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Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind.

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COMMENTS

Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?

Jo Beth Eubanks

So I can dream of a day, perhaps nearer than I think, when childless parents will take a child for their own without caring what the color of the skin may be. On that day prejudice will really be ended and the ultimate reach of love achieved.[1]

I. INTRODUCTION

The video film footage is searing — a crying, screaming three-year-old African-American[2] child, Christopher, is forcibly removed from the only family he has ever known, the Caucasian couple who have been his foster parents since he was five weeks old.[3] The subsequent news coverage focused intense public scrutiny on the issue of transracial adoption[4] in Texas.[5]

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1. PEARL S. BUCK, CHILDREN FOR ADOPTION 91 (1964).

2. *See* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332-33 n.2 (1988) (discussing interchangeable use of terms "African-American" and "Black" with upper-case "B" to denote specific cultural-minority group, similar to "Asian" and "Latino"). This Comment will adhere to the "African-American" term.

3. *KMOL News* (San Antonio NBC affiliate television broadcast, Oct. 12, 1992); *see also* Lisa Mascaro, *Racial Bias Cited in Fierce Battle over Foster Baby*, SAN ANTONIO LIGHT, Oct. 15, 1992, at A1 (discussing Jenkins case). This story detailed the efforts of Phillip and Lana Jenkins, a Caucasian family from Abilene, Texas, to adopt their African-American foster child, Christopher, in spite of the opposition of the Texas Department of Protective and Regulatory Services, which wanted to remove Christopher and place him in an African-American home. *Id.* at A12. The Texas Department of Protective and Regulatory Services's physical removal of Christopher from the Jenkins home was depicted in the KMOL Newscast of October 12, 1992. *KMOL NEWS* (San Antonio NBC affiliate television broadcast, Oct. 12, 1992). The *Jenkins* case was decided in favor of the Caucasian foster parents, granting them the right to adopt Christopher. *In re* Christopher Dewayne Harden, Nos. 1067-CX and 2828-CX (Dist. Ct. of Taylor County, 326th Judicial Dist. of Texas, Feb. 26, 1993); *see also* RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 6-9 (1987) (concerning attempt at transracial adoption). The authors recount the experiences in 1985 of a childless Caucasian couple in Maryland, both special-education teachers, who attempted to adopt their African-American retarded foster child who had been in their care since birth. *Id.* at 6. The parallels to the *Jenkins* case include the state agency's insistence on finding an African-American adoptive family for the child; the attendant media uproar, both locally and nationally; the agency's subsequent reevaluation of its policies; and an African-American state senator's introduction of legislation to prohibit the blocking of adoptions on the basis of race. *Id.* at 7-8.

4. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1174-75 (1991) (noting that "transracial adoption" generally used in context of placement of African-American child with Caucasian parents). In this Comment, the term is used generally to refer to the placement of a child in the home of parents of a different race or ethnic heritage.

5. *See* Lisa Mascaro, *Racial Bias Cited in Fierce Battle over Foster Baby*, SAN ANTONIO

Although the Texas Family Code is silent on this issue,[6] the Texas Department of Protective and Regulatory Services (formerly Texas Department of Human Services), the agency charged with regulating adoption, has administrative policies stipulating same-race placement as a primary guideline for foster care and adoption.[7] However, in response to the media and public

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LIGHT, Oct. 15, 1992, at A1 (noting that *Jenkins* case placed state adoption policies, which consider race and ethnicity, into public spotlight); Mike Tolson, *Foster Parents Call for Change*, SAN ANTONIO LIGHT, Nov. 13, 1992, at D1 (detailing parents' attempts to adopt crossracially and noting state removal of Christopher from Jenkins family); *Ethnicity Should Not Be Key in Matching Child with Couple*, SAN ANTONIO LIGHT, May 24, 1992, at D1 (commenting through editorial on transracial adoption); *see also* Suzanne McAuliffe, *Anglo Couple Battle to Adopt Hispanic Girl*, SAN ANTONIO LIGHT, May 19, 1992, at A1 (detailing efforts of Caucasian couple to adopt Hispanic baby). This adoption dispute was known as "the *Baby Annie* case," and was also widely reported in the media. Cheryl and Nathan Peacock sought to adopt their Hispanic foster child, Annie. *Id.* The state adoption agency contested this adoption both on racial grounds and to keep Annie with her siblings. *Id.* at 5; Dan Trotta, *Anglo Couple Get Baby Annie "With God's Help"*, SAN ANTONIO LIGHT, Dec. 1, 1992, at A1, A8 (noting *Baby Annie* case heard in district court in San Antonio, with adoption to be finalized in December, 1992). Adoption records are sealed at the conclusion of the proceedings and are, therefore, not available for review. *See generally* Usha Lee McFarling, *Adoption Agency Ripped: Foster Parents, Senators Urge Overhaul of System*, SAN ANTONIO LIGHT, Aug. 19, 1992, at C1 (describing Texas Senate hearing on issue of transracial adoption); David McLemore, *Adoption Case May Be Pivotal*, DALLAS MORNING NEWS, Dec. 6, 1992, at 39A (quoting state officials who express intentions to review agency policies on transracial adoption).

6. TEX. FAM. CODE §§ 16.01-02 (Vernon 1986 & Supp. 1992). The Texas Family Code states: "Who May be Adopted[:] Any child residing in this state at the time a petition requesting adoption is filed may be adopted. . . . Qualifications of Petitioner[:] any adult may petition to adopt a child who may be adopted." *Id.*

7. TEXAS DEP'T OF HUMAN SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 6925 (1990) (on file with *St. Mary's Law Journal*). The "Management Policy for Selecting an Adoptive Home" states the following:

> The workers and supervisors must consider the following issues when selecting a home.
>
> 1. The child's need for placement with his siblings. DHS prefers to place siblings as a family group. . . .
> 2. Preservation of the child's racial and ethnic identity and heritage. DHS prefers to place children with adoptive parents whose race or ethnicity is the same as the child's.
>
> Note: When the selection of an adoptive home does not conform to either of the two considerations listed above, the worker must document the reasons for the exception and the supervisor must approve and sign the worker's documentation.

Id.; *see Adoption Bill Eyes Race*, SAN ANTONIO LIGHT, Dec. 18, 1992, at E8 (discussing state proposed adoption guidelines removing race as criterion); *see also* Mike Tolson, *Foster Parents Call for Change*, SAN ANTONIO LIGHT, Nov. 13, 1992 at D1 (detailing several families' difficulties in adopting children of different race because of opposition from Texas Department of Human Services). The article quotes a child-placement worker who complains that children remain in state custody for long periods of time instead of being placed in adoptive homes of different ethnicity. *Id.*

concerns, the department has undertaken a review of its policies,[8] and a state

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8. TEXAS DEP'T OF HUMAN SERVS., CHILD PROTECTIVE SERVICE HANDBOOK § 6925 (Draft Revision 1993) (on file with *St. Mary's Law Journal*). The revision is as follows:

The primary consideration in selecting an adoptive home for a child is the child's best interest. In pursuit of the child's best interest, TDPRS tries to base each placement on an ~~the selection of a home for the child is based on~~ informed evaluation and understanding of the child's needs and on the adoptive family's understanding of and potential for meeting these needs. . . .

~~The workers and supervisors must consider the following issues when selecting a home.~~ The workers and supervisors who select a home for a child must consider the issues listed below. However, consideration of these issues should not delay the selection of a home.

Note: The order in which these issues are listed is not intended to suggest their relative importance. The weight given to each of them varies from placement to placement according to the child's specific short-term and long-term needs. In every placement, the importance of a given issue depends on the individual child's particular needs.

Issues to Consider

1. The appropriateness of continuing the foster parents' relationship with the child through adoption; when the foster parents have made a request to adopt the child . . . .
2. ~~1.~~ The child's need for placement with his siblings.
   Placing a child with his siblings ~~DHS prefers to place siblings as a family group. This~~ preserves family identity and reduces separation trauma. When it is not possible to place siblings together, or when staff determine that a sibling placement is not in the best interests of the individual children, workers must try to place the siblings with adoptive parents who are committed to helping them stay in *touch* ~~contact~~ with one another.
3. ~~2.~~ Preservation of the child's racial and ethnic identity and heritage.
   ~~DHS prefers to place children with adoptive parents whose race or ethnicity is the same as the child's.~~ *Placing a child with adoptive parents whose race or ethnicity is the same as the child's helps the child develop a sense of identity consistent with his racial or ethnic background. The department will, however, consider placing a child with adoptive parents of a different race or ethnicity if staff determine that the adoptive parents are able to*
   - *help the child*
     - *develop a sense of identity consistent with the child's racial and ethnic background, and*
     - *learn to cope with difficulties that may arise from racial or ethnic differences, both within and outside the adoptive family; and*
   - *develop a plan for helping the child manage the issues described above as the child reaches developmental milestones.*

   ~~Note: When the selection of an adoptive home does not conform to either of the two considerations listed above, the worker must document the reasons for the exception and the supervisor must approve and sign the worker's documentation.~~
4. ~~3.~~ The child's known or predicted needs for special services after the adoptive placement, including therapy or special medical care.
5. ~~4.~~ The prospective adoptive family's ability and willingness to adapt its discipline practices to the child's needs.

representative has introduced a bill for consideration in the 1993 legislative session, which would forbid the use of race as a primary consideration in adoption placements.[9]

As revealed by this current controversy, a wide divergence of opinion exists in the legal and social-work communities regarding the appropriateness of "race matching"[10] in foster care and adoption.[11] Historically, both pub-

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6. ~~5.~~ The personalities, temperaments, and lifestyles of the child and of the adoptive family.
7. ~~6.~~ The family's ability to accept and develop the child's intellectual and scholastic capabilities.
8. ~~7.~~ The family's ability to accept and provide for the child's religious beliefs and practices.
9. ~~8.~~ The family's plan for protecting the child's health if, for religious reasons, the family does not believe in medical care.
11. ~~10.~~ The family's commitment to ensuring that the child has a permanent placement.

Id.

9. Tex. H.B. 196, 73d Leg., R.S. (1993). State Rep. Karyne Jones Conley, who is African-American and represents District 120, introduced the following bill into the 1993 Legislative Session:

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subchapter A, Chapter 16, Family Code, is amended by adding Section 16.081 to read as follows:

Sec. 16.081. RACE MAY NOT BE CONSIDERED AS A PRIMARY FACTOR. In determining the best interests of the child under Section 16.08 of this code, the court may not consider the race of the child or the prospective adoptive parents as a primary factor.

SECTION 2. Subchapter B, Chapter 41, Human Resources Code, is amended by adding Section 41.028 to read as follows:

Sec. 41.028. RACE MAY NOT BE CONSIDERED AS A PRIMARY FACTOR. The department may not consider the race of a child or a prospective foster family as a primary factor in placing the child in foster care.

SECTION 3. Chapter 47, Human Resources Code, is amended by adding Subchapter C to read as follows:

SUBCHAPTER C. PLACEMENT OF CHILDREN

Sec. 47.041. RACE MAY NOT BE CONSIDERED AS A PRIMARY FACTOR. The department, a county child-care or welfare unit, or a licensed adoption agency may not consider the race of a child or prospective-adoptive parents as a primary factor in placing the child for adoption.

Id.

10. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1176 (1991) (defining race matching as placing "children who were physically and mentally as close a match as possible to the biological children they [the parents] might have produced"). *See generally id.* at 1176 n.15 (noting Child Welfare League of America's Standards for Adoption Services 1958 guideline, which provides that selection of home should not be based on physical resemblances, except for racial characteristics such as color); Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 333-34 (1979) (arguing that race matching may result in "undesirable" children, such as African-American or older children, remaining in foster or institutional care).

lic- and private-placement agencies have widely employed the practice, whether sanctioned by existing laws or not.[12] The practice of race matching raises a serious concern about the constitutionality of state administrative procedures, which base their decisions on the race or ethnicity of the parties involved. Such state actions should be determined to be violative of the equal protection, due process, and liberty rights of the adoptive parents and the adoptee, rights which are guaranteed by both the Fourteenth Amendment of the United States Constitution[13] and the Texas Constitution.[14]

This Comment will trace the history of transracial adoption and outline

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11. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1210-11 (5th Cir. 1977) (denying adoption in which race consideration played part), *cert. denied*, 437 U.S. 910 (1978); McLaughlin v. Pernsley, 693 F. Supp. 318, 331 (E.D. Pa. 1988) (analyzing race as criteria in adoption), *aff'd*, 876 F.2d 308 (3d Cir. 1989); *In re* R.M.G. & E.M.G., 454 A.2d 776, 791 (D.C. App. 1982) (setting up three-prong test to determine if race consideration is in best interests of child). *See generally* James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487 (1988) (arguing that transracial adoption is detrimental, for most part, for African-Americans); Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 327-35 (1968) (presenting early perspective on question of transracial adoption); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 126-27 (1990) (arguing that race should be factor only in initial placement of children in foster care or adoption, but not in other custody contexts).

