Michigan Journal of Gender & Law

Volume 19  |  Issue 1

2012

Displaced Mothers, Absent and Unnatural Fathers: LGBT Transracial Adoption

Kim H. Pearson
Gonzaga University School of Law

Follow this and additional works at: https://repository.law.umich.edu/mjgl

Part of the Family Law Commons, Juvenile Law Commons, Law and Gender Commons, Law and Race Commons, and the Sexuality and the Law Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjgl/vol19/iss1/3

This Article is brought to you for free and open access by the Journals at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Journal of Gender & Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
INTRODUCTION · 150

I. NON-NEUTRAL CLAIMS · 154
   A. In re J.N. · 154
   B. History of Claims and Fears · 158
      1. Race-Based Claims · 161
      2. Orientation Transmission Fears · 168

II. STAGING A COMPETITION · 174
    A. Brüno and ABC News · 175
    B. Good Fathers · 179
    C. Absent Versus Unnatural · 183
    D. Patriarchy Versus Privilege · 190

III. COSTS OF STAGING A COMPETITION · 194
    A. Displacing Mothers: Black Women, Abortion and Foster Care · 195
    B. Obscuring Parents: LGBTs of Color, Low Income, or Both · 199
    C. Fixing Identities: Black Boys, White Gay Men, Black Fathers · 204
    D. Acknowledging Adoptees: Providing More Resources for Adoptees · 207

CONCLUSION · 214

APPENDIXES · 215

* Assistant Professor Gonzaga University School of Law. I am grateful for comments and insights from Angela P. Harris, Cheryl I. Harris, Devon W. Carbado, Dorothy E. Roberts, Russell Robinson, David L. Eng, Nancy D. Polikoff, Addie Rolnick, Douglas NeJaime, Kif Augustine-Adams, Fredrick M. Gedicks, Orly Rachmilovitz, Robin Fretwell Wilson, Nancy Dowd, Mary Pat Treuthart, Jason Gillmer, and friends and colleagues at the BYU faculty workshop, Williams Institute and Fellows Roundtable, LSA Works in Progress, Feminist Collaborative Research Network, Gonzaga faculty workshop, UCLA Advanced CRT Seminar, and the Texas Wesleyan faculty workshop. For excellent research assistance, my thanks to Emily Wood, Kaarin Praxel, and Candace Magnin. My thanks to Stephanie Plotin for her expert insights and to the librarians of the Chastek Library for their professionalism and assistance. I also wish to extend many thanks to the excellent editors at the Michigan Journal of Gender & Law for their expertise and hard work.
**Introduction**

*Brüno* is a 2009 comedic film about a gay Austrian man seeking fame in America. As part of his attempt to achieve fame, Brüno adopts a Black child and then appears on a daytime talk show to discuss the adoption. The child sports a shirt that reads, “Gayby” and Brüno claims to have traded the baby for an iPod. The talk show audience members, predominantly Black women, respond in disbelief and outrage. The few Black men in the audience do not ask questions or appear to respond verbally to Brüno’s appearance. Brüno then claims to have given the baby a “traditional African-American name.” The host asks what the baby’s name is, and Brüno says that it is O.J. The audience again erupts in outrage.

The Black women in the audience play a complex role. They are there to critique gay adoption as part of the African-American community with implicit race-based claims, but they are also perceived as the reason Black children are available for adoption. No one imagines that the Black women in the audience are suitable mothers for the Black child, ready to rush the stage and take custody of the baby. The spectacle of Black women reacting in outrage to a White gay man adopting a Black child depends on larger narratives of privilege, good parenting, and disfavored identities. The few Black men in the audience, largely silent and seemingly unengaged to the same degree as the women, reinforce stereotypes of Black men as absent and uninterested in fatherhood. The way the discourse between Black and gay is staged casts gay as White and privileged and Black as failed mothers and absent fathers.

The scene in *Brüno* is one instance of the comparisons between Black and gay identities that was seen after the Proposition 8 election in California and during discussions about repealing “Don’t Ask, Don’t
Tell." Among other things, the comparison wrestles with the question of whether racial and sexual minority statuses are interchangeable. In the context of LGBT transracial adoption, race and sexual orientation are thrown into relief. 

Briino provides a snapshot of the tension that appears when race and orientation appear to be pitted against each other. The discourse functions like a competition pitting Black against gay to find which group has the rightful claim to raise Black children.

While some might believe that Black versus gay discourse only surfaces in highly politicized settings like the military and marriage, it holds sway in the area of LGBT transracial adoption. LGBT transracial adoptions are a relatively small percentage of all adoptions, which include private adoptions, LGBT second-parent adoptions, and step-parent adoptions, but they are an important site for interrogating the Black versus gay discourse because adoption and custody decisions often address parent-child transmission. When claims intersect, as they do in a case where a White LGBT foster parent and a Black maternal grandmother


6. LGBT families adopt children of various racial and ethnic backgrounds, but this project is focused on Black children because they are often invoked as part of media campaigns for parenting advocacy and social justice. Black children are perceived as being unwanted and more easily available to foster and adopt. Latina/o and Asian children are racialized differently. These children are outside the scope of this Article, but an interrogation of multiple intersections of race, nationality and LGBT parenting merits attention.


8. The paper focuses on Black-White adoption rather than Asian and Latina/o adoption because Asian and Latina/o children are racialized by the media differently from Black children. The focus on Black children is part of American discourse that includes welfare, dependency systems and Black versus gay discourse.

9. Charlotte J. Patterson & Samantha L. Tornello, Gay Fathers’ Pathways to Parenthood: International Perspectives, 22 Zeitschrift für Familienforschung, 103, 113 (2010) (data shows there is a generational shift in parenting by gay fathers, indicating that they are opting into adoption; however, there is no indication that the generational shift has increased interracial adoptions for fathers outside of the United States).
dispute the adoption of a Black child, weakened race-based claims and LGBT transmission fears inform the court's decision.\textsuperscript{10}

Disrupting the media staging of Black versus gay could provide courts better insight into how weakened race claims and LGBT transmission fears pull in opposite directions, and this would create the conditions for better, more innovative family decisions. If courts had a better understanding of the apparent competition between race and orientation, but also understood the costs attached to the media staging of the discourse, decision making in adoption and custody cases could be more comprehensive, taking into account the common interests in the children at issue. Understanding the costs that result from the media staging of Black versus gay discourse is key to finding common ground for identity groups and helping children of color already in LGBT homes.

Black versus gay discourse is dangerous because of the structural costs that come with continued reliance on pernicious stereotypes of Black and gay. Looking at media and advocacy sources about LGBT transracial adoption, it appears as though rich, White gay men who adopt dangerous, damaged Black children may be the answer to racism, the superabundance of children in foster care, and poverty and criminality. This narrative looks like the gentrification of Black children by the gay community.\textsuperscript{11} This is dangerous because it imagines that Black is not gay and gay is not Black. It also displaces Black women as rightful, loving, and capable mothers and obscures the contributions of LGBTs of color and those with lower incomes, many of whom are mothers and fathers.

Section I begins with an adoption case where a Black biological grandmother and a White lesbian foster mother both wish to adopt a Black child. This case presents an example of Black versus gay discourse in a court setting. Looking at the treatment of race and sexual orientation in the context of custody and adoption suggests that there are parallels between these situations. This section focuses on the language used in custody disputes and adoption advocacy, illustrating the different treatment of racial cultural transmission and sexual orientation transmission from parent to child. Courts tend to be vigilant about the possibility of sexual orientation being transmitted by an LGBT parent.

\textsuperscript{11} Twila Perry, Transracial Adoption and Gentrification: An Essay on Race, Power, Family and Community, 26 B.C. THIRD WORLD L.J. 25 (2006) (suggesting that gentrification where there is competition between wealthy White would-be homeowners and Black property owners for scarce resources can be compared to the competition for healthy Black babies).
to a child, but downplay race-based claims when a parent of color expresses a desire to pass on racial culture to a child. The favored identity, white heterosexual, and mainstream preference for that identity, is the point of comparison or baseline normal from which other children deviate in both situations. When a judge expresses concern that a homosexual parent might disrupt a child's sexual development, the implication is that heterosexuality is the default and exposure to homosexuality is the disruption. When judges give less weight to race-based claims, they value children of color who are only skin-deep ethnic minorities.

