even though white couples are willing to adopt them.”⁷⁹ The NABSW’s position statement has effectively delayed transracial adoption practices, labeling it “cultural genocide.”⁸⁰

Indeed, the goal of race-matching stems from a desire to place a child in the best environment, but that goal should not be compromised by delaying the adoption process to find a same race family. If there is no immediate same race family available, a transracial adoption should be the next step in providing the child with a home. While the search for a same race match often denies an ethnic child a loving and committed family, a transracial adoption would provide one.⁸¹ Once again it is important to note that one study shows that transracial adoption does not adversely affect the adopted child and such children have made successful adjustments.⁸² Supporters of transracial adoptions claim that prospective families “should not be judged on”⁸³ the basis of their skin color, rather the emphasis should be placed on their ability to be fit parents and provide a stable home.⁸⁴ The disproportionate weight assigned to race in the adoption process reveals a flaw in the system. More emphasis should be placed on parenting skills and the ability to provide permanence for the child.

Transracial adoption is problematic due to society’s need to label people by race.⁸⁵ On the other hand, the significance of racial identity should not be underestimated. Central to the opponent’s argument is the issue of how the adoptive child of a different race can cope with their racial identity and be accepted by their peers. Opponents of transracial adoptions, other than the NABSW, argue that such “children will lose their racial identity”⁸⁶ and culture, with a specific reference to black children, “if adopted by parents of”⁸⁷ a different race.⁸⁸ Additionally, the oppo-

78. McManus, *supra* note 42.

79. *Id.*

80. *Id.*

81. Jennifer Swize, Note, *Transracial Adoption and the Unblinkable Difference: Racial Dissimilarity Serving the Interests of Adopted Children*, 88 VA. L. REV. 1079, 1083 (2002).

82. McManus, *supra* note 42.

83. *Id.*

84. *Id.*

85. Cassandra L. Wiedenhoef, *Should Race Be Considered in the Adoption of a Child?*, 11 J. CONTEMP. LEGAL ISSUES 600, 604 (2000).

86. McManus, *supra* note 42.

87. *Id.*

88. *Id.*

nents stress that adoptive children who have not yet grasped their racial identity will experience problems “coping with prejudice and discrimination,”⁸⁹ especially if adopted by white parents.⁹⁰

Accordingly, the opponents raise two issues with transracial adoptions.⁹¹ The first is that public agencies do not use their best efforts to locate black adoptive families and the agencies’ criteria discriminates against black families.⁹² Their second complaint is that white families are unable to offer a relatable “sense of identity for black children.”⁹³ But how are these children better off unwanted in an unloving, same race home rather than being wanted and loved in an adoptive family of a different race where the children are chosen despite their racial differences? While race should not be taken completely out of the equation, it should be one of the contributing factors.

II. TRANSRACIAL ADOPTION: AN ACCEPTABLE MEANS OF RACISM? ANALYSIS OF FEDERAL AND STATE LEGISLATION

A. *The Best Interest Standard*

The absolute right to create a child exists, but there is no absolute right to adopt.⁹⁴ Both foster and adoptive parents are at the mercy of the biological parent.⁹⁵ Biological parents have an immense proprietary power over their children. “Even in situations of serious abuse and neglect, the government is reluctant to interfere with parental rights.”⁹⁶ Although the welfare system is supposed to act in a child’s best interest, which requires a nurturing home, it is distressingly apparent that children have no role in obtaining rights to those interests.⁹⁷

Adoption agencies traditionally sought to implement same-race policies asserting that the child’s best interest was served by matching the physical appearance of the child to that of the adoptive parents.⁹⁸ Many traditionalists believe that children will lose faith in their parents as role

89. Maureen McManus, *Issues in Transracial Adoption*, <http://userpages.umbc.edu/~mmcman1> (last visited Sept. 24, 2005).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. ELIZABETH BARTHOLET, *FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING* 76 (1993).

95. *Id.*

96. *Id.*

97. *Id.* at 76-77.