12. *See* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 529-30 (1984) (criticizing social workers for vacillating positions on transracial adoption); Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 354 (1979) (noting that while race matching is controversial, it is nonetheless part of procedural process of most agencies). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163 (1991) (discussing current race-matching policies).

13. U.S. CONST. amend. XIV § 1. The Fourteenth Amendment provides:

> No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. See generally Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 335-45 (1968) (discussing implications of statutes and social-agency practices regarding transracial adoption on due process and equal protection aspects of federal Constitution); D. Michael Reilly, *Constitutional Law: Race as a Factor in Interracial Adoption*, 32 CATH. U. L. REV. 1022, 1024-37 (1983) (discussing constitutionality of several court decisions on transracial adoption).

14. TEX. CONST. art. I, § 3. The Texas Constitution provides: "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to exclusive separate public emoluments, or privileges, but in consideration of public services." *Id.*; *see also* Biggs v. Washington Nat. Ins. Co., 275 S.W.2d 566, 569 (Tex. Civ. App.—Waco 1955, no writ) (affirming Texas constitutional mandate that all persons are to be judged in court by same legal standards, regardless of race or color).

the current controversies over the practice of race matching and its inclusion as a factor in the existing standard of child placement known as "the best interests test." This Comment will then analyze judicial treatment and statutory provisions that have been enacted in other jurisdictions to deal with transracial adoption; question the constitutionality of race matching; and explore proposed alternate solutions. Finally, in discussing the currently proposed legislation, this Comment will recognize the need for the Texas Legislature to take action to prohibit race matching in order to comply with the state's existing mandate to act in the best interests of the child.

II. LEGAL BACKGROUND

A. *History of Adoption*

Adoption is "one of the oldest and most widely employed legal fictions."[15] It was mentioned as early as 2000 B.C. in the Code of Hammurabi, it occurred during Biblical times, and it was widely practiced by the ancient Romans.[16] However, because of the feudal emphasis on bloodlines to transfer inheritance, England did not recognize adoption until 1926.[17] This absence of English common-law precedent hampered the development of adoption in the United States.[18] Nevertheless, Texas, along with Louisiana, recognized

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15. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743 (1956).

16. *See In re* Thorne's Estate, 49 N.E. 661, 662 (N.Y. 1898) (commenting on practice of adoption of "strangers to the blood" in ancient Sparta, Athens, Rome and Germany); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744-45 (1956) (noting early practitioners of adoption). *See generally* Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 445-48 (1971) (detailing adoption practices of ancient Romans); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1041 (1979) (noting widespread practices of adoption ranging from ancient Europe, through tribal Africa, Middle East, Asia, and Oceania).

17. *See* John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 335 (1922) (presenting pre-1926 perspective on complete lack of adoption in England and stating that parents cannot abdicate parental responsibilities by contract); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 746 (1956) (referring to England's Adoption of Children Act of 1926); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 448 (1971) (tracing early English law and noting "inordinately high regard for blood lineage" of English); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1045 (1979) (commenting on inability of English common law to incorporate adoption). The English common law was unable to accommodate a system of adoption, because of its complicating effects on the English system of land title, which passed solely through descent, and its violation of the rules of inheritance. Furthermore, adoption interfered with parental authority, which was viewed as an absolute, God-given right. *Id.*

18. *See In re* D.L., 479 N.W.2d 408, 414 (Minn. App. 1991) (stating that adoption en-

the practice of adoption before the rest of the country because of the early influence of the civil law of Spain and France.[19] The earliest adoption statutes in the United States were enacted in the mid-nineteenth century.[20] Although the ancient and civil-law practice of adoption was born of the desire for continuity of the family,[21] adoption in the United States arose largely

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tirely statutory and not known at common law); *In re* Thorne's Estate, 49 N.E. 661, 662 (N.Y. 1898) (emphasizing adoption as "form of domestic relation" was unknown at English common law); Belden v. Armstrong, 113 N.E.2d 693, 696 (Ohio 1951) (noting adoption exists by statute only, not at common law). *See generally* Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 306-09 (1967) (tracing statutory development of adoption in United States); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 743 (1956) (commenting on lack of adoption law in England); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 456-61 (1971) (noting early American substitutes for adoption, such as "putting out" children from one home to another, indentured servitude, and apprenticeship).

19. *See* Teal v. Sevier, 26 Tex. 516, 520-21 (1863) (reporting early Texas case dealing with adoption under Spanish law); *see also* Vidal v. Commagere, 13 La. Ann. 516, 517 (1858) (accepting term "adoption" in context of meaning at Roman and Spanish law); *In re* Thorne's Estate, 49 N.E. 661, 662 (N.Y. 1898) (discussing provisions of Roman adoption law, modified by Justinian, which were conveyed to modern Europe, including France and Spain). *See generally* John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 336 (1922) (noting Roman law requirements in adoption, which were directly reflected in Texas and Louisiana statutes); Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 306 (1968) (comparing development of adoption law in Texas and Louisiana with remainder of United States).

20. *See* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1042-45 (1979) (tracing passage of Massachusetts adoption statute of 1851). The Massachusetts statute was the first modern adoption law. *Id.* at 1042. Its importance was twofold: first, it overruled all of the fundamental English common-law principles and precedent; second, it shifted the traditional focus of adoption from benefitting the adopter to benefitting the adoptee. *Id.* at 1042-43. For the first time, the welfare of the adoptive child became paramount, and the qualifications of the prospective parents were subject to scrutiny. *Id. See generally* Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 306 (1968) (commenting on early state laws); Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 748 (1956) (citing early Mississippi statute of 1846 and Massachusetts statute of 1851); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465-89 (1971) (giving detailed analysis of early American adoption laws and rise of private-placement agencies).

21. *See* John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 332 (1922) (stating that Roman adoption designed to avoid termination of family line as well as perpetuate family religious worship); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 447 (1971) (noting that Roman adoption was meant to benefit adopting parent, not child); Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1041-42, n.6 (1979) (citing examples of adoptive practices, which fulfill purposes of perpetuating ancestral worship and providing descendants to those lacking heirs).

from concern for the welfare of neglected and dependent children.[22] This interest in the welfare of the child manifested itself in the evolution of the "best interests"[23] standard, a "uniquely American contribution to the law of adoption."[24]

B. *The Best Interests Standard*

The best interests standard has been widely used as the appropriate test in

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22. *See In re* Thorne's Estate, 49 N.E. 661, 662 (N.Y. 1898) (referring to pre-statutory adoptions in mid-nineteenth century New York administered by charitable organizations on behalf of destitute and homeless children); Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 488 (1971) (summarizing mid-nineteenth century rise of private-placement agencies whose efforts at child welfare led to inhome placements). As adoption became more commonplace, public pressure increased to regulate the relations between children and parents and to assure benefits of heirship to the children. *Id.* at 488-89. These pressures led to the passage of general adoption statutes in the latter half of the century. *Id.*; *see also* Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 748-49 (1956) (stating that American adoption laws departed radically from Roman precedent in concern for welfare of child); Susan L. Brooks, Note, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130, 1137 (1991) (citing deinstitutionalization movement as impetus for increased child placements).

23. *See* Linda Henry Elrod (revised by Steven C. Windsor, 1992), *Child Custody and Visitation*, *in* FAMILY LAW AND PRACTICE 32-1, 32-16, 32-17 (Arnold H. Rutkin, ed. 1992) (stating that best interests determination requires judicial assessment and prediction based on facts and circumstances in each case). The trial judge must, based on his perceptions, decide which custodial arrangement will best serve "the child's physical, psychological and emotional needs." *Id.*; *see also* ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN, 16-18 (1985) (noting that child's best interests is alternative that maximizes good for child and commenting on difficulty in predicting consequences of choices and selecting criteria to be used in evaluating alternatives). *See generally* Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1072-84 (1979) (tracing early development of best interests standards in 1840s and citing subsequent cases weighing custodial rights in light of children's interests); Edward L. Barker & Cathryn L. Hamman, Note, *The Best Interests of the Child in Custody Controversies Between Natural Parents: Interpretations and Trends*, 18 WASHBURN L.J. 482, 483 (1979) (discussing evolution of determining child custody from early common-law view of child as father's chattel through emerging dominance of best interests doctrine).

24. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 749 (1956); *see also In re* Adoption of J.S.R., 374 A.2d 860, 863 (D.C. App. 1977) (tracing best interests standard from late-nineteenth century usage to modern applications); Chapsky v. Wood, 26 Kan. 650, 655-57 (1881) (noting balancing of factors to decide custody of child between father and aunt who raised child); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (holding that sole concern of court in custody dispute is interest of child, rather than mediating parents' dispute). *See generally* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 54-55 (1990) (noting application of best interests standard in custody, adoption, and foster care proceedings); Richard A. Edwards, Note, *Adoption — The Welfare and Best Interest of the Child*, 5 WILLAMETTE L. REV. 93, 93-102 (1968) (enumerating factors to be considered in determining best interests of child).

deciding child placement, both in custody and adoption proceedings.[25] Generally, the best interests standard holds that the sole guideline in determining placement of the child should be furtherance of the welfare of the child.[26] This standard requires that placement agencies and courts consider various factors, such as the age of the child, family resources, stability of the family, blood relationships, and preference of the child.[27] However, the best interests concept has been criticized by commentators as a generalized standard that is too vague and subjective,[28] and, therefore, subject to overly broad

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25. *See* TEX. FAM. CODE § 16.08 (Vernon 1986) (setting forth best interests test). This provision states: "If the court is satisfied that . . . the adoption is in the best interest of the child, the court shall make a decree granting the adoption." *Id.*; *see also* Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (noting state has duty to protect interests of children); *In re* D.I.S. for the Adoption of S.A.O., 494 A.2d 1316, 1322 (D.C. App. 1985) (stating that best interests of child has been standard in custody cases for many years); Finlay v. Finlay, 148 N.E. 624, 626 (N.Y. 1925) (Justice Cardozo opining that chancellor in custody dispute acts as *parens patriae* to do what is in best interests of child); Andrea Charlow, *Awarding Custody: The Best Interests of the Child and Other Fictions*, 5 YALE LAW & POL'Y REV. 267, 267-69 (1987) (discussing current standard); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 54 (1990) (noting best-interest rule widely accepted).

26. *See Palmore*, 466 U.S. at 432 (stating that welfare of child controlling factor); State *ex rel.* Portage County Welfare Dep't v. Summers, 311 N.E.2d 6, 12 (Ohio 1974) (citing historic preference for consideration of child's interests in adoption proceedings); Davis v. Collins, 147 Tex. 418, 425, 216 S.W.2d 807, 811 (1949) (affirming that welfare and rights of child paramount consideration in adoption); Legate v. Legate, 87 Tex. 248, 252, 28 S.W 281, 282 (1894) (stating that child's interests must be served above all others in adoption); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.8, at 653 (2d. ed. 1988) (affirming that adoption, as well as custody, utilizes best interests standard in determining placement). *But see* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 503 (1984) (stating that best-interest consideration unacceptable as either rule or goal because consideration inhibits actual analysis of competing values and evaluation of such values in placement considerations).

27. *See* Turner v. Pannick, 540 P.2d. 1051, 1054 (Alaska 1975) (listing such factors as age, sex and health of child, emotional attachments of parties, moral fitness of parties); *In re* Petition R.M.G. & E.M.G., 454 A.2d 776, 781 (D.C. App. 1982) (listing factors to be considered in best interests analysis); HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 21.8, at 653-54 (2d. ed. 1988) (listing factors that courts sometimes find not dispositive in adoption, such as unmarried status and age of adoptive parent); David L. Chambers, *Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 487-99 (1984) (outlining differing ways to consider best interests of child, including child's own perception).