Section II explores how parent-child sexual orientation transmission fears and racial cultural claims pull in opposite directions; race-based claims depend on the transmission of racial culture and arguing that orientation is not transmissible defuses orientation transmission fears. In cases like In re J.N. and in media representations of LGBT adoption, black versus gay discourse functions structurally like a competition. Black men and gay men are seemingly arrayed against each other, competing for the rightful fatherhood of Black children. The comparisons of absent versus unnatural and patriarchal versus privileged are part of a media narrative that provides only a one-dimensional version of LGBT transracial adoption.

Section III shows the structural costs resulting from the Black versus gay narrative as staged by the media. Black women are displaced as mothers because they are portrayed as irresponsible, victims of social forces, or bad mothers generally who contribute to the overabundance of Black children in need of "loving" homes. The lives of lesbians and gay men who are low income, people of color, or both, who are and have been parenting children for years, are obscured by the media version of rich, White gay men as the preferred adoptive parents.

In conclusion, critically assessing how the media portrays LGBT transracial adoption should not be taken as an argument against transracial adoption or LGBT adoption. Rather, the goal is to continue disrupting Black versus gay discourse. In providing a more granular view of race and orientation concerns, judges and advocacy groups may become more sensitive and open to imagining better solutions to seemingly diametrically opposed interests. In addition to acknowledging

12. Kimberly Richman, Courting Change: Queer Parents, Judges, and the Transformation of American Family Law, 48–50 (2009). ("In 16 percent (48) of the 316 custody and adoption cases since 1952, the judges discussed the possibility of a child's sexual orientation being affected by that of his or her parents ... the notion of homosexuality as contagion continued to appear, though with much less frequency, in some judicial decisions well into the late twentieth century.")

the structural costs of this discourse, interrogating how it is staged may help people with an interest in children of color find common ground to enrich the lives of children adopted transracially by LGBT parents.

I. Non-neutral Claims

A. In re J.N.

Courts rarely publish adoption proceedings; most cases are sealed, and there are strong policy reasons for keeping adoption proceedings as private as possible. Considering how rare it is for a court to conduct adoption proceedings openly, there are not many adoption opinions available to see how race and orientation are treated. Closed adoptions function to replace a child's birth and affinity bonds with legal bonds. After closed adoptions, minor children have no access to records about their birth parents or their extended family members. Although there is an increase in open adoptions that allow varying degrees of contact with a child's birth parent(s), on the whole, there is no general trend towards open adoptions because of the fear that granting legal strangers visitation rights may dissipate adoptive parents' rights to an adopted child. Doing so would be against public policy because it would offer adoptive parents fewer parental rights than biological parents. Prior to adoption, parental rights are terminated.

With the heightened level of protection for adoptive parents' rights in mind, the case of In re J.N. is a rare instance in which the Family Court of the State of New York discussed its reasoning for granting an adoption of a Black child to a White lesbian woman rather than to the child's Black biological grandmother who had custody of the child's bio-

14. Access to Adoption Records: Summary of State Laws, Child Welfare Information Gateway 1 (June 2009), http://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessapall.pdf ("In nearly all States, adoption records are sealed and withheld from public inspection after an adoption is finalized. Most States have instituted procedures by which parties to an adoption may obtain both nonidentifying and identifying information from an adoption record while still protecting the interests of all parties.").
18. See, e.g., Troxel v. Granville, 530 U.S. 57 (2000) (parents' right to raise a child, in this case, with whom the child would spend time, is constitutionally protected).
logical sibling. This case illustrates how ideas about privilege, race, and sexual orientation infect the way the court thinks about the best interests of the child.

In In re J.N., the heart of the dispute is whether the lesbian foster mother or the biological grandmother of the child should adopt the child. The child's parents had their rights terminated by the court. The child, E., was in need of surgery to repair her cleft palate and to place tubes in her ears to drain excess fluid. E. was placed with a White lesbian woman who provided a foster home for her from four months of age. Her foster mother then sought adoption. The child's biological grandmother, beset with illness and providing care for E.'s sibling, J.N., could not visit E. until she was nearly four months old. The grandmother intervened in the adoption proceedings to maintain a legal tie to the child. The court granted the adoption to the lesbian mother, citing her care of the child and the grandmother's lack of a sufficient bond to the child.

During the adoption proceedings the court dealt with race, limited resources, and the divide between the two prospective mothers. According to the court, the decision was based on considerations of the "child's stability, [and] physical and emotional security" rather than on the wishes of the prospective adoptive parents. However, the court had to navigate cultural competency concerns and family preservation goals. In response to "forceful arguments against" the adoption of the child by a White lesbian, the court cited to Palmore v. Sidoti to make the claim that "this state and nation do not legitimize private prejudices." It is unclear if it is the foster mother's race or her orientation or both that

21. The gender of the litigants does matter, and this case is discussed in narrow terms; however, the reason for the narrow focus is not to conflate gender with race and sexual orientation, but to highlight the salient features of race claims and orientation transmission fears to show the opposing pull of both types of claims.
25. In re J.N., 601 N.Y.S.2d at 216 (child was placed with foster parent at four months and grandmother did not visit with regularity until child was two years old).
30. Palmore v. Sidoti, 466 U.S. 429 (1984). In Palmore, the child's mother, a White woman, began cohabiting with an African American man. The father sought a change in custody based on race, but the court refused to allow race to be a dispositive factor in making a child custody determination.
prompt the forceful arguments; however, after the court’s discussion of cultural competency, sexual orientation seems to be the trigger for the Palmore reference. The court considers the foster mother’s efforts to gain cultural competency by “ensuring E. [the child at issue] has a racially mixed school, neighborhood, church and friends of all backgrounds.” The underlying assumption is that the grandmother is capable of transmitting racial identity to the child. Either the foster mother’s cultural competency is considered sufficient, if not better than the grandmother’s ability to transmit racial identity to the child, or the value of a racial identity is less than the value of a culture of privilege. Privilege in this case is a proxy for love, ability to provide care, and, according to Black versus gay discourse, orientation itself.

Returning to the court’s statement: “Contrary to forceful arguments against having this child with a white lesbian, the law of this state and nation does not legitimatize private prejudices.” This comment seems to be a warning that the foster mother’s orientation is off-limits as a basis for unfitness as a parent. Although the court makes reference to the adoptive mother’s sexual orientation, there is no discussion about her orientation as a benefit or detriment to the child. The court focuses on the lesbian mother’s ability to provide for the child, and not just to provide medical care and special schooling, but to also provide racial diversity and a caregiver “she [the child] can trust,” the implication being that she cannot rely on her birth parents or grandmother. The court’s discussion of race and sexual orientation, with extended commentary about the child’s needs, reveals that the lesbian foster mother is conceptually linked to privilege, stability, and love. “E. [the child] needs a substantial amount of special care . . . Possibly due to her vast medical problems, including exposure to drugs in the womb, she has an even greater need than a normal child for someone she can trust.” The absent Black mother’s failure to care for the child haunts the proceedings.

In connection to the mother’s absence, the biological grandmother is conceptually linked to hardship, pain, instability, poverty, and genocide. She is first condemned because she “did not wish to care for [the child]” when she was first placed with the foster mother at four months of age. The court later speculates that perhaps the grandmother’s ad-

34. Id. at 100 (citing Palmore, 466 U.S. 429).
vanced age, lack of resources, and duties caring for E.'s sibling, J.N., might have prevented her from taking the child at birth. The court briefly conducts a cost-benefit analysis of changing custody, tallying up the harm to the child should she be moved to her grandmother's home. An unknown amount of suffering is predicted, but the court does not take into consideration the benefit of living with her grandmother.

This case illustrates the intersection of race and orientation. Race is often framed as biologically-based or an innate trait and orientation is framed as a characteristic that ought to be protected in the same way as race, treated implicitly by the court as an impermissible ground for finding unfitness. In the court's discussion of child placement, the factors used to weigh the child's best interests are treated as roughly equal. In crude mathematics, cutting the child legally from her grandmother and implicitly from her racial background was a negative, but removing her from poverty was a positive. Cultural competency, although not a perfect reproduction of racial transmission, is considered a positive by the court because racial identity is not viewed as solely a genetic or phenotypic trait. The record of the foster mother's care for the child is a positive, tipping the factors in favor of the foster mother over the grandmother. Race is treated as a non-dispositive social construct and orientation is neutral or ignored, a reflection of current treatment by courts. Access to resources becomes the most salient factor.

The claim is not that many judges choose orientation over race or that judges should choose one over the other. Rather, this case shows how race and orientation discourse function in line with considerations about the child's outcome. Looking at the claims separately reveals how race and orientation claims pull in opposite directions because they are based on racial preference and fears of LGBT transmission. Orientation transmission fears have been defused by framing orientation as an innate trait and race claims have been framed as a social construct free from heritable phenotypic traits.