98. See generally Jay M. Zitter, Annotation, *Race as a Factor in Adoption Proceedings*, 34 A.L.R. 4th 167 (2000) (asserting other adoption agencies prefer same race matches).

models if the welfare system abandons the matching process.⁹⁹ This argument rests “on the assumption that children”¹⁰⁰ run a higher risk of losing their identity when no biological link exists between the parent and child.¹⁰¹ This argument is weakened by the fact that adoptive parents consciously chose parenthood, which should compensate for any difficulties inherent in adoption.¹⁰²

Indeed, adoption is a creature of statute and the law of the state in which it takes place governs the process. Courts have struggled for years with the language “the best interest of the child,” which is found in all adoption statutes.¹⁰³ This standard promotes the fundamental purpose for the enactment of all adoption statutes.¹⁰⁴ The standard requires agencies and courts to use the child’s best interest as the sole guideline for their placement with a family.¹⁰⁵ Hence, placement agencies and courts are required to consider various factors such as the child’s age, family resources, steadiness in the family, blood relationships, and the child’s preference for placement.¹⁰⁶ The Texas case, *Holley v. Adams* provides a more detailed list of factors: the desires of a child, his present and future emotional and physical needs, “the parental abilities of the¹⁰⁷ person seeking custody, “the programs available to assist”¹⁰⁸ in “promoting the best interests of the child,”¹⁰⁹ the custodian’s plans for the child, and the stability of the proposed home.¹¹⁰

The *Holley* factors were revisited twenty seven-years later in a 2003 case, as the factors to be employed to determine the child’s best interests.¹¹¹ However, after considering these factors courts are free to set further guidelines.¹¹² While adoption statutes specify that the child’s best

99. BARTHOLET, *supra* note 94, at 81.

100. *Id.*

101. *Id.*

102. *Id.*

103. Eric C. Czerwinski, Comment, *Adoption Law: Congratulations! For Now - Current Law, the Revised Uniform Adoption Act, and Final Adoptions*, 49 OKLA. L. REV. 323, 325 (1996).

104. *Id.*

105. *See, e.g.*, *Turner v. Pannick*, 540 P.2d. 1051, 1054 (Alaska 1975) (listing factors to be considered in the best interest standard).

106. *See, e.g., id.* (listing factors to be considered in the best interest standard).

107. *Holley v. Adams*, 544 S.W.2d 367, 371-72 (Tex. 1976).

108. *Id.*

109. *Id.*

110. *Id.*

111. *See In the Interest of W.C.*, 98 S.W.3d 753, 757 (Tex. App. – Fort Worth 2003) (reaffirming that the *Holley* factors are still applicable in applying the best interest standard).

112. *See Czerwinski, supra* note 103, at 325 (asserting that courts have disregarded the statutory guidelines to give race a dominant role).

interest should be protected, courts have failed to do so by needlessly making racial differences an issue.¹¹³ Courts have used the flexibility of the standard as an opportunity to use race as a factor.

As a result, this standard has been frequently criticized. The best interest standard has been denounced as too vague and subjective, thus allowing broad judicial interpretation¹¹⁴ leading to an inconsistent application of the standard. A child should not be left to the whim of the agencies and courts to decide whether race is either a determinative or impermissible factor to determine placement. Such inconsistencies only stand to harm innocent children. It is imperative that the legislature address the ambiguity of this standard to avoid race matching policies. The next section will provide an overview of the current legislation followed by a discussion regarding the impact of loopholes present in the law and the best interest standard. This comment further argues that these loopholes must be reconciled and proposes a solution for change in order to achieve uniformity in the application of the best interest standard.

B. *The Road to the Current Federal Legislation*

Racial matching tactics contradict the fundamental prohibition of race discrimination in our laws.¹¹⁵ In no other area have states used race, so methodically, “as the basis for action.”¹¹⁶ While the antidiscrimination norm does not extend to aspects of our social life, the government should not accommodate “racial separatism in private life.”¹¹⁷ “There is no compelling necessity for racial matching.”¹¹⁸ Race matching policies, as implemented by adoption agencies, necessitate a change.

In response to Native American concerns discussed *supra*, Congress passed the Indian Child Welfare Act in 1978.¹¹⁹ “The goal of the Indian Child Welfare Act was to”¹²⁰ impede “illegal adoptions of Native American children,” and to prevent the unwarranted removal from their homes.¹²¹ However, no similar legislation was enacted to specifically af-

113. *See id.* (asserting that courts have disregarded the statutory guidelines to give race a dominant role).