28. *See, e.g.*, ROBERT H. MNOOKIN, IN THE INTEREST OF CHILDREN, 16-18 (1985) (commenting on indeterminacy of best interests standard and pointing out many possible interpretations based on competing views and values of decisionmaker); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 527-45 (1984) (analyzing child-welfare agencies, minority groups, and children whose individual interests and values compete against one another under the banner of "best interests"); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 58-59 (1990) (criticizing best interests standard as incapable of functioning as guideline in custody cases).

judicial interpretation.[29] This subjectivity has especially troubling implications for transracial adoption which, like all other placements, is governed by the best interests standard.[30]

C. *Transracial Adoption*

1. Race Matching and the *In re Minor* Standard

Traditionally, race has been one of the relevant factors considered by the courts in determining the best interests of the child.[31] Courts and legal commentators have addressed extensively the issue of whether a racial match between adoptee and adoptive parents should be one factor, or indeed the overriding factor, of the best interests determination.[32] In one of the early

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29. *See* B.G. v. San Bernardino County Welfare Dep't, 523 P.2d 244, 256-57 (Cal. 1974) (opining that sole consideration of best interests would allow judge to remove child from biological parents without showing of detriment to child); *In re* D.I.S., 494 A.2d at 1323 (stating that best interests test is flexible standard requiring judge to make rational decisions free of bias, reversible only for abuse of discretion); *In re* J.S.R., 374 A.2d 860, 863 (D.C. 1977) (stating that best interests standard by necessity is imprecise and elastic); Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 309 (1968) (observing that courts freely interpret standards); Shari O'Brian, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 486 (1986) (concluding that courts granted wide latitude by statutes that allow race as factor bearing on best interests determination).

30. *See Palmore*, 466 U.S. at 432 (stating that child's welfare was controlling factor in racially disputed case); Beazley v. Davis, 545 P.2d 206, 207 n.2 (Nev. 1976) (overturning lower court decision and noting trial court's reliance on physical appearance of children in placing them with African-American father); Raysor v. Gabbey, 395 N.Y.S.2d 290, 294 (N.Y. 1977) (stating that decision on custody for racially mixed child must focus on who can best furnish guidance and confront future problems of race); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 503-04 (1984) (noting that transracial placement troubled by competing interests of child versus minority cultural identity). *See generally* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 56-57 (1990) (stating best interests rule does not help resolve issues when racial differences present).

31. *See In re* R.M.G. & E.M.G., 454 A.2d 776, 782 (D.C. 1982) (stating "the question of race is important" in adoption); *In re* Davis, 465 A.2d 614, 622 (Pa. 1983) (concluding that race should be factor considered in child-custody proceeding); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 81 (1990) (stating that race often used as factor even if alternative to crossracial adoption is institutionalization). *But see* Beazley v. Davis, 545 P.2d 206, 208 (Nev. 1976) (holding that race consideration impermissible and violative of Fourteenth Amendment of United States Constitution); Commonwealth *ex rel.* Lucas v. Kreischer, 299 A.2d. 243, 246 (Pa. 1973) (holding that interracial marriage of mother was not valid reason to deny custody of children). *See generally* D. Michael Reilly, Note, *Constitutional Law: Race as a Factor in Interracial Adoption*, 32 CATH. U. L. REV. 1022, 1023-24 (1983) (presenting analysis of three-prong test developed by District of Columbia Court of Appeals to determine whether race plays factor in adoption).

32. *See In re* R.M.G., 454 A.2d at 791 (proposing specific three-part analysis to determine relevancy of race when two families are vying for child). The court's three-step evalua-

leading cases dealing with interracial adoption, *In re Adoption of a Minor*,[33] an African-American husband wished to adopt his Caucasian wife's child who had been born out of wedlock.[34] The trial court denied the adoption, stating that the child "might lose the social status of a white man by reason of the fact that by record his father will be a negro."[35] The appellate court, in overturning the lower court's decision, said that race may be relevant, but that as a "factor alone [race could not] be decisive in determining the child's welfare."[36] Courts have since ostensibly followed this case's standard, "relevant but not decisive," when confronted with a custody or adoption proceeding involving race.[37]

2. The Early View of Transracial Adoption

Historically, the states' statutory treatment of the issue of race in adoption varied from outright prohibition to silence.[38] For many years, some states,

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tion is: "(1) how each family's race is likely to affect the child's development of a sense of identity, including racial identity; (2) how the families compare in this regard; and (3) how significant the racial differences between the families are when all the factors relevant to adoption are considered together." *Id.*; *see, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1204 (5th Cir. 1977) (allowing race to play substantial part in denying adoption), *cert. denied*, 437 U.S. 910 (1978); *Lucas*, 299 A.2d at 245-46 (holding that race may not be considered in custody battle); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1254-56 (1991) (arguing that race should not be factor in adoption proceedings); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 545-47 (1984) (suggesting that hierarchy of interests exists in determining relevance of race in adoption placement, including interests of child and relevant social goals). *See generally* Jay M. Zitter, *Race as Factor in Adoption Proceedings*, Annotation, 34 A.L.R.4th 167 (1984) (summarizing cases which address race in adoption and categorizing them according to granting or denying adoption).

33. 228 F.2d 446 (D.C. Cir. 1955).

34. *Id.*

35. *Id.* at 447.

36. *Id.* at 448.

37. *See, e.g.*, Compos v. McKeithen, 341 F. Supp. 264, 266 (E.D. La. 1972) (finding race relevant but not determinative); *In re* Davis, 465 A.2d 614, 624 (Pa. 1983) (noting that undue emphasis should not be placed on race); *In re* Gomez, 424 S.W.2d 656, 658 (Tex. Civ. App.—El Paso 1967, no writ) (citing *Minor* standard in decision striking down statutory prohibition against crossracial adoption). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1239 (1991) (finding that courts use race as significant and possibly determinative factor); D. Michael Reilly, Note, *Constitutional Law: Race as a Factor in Interracial Adoption*, 32 CATH. U. L. REV. 1022, 1025 (1983) (stating that courts inconsistently interpret *Minor* standard due to impreciseness).

38. *See, e.g.*, Compos v. McKeithen, 341 F. Supp. 264, 264 (E.D. La. 1972) (citing LA. REV. STAT. tit. 9, § 422: "[a] single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race"); *In re* Gomez, 424 S.W.2d 656, 657 (Tex. Civ. App.—El Paso 1967, no writ) (citing TEX. REV. CIV. STAT. § 8, art. 46a:

including Texas, prohibited cross-racial adoption by statute.[39] In a seminal 1967 case, *In re Gomez*,[40] the Texas Court of Civil Appeals struck down the Texas statute forbidding such adoptions.[41] The court declared the law in violation of both the Texas Constitution and the Fourteenth Amendment of the United States Constitution.[42] Five years later, the last outright prohibition on transracial adoption fell when a United States district court overturned a similar Louisiana statute,[43] declaring that race could be a relevant, but not determinative, factor in adoption.[44]

3. The Continuing Debate Over the Role of Race in Adoption

Although governmentally sanctioned racial discrimination in the form of a blanket prohibition of transracial adoption is now unconstitutional, an intense debate still rages regarding the proper role of race in child placement. This battle has been, and continues to be, waged on a philosophical level in both the legal and social work arenas.[45] As social conditions changed and

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"[n]o Caucasian child can be adopted by a negro person, nor can a negro child be adopted by a Caucasian person"). *But see* Hodges' Heirs v. Kell, 51 So. 77, 81-82 (La. 1910) (allowing Caucasian father to adopt illegitimate biracial children because at time of birth no miscegenation statute was in place); Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 308 (1968) (noting 1962 South Carolina statute not expressly prohibiting interracial adoption, but declaring misdemeanor for Caucasian person to give over Caucasian child to care or custody of African-American person); Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 722 n.36 (1950) (listing various state statutes which in 1950 prohibited or somehow restricted transracial adoptions).

39. *See Compos*, 341 F. Supp. at 268 (overturning last remaining statutory prohibition on transracial adoption); *In re* Gomez, 424 S.W.2d at 659 (overturning Texas statute that had forbidden transracial adoption). *See generally* Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 306-14 (1968) (discussing adoption law in 1968, including states which outlawed transracial adoption); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 80-81 (1990) (discussing *Compos* decision).

40. 424 S.W.2d 656 (Tex. Civ. App.—El Paso 1967, no writ).

41. *Id.* at 659.

42. *Id.* at 657-58. The court noted that the question of whether denial of adoption on the basis of race was unconstitutional presented an issue of first impression for both state and federal courts. *Id.*

43. *See Compos*, 341 F. Supp. at 268 (declaring that statute violated equal-protection standard).

44. *Id.* at 266.

45. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1204-05 (5th Cir. 1977) (allowing race to play very substantial part in denying adoption of African-American child by Caucasian adoptive parents), *cert. denied*, 437 U.S. 910 (1978); McLaughlin v. Pernsley, 693 F. Supp. 318, 331 (E.D. Pa. 1988) (determining that race alone could not be deciding factor in adoption placement); *In re* Davis, 465 A.2d 614, 622 (Pa. 1983) (concluding that race should be factor considered in child-custody proceeding); RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 3 (1987) (noting

legal barriers to segregation fell in the 1960s, the acceptance of transracial adoption grew.[46] In 1972, however, the National Association of Black Social Workers (NABSW) took a militant stand against transracial adoption, referring to it as "genocide,"[47] and subsequently, crossrace placements fell 39% in one year.[48]

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popular conception among many child-welfare professionals that transracial adoption is unnatural); *cf.* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, LAW & CONTEMP. PROBS., Summer 1975, at 226, 246-47 (noting standards used in various types of custody cases have differing guidelines, and commenting that judicial, legislative, and scholarly authorities increasingly demand uniform standard). *Compare* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1254 (1991) (arguing against any official racially determined adoption-placement policy) *with* James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 533-44 (1988) (proposing act which makes race dispositive in adoption placement).

46. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 12 (1967) (declaring state's anti-miscegenation law unconstitutional); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (striking down Florida statute forbidding African-American/Caucasian cohabitation as violative of constitutional freedom from official discrimination on basis of race); Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (finding racially segregated schools unconstitutional). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1178 (1991) (citing increase in transracial adoptions from 733 reported in 1968 to 2,574 reported in 1971); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 505-16 (1984) (finding seven major factors which led to increase in transracial adoptions in 1950s and 1960s). These factors are: (1) the increasing numbers of children, especially abused children, entering the placement system; (2) deficiencies in the foster-care system, which kept many children in long-term foster care; (3) clinical studies, which identified the detrimental effects of long-term institutionalization and maternal deprivation; (4) the dramatic decline in the number of healthy Caucasian babies available for adoption, because of the increasing availability of contraception and abortion; (5) the social-work profession's declining emphasis on race matching in adoption; (6) the insufficient number of minority homes wishing to adopt; (7) changing social attitudes towards racial integration, which led to an increased acceptance of transracial adoption. *Id.*

47. *See* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 517-18 (1984) (quoting National Association of Black Social Workers (NABSW) Position Paper from April 1972). The NABSW paper stated:

> [W]e have taken the position that Black children should be placed only with Black families whether in foster care or for adoption. Black children belong, physically, psychologically and culturally in Black families in order that they receive the total sense of themselves and develop a sound projection of their future. Human beings are products of their environment and develop their sense of values, attitudes and self concept within their family structures. Black children in white homes are cut off from the healthy development of themselves as Black people.
>
> . . . .
>
> We the participants of the workshop have committed ourselves to go back to our communities and work to end this particular form of genocide.

Id.

48. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race*

Similarly, the Standards for Adoption Services of the Child Welfare League of America (CWLA) revealed the vacillating attitudes towards cross-racial placement over the last thirty-five years. In 1958, the CWLA advocated race matching; in 1968, it reversed its position to encourage transracial adoption; and in 1972, it retreated to its advocacy of race matching yet again.[49] A similar pattern of adoption placement for Native American children emerged, culminating in the 1978 Indian Child Welfare Act,[50] which mandated a strong preference for placing Indian children in racially matched homes.[51] The NABSW and several commentators have proposed passage of an act for African-American children analogous to the Indian Child Welfare Act.[52]

Matching in Adoption, 139 U. PA. L. REV. 1163, 1180 (1991) (citing falling numbers of African-American adoptions for years 1971 through 1973); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 517-18, 528 (1984) (discussing effect of NABSW position on transracial adoptions and attitudes of social workers).

49. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1181 (1991); *see also* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 528 (1984) (decrying social-work professionals' tendency to alter commitment to transracial adoption based on political considerations, as exemplified by bowing to pressure from NABSW).

50. Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (1983).