Courts and policy makers addressing transracial adoption are not immune to advocacy and media discourse about race and orientation. Speculation about children's outcomes underpins arguments about best practices and ideal adoptive parents. Concerns that gay parents make gay children or that White parents will not be culturally competent to raise children of color pervade discussions about gay and transracial

38. In re J.N., 601 N.Y.S.2d at 216 (noting that perhaps the grandmother's "health and understandable emphasis on J. [E.'s sibling]" prevented more visits prior to E's second birthday).
39. In re J.N., 601 N.Y.S.2d at 218 ("it is clear that suffering will result, and no one can be sure of its extent or its results.").
adoption. Historically, parent-child identity transmission has been devalued for adoptive children with disfavored identities.\textsuperscript{40} LGBT advocates have spent considerable resources doing advocacy work and producing empirical studies in an effort to prove that LGBT parents will not make children gay.\textsuperscript{41} Advocates for Black family stability argue that higher value should be placed on transmitting racial identity for better child outcomes.\textsuperscript{42} When prospective parents for Black children adoptees are gay White men, it becomes difficult to assess how parent-child transmission claims are treated without using the same language as the Black versus gay discourse and reinforcing the same harms caused by that discourse. Rather than thinking about Black and gay as separate competitive claims, the focus should be on the site where they meet to develop a better understanding of both types of claims and find spaces of commonality.

\textbf{B. History of Claims and Fears}

To counter historic bias, race claims in the areas of adoption and custody have been treated by modern courts and policy makers as something that should not be taken into account as a dispositive factor. For orientation claims in custody cases, unless there is evidence of harm to the child, orientation is not typically taken into account.\textsuperscript{43} Adoption and custody cases are separate areas of law with different policy concerns. However, much of the discourse in adoption advocacy is similar to the language and imagery used in custody cases. The shift towards race and orientation neutrality is seen as a mark of progress that construes racial identity as a social construct and sexual orientation as an innate trait.

\textsuperscript{40} Elizabeth Bartholet, \textit{Where do Black Children Belong? The Politics of Race Matching in Adoption}, 139 U. Pa. L. Rev. 1163, 1211 (1991). Bartholet’s strong push for transracial adoption is based on the good that can be done for Black children rather than the loss of Black families who can pass on cultural identities: “whites are in the best position to teach black children how to maneuver in the white worlds of power and privilege.” \textit{id.} at 1222. Once race matching fell into disfavor, adoption placements were purportedly performed without reference to the children’s identities.

\textsuperscript{41} \textit{Leslie Cooper \& Paul Cates, ACLU, Too High a Price: The Case Against Restricting Gay Parenting} 96–100 (2d ed. 2006) (listing a series of studies used to provide empirical evidence that children raised by LGBT parents have positive outcomes).


\textsuperscript{43} See, e.g., \textit{Damron v. Damron}, 670 N.W.2d 871 (N.D. 2003) (providing an example of the nexus test used to balance evidence of harm to the child because of a parent’s sexual orientation).
rather than thinking of race as purely biological and homosexuality as a disease. An unintended side effect of this shift to viewing racial identity as wholly social is the loss of any race-based transmission claims that could be made by parents, family, and the child’s community. In a similar vein, advocacy for parenting equality has, in many states, moved courts away from using the sexual orientation of parents as a basis for per se disqualification of LGBT parents seeking custody of their children.44

On the surface, neutrality toward race and orientation are steps towards equality. The reality is that underlying these efforts for neutrality is the residual preference for White and heterosexual outcomes for children. In custody decisions generally, courts prefer that children grow up to become heterosexual.45 Racialized parents of biracial children who make race-based arguments for custody rarely, if ever, prevail on that basis in custody disputes. In adoption literature and custody decisions generally, courts express concern that children may not grow up to become heterosexual.46 Judicial opinions have not made overt expressions of preference for heterosexual children or White children as social acceptance of racial and sexual minorities has increased, but the treatment of race-based claims47 and the orientation tests many courts now employ may hide residual preferences.48 They illustrate a bias for the invisible privilege that White and heterosexual identities enjoy. Courts display an

44. Nancy Polikoff, A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century, 5 STAN. J. C.R. & C.L. 201, 203–04 (2009) (“Early scholarship urged a legal standard requiring proof of harm to a child before a mother’s lesbianism could result in a loss of custody. Scholars and lawyers debunked pervasive myths about gay and lesbian parents and urged rulings grounded in which parent could best meet a child’s needs rather than in assumptions of the harm caused by living with a gay or lesbian parent.”) (internal citations omitted).
45. Historically, the concern over homosexual parenting was that a child’s sexual development would be interrupted by homosexuality. RICHMAN, supra note 12, at 29–30.
46. RICHMAN, supra note 12, at 29–30.
interest in heterosexual outcomes for children, despite orientation-neutral standards that do not seem to have an investment in a child's outcome. While sexual orientation and transgender issues are different, they share the common problem of disagreement over the etiology of sexual identity development. A comparison of the two issues highlights how the inability to reach consensus in regards to etiology reveals an ongoing preference for the default or "real" gender of children. As more courts utilize orientation-blind standards, the concern about the natural development of children's sexual identity still remains, even if courts no longer overtly discuss an LGBT parent's possible role modeling. The focus has shifted to transgender parents and children's gender identity. Rhetoric about role modeling by parents, toys with which children play, clothing children wear, and sports children play that used to populate cases about parents' sexual orientation now appears in transgender cases. Discussions of race in custody cases often acknowledge racism in the past, but then courts tend to reduce race to exposing children to neighborhoods with racial diversity or signing them up for Taekwondo classes.

Subsection 1 provides a brief sketch of race-based claims in custody and adoption. Subsection 2 provides a brief sketch of orientation fears in custody and adoption. Tracking race and sexual orientation shows that there are parallels in the construction of the identity-based claims, but the claims develop differently and end with seemingly opposite results. For race, it seems as though race-based claims are weakened by thin readings of racial transmission that reduce race to a set of cultural practices or geographic areas, and thus harm disfavored racial identities that may wish for a more robust understanding of race as something inimitable. For sexual orientation, it seems as though orientation fears must be defused by staunchly denying any transmission from parent to child. Although the claims pull in opposite directions, examining the parallel development of the claims illustrates the underlying preferences for heterosexuality and majority racialization.

49. Gender Identity Disorder means that a child's birth gender conflicts with the child's desired gender presentation. When parents disagree about how to raise the child, the same questions appear about whether children's sexual identity is formed by external forces like role modeling that were seen in parent sexual orientation cases. See, e.g., id. at 31–32; Smith v. Smith, No. 05 JE 42, 2007 WL 901599 (Ohio Ct. App., Mar. 23, 2007) (the father wished to raise the child in accord with the child's birth gender and the court agreed so that the child's authentic gender could be discovered).


51. Supra note 47.

52. Foster v. Waterman, 738 N.W.2d 662 (Table), 2007 WL 2119125 at *2 (Iowa Ct. App. 2007).
1. Race-Based Claims

Courts making custody decisions tend to treat race-based claims thinly, meaning that the concept of race and racial cultural transmission are often reduced to cultural practices and demographic choices. Race-based claims, such as one parent claiming custody based on the child's race or racial appearance, appear in biracial child custody cases. Thin readings of race claims are the result of trying to remove historic racial bias or trying to foster the idea that courts are colorblind. The treatment of race-based claims also demonstrates the preference courts have for heterosexual family forms and expressions of racial identity that fit within mainstream norms.