114. *See, e.g.,* B.G. v. San Bernardino County Welfare Dep’t, 523 P.2d. 244, 256-57 (Cal. 1974) (stating that the sole consideration of best interests allows the judge to remove a child from his biological parents without a showing of injury to the child).

115. BARTHOLET, *supra* note 94, at 106.

116. *Id.*

117. ELIZABETH BARTHOLET, FAMILY BONDS: ADOPTION AND THE POLITICS OF PARENTING 106 (1993).

118. *Id.* at 108.

119. Indian Child Welfare Act of 1978 § 2, 25 U.S.C. §§ 1901-1963 (2000).

120. Public Broadcast Service, *supra* note 53.

121. *Id.*

ford the same protection to black families from similar purported discrimination in the adoption process. While there is no evidence that black families experienced the same type of child snatching as Native Americans, it is arguable that all cultures should be afforded similar protection, and not individually singled out by legislation.

On the other hand, a distinction must be made between the experiences of Native Americans and Blacks in these situations. Native American children were fraudulently taken away from their families whereas the black children were already placed for adoption. It appears that the NABSW and Native Americans would rather have race as an absolute factor. While fairness may dictate equal treatment in the law for black children, their culture, although different, is not lost on this country. Native Americans on the other hand, have a completely different way of life, which has a history of being misunderstood and contrary to mainstream beliefs. Regardless, any ethnic child should not be deprived of a loving home based solely on racial pretexts.

A substantial step towards eradicating race matching all together occurred during the Clinton administration. Congress reshaped the federal adoption laws during that time. "Congress passed the Adoption and Safe Families Act of 1997 (ASFA),"¹²² which was the first major federal reform of "child welfare policy since 1980."¹²³ "Guidelines for Public Policy and State Legislation Governing Permanence for Children were developed as one of the several steps undertaken by the Federal government in response to Adoption 2002, President Clinton's Initiative on Adoption and Foster Care."¹²⁴ The guidelines serve to help states examine their own laws and improve their existing statutes and policies to enhance child welfare practices.¹²⁵ In response to these guidelines, Congress passed the ASFA.¹²⁶ Nevertheless, the guidelines were designed to highlight key issues, identify specific questions, and facilitate clear policy choices in an effort to achieve permanency for children.¹²⁷

Even though child protection and the foster care system are state regulated, the guidelines specifically concentrate on the legal process, its effect on children and families, and were intended for a broad audience

122. Admin. For Children & Families, U.S. Dep't of Health & Human Services, Fact-sheets/Publications - Introduction, <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt1.htm> (last visited Sept. 10, 2005).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. Admin. For Children & Families, *supra* note 122.

including state legislators and child welfare officials.¹²⁸ On December 14, 1996, President Clinton issued the following executive memorandum:

I am committed to giving the children waiting in our Nation's foster care system what every child in American [sic] deserves loving parents and a healthy, stable home. The goal for every child in our Nation's public welfare system is permanence in a safe and stable home, whether it be returning home, adoption, legal guardianship, or another permanent placement. While the great majority of children in foster care will return home, for about one in five, returning home is not an option, and they will need another home, one that is caring and safe. These children wait far too long[,] typically over 3 years, but for many children much longer to be placed in permanent homes. Each year State child welfare agencies secure homes for less than one-third of the children whose goal is adoption or an alternative permanent plan. I know we can do better.¹²⁹

"President Clinton directed the Secretary of Health and Human Resources, Donna Shalala, to"¹³⁰ make recommendations for a higher turnover rate for moving children from foster homes to permanent homes.¹³¹

As a result, "Secretary Donna Shalala issued *Adoption 2002: A Response to the Presidential Executive Memorandum on Adoption*."¹³² A number of important assumptions expressed in the report are as follows: permanency planning should begin once the "child enters foster care because"¹³³ while foster care is a temporary placement, adoption is one method to find a permanent family, and the diversity and influence of all communities should be utilized.¹³⁴

In contrast to the Adoption Assistance and Child Welfare Act of 1980, which discouraged excessive reliance on foster care placement and promoted the use of services to prevent out of home placement, the guidelines for Public Policy & State Legislation Governing Permanence for Children and the legislation that followed supported permanency and alternative approaches.¹³⁵ The subsequent legislation includes "the Family Preservation and Family Support Services Program established in 1993. . .the Multi-Ethnic Placement Act (MEPA) of 1994 which was re-

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. Admin. For Children & Families, *supra* note 122.