51. *Id.* Section 1915, which deals with adoption of Native-American children, specifies that preference should be given to the child's extended family, his tribe, or other Native-American families. Furthermore, preadoptive placement and foster care are limited to the above three categories, or an institution for Native-American children. *Id.*; *see also* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 520-22 (1984) (detailing adoption of Native-American children in large numbers during 1960s and 1970s, which resulted in fears that tribal cultural identity would be lost); Richard B. Taylor, Note, *Curbing the Erosion of the Rights of the Native Americans: Was the Supreme Court Successful in* Mississippi Band of Choctaw Indians v. Holyfield?, 29 J. FAM. L. 171, 187 (1990) (noting that Congress passed Indian Child Welfare Act because large number of Native-American children removed from tribes through adoption by non-tribal members). The Act was intended to serve the best interests of the Native-American child as well as the tribe. *Id.*

52. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1182 n.43 (1991) (noting that NABSW proposed National Black Heritage Child Welfare Act as amendment to Indian Child Welfare Act to mandate same race placement for all minority children); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 533-44 (1988) (detailing proposed draft of Afro-American Child Welfare Act of 1988); Marlon N. Yarbrough, Comment, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353, 360 (1988) (arguing for passage of National Black Heritage Child Welfare Act, patterned on the Indian Child Welfare Act). *But see* Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 530-33 (1984) (comparing group interests of African-Americans and Native-Americans affected by transracial adoption). There are several distinguishing features that separate the Native-American and African-American posi-

4. Statutory and Judicial Treatment of Race in Adoption Proceedings

In conjunction with the changing attitude toward transracial adoption in the social-work establishment, state legislatures have moved to address the issue. Several states have recently implemented statutes that require agencies to follow "inrace"[53] placement guidelines in adoption.[54] Minnesota passed a Minority Adoption Act in 1990, which mandated that courts follow inrace-placement preferences for minorities and children of ethnic heritage.[55] In 1991, the Minnesota Court of Appeals found the statute unconstitutional because it imposed different criteria for racial minorities.[56] The Minnesota Legislature, following the recommendations of the court,[57] revised the statute in 1992 to eliminate any reference to the child's "minority" status.[58] In contrast, other states have decreed that race should not be a dispositive factor in adoption.[59] For example, Ohio instituted a detailed

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tions on crossracial adoption's effect on cultural and ethnic identities. *Id.* One major difference is that, whereas the numbers of Native-American children being transracially adopted was large enough to pose a genuine threat of cultural extinction, the numbers of African-American children adopted has been and continues to be very small. *Id.* at 532. There appears to be no genuine threat of assimilation of the African-American cultural, ethnic, and racial group. *Id. See generally* RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 9 (1987) (noting "intransigent opposition of most major black social work organizations to transracial adoption").

53. *See* RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 4-6 (1987) (comparing number of inracial adoptions versus transracial adoptions, and noting that most adoptions are family members). "Inrace" denotes placement of the child in a home of the same racial or ethnic background. *See id.* (using term as opposite of transracial).

54. *See, e.g.*, CAL. CIV. CODE §§ 222.35-222.36 (Deering Supp. 1993). The California Code provides that "[w]henever a child is being considered for adoption, the following order of placement preferences regarding racial background or ethnic identification shall be used . . . (a) [i]n the home of a relative. (b) If a relative is not available . . . with an adoptive family of the same racial background." *Id.* § 222.35. Furthermore, the California statute places a ninety day limit on the search for a suitable racially matched family. If no such family is located within that time, then the child can be placed in a home "where there is evidence of sensitivity to the child's race, ethnicity and culture." *Id.* § 222.35(c); *see also* ARK. CODE ANN. § 9-9-102 (Michie 1991) (dictating that consideration be given to child's race or minority heritage in adoption placement). *But see* FLA. STAT. ANN. ch. 63 (West Supp. 1993) (including no mention of race in adoption statute).

55. *See In re* D.L., 479 N.W.2d 408, 412 (Minn. App. 1991) (citing original statute).

56. *Id.* at 415-16.

57. *Id.* at 413 (urging less-discriminatory alternative through use of racially neutral wording).

58. MINN. STAT. ANN. § 259.28 (West 1992). The statute reads in part, "[T]he policy of the State of Minnesota is to ensure that the best interests of children are met by requiring due consideration of the child's race or ethnic heritage in adoption placements." *Id.*

59. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-63 (West 1981) (stating that court "shall not disapprove any adoption solely because of . . . a difference in race, color or religion . . ."); KY. REV. STAT. ANN. § 199.471 (Michie/Bobbs-Merrill 1991) (stating that petition for adoption

transracial placement scheme which forbids denial of adoption on the basis of race.[60] Unlike most other state laws, the Ohio regulations specifically forbid a delay in placement if the agency cannot find an adoptive home of the same race or heritage.[61]

The decisions of the last two decades interpreting these various statutes and early case law show that the courts, while ostensibly following the "relevant but not decisive" standard of *In re Minor*,[62] may still allow race to be an overriding determinative factor in adoption.[63] In *Drummond v. Fulton County Department of Family & Children's Services*,[64] the Fifth Circuit denied a Caucasian couple the right to adopt the racially mixed child for whom they had served as foster parents for over two years.[65] The court granted the state agency the right to remove the child, Timmy, from the foster home, even though no other family was available to adopt him.[66] The court agreed

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cannot be denied on basis of race, religion, ethnicity, or interfaith background); MD. FAM. LAW CODE ANN. § 5.311 (Supp. 1992) (stating that agency cannot withhold consent for sole reason of difference in race between adoptive parents and child); WIS. STAT. ANN. § 48.82(6) (West 1992) (stating that no person may be denied as adoptive parent on basis of race, color, ancestry, or national origin). However, Kentucky allows parents to annul an adoption within five years if the child exhibits any different ethnic traits of which the parents were not aware. KY. REV. STAT. ANN. § 199.540(1) (Michie/Bobbs-Merrill 1991).

60. OHIO ADMIN. CODE § 5101:2-48-03 (1990).

61. *Id.*

62. 228 F.2d 446 (D.C. Cir. 1955).

63. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1204 (5th Cir. 1977) (showing evidence that race played substantial part in denying adoption), *cert denied*, 437 U.S. 901 (1978); *In re* R.M.G. & E.M.G., 454 A.2d 776, 782 (D.C. 1982) (upholding statute that allowed race as consideration in adoption proceedings, as long as not "automatic"); Rockefeller v. Nickerson, 233 N.Y.S.2d 314, 316 (N.Y. Sup. Ct. 1962) (finding lower court had alternative reasons to deny adoption other than race). *But see In re* Adoption of Baker, 185 N.E.2d 51, 53 (Ohio Ct. App. 1962) (overturning lower court decision, which had denied adoption on issue of race). *See generally* Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 303 (1990) (questioning effectiveness of *Minor* rule); D. Michael Reilly, Note, *Constitutional Law: Race as a Factor in Interracial Adoption*, 32 CATH. U. L. REV. 1022, 1025 (1983) (stating that courts have applied *Minor* test in various ways).

64. 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

65. *Id.* at 1203.

66. *See id.* at 1215-16 (dissenting opinion) (detailing agency's administrative decision-making process, which focused solely on race); Shari O'Brian, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 489 n.18 (1986) (tracing subsequent unsuccessful placement effort of child in *Drummond*). Of the nineteen agency staffpersons who jointly decided to remove the child Timmy from the Drummond home, only four had ever seen him or the Drummonds. *Id.* at 488; *see also* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 81 (1990) (noting only alternative for child in *Drummond* was institutionalization). *See generally* Larry I. Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RTS. L. REV. 1, 1-25 (1979) (presenting detailed analysis and harsh criticism of *Drummond* decision).

that it was clear from the evidence that the agency had given "substantial weight" to the race of the parties in the decision to deny the adoption, yet, the ultimate decision unconvincingly concluded that "race was not used in an automatic fashion."[67]

This decision overturned an earlier panel verdict ruling[68] that the Drummonds and Timmy possessed protectable interests under the Fourteenth Amendment that could not be denied without affording them due process.[69] The factual record and testimony of the original district court proceeding reveal an unrelenting emphasis on the child's mixed-race heritage and the Drummonds' race,[70] even while lauding the exceptional home the Drummonds had provided for Timmy.[71] The tragic outcome for Timmy was that "[h]e was . . . deprived of his status as a wanted child as a result of a generalized agency assumption about the long-term best interests of a minority child."[72]

In *Rockefeller v. Nickerson*,[73] the court denied adoption by a Caucasian family of an African-American child who was a boarder in a group home.[74] The court reasoned that the agency had not denied the adoption on racial grounds because other factors, such as family size and the mother's working outside the home, were ostensibly considered, despite evidence showing that the agency's assistant director had aired her personal views regarding the "problems that might arise from interracial adoption."[75] And, in another leading case involving competing adoption petitions of an African-American

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67. *Drummond*, 563 F.2d at 1204; *see also* Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 310 (1990) (stating that race was clearly used in *Drummond* to deny family right to adopt child they loved).

68. Drummond v. Fulton County Dep't. of Family & Children's Servs., 547 F.2d 835 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978).

69. *Id.* at 857.

70. *See id.* at 837-49 (repeatedly noting that Drummonds were Caucasian and that Timmy was of mixed African-American descent). At one point, the court noted that "his complexion is light olive. He has a definite Afro and is a physically appealing mixed race child." *Id.* at 840.

71. *See id.* at 842 (commenting on home life of Timmy and Drummonds). The agency report noted that "Timmy is an exceptionally well-adjusted child. There is no question that he is the center of this household. He talks in sentences, counts to ten. . . . [T]he fact that he is bright, active, and friendly is a tribute to the excellent care he is receiving from these parents." *Id.*

72. Shari O'Brian, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TUL. L.J. 485, 488 (1986).

73. 233 N.Y.S.2d 314 (N.Y. Sup. Ct. 1962).

74. *Id.* at 316; *see also* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51 (1990) (noting situation of *Nickerson* child in institution).

75. *Rockefeller*, 233 N.Y.S.2d at 316.

child's grandparents and the Caucasian foster parents, the District of Columbia Court of Appeals analyzed in detail the statute, which allowed race as a consideration in adoption.[76] The court, applying a constitutional analysis of strict scrutiny, concluded that the best interests of the child are a compelling government interest.[77] The court determined, however, that the trial court had not specifically addressed the issue of whether the placement agency had impermissibly used race as a factor.[78] Therefore, the court remanded[79] and provided a three-prong test to aid the trial court in analyzing race as a relevant factor in an adoption dispute.[80]

III. THE CONSTITUTIONAL QUESTION

A. *Race Matching and Antidiscrimination Analysis*

The patent use of race as a factor in determining adoption placement appears to be in direct conflict with federal and state laws prohibiting racial discrimination.[81] In practically no other realm is racial classification an acceptable basis for state action.[82] Because the United States Supreme Court

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76. *In re* R.M.G., 454 A.2d at 783.

77. *Id.* at 788.

78. *Id.* at 792-93.

79. *Id.* at 791.

80. *In re* R.M.G. at 791, 794.

81. *E.g.*, U.S. CONST. amend. XIV; TEX. CONST. art. I, § 3. Federal law provides a remedy to private citizens for incursions against their constitutional rights by state authorities acting under state law. 42 U.S.C. § 1983 (1988). The law states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law. . . .

Id.; *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding that denial of freedom to marry based on racial classification violates Equal Protection Clause and Due Process Clause of Fourteenth Amendment); McLaughlin v. Florida, 379 U.S. 184, 196 (1964) (striking down Florida statute forbidding interracial cohabitation as violative of constitutional freedom from official discrimination on basis of race); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (stating that distinction between citizens because of ancestry "odious to a free people whose institutions are founded upon the doctrine of equality"). *See generally* SHELDON H. NAHMOD, CIVIL RIGHTS AND CIVIL LIBERTIES LITIGATION § 1.03 (3d. ed. 1991) (detailing history and purposes of 42 U.S.C. § 1983); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1226 (1991) (stating that use of race matching is discriminatory and in conflict with law).

82. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (stating that Fourteenth Amendment created to eliminate all governmentally imposed discrimination based on race); *cf.* Larry I. Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RTS. L. REV. 1, 13-14 (1979) (arguing for focus on child's constitutional right to have family rather than on constitutional theory of race). *See generally* Brown v. Board of Educ., 347 U.S. 483, 495 (1954) (finding school segregation unconstitutional); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 315 (1978) (stating racial preference for no reason other than race is discrimina-

has mandated that racial classifications are inherently suspect and must be subjected to strict scrutiny, only a finding of a compelling government interest should survive these challenges.[83] Yet, to date, the courts have generally failed to consider the use of race in adoption proceedings as an invidious violation of constitutionally guaranteed rights. Several prospective adoptive and foster parents have challenged race-matching policies on the constitutional grounds of equal protection, due process, and denial of a liberty interest, but these parents have met with little success.[84]

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tion); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1229 (1991) (declaring that "the adoption world is an anomaly in this legal universe in which race-conscious action is deemed highly suspect and generally illegal").

83. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (analyzing use of racial classification); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (stating classification based on race must be viewed in light of Fourteenth Amendment, which was created to eliminate race discrimination arising from state actions); Korematsu v. United States, 323 U.S. 214, 216 (1944) (declaring racial classifications subject to rigid scrutiny); DeWees v. Stevenson, 779 F. Supp. 25, 28 (E.D. Pa. 1991) (concluding that race classifications are suspect and must achieve compelling state interest); *In re* R.M.G. & E.M.G., 454 A.2d 776, 784-86 (D.C. 1982) (analyzing requirement of strict scrutiny as relating to consideration of race in adoption and holding strict scrutiny appropriate). *See generally* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1000 (1978) (stating that strict scrutiny must be applied to political actions that burden fundamental rights or exhibit prejudice against racial minorities). Professor Tribe explains that legislative and administrative actions that classify on the basis of race and benefit or burden the fundamental rights of different groups unequally must be subjected to strict scrutiny. *Id.* at 1002. Such state actions may be unconstitutional, unless a compelling governmental justification exists. *Id.*; *see also* Eileen M. Blackwood, *Race as a Factor in Custody and Adoption Disputes:* Palmore v. Sidoti, 71 CORNELL L. REV. 209, 210-11 (1985) (discussing Supreme Court's use of strict scrutiny as test for racial classification). *See generally* Lisa Jonas & Marshall Silverberg, Comment, *Race, Custody and the Constitution:* Palmore v. Sidoti, 27 HOW. L.J. 1549, 1551-54 (1984) (discussing race as suspect classification).

84. *See, e.g.*, Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 836-37 (1977) (finding that foster families not deprived of constitutional rights by state actions); *DeWees*, 779 F. Supp. at 28 (showing that Caucasian foster parents wishing to adopt biracial child not unconstitutionally denied adoption on basis of race; rather, attitudes towards race and coping with racial problems appropriate consideration in determining child's best interests); McLaughlin v. Pernsley, 693 F. Supp. 318, 325 (E.D. Pa. 1988) (noting that foster parents have protectable liberty interest under Pennsylvania Constitution), *aff'd on other grounds*, 876 F.2d 308 (8th Cir. 1989); *In re* R.M.G., 454 A.2d at 778 (finding that adoption statute, which allows race as factor, does not deny equal protection to prospective parents). *See generally* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 84-85 (1990) (arguing that strict scrutiny should be applied to adoption and foster-care proceedings where race is issue); D. Michael Reilly, *Constitutional Law: Race as a Factor in Interracial Adoption*, 32 CATH. U. L. REV. 1022, 1030 (1983) (discussing court's rejection of adoptive parents' equal-protection claim in *In re* R.M.G.).

B. *Case Law: How Much Emphasis on Race Is Permissible?*

1. *McLaughlin v. Pernsley*

In *McLaughlin v. Pernsley*,[85] Caucasian foster parents challenged, as a violation of their equal protection and due process rights, the city's removal of their African-American foster child without notice, and subsequent placement of the child in an African-American foster home.[86] The parents alleged that such action was taken on the basis of their race.[87] The federal district court concluded that the decision to remove the child was unconstitutional because it was based solely on race and, therefore, violated both the child's and the foster parents' equal-protection rights.[88] The court reasoned that the racial classification used by the placement agency, in order to be constitutional, must be justified by a compelling governmental interest that serves a legitimate purpose.[89] Acknowledging that the child's best interest was such a compelling interest, the court concluded that the use of race as the determining factor in foster-care placement was not a proper objective,[90] and that the evidence was substantial that race had been the only consideration in removing the child.[91] However, other courts have found that when race is used as merely one factor in the placement determination, such a facial classification will survive strict scrutiny because it is deemed necessary to advance the compelling interest of fulfilling the best interests requirement in child placement.[92]

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85. 693 F. Supp. 318 (E.D. Pa. 1988), *aff'd on other grounds*, 876 F.2d 308 (8th Cir. 1989).

86. *Id.* at 319-20.

87. *Id.*

88. *Id.* at 324. The child, Raymond Bullard, had been removed from the McLaughlins' (his Caucasian foster parents) home in 1985 and placed in an African-American foster home where he resided during the ensuing three years. *Id.* at 321. Psychiatric testimony presented during the trial found that Raymond had suffered from severe depression since being removed from the McLaughlins. *Id.* at 327. Upon being reunited with the McLaughlins at a psychiatric-testing session, the psychiatrist noted that "it was as if someone had turned on a light switch and a light had come on inside of him." *Id.* at 329.

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

90. *Id.*

91. *Id.* The court obviously disbelieved the placement agency, which belatedly attempted to disparage the McLaughlins' abilities as foster parents, in the face of the agency's own overwhelmingly favorable evaluations of the family. *Id.* at 321-23.

92. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (stating that consideration of race is merely factor in finding child best home), *cert. denied*, 437 U.S. 910 (1978); *In re* R.M.G. and E.M.G., 454 A.2d 776, 782 (D.C. 1982) (allowing race to be used as consideration in adoption as long as use not automatic). *But see In re* D.I.S. for Adoption of S.A.O., 494 A.2d 1316, 1327 (D.C. 1985) (stating that strict scrutiny not required in interracial adoption case). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1239 n.213 (1991) (listing cases that allowed race to be used as signifi-

2. *Palmore v. Sidoti*

The Supreme Court took the unusual step of reviewing a Florida state court child-custody decision in *Palmore v. Sidoti*[93] because the Court found that the case raised important constitutional concerns regarding race discrimination.[94] In *Palmore*, a Caucasian father sought to obtain custody of his daughter from the girl's biological mother, who had lived with, and subsequently married, an African-American man.[95] The Florida court had ordered a change in custody solely on the basis that the child might suffer social stigma if she remained in the racially mixed home.[96] The Supreme Court affirmed that this racially motivated action was subject to strict scrutiny and must, therefore, achieve a compelling governmental interest to avoid being unconstitutional.[97] The Court then determined that "granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause."[98] The Court acknowledged that social pressures and private prejudices undoubtedly exist; it found, however, that such prejudices do not justify the use of racial classifications in deciding child custody.[99] Nonetheless, it appears that the Court did not decisively close the door on any consideration of race; rather, it precluded a racial classification based solely on a presumption of harm to the child.[100] It remains unclear whether the Court intended that a showing of actual injury to a child would permit race to be a controlling consideration in a custody dispute.[101] To date, the *Palmore* decision has

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cant or determinative factor); Shari O'Brian, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 490 (1986) (criticizing *Drummond* decision as example of court's concealing use of race as overriding factor).

93. 466 U.S. 429 (1984).

94. *Id.* at 431-32.

95. *Id.* at 430.

96. *Id.* at 431.

97. *See Palmore*, 466 U.S. at 432-33 (stating that lower court's decision based entirely on race and explaining strict-scrutiny doctrine).

98. *Id.* at 433.

99. *Id.*

100. See *id.* (stating that possible injury to child because of prejudice cannot be consideration in decision to remove child from mother based on interracial marriage).

101. *See* J.H.H. & S.C.H. v. O'Hara, 878 F.2d 240, 245 (8th Cir. 1989) (holding that where child may be reunited with natural parent, race obviously must be considered as part of best interests determination, thereby distinguishing *Palmore*); Holt v. Chenault, 722 S.W.2d 897, 898 (Ky. 1987) (finding that child's severe emotional reaction to mother's biracial remarriage may be considered as part of best interests determination). *See generally* Charles P. Wisdom, Jr., *Will* Palmore v. Sidoti *Preclude the Use of Race as a Factor in Denying an Adoption?*, 24 J. FAM. L. 497, 499-506, 520-21 (1985) (critiquing *Palmore* decision); Eileen M. Blackwood, Note, *Race as a Factor in Custody and Adoption Disputes:* Palmore v. Sidoti, 71 CORNELL L. REV. 209, 226 (1985) (concluding that intent of *Palmore* decision unclear as to whether it prohibits use of race in all custody decisions).

been interpreted narrowly to apply only to parental custody disputes and, therefore, its impact in other circumstances is unknown.[102]

In spite of the narrow application of *Palmore* thus far, it is certainly possible to read the Court's decision more broadly to apply to the invidious use of race to assess placement of children, whether in custody, adoption, or foster-care contexts.[103] Indeed, the Court's willingness to address race as a factor in a family dispute shows that it considers racial discrimination in this context to be of the highest priority. Because in *Palmore* the Court reaffirmed that any state action that relies on a racial classification must be taken for a compelling reason,[104] a state preference for race matching that results in a disproportionate number of minority children remaining in foster or institutional care indicates that the state has failed to fulfill rationally its goal of protecting the welfare of the children.

IV. SOCIETAL BACKGROUND AND EMPIRICAL STUDIES

A. *Society's Children: The Statistical Imbalance*

The legal and sociological theories regarding transracial adoption must be analyzed in the context of the social realities of the adoption world and the existing research on the effects of cross-racial placement. Although the

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102. *See J.H.H.*, 878 F.2d at 245 (distinguishing *Palmore* by finding that foster parents do not have rights coequal to natural parent's right in custody dispute); *Holt*, 722 S.W.2d at 898 (finding *Palmore* controlling, and declaring that trial court erred in denying custody to Caucasian biological mother married to an African-American man on basis of race). The court did not read the *Palmore* decision to prohibit race as a consideration in determining the best interests of the child in foster placement. *Id.* *See generally* Eileen M. Blackwood, Note, *Race as a Factor in Custody and Adoption Disputes:* Palmore v. Sidoti, 71 CORNELL L. REV. 209, 226 (1985) (concluding that some racial considerations necessary and judicial flexibility serves children's best interests); Dixie Lynn Johnson, Note, *Domestic Relations: Racial Factors in Change of Custody Determinations:* Palmore v. Sidoti, 15 N.M. L.J. 511, 518 (1985) (stating that although facts and cases cited in decision indicate narrow construction, broader interpretations possible).

103. *See* Farmer v. Farmer, 439 N.Y.S.2d 584, 588-89 (N.Y. 1981) (surveying judicial decisions in which race played part in custody and adoption proceedings, and contrasting weight given to race in parental custody disputes compared to non-parental disputes). The *Farmer* court concluded that race is only one of many factors to be considered in a custody dispute between parents over a biracial child. *Id.* at 590. *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1244 n.233 (1991) (arguing that custody dispute in *Palmore* closely analogous to adoption in that state attempting to structure family on basis of race); Eileen M. Blackwood, Note, *Race as a Factor in Custody and Adoption Disputes:* Palmore v. Sidoti, 71 CORNELL L. REV. 209, 212 (1985) (comparing custody and adoption proceedings and noting similarities in that both use best interests test to determine most beneficial home for child). Blackwood noted also that nothing in the *Palmore* decision precludes application of the *Palmore* analysis to adoption proceedings. *Id.* at 224.

104. *Palmore*, 466 U.S. at 432.

United States government ceased collecting data on adoption in 1975,[105] statistics for fiscal year 1988 indicated that nationwide approximately 46% of children in foster care awaiting permanent homes were African-American.[106] In contrast, African-American children under age 19 constitute approximately 14% of the general population of children in the United States.[107] Furthermore, studies indicate that the number of families waiting to adopt are overwhelmingly Caucasian.[108] In May 1992 in Texas, there

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105. RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 4 (1987).

106. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 7 (1990). American Public Welfare Association statistics for 1988 indicated that approximately 49% of children in foster care were Caucasian, 39% were African-American, and 8% Hispanic. Lynee Duke, *Couples Challenge Same-Race Adoption Policies*, WASH. POST, Apr. 5, 1992, at A1. However, of those placed during that year, 61% were Caucasian, 23% African-American and 9% Hispanic. *Id.*; *see also* Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 816, 833-34 (1976) (recognizing that disproportionate number of children in foster care are minorities). *See generally* Kimberlé Williams Crenshaw, *Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332-33, n.3 (1988) (noting great disparities in socioeconomic positions of Caucasian and African-Americans). Approximately 44% of African-American children lived in poverty in 1986. *Id.*; *see also* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 51 n.1 (1990) (citing health study that indicated in 1989 African-American children represented 55% of AIDS cases in children under 13, and African-Americans accounted for 25% of all AIDS cases). There are large gaps in income levels, unemployment, infant mortality, and life expectancy between African-American and Caucasian populations. *Id.*; *see also* RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 121-26 (1987) (detailing effects of abortion, birth rates, and lifestyle choices on Caucasian and non-Caucasian populations with resulting dearth of Caucasian infants and effect on transracial adoptions).

107. SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 38 (1990). In 1986 in New York, 80% of the children in foster care were African-American or Hispanic. *Id.*

108. *See* RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 8-9 (1987) (listing possible reasons advanced by African-American social-work professionals for discrepancy between numbers of Caucasian and non-Caucasian adoptive homes). Among the reasons cited are the lack of effort by predominantly Caucasian social workers to recruit African-American families, the use of Caucasian middle-class standards that precludes many working-class African-American families, and historic suspicion among African-Americans of public agencies. *Id.*; *see also* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1186-87 (1991) (discussing disproportionate fit between Caucasian adoptive-parent pool and children awaiting adoption); Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 513-14 (1984) (giving several reasons for insufficient number of African-American adoptive homes). Professor Howard notes that often agencies have been accused of not taking affirmative steps to recruit African-American adoptive families and that higher economic criteria often keep African-American families out of the adoptive pool. *Id.* at 514.

were almost 9,000 children in foster care, almost a third of whom were African-American.[109] Of the almost 700 Texas families waiting to adopt, nearly two-thirds were Caucasian.[110] This disparity between the number of minority children awaiting placement and the number of available homes makes clear why a racially unbiased placement system is urgently needed: to assure that each child is moved into a loving, permanent home as quickly as possible.[111] One of the greatest criticisms leveled at the policy of race matching is that it delays placement of minority children so that they languish in foster care or in an institutional setting far longer than other children before finding a home.[112]

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109. *See* Cindy Rugeley, *Ethnic Adoptions Blessing or Curse? State Discourages Transracial Placement*, HOUSTON CHRON., May 31, 1992, at State 1 (quoting Texas Department of Human Services statistics). Of the 8,814 children in foster care in Texas, 3,127 were Caucasian, 2,750 were African-American, 2,232 were Hispanic, and 705 were classified as "other." *Id.*

110. *Id.* The statistical breakdown of the 694 families waiting to adopt was 476 Caucasian families, 132 African-American families, and 86 Hispanic families. *Id.*

111. *See Smith*, 431 U.S. at 836-37 (citing studies that show median time spent in foster care in New York was four years and that the longer child is in foster care, the more likely she will never leave it); SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 7 (1990) (recognizing that median length of stay for African-American child in foster care is one third longer than Caucasian child). *See generally* Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L. Q. 343, 347 (1972) (advocating full legal status and bill of rights for children). The authors list ten rights to which children should be entitled. The first right is "[t]o receive parental love and affection, discipline and guidance, and to grow to maturity in a home environment which enables him to develop into a mature and responsible adult[.]" *Id.*; Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 355 (1979) (noting overwhelming recognition of harm to child caused by delay in placement).

112. *See* SELECT COMM. ON CHILDREN, YOUTH AND FAMILIES, NO PLACE TO CALL HOME: DISCARDED CHILDREN IN AMERICA, H.R. REP. NO. 395, 101st Cong., 2d Sess. 39 (1990) (noting that minority and impoverished children stay in foster care significantly longer, and wait longer, than Caucasian children for permanent families). In 1985, there were more than 16,000 children awaiting adoption: 71% were older than six months of age, 47% were minority races, and 79% waited longer than six months. *Id.* at 54. *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1193-94 (1991) (describing policies that involve holding minority children in foster or institutional setting for "substantial periods of time" when no inrace adoption possible); Marlon N. Yarbrough, Comment, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353, 358 (1988) (arguing that delaying or denying adoption placement to African-American child on basis of race is overt racism). Although an indepth analysis of the relevant literature is beyond the scope of this Comment, there is overwhelming support in the mental-health field for the view that continuity and finality of relationships are vital to the psychological wellbeing of children and that institutionalization or lengthy and successive foster placement extremely detrimental, often resulting in permanent personality deficiencies. *See, e.g.*, Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1223-25 (1991)

B. *Empirical Studies of Transracially Adopted Children*

What happens to a child after adoption into a racially different home has been the subject of both conjecture[113] and scientific analysis.[114] The principle drawback to transracial adoption voiced by its opponents is the possibility of the child's loss of cultural and ethnic identity.[115] Several empirical

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(noting vast body of research that indicates serious harm to children caused by delay in placement and concluding that current inrace-placement policies exacerbate this harm); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 72 & nn.74-77, 73 & nn.80-82 (1990) (noting widely accepted concept of "psychological parenthood" and importance of bonding with primary caretaker, and citing studies on psychological bonding); Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 356 & n.114 (1979) (noting harmful effects of institutionalization and listing psychiatric studies on parental deprivation). Ballard noted also that the leading authority on children's emotional wellbeing emphasizes the importance of stable relationships to children. *Id.* at 338. A "psychological parent" is defined as "one who, on a continuing day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's psychological needs for a parent, as well as the child's physical needs." Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 72 n.76 (1990).

113. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (considering transracial adoption as "potentially tragic" because parents unable to cope with child's problems), *cert. denied*, 437 U.S. 910 (1978); *In re* Adoption of a Minor, 228 F.2d 446, 447 (D.C. Cir. 1955) (quoting lower court, which opined that child would lose Caucasian status if adopted by African-American man); *In re* B Children, 391 N.Y.S.2d 812, 814 (N.Y. Fam. Ct. 1977) (overruling social agency decision to leave African-American child with Caucasian foster mother by relying in part on hypothetical view that such children "could develop dysfunctional coping mechanisms"); *In re* Davis, 465 A.2d 614, 623 (Pa. 1983) (stating that child raised in racially different environment may face hostility of adoptive parents' relatives). *But see* Commonwealth *ex rel.* Lucas v. Kreischer, 299 A.2d 243, 245 (Pa. 1973) (noting increasing incidence of interracial marriage and transracial adoption, and stating that studies show children raised in such homes do not suffer).

114. *See* LUCILLE J. GROW & DEBORAH SHAPIRO, BLACK CHILDREN-WHITE PARENTS (1974) (reporting results of study on transracial adoption); RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 27-85 (1987) (presenting in-depth study of attitudes of transracially adopted children and their parents); J. SHIREMAN, GROWING UP ADOPTED: AN EXAMINATION OF MAJOR ISSUES 24 (1988) (describing major studies on transracial adoptees' adjustment and concluding the children seem to be as well adjusted and integrated into their families as other adoptees), *quoted in* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1208 n.120 (1991); CHARLES H. ZASTROW, OUTCOME OF BLACK CHILDREN-WHITE PARENTS TRANSRACIAL ADOPTIONS (1977) (detailing results of study of parental satisfaction with transracial adoption); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 533-44 (1988) (presenting overview of legal, sociological, and psychological literature regarding role of African-American family in maintaining African-American culture in relation to transracial adoption). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1207-26 (1991) (extensively reviewing existing research on psychosocial adjustment of transracial adoptees).

115. *In re* R.M.G. & E.M.G., 454 A.2d 776, 792 (D.C. 1982) (evaluating effect of family's

studies, however, including a comprehensive examination spanning twelve years of transracially adopted children and their families,[116] indicate that this fear is largely unfounded.[117] The studies analyze factors such as educational achievement, self-esteem, behavioral problems, and levels of satisfaction expressed by members of the families.[118] The studies found the adoptees fully integrated into their families,[119] with self-esteem comparable to other children,[120] and comfortable with their racial identity.[121]

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race on child's sense of racial and cultural identity and self-esteem); *In re* B Children, 391 N.Y.S.2d at 814 (stating that child's acceptance of African-American image crucial to adjustment in life); *see In re* Davis, 465 A.2d at 623 (opining that child raised in racially different environment may face many problems such as lack of role models); James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 510-11 (1988) (arguing that African-American homes provide African-American children with survival skills needed to cope in racist society). *But see* Marlon N. Yarbrough, Comment, *Trans-Racial Adoption: The Genesis or Genocide of Minority Cultural Existence*, 15 S.U. L. REV. 353, 359-60 (1988) (arguing that African-American child placed in Caucasian home maintains ethnic pride and identity).

116. *See* RITA J. SIMON & HOWARD ALTSTEIN, ADOPTION, RACE AND IDENTITY 126-28 (1992) (summarizing results of longitudinal study of transracial adoptees and families from 1972 to 1984).

117. *See id.* at 124-41 (detailing tests of racial identity of transracially adopted children and their siblings and finding adoptees accurately identified themselves racially and expressed no Caucasian racial preferences); Rita J. Simon, *An Assessment of Racial Awareness, Preference and Self Identity Among White and Adopted Non-White Children*, 22 SOC. PROBS. 43, 56 (1974) (reporting that African-American children reared in multi-racial families do not show ambivalence toward their race, in contrast to other groups of African-American children); *cf.* CHARLES H. ZASTROW, OUTCOME OF BLACK CHILDREN-WHITE PARENTS TRANSRACIAL ADOPTIONS (1977) (concluding transracial adoption is successful and desirable way to care for homeless African-American children). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1207-1226 (1991) (presenting detailed analysis of research studies on transracial adoption); *id.* at 1211-12 n.128 (listing fourteen major studies on transracial adoption).

118. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1211 (1991); *see also* CHARLES H. ZASTROW, OUTCOME OF BLACK CHILDREN-WHITE PARENTS TRANSRACIAL ADOPTIONS (1977) (noting that studies show parental satisfaction in transracial adoption as high as in intraracial adoption); Sandra Scarr & Richard A. Weinberg, *I.Q. Performance of Black Children Adopted by White Families*, 31 AM. PSYCHOLOGIST 726, 726 (1976) (reporting study on I.Q. test scores of transracially adopted African-American and biracial children). The research indicated that the children scored above the I.Q. and mean school-achievement scores of the Caucasian population in general. *Id.*

119. RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 69 (1987).

120. *Id.* at 79.

121. *Id.* at 27-28; *see also* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1217 (1991) (citing Chicago Child Care Society study that found transracial adoptees developed strong sense of African-American identity and pride); Rita J. Simon, *An Assessment of Racial Awareness, Preference and Self Identity Among White and Adopted Non-White Children*, 22 SOC. PROBS. 43, 57

V. THE INDETERMINATE STANDARD

A. *Inconsistency in Judicial Application of the Race Factor*

There is general agreement that the welfare of the children should remain as the paramount consideration. Nevertheless, suggested answers to the question of whether race should be a factor in adoption placement are as varied as the points of view detailed in this Comment. Basically, the cases assume three positions. While the courts have not expressly supported the extreme position of the NABSW that any transracial placement is detrimental to the child, some opinions ostensibly use "harm to the child" to mask the fact that race was indeed the underlying and overriding concern.[122] With rare exception, the opposing view that race should play absolutely no part in the balancing of best interests factors has also not found currency with the courts.[123] The majority of decisions nominally favor a middle

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(1974) (noting that African-American children raised in Caucasian families perceive their racial identity as well as Caucasian children, and have positive attitudes toward African-American images).

122. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1210-11 (5th Cir. 1977) (removing African-American child from Caucasian foster family who wished to adopt him, even though no other home was available to him), *cert. denied*, 437 U.S. 910 (1978); Ethridge v. Ethridge, 360 So. 2d 1005, 1008 (Ala. Civ. App. 1978) (affirming lower court decision to remove children from custody of mother following her marriage to African-American man); *In re* D.I.S. for the Adoption of S.A.O, 494 A.2d 1316, 1327 (D.C. 1985) (upholding removal of mixed-race child from Caucasian foster parent in spite of considerable testimony by social workers and mental-health professionals that child would be best served by remaining in foster home). Among the circumstances noted by the appellate court in *Ethridge* were that the father was in arrears for child support and had been convicted of assault and battery on the wife, the children had expressed a preference for the mother and her new husband, the new husband was a dentist earning $56,000 annually and had provided a large home, while the biological father and his new wife resided in a trailer in rural Alabama. *Ethridge*, 360 So. 2d at 1006-08. In spite of such evidence, the trial court found that it was in the children's best interests to remove them from the custody of their mother, and the appellate court, in affirming, acknowledged that "perhaps" the decision would have been different had the dentist been Caucasian. *Id.* at 1008. *See generally* Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 344 (1968) (stating that courts have upheld race matching even if another outcome preferable); Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 315-16 (1990) (stating that courts hide decisions based on race because "relevant but not decisive standard" too ambiguous).