The conflict between biological identity and cultural identity plays out in child custody cases where one parent is Black and the other is White. Where it seems as though parents of color should be able to argue successfully for child custody based on their ability to transmit cultural identity, courts are reluctant to make custody decisions based on race and racial or phenotypic appearance. In Fountaine v. Fountaine, a 1956 case, a White mother appealed the trial court's decision to award custody of the parties' two children to their Black father "solely on the basis of the race and color of defendant mother and the minor children." The year before the divorce, the father had served one year in prison for a rape conviction. The mother, appearing pro se, agreed to allow the father to have custody of the children at the time of divorce. At trial, the record reflected an interest in the children's phenotypic appearance, stating, "the two children have 'the outstanding basic racial characteristics of the Negro race and that for racial and religious reasons these children will make a better adjustment to life if allowed to remain identified, reared and educated with the group and basic stock of the plaintiff, their father.'" After the divorce, the father was awarded custody, and the mother received visitation. The order placing the children with the father was reversed and remanded because the appellate court did not believe that "the question of race alone can overweigh all other considerations and be decisive of the question." The appellate court considered race and culture. When the court considered race, in addition to looking at phenotypic racial markers, it looked at the mother's and stepfather's neighborhood composition: "adequate living quarters

53. See, e.g., Foster, 2007 WL 2119125 at 2.
56. Fountaine, 9 Ill. App. 2d at 484.
57. Fountaine, 9 Ill. App. 2d at 486.
for the minor children, on the south side of the City of Chicago in a neighborhood in which both white and colored people live, in which there are many mixed marriages and both colored and white children attend the same school.” Although the lower court noted “there was no difference in the character or the condition” of the mother’s and father’s homes, the appellate court commented that the mother remarried after the parties’ divorce to a White man. The argument is that demographics and cultural practices are enough to support a child’s placement regardless of the parent’s race, making the point that racial culture is understood as separable from phenotypic race. This analysis is similar to a 2007 case where the court concluded that attending Taekwondo class allowed a one-quarter Korean child to stay in touch with her culture in lieu of spending time with her Korean grandmother.

The case does not offer up an easy equation for determining the best interests of the children. The father was a convicted felon, but his female relatives, in the tradition of kinship care and networks, helped provide for the children’s care. The mother, absent for a year while looking for employment, seems to have had less external support as she lacked an attorney, a job, and family members willing to help provide care so she could find employment. Both parents had the desire to have custody of the children, but the father specified his right as being one based on race. The trial court considered the parents equally situated in terms of fitness, or more precisely, the mother would have been given custody but for the children’s racialized appearance.

The father’s criminal conviction was not discussed at length as a factor making him unfit as a parent nor was there any apparent deficiency in the care provided by the father and his extended family network. The critical question was racial appearance and the likelihood the children would blend or be accepted because of race. In Fountaine, the level of racial diversity in the mother’s neighborhood became an implicit indicator of the mother’s ability to sufficiently transmit the father’s cultural identity through contact with people racially similar to the children. Implicit in the consideration is that the White mother’s culture would be transmitted and the father’s Black-ness was an add-on that could be transmitted by surrounding the children with Black and

58. Fountaine, 9 Ill. App. 2d at 484.
60. Fountaine, 9 Ill. App. 2d at 484.
61. See Foster v. Waterman, 738 N.W.2d 662 (Iowa Ct. App. 2007).
62. Fountaine, 9 Ill. App. 2d at 484–85.
63. Fountaine, 9 Ill. App. 2d at 484.
There was no question put to the father as to his ability to transmit the culture or religion of the mother’s family. In contrast, the White mother with a White husband living in a multicultural neighborhood was better than the Black multi-generational home with the former convict father. The strength of parent-child transmission arguments depends on whether the parent’s identity is favored; this disparity is seen when courts prefer the family formation that more closely aligns with mainstream norms.

The diffusion of the race consciousness seen in Fountaine into the idea of an invisible, privileged identity against which Black cultural identity is measured can be seen in a 1981 case, Farmer v. Farmer. In Farmer, a White mother and Black father both sought custody of their daughter. The child was described by the expert witnesses as having “evident black physical characteristics, however subtle, [that] will be perceived by society at large as a Black child.” The court stated that race could not be the only consideration in cases like Fountaine. The court reviewed a number of expert opinions about race and culture without indicating how much emphasis was placed on the expert opinions and what factors were used in discriminating among the multiple expert opinions. The Farmer court decided to award custody to the mother based on the trend in other appellate court decisions about race. The court’s decision reflects Dr. Gordon F. Derner’s expert opinion. Dr. Derner was hired by and testified for the mother. The court summarized his testimony as saying that the best interests of a child are defined by a child’s need for “continuity and consistency of parenting and the proper discipline. Economic stability is valuable; emotional stability is crucial, educational background is not necessary; however, the better educated can be said to have a better grasp on some of the issues affecting the child’s rearing process.”

Derner’s opinion is race-neutral, highlighting qualities that both parents could ostensibly utilize in raising the child, such as economic well-being, emotional stability, and consistency. The court does not address how the mother specifically can provide or embody those characteristics and how the father fails to do so except for a short statement

64. Fountaine, 9 Ill. App. 2d at 484.
66. Farmer, 109 Misc. 2d at 140.
67. Farmer, 109 Misc. 2d at 140–43.
68. Farmer, 109 Misc. 2d at 148.
69. Farmer, 109 Misc. 2d at 142–43.
70. Farmer, 109 Misc. 2d at 142–43.
71. Farmer, 109 Misc. 2d at 142–43.
that the mother has "maintained a consistent pattern of employment." If the mother was "the best hope," then the father was the lesser hope because he failed to embody to the same extent as the mother the economic and emotional stability and education that Derner concluded can help a parent better raise a child. Again, themes of the mother's privilege and the father's absence inform the opinion so that any possible preferential treatment because of race is masked by the dislike of absence and economic instability.

The 1997 case *Davis v. Davis* was a custody dispute between a Black father and White mother. The Black father argued that the court erred by not taking race into account when making its determination that the mother should have sole custody. The father argued that he and his White girlfriend were better suited to raise the child as compared to the mother's all-White home. The court acknowledged that the child had learned the term "nigger" at some point, but was not persuaded that the mother's boyfriend was involved or that the incident alone merited a change in custody. The cultural transmission argument appeared again because the father was concerned that the child would become bulimic from exposure to the mother, but this was also dismissed. The court cited that the father has "a low tolerance for frustration, is somewhat controlling, is unwilling to compromise and is easily agitated" and, in comparison, the mother has "greater flexibility in dealing with [the child's] day-to-day requirements . . . [a] strong attachment to [the child,] and has provided him with a greater continuity of care." The court used this comparison of traits to determine that the mother was fit to remain the primary custodian. This could be a case of racial and gender bias, but it is noteworthy that the father's transmission arguments, negative or positive, were not taken seriously by the court. In the same way the court was dismissive of the child learning a racial epithet, so was it unmoved by the claim that he and his wife could transmit culture in a better way to the child.

A similar argument appeared in a 2000 case, *Ebirim v. Ebirim*. The White mother was awarded sole custody of the parties' minor child, Chika. The Black father appealed, arguing that the court failed to take

---

72. *Fanner*, 109 Misc. 2d at 147.
73. *Fanner*, 109 Misc. 2d at 142-43.
75. *Davis*, 240 A.D.2d at 928.
76. *Davis*, 240 A.D.2d at 928.
77. *Davis*, 240 A.D.2d at 929.
78. *Davis*, 240 A.D.2d at 929 n.1.
the child’s biracial status into consideration when making its determination. The mother had moved away from Omaha with its greater racial diversity to a community in Brownville without any Black children. Additionally, the mother’s family “made racial slurs against” the father. The mother shared a room with the child and lived with her father in a two-bedroom mobile home. While the living situation is not related to the parents’ race or ability to transmit racial culture, a child’s living situation, including whether a child has his or her own bedroom, can be taken into account as a factor in determining custody. The court rejected the father’s argument, stating that race could not be the sole or dominant factor in making a determination. The child’s Guardian ad Litem reported that the mother’s family accepted the child in the same way as the other grandchildren. The mother’s testimony that she “attempts to expose [the child] to biracial and minority children in the greater Brownville area and that he is exposed to minority children during visitations to Omaha” is similar to statements made in other biracial cases where phenotypic racial appearance does not match the culture into which the child is placed. Such cases make the idea of racial transmission seem less authentic.

Critics of race consciousness might argue that requiring parents to prove that they can transmit race highlights the artificiality of the tie between culture and race. The relative inauthenticity of cultural transmission of a disfavored culture by a favored parent can be seen as the court sanctioning the transmission of the favored culture. The biracial cases do not address the transmission of the White parent’s culture or the need for the racial minority parent to demonstrate the ability to transmit White culture. The onus is seemingly on the favored parent to replicate the disfavored parent’s identity, but the quality of that transmission reinforces the artificiality of the belief in transmission by purely social means and illustrates how disfavored racial identities are devalued.