133. Admin. For Children & Families, U.S. Dep't of Health & Human Services, Factsheets/Publications - Introduction, <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt1.htm> (last visited Sept. 10, 2005).

134. *Id.*

135. *Id.*

pealed and replaced by the Inter-Ethnic Adoption Provisions (IEAP) in 1996, and the Adoption and Safe Families Act (ASFA) in 1997.”¹³⁶

C. *Current Federal Legislation: The Answer is not Black and White*

In conjunction with the changing attitudes towards transracial adoption, Congress has enacted statutes to address the issue of race in adoptions. In 1994, the MEPA¹³⁷ prohibited all adoption agencies receiving federal funds to deny or postpone adoptions based solely on racial dissimilarity.¹³⁸ The driving force for the Act was the fact that there were an increasing number of foster children due to the preference for racial matching.¹³⁹ Thus, “MEPA outlawed discriminatory practices in adoptions and foster care placement decisions.”¹⁴⁰

In 1996, the IEAP replaced MEPA. Similar to MEPA, the IEAP prohibited federally funded agencies to deny or delay “placement of a child for adoption or into foster care, on the basis of race, color, or national origin.”¹⁴¹ Furthermore IEAP provided “sanctions for States and agencies”¹⁴² that failed to comply with its provisions.¹⁴³ IEAP sets up a penalty construction and remedial planning for any federally funded agency that violates the provisions of the act.¹⁴⁴

Nevertheless, the IEAP raised controversy in its effort to combat racial favoritism in the adoption process as well as decreasing the amount of children in foster care.¹⁴⁵ Although the IEAP was intended to show Congress’ support for transracial adoptions, it has had a trifling effect because it did not extend to private adoption agencies. Private adoption agencies are funded by the state. Therefore, the statute does not prevent race from being a factor in private placement decisions.¹⁴⁶ MEPA and IEAP are noteworthy statutes for two reasons: they not only called for “a change in laws and policy”¹⁴⁷ but “required changes in child welfare prac-

136. *Id.*

137. Multiethnic Placement Act of 1994, 42 U.S.C. § 5115(a) (1994) *repealed by* Inter-ethnic Adoption Provisions of the Small Business Job Protection Act of 1996, 42 U.S.C.S. § 1996(b) (2005).

138. 42 U.S.C. § 5115(a) *repealed by* 42 U.S.C.S. § 1996(b).

139. Swize, *supra* note 81, at 1084 n.24.

140. Admin. for Children & Families, *supra* note 133.

141. Interethnic Adoption Provisions of the Small Business Job Protection Act of 1996, 42 U.S.C. § 1996(b) (2005).

142. Admin. for Children & Families, *supra* note 133.

143. *Id.*

144. *Id.*

145. Public Broadcast Service, *supra* note 53.

146. Swize, *supra* note 81, at 1085 n.24.

147. Admin. for Children & Families, *supra* note 134.

tice to”¹⁴⁸ assist in the goal of timely transfer of children into both foster care and adoptive homes.¹⁴⁹

Additionally, ASFA addresses the permanency issues in child welfare law.¹⁵⁰ The statute was passed to make sure that children’s safety becomes the central concern in all child welfare decisions and to support the adoption of children.¹⁵¹ This law has two goals: to move children that are wedged “in the welfare system,”¹⁵² and to alter the welfare experience of children entering the system today.¹⁵³

Five principles facilitate the implementation of ASFA: safety,¹⁵⁴ the idea that foster care is temporary,¹⁵⁵ that permanency planning should begin once the child enters the system,¹⁵⁶ that the system “should focus on results and accountability,”¹⁵⁷ and encouraging innovative approaches to achieve these goals.¹⁵⁸ This statute reaffirms the need to create a link “between the child welfare system and”¹⁵⁹ the judiciary.¹⁶⁰