123. *See In re* Custody of Temos, 450 A.2d 111, 120 (Pa. Super. 1982) (finding fundamental error in lower court's consideration of race of mother's boyfriend in deciding custody of children). The *Temos* court stated, "[R]ace is not a 'consideration', or 'concern' or 'factor.' Questions about race are in no respect 'appropriate.' In stating that race 'ought to be' a consideration, the lower court was fundamentally mistaken." *Id.* at 120; *see also In re* Bess P., 276 N.Y.S.2d 257, 262 (1966) (urging that agency policies and procedures be reviewed so that equal placement services provided to all children regardless of race, color, and religion); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*,

ground, which allows varying degrees of consideration of race as a factor.[124] The problem with this approach is an inconsistency in application that allows judicial bias to dictate the outcome, while ostensibly upholding the principle of equal protection.[125] Unfortunately, the result of adherence to this policy has been actual harm to the children.[126]

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139 U. PA. L. REV. 1163, 1256 (1991) (arguing that society should not use racial preferences to determine best interests of child in adoption); Shari O'Brian, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 498 (1986) (concluding that use of racial criteria in adoption perpetuates racial separatism).

124. *See, e.g.*, Dewees v. Stevenson, 779 F. Supp. 25, 28-29 (E.D. Pa. 1991) (finding that placement agency did not unconstitutionally rely on race in placement, but that race may be consideration in transracial adoptions); McLaughlin v. Pernsley, 693 F. Supp. 318, 324 (E.D. Pa. 1985) (finding that use of race as sole criteria inadequate for placement); *In re* R.M.G. & E.M.G., 454 A.2d 776, 786 (D.C. 1982) (concluding that race may be factor, but its use must be precisely articulated). *See generally* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 127 (1990) (concluding that race should be major factor only in initial placement of children, but should be limited as factor in removing children from foster parents wishing to adopt them); Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 373 (1979) (concluding that ideal policy is to follow *Minor* standard and apply as liberally as community standards permit).

125. *See In re* Adoption of a Minor, 228 F.2d 446, 447 (D.C. Cir. 1955) (quoting lower court, which commented that child would lose Caucasian status if adopted by African-American man); *In re* Davis, 465 A.2d 614, 623 (Pa. 1983) (denying adoption reasoning that child might not be accepted by adoptive parents' relatives); *cf. McLaughlin*, 693 F. Supp. at 331 (stating that removing children from psychological parents because of differing races can never promote the public interest). *See generally* Patricia W. Ballard, Comment, *The Interracial Adoption Implications of* Drummond v. Fulton County Dep't of Family & Children's Servs., 17 J. FAM. L. 117, 151 (1978) (citing judicial reluctance to consider interracial adoptions tends to give agencies complete discretion in placements); Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1240 (1991) (claiming that courts have tendency to ignore or distort role race plays in placement agencies' decisions); Henry H. Foster, Jr. & Doris Jonas Freed, *A Bill of Rights for Children*, 6 FAM. L. Q. 343, 350 (1972) (declaring that "legal fictions" should not mask fact that factors other than child's best interests are determinative in placement decisions); Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 315 (1990) (noting that present standard allows courts to disguise unconstitutional decisions based on race).

126. *See, e.g.*, Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1210-11 (5th Cir. 1977) (removing African-American child from Caucasian foster family who wished to adopt him, when no other home was available), *cert. denied*, 437 U.S. 910 (1978); *McLaughlin*, 693 F. Supp. at 330 (citing severe depression in African-American child removed from Caucasian foster home); *Ethridge*, 360 So. 2d at 1008 (removing children from custody of mother because she married an African-American man); *In re* D.I.S. for the Adoption of S.A.O, 494 A.2d at 1327 (upholding removal of mixed-race child from Caucasian foster parent contrary to testimony by mental-health professionals that child would be best served by remaining in foster home). *See generally* Shari O'Brian, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 492-93 (1986) (contrasting harms to minority children from delays incurred in waiting for racial match, as compared to alternative of inter-

B. *Legal Commentary and Suggestions to Eliminate Inconsistency and Bias*

In addition to the courts and legislatures, legal commentators have grappled with the difficult question of how much of a factor race matching should play in adoption and, consequently, have devised varying formulas. Professor Bartholet, a frequently cited legal authority on transracial adoption, considers three options: (1) a significant preference for race matching;[127] (2) a mild preference, which favors inrace placement only if all other factors are equal;[128] and (3) no racial preference at all.[129] Professor Bartholet's conclusion is that any preference for race matching is harmful to the children.[130] Among the harms she details are delays in placement, which prevent early development of crucial parent-child bonding; the breaking of close bonds formed with foster families while awaiting same-race placements; and increased risk that older and disabled minority children will never find permanent homes.[131] In addition, Dr. Bartholet points to empirical studies showing that transracially adopted children are well-adapted and, thus, are not disadvantaged "from the children's viewpoint."[132]

Dr. Bartholet rejects the first option allowing a "significant preference" for racial matching in child placement.[133] This is the position espoused in the current Texas Department of Protective and Regulatory Services guidelines.[134] Professor Bartholet rejects this position as one that causes delay or otherwise harms the child's best interests, and, therefore, directly violates

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racial adoption); Larry I. Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RTS. L. REV. 1, 8 (1979) (criticizing *Drummond* decision and stating that because of placement system, child spent entire life in "legal limbo"); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 75 (1990) (noting that absence of clear rules governing use of race in placement proceedings resulted in continuing disruption of child's life in *McLaughlin* case as child was moved several times between families that were competing for him). The author contends that "the child had to suffer actual injury before needs other than his racial ones could be judicially recognized." *Id.*

127. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1248 (1991).

128. *See id.* at 1249-52 (listing factors that favor mild preference for same-race placement, and then listing dangers of this approach).

129. *See id.* at 1253-54 (explaining reasons why no racial preference is best approach).

130. *Id.* at 1254.

131. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1254-55 (1991).

132. *Id.*

133. *Id.*

134. *See* TEXAS DEP'T OF PROTECTIVE & REGULATORY SERVS., CHILD PROTECTIVE SERVICES HANDBOOK § 6925 (1990) (stating that Department "prefers" racially or ethnically matched placements and requiring written documentation if placement does not conform to this consideration).

anti-discrimination laws.[135]

Professor Bartholet next examines a "mild preference" option for race matching, which would allow racial considerations if all other aspects of the prospective homes for the child are equal.[136] Although she finds valid arguments favoring this position, Professor Bartholet ultimately rejects it. Factors favoring a mild preference are the possible difficulties that children who are "different" from the communities might face, and the valid interests of prospective African-American adoptive parents and the African-American community at large in maintaining the children within their racial group.[137] However, Professor Bartholet sees the dangers of a mild preference outweighing the perceived benefits. On a symbolic level, any resort to a race-matching policy means that the state and social agencies assume the responsibility of deciding what "the appropriate racial composition of families" is, rather than the families themselves.[138] The state should not actively discourage the creation of interracial families, because such units may reinforce a "positive good" of racial and cultural understanding.[139] Finally, allowing even a mild preference raises the specter of the state-authorized decisionmaker's placing an inordinate emphasis on the racial factor.[140]

Professor Bartholet concludes that "[t]he generally applicable legal rule that race should not be allowed to play *any* role in social decisionmaking should . . . apply in the adoption area as well."[141] Instead, she envisions that agencies, although removed from dictating racial policies, should expand their role to advise and educate prospective parents on the issues involved in transracial adoption.[142]

VI. CRITIQUE OF PROPOSED CHANGES TO TEXAS ADOPTION STANDARDS

A. *Proposed Legislation and Administrative Guidelines Are Inadequate*

Texas's higher courts have not defined the state's position on how much, if any, emphasis can be placed permissibly on race matching in adoption.[143]

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135. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1248-49 (1991) (examining possible outcomes of significant preference for race matching).

136. *See id.* at 1259-62 (discussing arguments for and against mild preference for racial matching).

137. *Id.* at 1249-51.

138. *Id.* at 1251.

139. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1252 (1991) (criticizing possible outcome of mild preference for race matching).

140. *Id.*

141. *Id.* at 1252.

142. *Id.* at 1253.

143. *See In re* Adoption of Gomez, 424 S.W.2d 656, 659 (Tex. Civ. App.—El Paso 1967,

As the foregoing survey of nationwide trends in legislative action, judicial decisions, and legal commentary suggests, any solution to this highly charged issue that permits race to be a factor in the best interests test produces inconsistent results in cases with similar facts.[144] Despite the United States Supreme Court's rare foray into the arena of family law to prohibit the use of race as the sole factor to determine child custody,[145] the Court declined to define the relationship between the best interests test and race, thus leaving the question open to interpretation and failing to provide definitive guidance to lower courts faced with this issue.[146]

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no writ) (declaring Texas statute forbidding interracial adoption unconstitutional). The *Gomez* court did not address the issue of whether any consideration of race is appropriate in adoption proceedings but relied almost solely on constitutional precedents involving racial discrimination. *See id.* at 658-59 (holding statute forbidding interracial adoption violates both the constitution of Texas and United States). The *Gomez* case dealt with an African-American man who wanted to adopt his Hispanic wife's two illegitimate daughters. *Id.* at 657. His challenge to the Texas statute, which forbade the adoption, remains one of the most cited cases in the literature of transracial adoption.

144. *Compare* Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1211 (5th Cir. 1977) (removing African-American child from Caucasian foster family who wished to adopt him), *cert. denied*, 437 U.S. 910 (1978) *with* McLaughlin v. Pernsley, 693 F. Supp. 318, 332 (E.D. Pa. 1987) (ordering African-American child returned to Caucasian home from which he had been removed). *Compare* Ethridge v. Ethridge, 360 So. 2d 1005, 1008 (Ala. App. 1978) (removing children from mother's custody following marriage to African-American man) *with In re* Custody of Temos, 450 A.2d 111, 129-30 (Pa. Super. 1982) (returning children to mother after children had been removed because mother had African-American boyfriend). *See generally* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 59 & n.29 (1990) (noting that substantial level of discretion allowed by best interests test is unwise when race a factor, based on unique social history of discrimination); Angela T. McCormick, Note, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 309-14 (1990) (comparing cases that used race as only one factor with those cases that allowed race to overwhelm all other factors).

145. Palmore v. Sidoti, 466 U.S. 429 (1984).

146. *See id.* at 432-33 (addressing Florida court's rationale based solely on race). The *Palmore* decision makes no reference to any previous cases concerning the role of race in custody proceedings. Instead, the Court focused on racial discrimination cases such as Loving v. Virginia, 388 U.S. 1 (1967), which held a state miscegenation statute unconstitutional, and Buchanan v. Warley, 245 U.S. 60 (1917), which struck down a Kentucky law that ostensibly promoted public harmony by forbidding African-Americans from buying homes in Caucasian neighborhoods. *Id.* at 432-34. *See generally* Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 57-65 & 56 n.17 (1990) (discussing *Palmore* decision and listing several commentaries that dispute effect of decision); Marshall H. Silverberg & Lisa A. Jonas, Palmore v. Sidoti: *Equal Protection and Child Custody Determinations*, 18 FAM. L.Q. 335, 352 (1984) (concluding that race not to be considered in adoption based on *Palmore*); Charles P. Wisdom, Jr., Note, *Will* Palmore v. Sidoti *Preclude the Use of Race as a Factor in Denying an Adoption?*, 24 J. FAM. L. 497, 521 (1985) (concluding that *Palmore* does not preclude state's use of race in adoption proceedings).

The proposed legislation[147] currently pending in the Texas House of Representatives suffers from this same fatal indeterminacy that plagues the previously discussed standards and judicial decisions. By simply stating that "race may not be considered as a primary factor"[148] in determining the best interests of the child, the bill's wording implies that race may continue to be considered at some level in adoptive placements. This approach is merely an echo of the "relevant but not decisive" standard of *In re Minor*,[149] which has allowed courts to follow freely their own personal beliefs in deciding cross-racial placements.[150] Such a discretionary standard would doubtless continue to spawn court battles as state placement agencies would still be left without a clear legal standard.[151] Only a definitive legislative mandate against any racial consideration in the adoption-placement process will offer protection against decisions such as *Drummond*.[152] By relying on an indeterminate standard, the *Drummond* court concluded that the state placement agency's removal of the child Timmy from a stable and loving home was not an "automatic" use of race and the court transparently ignored the overwhelming racial motives.[153] The children of Texas awaiting adoption must not be forced to rely on agency and judicial decisionmaking, which would allow subjective weighing of race as a factor.