Although the conflict point in adoption is not choosing between two differently racialized parents, concerns about the degree to which race plays a part in a child’s identity development provoke similar arguments to those seen in biracial custody cases. Early adoption practices relied on race, religion, and appearance-matching so adoptive parents could pass as biological parents. Due to growing interest in adopting children from Latin America and Asia, there was a push for transracial

81. Ebirim, 9 Neb. App. at 744.
82. Ebirim, 9 Neb. App. at 744–45.
83. Ebirim, 9 Neb. App. at 743.
84. Ebirim, 9 Neb. App. at 744.
85. ELLEN HERMAN, KINSHIP BY DESIGN, 122–23 (2008).
adoption. Some scholars posit that the interest arose concurrently with the rise of safe, legal abortions because this development significantly decreased the availability of White babies for adoption. There was also concern that Black children were languishing in foster care because of race matching performed as a matter of policy and practice in adoption agencies. The effort to move more children, specifically children of color, out of foster care resulted in a push away from race matching practices. In a turnaround, rather than trying to pass as a biological family, White adoptive families were characterized as part of the sweeping change in race politics.

The Multiethnic Placement Act of 1994 (MEPA) and Interethnic Adoption Provisions of 1996 (IEP) instituted colorblind adoption placements, preventing the race matching that was practiced until 1994. Unlike Native American families that have the protection of the Indian Child Welfare Act (ICWA), Black families are blocked by MEPA-IEP and political resistance to race matching, resulting in limited access to race, culture, and religious claims on Black children.

In 1972, the National Association of Black Social Workers (NABSW) opposed the transracial placement of African American children. The basis for this opposition was the deleterious effect transracial foster placement and adoption has on children of African descent. The group claimed that studies showed all children in out-of-home placements experienced poor educational outcomes as a result of being removed from their home, community, and school. Children of African descent were in foster care longer, with more placements, leading to the conclusion that those children would therefore suffer poorer educational outcomes. The 1994 document “Preserving African American

87. Id. at 83.
88. Herman, supra note 85, at 233–43.
89. Herman, supra note 85, at 204–05.
90. Herman, supra note 85, at 245.
94. Bartholet, supra note 40.
95. NABSW, supra note 42.
96. NABSW, supra note 42 (segment covering historical context and disparate treatment provides reasoning for the organization’s advocacy efforts).
97. NABSW, supra note 42.
families" helps explain the importance of transmitting culture:99 "Culture is the essence of being human. Culture is the bridge that links the present with the past and the past with the future. Culture provides a sense of historical continuity. It is a protective device structured to eliminate trial and error in the past and the future. Culture is second nature. It is a person's values, beliefs, learnings, practices, and understandings that are passed on..."100 The cultural rupture happens when "[c]hildren [are] removed from their home, school, religious environment, physicians, friends, and families are disengaged from their cultural background. They are denied the opportunity for optimal development and functioning.101

There is a strong suggestion that an out-of-community placement, or, in other words, a transracial one, will result in a poor outcome for a Black child because there is no opportunity for Black cultural identity transmission.102 Cultural identity, and more specifically the failure to adequately transmit cultural identity, is presented as the reason for opposing transracial placements. The NABSW website notes, "An additional developmental consideration is that [sic] of identity development. Children of African ancestry learn about their identity from within the home and community. Identity is critical to being able to negotiate the world, understand one's barriers and realities, and feeling good about one's self. Identity forms the basis of character development, pride, and belief in achievement.103 Cultural identity is construed as a set of skills to "negotiate the world" and "understand one's barriers and realities" as well as vital for "character development, pride, and belief in achievement.104 The section is worded so that it appears race-neutral, but implied in the section is the belief that transmission of cultural identity is linked to the racial sameness of parent and child. The assertion that "[c]hildren of African ancestry learn about their identity from within the home and community"105 assumes that non-African American children learn about identity from another source(s). It seems fairly safe to assert that most parents believe that their children are acquiring cultural identity from home and community.

99. NABSW, supra note 42.
100. Id.
101. Id.
102. Id. (citing "poorer educational outcomes, such as lower reading and math scores" with out of home placement").
103. Id. (citations omitted).
104. Id.
105. Id. (segment entitled "Developmental Issues" cites to studies about how children develop identities).
In a similar vein, Dorothy Roberts, a law professor at Northwestern University School of Law, posits that because of the erasure and devaluation of Black families' genetic ties, Black communities have consciously valued cultural preservation over genetic preservation. Thus, "[a] Black parent's essential contribution to his or her children is not passing down genetic information but sharing lessons needed to survive in a racist society. Black parents transmit to their children their own cultural identity and teach them to defy racist stereotypes and practices, teaching their children to live in two cultures, both Black and White." Cultural identity transmission is privileged over biology because of the metanarrative of Black children being taken from Black mothers and families during slavery and currently through the foster system.

Judges and policy makers faced with decisions about the best interests of a child may not know how to resolve the differences in community valuations of non-genetic racial cultural identity when deliberating about race-based claims. Not surprisingly, if phenotypic appearance is seen as something inherited, but racial identity is something that is formed by surroundings, best interests deliberations shift towards economic privilege, educational attainment levels, freedom from state intervention in the form of child removals and the foster care system, and so forth.

2. Orientation Transmission Fears

In custody cases and adoption, a parent's LGBT orientation has historically been treated as either a negative attribute making that person per se unfit for parenthood or, more recently, as something neutral like race or religion, unless there is evidence that the parent's sexual orientation poses harm to the child. If there is evidence of harm to the child, the court can take the parent's orientation into account when making a custody determination. The seeming neutrality of the standard used

107. Id. at 234; see also id. at 232 ("Whites defined enslaved Africans as a biological race. Blacks in America have historically resisted this racial ideology by defining themselves as a political group.... By the turn of the twentieth century, Black Americans had developed a race consciousness rooted in a sense of peoplehood that laid the foundation for later civil rights struggles.").
109. Kenji Yoshino, Covering, 111 YALE L.J. 769, 859 (2002) ("[T]he majority of states have come to adhere to a nexus test.").
masks the underlying preference for reproducing heterosexuality and not reproducing homosexuality.

Although there are few states that have an outright ban on LGBT adoption, there are continuing efforts to prohibit adoptions by single people as an effort to prevent LGBT adoption.110 Again, adoption and custody are different legal mechanisms with unique policy considerations, but despite those differences, like race-based claims, rhetoric about sexual orientation shares common features across custody and adoption advocacy. In earlier cases, frequently the couples disputing custody were in heterosexual marriages or marriage-like relationships. The dispute over custody that resulted from those relationships was beset by confusion about the seemingly sudden appearance of homosexuality. Courts have employed two standards for determining parental fitness in custody cases, the per se unfit standard and the nexus test, which looks for a connection between a parent’s sexual orientation and harm to the child.111

Opponents of LGBT parenting were concerned that children would be victimized, converted to homosexuality, or both.112 These concerns arose from a longstanding dispute about whether sexual orientation was innate or a product of one’s environment.113 Kimberly Richman, a professor of law and society at the University of San Francisco, conducted a study of lesbian, gay, and bisexual cases from 1952 through 2004. Her analysis reveals that “the most discussed (and studied) concern raised against gay and lesbian parents in custody and adoption cases was that the child would become homosexual or develop a non-normative gender identity as a consequence of contact with a

110. In Arkansas, the group behind the single adult adoption ban stated outright that they were attempting to ban homosexual adoption by preventing all single adults from adopting. The group modeled its law after similar laws in Utah that prevent single adults from adopting children to whom they are not legally related. For statements about homosexuality, see FAQ, Arkansas Adoption and Foster Care Act, FAMILY COUNCIL ACTION COMMITTEE, http://adoptionact.familycouncilactioncommittee.com/index.asp?PageID=4, (April 9, 2012) [hereinafter FAMILY COUNCIL ACTION COMMITTEE].

111. RICHMAN, supra note 12, at 38–39.


113. RICHMAN, supra note 12, at 47–51.
homosexual parent . . . [I]n 14 percent of the cases (forty-four [cases]) 'harm' was defined at least in part as the production of a homosexual child.” In line with Richman’s assessment, there continue to be concerns about appropriate gender identity development and promiscuity or heightened rates of sexual activity by children raised by one or two LGBT parents. Although the form of opposition has changed, the root is the same—fear of the LGBT parent tampering in some way with “normal” heterosexual development.

The idea of sexual orientation as an innate trait has developed over time with advocacy efforts and scientific research aimed at discovering the etiology of homosexuality. Although sexual orientation as an innate trait has begun to gain traction with courts, the idea of inheriting sexual orientation does not function in the same way as concepts of racial heritability. Likely because of its medical beginnings as a mental illness, homosexuality was viewed like a genetic disorder or disease to be contracted rather than a value-neutral trait that simply passes from parent to child. For people who insist that homosexuality is based on conduct rather than status, one can imagine that the more salient fear is that sexual identity is something to be learned, accepted and imitated by children of LGBT parents.