With respect to the statutes enacted thus far, the laws imply that race may not be used as a primary factor in determining placement for a child. This mirrors the relevant but not decisive standard of *In re Adoption of a Minor*,¹⁶¹ which grants courts and agencies discretion in deciding cross racial placements.¹⁶² Thus, the barrier of race in transracial adoptions is still very much in existence because the statutes do not suggest a standard. Therefore, the courts use the ambiguity in the standard as an opportunity to use race as a determinative factor. While race should not be a dispositive factor in transracial adoptions, it should not be completely taken out of the equation either. Race is relevant but it should not pose as a barrier to deny a wanted child a loving and permanent home.

148. *Id.*

149. *Id.*

150. *See generally* Adoption and Same Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (articulating provision for permanency issues in child welfare law).

151. Admin. For Children & Families, U.S. Dep’t of Health & Human Services, Fact-sheets/Publications - Introduction, <http://www.acf.hhs.gov/programs/cb/publications/adopt02/02adpt1.htm> (last visited Sept. 10, 2005).

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. Admin. for Children & Families, *supra* note 151.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *In re Adoption of a Minor*, 228 F.2d 446, 448 (D.C. Cir. 1955).

162. *Id.*

D. *State Participation in Taking Race out of the Equation: Texas Legislation and Guidelines*

State legislatures authorize state agencies, to actively recruit potential families and provide them information about the children available for adoption. Section 162.015 of the Texas Family Code governs the role of race or ethnicity in adoption placements.¹⁶³ This section states, “[i]n determining the best interest of a child, the court may not deny or delay the adoption or otherwise discriminate on the basis of race or ethnicity of the child or the prospective parents,”¹⁶⁴ followed by the general disclaimer found in all related legislation that this section does not apply to “proceedings subject to the Indian Child Welfare Act.”¹⁶⁵

However, the statute fails to mention that adoption agencies, in conjunction with the court system, are precluded from using race. The Texas Family Code attempts to address this issue in section 162.308, which governs the Department of Protective and Regulatory Services.¹⁶⁶ The relevant part of this section does not permit the agency to support an adoption placement on the assumption that a same race match is in the best interest of the child.¹⁶⁷

In addition, the Texas statute states that unless an independent psychological assessment specific to that child reveals an interracial adoption will have a detrimental effect upon the child, the agency cannot delay the adoption to locate a family of the same race.¹⁶⁸ This is the first instance where the meaning of delay and weight of race is clarified in the statutory language. The statute further imposes sanctions on employees that violate the section.

At the same time while section 162.308 appears to be in compliance with ASFA, there is one exception. Under the Texas Family Code, the adoption may be denied or delayed if a psychological evaluation reveals that transracial placement would be harmful to the child.¹⁶⁹ Despite the fact that this would serve the best interest of the child, it would go against ASFA.¹⁷⁰ While Texas law is a definite improvement in terms of specific-

163. TEX. FAM. CODE ANN. § 162.015 (Vernon 2002 & Supp. 2004-2005).

164. § 162.015.

165. § 162.015.

166. *See generally* TEX. FAM. CODE ANN. § 162.308 (Vernon 2002 & Supp. 2004-2005) (attempting to close the loophole of race matching and the best interest of the child).

167. TEX. FAM. CODE ANN. § 162.308(a) (Vernon 2002).

168. TEX. FAM. CODE ANN. § 162.308(b) (Vernon 2002).

169. § 162.308(b).

170. Cynthia R. Mabry, “Love Alone is Not Enough!”: *In Transracial Adoptions - Scrutinizing Recent Statutes, Agency Policies, and Prospective Adoptive Parents*, 42 WAYNE L. REV. 1347, 1382 (1996).

ity, it nevertheless suffers from the same problems as the federal legislation discussed in Part IV.

The Texas approach to transracial adoptions does not shed any positive light on the issue. Texas Family Code sections 162.015 and 162.308 should be combined, or at least a cross-reference to each section should be included. The Texas courts have not clarified the State's position on how much emphasis may be placed on race in the adoption process. No current case law sheds light on the best interest standard, as applied in Texas, since the passage of MEPA. Texas, along with other states, has failed to adequately describe what the permissible factors are for the multi-faceted standard.