The proposed adoption guidelines of the Texas Department of Protective and Regulatory Services as presently drafted retain a preference for same-

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147. Tex. H.B. 196, 73d Leg., R.S. (1993).

148. *Id.*

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

150. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. Summer 1975, at 226, 269 (1975) (stating that indeterminate standard allows judge to rely on own personal values); Larry I. Palmer, *Adoption: A Plea for Realistic Constitutional Decisionmaking*, 11 COLUM. HUM. RTS. L. REV. 1, 10-11 (1979) (decrying use of "substitute judgment doctrine" which allows courts and adoption agencies to make decisions on basis of perceptions of child's best interests, rather than on perception of what child would wish); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 83 (1990) (criticizing discretionary system that allows judge to decide placement on basis of personal opinion).

151. *See* Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 263 (citing study in which child-welfare professionals were given case studies and asked to make decision whether to remove children from home). The results showed agreement in less than half the cases, and different factors were considered decisive by each person. *Id.*; *see* Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 372 (1979) (concluding that lack of statutory guidelines results in courts' undue reliance on agency recommendations, thereby giving agencies "almost unbridled . . . discretion, which assumes the force of law").

152. *See Drummond*, 563 F.2d at 1207 (utilizing Georgia's legislative guidelines to prohibit transracial adoption).

153. *See id.* (quoting Georgia Department of Human Resources Adoption Services manual as criterion for adoption placement).

race placement, although more obliquely stated than in the policy currently in force.[154] The proposed policy focuses on maintaining the child's racial or ethnic background, while allowing "consider[ation]" of transracial placement if the staff determines that the prospective parents can aid the child in developing ethnic awareness and in coping with any difficulties that may arise due to racial or ethnic differences.[155] The guidelines do offer a better approach to solving the present controversy surrounding transracial adoption in Texas because they focus on all of the needs of the child rather than merely ethnicity.[156]

The proposed guidelines also state that the facts to be considered in placement, such as race or ethnicity, continuation of a foster relationship, religion, or special needs, should not delay the selection of an adoptive home for the child.[157] However, the overall approach of the proposed guidelines still offers impermissibly wide latitude to agency personnel to focus primarily on race as the factor that will override all other considerations, with the result that challenges will continue to plague the system. With this approach the possibility still exists that agencies will interpret such guidelines as a preference for same-race placement, with the resultant delays and challenges that plague the present system.[158]

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154. *Compare* TEX. DEP'T OF PROTECTIVE AND REGULATORY SERVS., CHILD PROTECTIVE SERVICE HANDBOOK § 6925 (Draft Revision 1993) (on file with *St. Mary's Law Journal*) (noting consideration of child's racial and ethnic heritage) *with* TEX. DEP'T OF HUMAN SERVS., CHILD PROTECTIVE SERVICE HANDBOOK § 6925 (1990) (stating preference for same-race placement).

155. *See* TEX. DEP'T OF PROTECTIVE AND REGULATORY SERVS., CHILD PROTECTIVE SERVICE HANDBOOK § 6925 (Draft Revision 1993) (on file with *St. Mary's Law Journal*) (detailing considerations in adoption placement).

156. *Id.* The guidelines specifically note that the various factors to be considered will vary from child to child, with differing weight being given to the factors depending on the child's needs. *Id.*

157. *Id.*; *see also* OHIO ADMIN. CODE § 5101:2-48-03 (1990) (providing for prevention of delays while also considering child's cultural heritage); JOHN GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 35-36 (1973) (recommending that child placement be final, unconditional, and without delay, and that waiting period in adoption proceedings be eliminated).

158. *See* OHIO ADMIN. CODE § 5101:2-48-03 (1990). Ohio's administrative policies regulating adoption present a good model of procedures which are designed to prevent delays due to race-matching attempts, yet which still allow the consideration of the child's cultural heritage. The Code provides:

> (A) Each agency shall pursue an adoptive placement for children . . . and shall not apply discriminatory practices related to race, color, national origin, handicap or age.
>
> (B) No agency shall deny an adoptive placement based solely on race, color, national origin, handicap or age.
>
> (C) Prospective adoptive parents shall not be denied the opportunity to adopt based on their race, color, national origin, handicap or age.
>
> (D) The adoptive placement for every child including biracial and multiracial shall meet

B. *Application of Fourteenth Amendment Principles to Adoption in Texas*

To assure that the Texas adoption laws truly function in the interests of the children, the statutes should conform to the strict legal principle embodied in the Fourteenth Amendment that guides state-related actions,[159] and should eliminate any semblance of governmentally imposed discrimination based on race.[160] The Supreme Court has affirmed many times its strong support for the exercise of individual rights within the context of the family and intimate-personal associations by grounding these important liberty interests in the Fourteenth Amendment. For example, the Court has declared marriage a fundamental right,[161] upheld the right of married couples to use

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> the child's best interests and address the special needs of the child. Cultural heritage may be a factor for consideration provided that the adoptive family can meet the special needs of the child. However, the sole criterion in the selection or denial of an adoptive placement shall not be race or cultural heritage.
>
> (E) Child-specific recruitment activities shall be conducted . . . to locate an adoptive placement of the same cultural heritage provided the adoptive placement . . . is not delayed because of failure by the agency to locate an adoptive placement of the same cultural heritage.
>
> . . . .
>
> (H) Nothing in this rule shall be construed to permit the agency to unduly extend the child's stay in substitute care until a same cultural heritage adoptive placement is recruited.

Id.

159. *See* Shelley v. Kraemer, 334 U.S. 1, 14 (1948) (declaring that action of state courts and judicial officers is state action and therefore governed by 14th Amendment); *Ex parte* Virginia, 100 U.S. 339, 346-47 (1879) (holding that no state agency or its officials can deny citizens equal protection).

160. *See* Palmore v. Sidoti, 466 U.S. 429, 432 (1984) (stating that primary purpose of 14th Amendment is to eliminate all governmentally imposed discrimination based on race); Fullilove v. Klutznick, 448 U.S. 448, 516 (1980) (Powell, J., concurring) (alluding to constitutional principle that race should be irrelevant in governmental actions); Loving v. Virginia, 388 U.S. 1, 12 (1967) (stating that racial classifications are directly subversive to principles of equality found in 14th Amendment); *In re* D.L., 479 N.W.2d 408, 412 (Minn. App. 1991) (affirming that 14th Amendment's purpose is to do away with racial discrimination). *See generally* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1226 (1991) (stating that race matching violates United States laws on discrimination); Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 341 (1968) (stating that if race sole factor for differentiation and other factors mostly ignored, then such governmental guidelines may be unconstitutional); Comment, *Moppets on the Market: The Problem of Unregulated Adoptions*, 59 YALE L.J. 715, 722-23 n.36 (1950) (suggesting that statutes that merely suggest race as determination in adoption may be founded on an unconstitutional criterion).

161. *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (striking down state statute that forbade marriage of person who owed unpaid child support); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (characterizing marriage as fundamental right); Maynard v. Hill, 125 U.S. 190, 211 (1888) (declaring marriage as foundation of family and society).

contraceptives,[162] struck down a state statute prohibiting interracial marriage,[163] invalidated a state statute forbidding interracial cohabitation,[164] and declared that race could not be used as a justification for modification of child custody.[165] All of these decisions lead inexorably to the conclusion that the state must take care not to engage inappropriately in the ordering of private lives, especially through invidious race-conscious actions. To withstand rigorous scrutiny, even benign racial classifications intended to benefit minorities must be narrowly tailored to achieve the desired benefit.[166] The fact that legally sanctioned race matching tends to delay placement of minority children into permanent homes is certainly more harmful than beneficial. Therefore, a legislative mandate that forbids any consideration of race as a factor in adoption proceedings will best serve the interests of children seeking a permanent home.

VII. CONCLUSION

Texas must reform its child-adoption laws at both the statutory and administrative levels to eliminate any consideration of race as a factor in adoption. This action will remove the decisions, which shape the lives of the state's most helpless citizens, from the realms of conjecture and unwarranted assumptions driven by deeply ingrained societal and personal biases.[167] Em-

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162. Griswold v. Connecticut, 381 U.S. 479, 507 (1965).

163. *Loving*, 388 U.S. at 12.

164. McLaughlin v. Florida, 379 U.S. 184, 196 (1964).

165. *Palmore*, 466 U.S. at 434 (1984).

166. *See* Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (stating that racial classifications carry danger of stigmatizing harm); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 273 (1986) (noting rigorous scrutiny necessary for racial classification, even if operating against group not traditionally subjected to discrimination); *cf.* Johnson v. Transportation Agency, 480 U.S. 616, 642 (1987) (Stevens, J., concurring) (stating that antidiscrimination measures benefit protected group by conferring benefits or by shielding actions taken to rectify past discrimination). Commentators have contrasted race-matching policies with affirmative action programs and have concluded that there are several significant differences that make the two policies inapposite. *See* Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1231-37 (1991) (comparing antidiscrimination policies, such as affirmative action, with race matching policies). For example, traditional affirmative-action programs must (1) be narrowly tailored to remedy past discrimination, (2) be limited in duration, (3) must promote racial integration, and (4) benefit racial minorities. *Id.* In contrast, race matching is forward looking, is not limited in time, is designed to perpetuate racial separatism, and is detrimental to minority children who are denied a home. *Id. See generally* Martha Minow, *The Free Exercise of Families*, 1991 U. ILL. L. REV. 925, 939 (1991) (advocating that free-exercise analysis, similar to Supreme Court's analysis in religion cases, be implemented for family matters, including scrutiny of state race-matching policies).

167. *See* Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1, 58 (1991) (discussing use of race in *Palmore*). Professor Gotanda notes that the Supreme Court's *Palmore* decision focused solely on the possible bias and prejudices that

pirical studies show that transracially adopted children fare no worse than other children in accomplishment and life adjustment; conversely, there is abundant evidence indicating that children who experience significant delays in finding a permanent home, who drift from foster placement to foster placement, or who languish in institutions, do experience significant psychological trauma, which may impair them for a lifetime.[168] The increasing crises in modern society, such as AIDS, poverty, and teen pregnancy, weigh disproportionately on minorities, resulting in large numbers of minority children entering the social-services system.[169] For those who are seeking permanent homes, the factor society should weigh most heavily when matching the child to the family should be: "Can *this home* give *this child* a safe and loving environment?"

For Christopher Jenkins, a Texas district court answered "yes" by granting his Caucasian foster parents the right to adopt him.[170] But for other children, such as Timmy in the *Drummond* case, the answer may depend solely on the disparity of race or ethnicity between the children and the families wanting to adopt them.

Justice Powell alluded to "the principle that the Constitution envisions a nation where race is irrelevant,"[171] and stated that "[t]he time cannot come too soon when no governmental decision will be based upon immutable characteristics or pigmentation."[172] Until that time, a child's best interests will be truly protected in adoption placement only by adhering to the antidiscrimination principles embodied in the Fourteenth Amendment.

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might affect a child growing up in a biracial home, and never even considered that growing up in a home with two cultures might be of positive value to the child. *Id.*

168. *See* Patricia W. Ballard, Note, *Racial Matching and the Adoption Dilemma: Alternatives for the Hard to Place*, 17 J. FAM. L. 333, 356-57 (1979) (stating child is harmed by delay in placement in permanent home).

169. *See* AIDS, FACTS AND ISSUES 253 (Victor Gong & Norman Rudnick eds., 1987) (noting that AIDS affects African-Americans disproportionately). African-Americans comprise approximately 12.5% of the United States population, and 25% of reported AIDS cases. African-American children represent approximately 56% of all pediatric AIDS cases. *Id.*; *see also* RICHARD H. ROPERS, PERSISTENT POVERTY: THE AMERICAN DREAM TURNED NIGHTMARE 183 (1991) (citing unemployment rate of approximately 45% for African-American male adults, and concluding that high rates of unemployment and underemployment of African-American men greatly influence instability in families. *See generally* RITA J. SIMON & HOWARD ALTSTEIN, TRANSRACIAL ADOPTEES AND THEIR FAMILIES 121-26 (1987) (discussing different lifestyle choices of Caucasian and non-Caucasian population); Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 51 (1990) (noting gaps in infant mortality, unemployment levels, and AIDS cases in African-American and Caucasian population).

170. *In re* Christopher Dewayne Hardin, Nos. 1067-CX & 2828-CX (Dist. Ct. of Taylor County, 326th Judicial Dist. of Texas, Feb. 26, 1993).

171. *Fullilove*, 448 U.S. at 516 (Powell, J. concurring).

172. *Id.*