Change is afoot in the popular imagination with regard to acknowledging the existence of LGBT children. Beginning with the Lofton v. Dep’t of Children’s Serv. dissent that critiques the idea that the state has an interest in gay child outcomes, and more recently, Judge Walker’s opinion in the Perry v. Schwarzenegger case which referred to the dread of the gay child as an inappropriate basis to oppose same-sex marriage, the fear of reproducing gay children is now openly addressed in a more neutral way. In Lofton v. Sec. of Dep’t of Children and Family, the Florida adoption case that upheld the state’s prohibition against adoption by LGBT individuals or couples, the state proffered homosexual outcomes as the motivation for its interest in preventing homosexual adoption.

117. Id.
118. Lofton v. Dep’t. Children’s Serv., 377 F.3d 1275, 1279 (11th Cir. 2004).
119. Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 1003 (N.D. Cal. 2010) (“The evidence shows, however, that Proposition 8 played on a fear that exposure to homosexuality would turn children into homosexuals and that parents should dread having children who are not heterosexual.”).
120. Lofton, 704 F. Supp. 2d at 1275.
Judge Barkett’s dissent points out that the state’s proffered interest of preventing homosexual outcomes is not a legitimate state interest. Barkett suggests that heterosexual parents are not any more likely to influence the outcome of their children’s sexual identity development with role-modeling behavior than are gay parents. In the Perry case, Judge Walker is more explicit in pointing out that the dread of the gay child is the driving force behind the opposition to gay marriage.

Greater neutrality does not mean that parenting equality has been achieved or that concerns about LGBT parents producing LGBT children are quieted, let alone embraced. Heterosexual outcomes for children continue to be favored. Unlike race contestation in child custody and adoption, because of sexual orientation and gender identity transmission fears, LGBT parents and parents of children with Gender Identity Disorder (GID) have remained in a defensive stance with courts that often express concern that parents will make LGBT children, that a father who cross-dresses will endanger his son, or that a mother who allows a boy to dress in girl’s clothing and identify as a girl is abusing the child. In the case In re marriage of D.F.D., the mother believed the father’s cross-dressing would harm the child from exposure to the father’s role modeling. Although an appellate court later reversed the decision, the lower court was persuaded by the mother’s argument, demonstrating the traction that parent-child imitation had into the 1990s.

Fears of parent-child transmission have not completely disappeared; instead, the fears of non-heterosexual outcomes are beginning to take shape as concern for “normal” gender identity development. An example

---

121. Lofton, 704 F. Supp. 2d at 1296–97 (refuting the state’s proffered rationale for its ban on homosexual adoption to the interests).

122. Lofton, 704 F. Supp. 2d at 1299 (“Is the panel suggesting that heterosexual parents are necessary in order to tell children about their own dating experiences after puberty?”).

123. 704 F. Supp. 2d at 988.

124. Cliff Rosky, Like Father, Like Son: Homosexuality, Parenthood, and the Gender of Homophobia, 20 YALE J.L. & FEMINISM 257, 297 (2009) (survey of family cases dealing with homosexual parents reveals that court opinions portray gay fathers as recruiters 50% of the time when the child in question is a boy as opposed to 10% of the time when the child in question is a girl. Lesbian mothers are portrayed as recruiters in roughly equal (32% for boys, 33% for girls) but lower numbers as compared to gay fathers); Richman supra note 12, at 31 (“[I]t has become standard practice in child custody cases involving gay and lesbian parents to raise, or dispute, these assumptions regarding their ability and propensities as parents.”).


of this fear surfaces in *Smith v. Smith*, a custody case where the mother allowed the parties’ child to dress and self-identify as a girl when the child’s birth gender was male. The father wanted to raise the child as a boy. The court ruled in favor of the father so that the child could make a “more informed decision about his gender at a later point in life.” There is a difference between gender identity disorder and sexual orientation. However, the fact that even experts have blurred the line between the two speaks to mainstream norms of heterosexuality and non-transgressive gender identity.

The question is not put to heterosexual parents as to their ability to raise homosexual children, but homosexual parents are seen as a danger to the natural development of sexual orientation. Scientific studies have been designed to provide empirical evidence that LGBT parents are as good as heterosexual parents in sexual orientation outcomes as well as other measures, such as schooling, adjustment, and so forth. Even so, there are suggestions that girls raised by lesbian parents engage in higher percentages of homosexual and bisexual behavior.

If orientation were treated like race in courts, then orientation would be treated as an inherent trait and not conduct. Even though orientation is not to be taken into account, LGBT parents are treated as acceptable so long as they do not transmit sexual orientation or non-heterosexual gender identity through socialization. The reality that LGBT parents are not encouraged in passing on identity and culture demonstrates that sexual orientation is not neutral. This means that when orientation is construed as innate, compared to the innate heritable characteristics of race, and thought to be reproduced in the same manner, then any empirical evidence that children imitate their parents’ behavior seems to undercut claims of innateness. In either case, the underlying dread of non-heterosexual child outcomes persists even when

128. Dailey v. Dailey, 635 S.W.2d 391, 394 (Tenn. Ct. App. 1981) (expert opinion offered to the court included statement that, “homosexuality is a learned trait and it would be very difficult for [the child] to learn and approximate sex role identification from a homosexual environment.”)
130. Nanette Gartrell, Henny Bos & Naomi Goldberg, *Adolescents of the U.S. National Longitudinal Lesbian Family Study: Sexual Orientation, Sexual Behavior, and Sexual Risk Exposure*, *ARCHIVES OF SEXUAL BEHAVIOR* 4-5 (2010). Of children raised by lesbian mothers, adolescent girls were more likely to have sexual contact with other girls and adolescent boys were more likely to delay sexual contact as compared to their peers. This data does not indicate children raised by lesbian mothers were more sexually active as compared to their peers raised by heterosexual parents.
there is seemingly neutral treatment of sexual orientation and gender identity.

The treatment of race-based claims and sexual orientation transmission fears in both custody and adoption settings over time shows that the parent with the disfavored identity has difficulty making nuanced identity reproduction arguments. Parents of color who ask the court to take race into account as more than cultural practices or the demographic makeup of the child's neighborhood are often met with the court's belief in a colorblind standard that fails to take into account the invisible reproduction of Whiteness. Even if LGBT parents felt they should have good custody and adoption results by arguing affirmatively that they wished to transmit an LGBT identity based on sociological reviews and critiques of current LGBT strategies, there is little evidence in case law or parenting advocacy rhetoric that such a tactic would be successful or advisable. The deep animus to the possibility that a parent could or would make a child gay allows for little latitude in the arguments available to LGBT parents who wish to achieve parenting parity with heterosexual families.

Discussing race-based claims and sexual orientation fears may be suggestive of some strict divide between race and orientation, imagining that LGBT families are White and parents of color are heterosexual. This is not the case, as there are LGBT families of color. Focusing on the separate strands of parent-child identity transmission is not to demonstrate that race and orientation develop in ways that are so similar as to be fungible, but to place these claims in the broader Black versus gay narrative that appears in debates over same-sex marriage, civil rights, access to justice, and Don't Ask Don't Tell.

131. In disputes where race and sexual orientation are contested, courts worry about the social stigma children will suffer. Potential social stigma is another articulation of the child's non-normative potential future because of the parent with a disfavored identity. See e.g., Dailey, 635 S.W.2d at 394 (expert opinion refers to “peer pressure and social stigma”).


II. Staging a Competition

Examining the media staging of Black versus gay discourse will show how the claims are imagined as a competition rather than as having similarities in their failure to align with mainstream norms. It is difficult to avoid recreating Black versus gay discourse, even in its interrogation and disruption. The shorthand for concepts and groups of people gives this discourse potency. Of course not all foster children are Black boys, just as not all adoptive parents are White, gay men. Nonetheless, interrogating and disrupting the discourse is in peril at all times of recreating the very thing it is trying to avoid. Statements about Black versus gay discourse cut against the reality that not all gay people are White and not all Black people are biased against homosexuality. Take for example judicial opinions that equate race with orientation. Just as there is a constellation of women that come to mind when the phrase "single mothers" is used, so too is there a constellation of racially marked groups that come to mind when race and orientation are addressed by courts. The comparison of race to orientation or disability to orientation is a comparison of seemingly similarly disfavored attributes.