Another contributing factor to the lack of guidance is the procedures published by each state for their respective agencies. The Texas Department of Family and Protective Services' website provides general guidelines that must be adhered to by all Texas adoption agencies.¹⁷¹ According to the Texas Department of Family and Protective Services, the basic requirements for adoptive families state that prospective parent(s) must: be twenty-one years of age, or older; financially stable and mature; complete an application, which also identifies their background; provide references; agree to a home study; must pass a criminal background and an abuse/neglect test by all members of the household over the age of fourteen; and attend a training session.¹⁷² Families that successfully complete the screening process will be approved. Yet these guidelines fail to adequately describe what constitutes background information. Noticeably absent is the role of race in the process. While the Constitution does not allow race to be a determining factor, there is no prohibition against it being one factor in the screening process.

Then again, this begs the question: is race considered part of a person's background information? Arguably, race may be embedded in such information, however, its weight and application goes unmentioned. The Texas Department of Family and Protective Services guidelines do not acknowledge that race is a criteria, which misleads the reader into thinking it is not part of the equation. But the debate on the existence of transracial adoption tells us otherwise. These general requirements appear to facilitate the race matching process because the influence of race goes unnoticed. It should be noted that there are additional requirements for foster care, which seem more stringent than adoption require-

171. Texas Adoption Resource Exchange, Basic Foster Care and Adoption Requirements, http://www.dfps.state.tx.us/adoption_and_foster_care/How_to_start/basic_requirements.asp (last visited Sept. 24, 2005).

172. *Id.*

ments.¹⁷³ The reasons for the strict requirements are not given. Foster care requirements may be harsher due to the fact that they are temporary placements. Therefore the family must be more sensitive to the child's needs. Once again, race is not mentioned in either part of the process.

III. THE REMOVAL OF BARRIERS TO THE PROPER APPLICATION OF THE BEST INTEREST STANDARD

A. *Exclusion of Race Not the Answer: Loopholes in Existing Legislation and Guidelines*

In evaluating the IEAP, there are several aspects that ought to be highlighted. Most importantly, the IEAP does not plainly incorporate a best interest standard for adoption placements.¹⁷⁴ Thus, there is a legitimate concern that the standard will not be used in adoptions pursuant to the IEAP.¹⁷⁵ As a result, social workers may be reluctant to exercise their discretion to decide “the best interests of the child,”¹⁷⁶ causing a substantial delay in adoptions.¹⁷⁷ Therefore, the IEAP should be amended to include ‘the best interest of the child’ language.

Moreover, section 554 of MEPA was not repealed, which requires state agencies to vigorously recruit adoptive families that reflect the racial mixture of the child.¹⁷⁸ But this section attempts to reconcile the difference by stating that this process should not delay or deny a placement based on race.¹⁷⁹ This further illustrates that the indefiniteness in the legislation is the driving force for the inconsistent application of race in the adoption context.

Under ASFA, the government did establish standards, incentives, and accountability, but left it to the states to determine how to implement those standards.¹⁸⁰ While it would not be in the best interests of children for the states to dictate a set of rules for all to follow, it would better serve the children's interests if the federal government would work with state governments to set standards with respect to the state's specific

173. *See id.* (listing additional requirements for foster care families).

174. Cynthia G. Hawkins-León & Carla Bradley, *Race and Transracial Adoption: The Answer is Neither Simply Black or White Nor Right or Wrong*, 51 CATH. U.L. REV. 1227, 1247-48 (2002).

175. *Id.* at 1248.

176. *Id.* at 1249.

177. *Id.*

178. *Id.*

179. Hawkins-León & Bradley, *supra* note 175, at 1249.

180. Adoption and Same Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115.

needs and circumstances.¹⁸¹ Furthermore, while ASFA mentions the best interest standard, it does not require states to adopt it.¹⁸² The lack of definitiveness in the legislation is the reason for the inconsistent application of the best interest standard thus allowing race to supercede all other factors in transracial adoptions.

Another loophole inherent in the legislation is the fact that it applies only to governmental agencies, and those that are the recipients of federal funds, resulting in the prevalence of race matching in the private sector.¹⁸³ Children of color seldomly enter into the public adoption system because those in that system have been removed from their natural parents.¹⁸⁴ As a result, the private adoption agencies are free to mask their policies and use race as a motivating factor in adoption placements because they are not in danger of losing any funding. This practice must be discouraged. The State Legislature should require a reporting system or have random audits of the agency's placement decisions to ensure compliance with the law.

Another factor that lacks clarification is the meaning of the word "delay" evident in all the statutes. How long is a delay? Six months? One year? Two years? What is an acceptable time frame to delay the adoption without violating the statutes? The answers to these questions must be addressed. The current federal legislation does not ensure that the best interests of the child will be met, which arguably encourages race matching practices to continue. These differences must be reconciled to align the theory behind the legislation with the purpose of the best interest standard.

Another aspect facilitating race matching policies is the lack of structured guidelines for adoption agencies. The Texas Department of Family and Protective Services guidelines, discussed earlier, lacks practical guidance for social workers. Following the passage of MEPA, the Department of Health and Human Services (HHS) extended policy guidance to adoption agencies.¹⁸⁵ Its national policy guidance is also ambiguous and does not aid in the creation of a uniform set of rules for the agencies.

181. *Report on Review of Child Welfare Programs, Hearing Before the Subcomm. on Human Resource Comm. of the House Ways and Means*, 108th Cong. (2004) (statement of Thomas C. Atwood, President, National Council for Adoption).

182. 111 STAT. 2115 (1997).

183. Suzanne Brannen Campbell, *Taking Race out of the Equation: Transracial Adoption in 2000*, 53 SMU L. REV. 1599, 1606-07 (2000).

184. Sandra Patton Imani, *Redefining the Ethics of Adoption, Race, Gender, and Class*, 36 LAW & SOC'Y REV. 813, 827 (2002) (reviewing Hawley Fogg-Davis, *THE ETHICS OF TRANSRACIAL ADOPTION* (2002)).

185. Policy Guidance on the Use of Race, Color or National Origin in Adoption, 60 Fed. Reg. 20272-01, 20272 (Apr. 25, 1995), available at 1995 WL 236376.

HHS recognizes that states have varying policies and preferences for adoption placements, yet it fails to establish standards for them to follow during the adoption process. Rather, HHS states that “determining the factors relevant in deciding whether a particular placement meets the standards, generally are matters of state law and policy. Agencies which receive federal assistance, however, may use race, culture, or ethnicity, only insofar as the Constitution, MEPA, and Title VI permit.”¹⁸⁶

The HHS guidelines further state that an adoption agency may consider race as a factor, but only to advance the best interest of a specific child; however, those of race will be subject to strict scrutiny by the courts.¹⁸⁷ Additionally, for those agencies that look at race in making placement decisions, HHS requires them to “do so in a manner consistent with the mode of individualized decision-making that characterizes the general placement process for all children.”¹⁸⁸ HHS appears to be sending mixed messages to agencies, resulting in their probable reluctance to adhere to the prohibition against using race, which creates another loophole to justify a race match.

The only examples noted by HHS for allowing race to be dispositive are in situations where the adoptive child lives in one racial community, developing a strong sense of racial identity, and makes the transition to another harmful to the child.¹⁸⁹ Arguably, there will be cases where a race match is in the best interests of the child. However, there is no specific standard available for agencies to determine when this would be the case. Once again this failure results in agencies having no incentive to deter them from the practice of race matching. HHS’s policies are just another failed attempt to close the gap.

B. *Reconciling Race and the Best Interest Standard*

The debate over transracial adoptions stems from the issue of whether race should be a factor, and if so, a determinative factor of the best interests determination.¹⁹⁰ While the easy answer for Congress was to remove race from the equation completely, the exclusion has not provided a solution for the existing barriers to transracial adoptions. While race should not be a determining factor, it should not be completely eliminated from the equation. Despite the prohibition, the fact remains that same race practices are still employed. Racial matching harms children by decreas-

186. *Id.* at 20273 (citing *Palmore v. Sidoti*, 466 U.S. 429 (1984)).