This type of comparison incorrectly suggests that these characteristics are somehow fungible but not necessarily intersecting. Framing In re J.N. as a case within the Black versus gay discourse, particularly in light of how race and orientation claims seem to have developed on parallel tracks, reveals that there are points of intersection between race and orientation. The points of intersection are staged as a competition. The terms of the competition treat race and orientation as mutually exclusive categories instead of as two claims that are related. If courts fail to see that race and orientation claims in custody and adoption are not fungible or in competition with each other, they participate in Black versus


135. Blew v. Verta, 617 A.2d 31, 35 (Pa. Super. Ct. 1992) (concern about child suffering stigma of lesbian mother is compared to stigma of having a parent in a wheelchair; both are character-building experiences and not grounds for denying custody).
gay discourse. The danger with participating in that discourse is that, rather than looking at the best interests of the child with a nuanced view of race and orientation, thin, weakened race and orientation claims will continue to provide cover for courts to prefer mainstream heterosexual, White cultural norms.

A. Brüno and ABC News

This section explores the media staging of Black versus gay discourse in the realm of LGBT transracial adoption. The fact that it is framed as a competition means there is little common ground around which parents, communities, and advocacy groups can coalesce to support the children in question. Rather, the focus shifts towards predicting which prospective parent is going to influence the child more or which parent has a better, more rightful claim to raise the child. Returning to the scenario at the beginning of the paper shows how the media stages Black versus gay discourse much like the seemingly separate treatment of race and orientation by the courts.

Sacha Baron Cohen's film Brüno used a satirical tone that was on point to the extent that it captured the tension underpinning White gay men adopting Black children, but perhaps failed to uncover all of the problems inherent in Black versus gay discourse. The title character is a fictitious gay Austrian fashionista who is making a documentary in America while pursuing fame. In the film, Baron Cohen takes aim at critics of LGBT adoption, transracial adoption, and the commodification of children. Brüno adopts a baby boy from Africa to obtain social cachet like celebrities who adopt children from developing countries.

Despite the film's stance with outrageous statements and a satirical take on homophobia, life imitated art when concerns arose about a baby

being exposed to gay sex. Early filmgoers were worried about the baby being present during the filming of graphic sex scenes with Brüno and other men. Filmgoers also worried about Brüno’s comment that the baby was a “man magnet.” Later, an insider on the film stated that the pictures were digitally created, so the child was not present for the photo shoot. There were no similar concerns raised about the portrayal of Black children removed from their homes and communities because the segment reiterated the commonly-held belief that it is normal for Black children to be available for adoption and that they are better off with non-Black parents—even if they are superficial gay men. The children’s orphan-like status has been naturalized so that the question of how children come to be available for adoption is not asked; they are understood as being already without parents.

In a review of Brüno, Rashad Robinson, Senior Director of Media Programs for GLAAD, the Gay & Lesbian Alliance Against Defamation, described the segments with the adopted child as “trivializing gay families, making them the butt of a series of crude jokes, and reinforcing pernicious stereotypes about gay men and children [that] didn’t feel funny. It felt dangerous.” Robinson characterized the segments as dangerous because they seem to function outside of the reality that many LGBT parents face obstacles to adopting children or risk removal of their children. According to Robinson’s account of the film, the depiction mirrors too closely the fear that an LGBT parent will be an inappropriately sexual individual first and a parent second.

Robinson’s critique that the film trivializes the lives of gay families applies to Black families as well, but not in the same way he imagines the film as being dangerous to gay families. In his critique of Baron Cohen’s film, Robinson refers to race only briefly by stating, “Brüno adopts a baby from Africa, giving Baron Cohen an opportunity to take aim at those celebrity parents who seem to treat their children like fashion accessories.” This statement elides overt reference to racial difference and unequal access to power and resources, but relies on the understanding

141. Id.
142. Robinson, supra note 139.
143. Id.
144. Id.
145. Id.
that the children available for adoption are poor, non-White children and that adoptive parents partake of racial privilege and have greater access to resources.

The portrayal of the Black audience's outrage remained flat; the film segment did not showcase or exhibit righteous indignation over the larger social problems that placed the Black child on the stage, but rather took aim at Black homophobia. The segment invited the viewer to laugh at the gay man's superficiality and Black homophobia as though homophobia and stereotypes of gay superficiality are equally problematic. Critiquing homophobia in the Black community without critiquing the concept that reports of homophobia in the Black community themselves are suspect fails to address the complexity of Black versus gay discourse. Rather than providing a deep critique, the segment reiterated the stereotypes that underpin Black versus gay discourse.

The vignette could be interpreted as trivializing legitimate dissent to the conditions that lead to higher removal rates for Black children. The scene where an angry Black woman expresses outrage and disbelief that a Black child was traded for an iPod resonates with outcries for reform of the welfare system and a painful history of children being sold away from parents in the American slave trade. The editing of the sequence reiterates stereotypical gender roles within Black families; the mother is too strong and the father is passive. Reaction shots are primarily of Black women; there are a few reaction shots of Black men but no lengthy shots or comments. Playing on the stereotypical angry Black woman without accounting for Black men's claim to fatherhood and relying on the pernicious stereotype that Black women's claims to motherhood are not to be taken seriously normalizes second class social citizenship as endemic to Black parenthood.

If the critique had merely been about a seemingly vacuous celebrity opportunistically adopting children, a predominantly Black female audience would have been unnecessary. Had race been without significance, any reasonable parents under the impression Brüno's adoption story was real would have been outraged, but the power of the scene lies in the outrage of Black women. The scene leaves the viewer caught among competing ideas: color-blind reasoning that permits transracial adoption, orientation-neutral principles that drive towards parenting equality, and inequality around access to resources. There is no clear sense about who has a rightful claim to the child and by what metric one should decide. Is the gay White man who is satirically portrayed as

---

146. Karst, supra note 108, at 985.
superficial better than the Black audience members who are portrayed as outraged and homophobic?

The competition operates in other media formats, not just satire. Even where the media format is more serious than a mainstream comedy film, Black versus gay discourse still operates to subtly position Black in opposition to LGBT. In February 2009, ABC News featured a story about Los Angeles County adoption agencies recruiting LGBT people to volunteer to care for children in foster care. The camera panned over a poster created by the Human Rights Campaign with the words “Life, Liberty and the Pursuit of Family.” Appearing below the words was an image of a White man, a Black child, and a Black man. A representative for an adoption agency discussed criteria for parenting without any reference to race or gender. She only remarked that the number of children languishing in the system was high and parents with loving homes were desperately needed, hence the outreach to the LGBT community. Representing opponents of LGBT adoption during the segment was a Black man from the Brotherhood Organization of a New Destiny (BOND). BOND is a non-profit organization based in Los Angeles that focuses on supporting traditional, patriarchal Black families. The Black man from BOND argued against LGBT adoption as an attack on traditional families, a misuse of state funds, and a strategy to further the homosexual agenda. He claimed that studies show children, especially girls, raised by homosexual parents act out sexually by becoming promiscuous. He also claimed that children of gay parents become confused about their gender identity. On the surface, the segment was only about orientation. At the same time, it was ineluctably about race because the segment relied on Black versus gay discourse. The privilege of fostering and adopting children as a social good primarily rested with White gay men. The affirmation of stereotypes of Black conservative, religious homophobia rested with a Black man. Arraying White gay men against Black straight men is the core concept that drives the ABC News segment. Disrupting and interrogating how the discourse works and why it is dangerous requires looking at how the media shapes ideas of Black men, gay men, and their access to fatherhood.


B. Good Fathers

Negative perceptions about Black men’s and gay men’s ability to be good fathers prevent both groups from appearing as rightful fathers to children. Being perceived as a rightful father is key to the idea of the traditional family and social citizenship. Historian Stephanie Coontz writes about how the myths and nostalgia for a traditional patriarchal family structure do not reflect how families actually were or are.\textsuperscript{150} An egregious example of this nostalgia for a non-existent past is the controversy over Michelle Bachman signing a pledge for traditional family values.\textsuperscript{151} The pledge falsely claimed that African American children were better off during slavery because they had a better chance of being raised in a traditional family than they do now. This nostalgic view facilitated the argument against other forms of family, like same-sex families. Coontz argues that family reform cannot be effective without recognizing the myths about traditional families and gender roles that persist.\textsuperscript{152} Lauren Berlant, an English professor at the University of Chicago, theorizes that moral and normative political conversations about private issues recently began to be played out on the national stage, shifting systemic critiques in public dialogue to become personalized against certain groups.\textsuperscript{153} Berlant argues that the conservative right utilizes rhetoric of economic crisis and downsizing to create competition among workers in the marketplace and drive them “into overvalorizing individual will, as though personal willpower” would be enough to overcome structural conditions of inequality.\textsuperscript{154} In the same vein, she posits that “the utopia of a color-blind and gender consensual society” allows for “egregious inequality” that “seem[s] like exceptions to the national standard.”\textsuperscript{155} The movement of the intimate from the private sphere to the public sphere results in disfavored groups becoming the focus of moral and policy discussions. The idea that society is blind to race, gender, and orientation makes persistent inequality seem exceptional and seem to be the personal responsibility of White gay men, Black men and gay men of color. Incarceration and poverty are seen as endemic to a racial

\begin{itemize}
\item \textsuperscript{150} Stephanie Coontz, \textit{The Way We Never Were: American Families and the Nostalgia Trap} (2000).
\item \textsuperscript{152} Coontz, \textit{supra} note 150, at 20–22.
\item \textsuperscript{153} Lauren Berlant, \textit{The Queen of America Goes to Washington City: Essays on Sex and Citizenship} 1–24 (1997).
\item \textsuperscript{154} Id. at 9.
\item \textsuperscript{155} Id.
\end{itemize}
condition or as a personal failing and inability to overcome obstacles, rather than the result of structural inequalities. Because of this shift in discourse, Black men's fitness as parents is seen as a character flaw or personal failing.