187. *Id.*

188. *Id.* at 20274.

189. *Id.*

190. *See In re R.M.G.*, 454 A.2d 776, 791 (D.C. 1982) (proposing a three part analysis to determine when race is relevant when two families are disputing to adopt a child).

ing the number of available homes. This policy inflicts greater harm on children of ethnic minorities, which goes against the fundamental purpose of the best interest standard.¹⁹¹

Indeed, the best interest standard was created to be a multi-factor balancing test. However its ambiguity allows race to dominate.¹⁹² The standard affords a broad range of discretion to courts and agencies permitting decisions to be based on “personal biases and unsupported assumptions,”¹⁹³ ignoring the more important interests of the child.¹⁹⁴ While some may argue that a case by case approach is most desirable, allowing judges and agencies such broad discretion is unwise where race is concerned. Furthermore, when there is no prior relationship between the adoptive parents and the child, there is no way to evaluate the best interest standard.¹⁹⁵ In order to have uniformity, there must be a system in place to assess and implement the standard.

Additionally, case law does not show a difference in the outcome of cases decided before and after the passage of the current federal legislation. Nearly ten years after the passage of MEPA, the impact of race in transracial adoptions remains unresolved. In a country that takes pride in being a melting pot of all cultures, this is distressing. The lack of effective remedial measures has harmed minority children, thereby making the best interest standard more like fiction rather than fact.

C. Proposed Changes

It is time to redefine the idea of a “normal” family.¹⁹⁶ The notion of a family should not depend on race. The adoption system and the legislation should focus on educating about race, not discriminating. The adoption policies should address the need to preserve a child’s access to his or her own cultural and racial heritage.¹⁹⁷ “Establishing role models and creating bonds that cross ethnicity are keys to successfully raising a child in a transracial family.”¹⁹⁸ Adoption agencies could provide classes for

191. Jane Patterson Auld, *Racial Matching vs. Transracial Adoption: Proposing a Compromise in the Best Interests of Minority Children*, 27 FAM. L.Q. 447, 455-56 (1993).

192. Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 82 (1990-1991) (“The discretion permitted under the best interests test permits racial issues to dominate other concerns.”).

193. *Id.* at 57.

194. *Id.*

195. *Id.* at 119.

196. Kimberly Liu, Op-Ed, *Adopting Racism?*, CAVALIER DAILY, Jan. 19, 2004, at 1, available at <http://www.cavalierdaily.com/CVArticle.asp?ID=E18148&pid=1095>.

197. Woodhouse, *supra* note 74, at 125.

198. Justin Ellis, *Issues of Race, Identity Hit Home; White Mainers Who Have Adopted Black Children Take on the Responsibility of Reinforcing the Youngsters’ Ethnic Heritage*, PORTLAND PRESS HERALD, Feb. 29, 2004 at A1.

interethnic families to gain insight into their adopted child's culture in order to facilitate a better understanding of the child's needs. Additionally, the agencies should provide a session on how to recognize and cope with differing identity issues.

With respect to federal legislation, the best interest standard must be clearly defined, leaving little discretion to the agencies and courts. The applicability of race should also be structured, because taking race out of the equation completely is not a solution. Rather the legislatures should determine the extent that it can be considered and when and how it plays a factor.

While it is impossible to have an all inclusive list of factors for the entire country to heed, there should be a list of universal factors that must be considered that can be substituted for any state imposed criteria. As long as systems are in place to ensure that states are in compliance with the federal legislation, these wrongful race matching policies can be eradicated. The conflicts between the laws should also be reconciled. Moreover, effective accountability systems with incentives must be implemented for state agencies and courts. This will enable state and local governments to monitor compliance, which should also be made available for the public to view.

IV. CONCLUSION

As long as there are ethnic children available for adoption, transracial adoptions will continue to be practiced. Clearly, there is no easy answer to the emphasis race has in transracial adoptions. Instead of banning the use of race altogether, the adoption and legal system should be guided on when to use it as a factor. The ultimate goal remains to preserve the best interest of the child. Excluding race altogether from the equation would undermine this goal. All children have needs, some more than others, and our legislation should embrace those differences and focus on providing education about those differences instead of discriminating because of them.