Gay men's right and ability to parent has been the subject of public debate, a matter of policy concern. Public discussions about the morality of gay parenting coupled with society's strongly held beliefs about gender roles and predation, not to mention laws and policies preventing gay men from fostering and adopting children, make it difficult for gay men to become fathers. So too have Black men's ability to parent been a matter of public debate and moral concern as though but for the absence of the father in the home, rates of childhood delinquency, poverty, child welfare removals, incarceration, and drug use would decrease. President Barack Obama critiqued Black fathers, stating, "They have abandoned their responsibilities, acting like boys instead of men. And the foundations of our families are weaker because of it." This public debate and concern about fathers with disfavored identities means that deviancy from mainstream norms in fathering can become a barrier to fatherhood materially through law and policy. Gay men are

156. Devon Brooks & Sheryl Goldberg, Gay and Lesbian Adoptive and Foster Care Placements: Can They Meet the Needs of Waiting Children? 41 Soc. Work 147 (2001) available at http://wikis.lib.ncsu.edu/images/c/cb/Gay_and_lesbian_foster_parents.pdf (last visited Oct. 15, 2011). "Despite the lack of empirical evidence that gay and lesbian parenting is detrimental to the wellbeing of children raised in their biological families, participants in our study described a presumption that they believed to be ubiquitous in the child welfare services system; namely that gay men and lesbians are unfit to raise adopted and foster children. Our data suggest that solely because of their sexual orientation, gay and lesbian prospective adoptive and foster parents experience considerable scrutiny of their parenting ability."

157. See, e.g., Deboobtube, Boys Beware Homosexuals Are on the Prowl. YouTube (Mar. 29, 2009), http://www.youtube.com/watch?v=Ehsyg2UIMnHM (short film produced by a police department and school district to inform boys of the dangerous homosexual man on the prowl, expressing beliefs that homosexuality was a disease and that pedophilia with homosexuality were related).

158. U.C.A. 1953 § 78B-6-117(3) ("A child may not be adopted by a person who is cohabitating in a relationship that is not a legally valid and binding marriage under the laws of this state."); A.C.A. § 9-8-304(a) ("A minor may not be adopted or placed in a foster home if the individual seeking to adopt or to serve as a foster parent is cohabiting with a sexual partner outside of a marriage that is valid under the Arkansas Constitution and the laws of this state."); In 2010 the law was held unconstitutional by Fla. Dept. of Child. and Families v. Adoption of X.X.G., 45 So. 3d 79 (Fla. Ct. App. 2010), but until then the Florida law stated that "[n]o person eligible to adopt under this statute may adopt if that person is a homosexual." F.S.A. § 63.042(3).


160. Id.
characterized as shallow, sex-obsessed, and immature. Black men are characterized as irresponsible, selfish, and boyish. Mature, capable fatherhood is the rite of passage to full social citizenship for adult males. Fatherhood, as defined by normative, heterosexual, White middle class standards, requires a balance of a man's absence and presence in the home. Good fathers are absent from the home, earning a wage and increasing their status in the workplace. They are not entirely absent, returning home to model masculine, heterosexual, patriarchal behavior, and a growing portion of fathers are expected to display gender consciousness by sharing in child care and household duties. Maintaining the balance between absence and presence has its own difficulties, evidenced by the number of men who elect not to take paternity leave when available or do not ask for use of flexible work schedules, and the growing number of men who feel pressure to participate more equally in childcare and housework duties. While men do not face the same barriers to re-entry to the workplace as women or the financial costs associated with having children, standards for good fatherhood are beginning to change, especially with the changing economic climate and entry of more women into the workplace. More women are earning advanced degrees and the recession has impacted industries that tend to employ more men, resulting in higher rates of unemployment for men.

The competitiveness and overvaluation of individual will that Berlant identified in workers who are fearful of economic scarcity is similar to the discourse between gay men and Black men in regard to adopting Black children. With barriers to fatherhood and thus good social citizenship standing between gay men and Black men, they are like the workers who are told that there is an economic crisis. The competition between gay men and Black men in the ABC News story is built on stories of

161. Gailey, supra note 86, at 84–85 (a male executive gives an account of hitting the "nursery ceiling" at work, where not having children is a liability for men and men without children are left out of socializing).

t%20ochs&st=cse (reporting that in a study on working families performed by UCLA, "women still do most of the housework, spending 27 percent of their time on it, on average, compared with 18 percent for fathers." Women also spent more solo time with children than men, averaging 34 percent for women, 25 percent for men.)

163. Harrington, supra note 162.

164. Harrington, supra note 162, at 4.
scarcity. Children, generally, are a scarce resource for gay men. Gay men, especially single gay men, face nearly insurmountable challenges to adoption. Prior to the campaign in Southern California featured in ABC News, there were “de facto social work practices” that permitted only “select” gay men to adopt children with special needs and HIV positive status but not other children. Court decisions that prevent gay adoption persist despite the fact that gay parenting has been increasing for the past fifty years in America. Lofton v. Sec. of Dep’t of Children and Family upheld a Florida law preventing LGBT adoption, despite the fact that the gay litigants had fostered the child in question for years. The Florida adoption ban was again challenged by the case In re: Gill, in which a gay foster father sought to adopt the two boys he raised from infancy and toddlerhood. The lower court granted the adoption and the Court of Appeal upheld the ruling. The governor announced the state would not appeal to the Florida Supreme Court. The recently overturned adoption ban in Arkansas also sends a message that children “should not be sacrificed” for anti-gay social agendas.
C. Absent Versus Unnatural

President Barack Obama’s call to action aimed at Black men echoes conservative thought articulated by thinkers such as Thomas Sowell who espoused personal responsibility and marketplace participation as an antidote to inequality. Professor James B. Stewart compared neoconservative accounts of the Black experience with social science information gathered about Black men. He compared the neoconservative accounts and social science evidence, seeking an explanation for the “significant disconnection” between them. Stewart gives an overview of longstanding accounts for the African American’s “underdeveloped patriarchal family life.” He credits major changes in the economy during the 1980s with the scapegoating of Blacks as a way to “disguise the true sources of worsening economic prospects.” He also draws a “direct connection between increasing incarceration rates and the available supply of workers.”

Through the 1980s and 1990s, incarceration rates for racial minorities grew, pulling previously employed men of color out of the work force. This increase in incarceration led to increased economic benefit for rural White communities that saw more correctional facilities built in their areas.

High incarceration rates also dilute political power because they are accompanied by the loss of votes. By 1997, the number of Black men who would not be permitted to vote because of felony convictions was estimated to be as high as 1.4 million. With nearly 40 percent of an entire generation of Black men unable to vote, political

172. Dimensions of Black Conservatism in the United States 2–3 (Gayle T. Tate & Lewis A. Randolph, eds., 2002). Thomas Sowell, a prominent conservative thinker, believed that if Black people “simply work harder, and place more emphasis on achievement rather than the historical and contemporary racial constraints—enslavement, segregation, and racial profiling—and the struggle for social equality, they will ameliorate most of their problems.”


174. Id. at 108.
175. Id. at 104.
176. Id.
177. Id. at 110.
178. Id.
179. Id. at 111.
181. Id.
power becomes diffused and bars Black communities from effectively exerting voting power to affect change.

Professor Dorothy Roberts discusses how Black male absence from the home and criminality are used as justifications for greater child removal rates, even though empirical evidence shows that absent Black fathers have more contact and provide more informal support to their children than absent White fathers. Related to this use of stereotype is the fear of transmitting bad moral values to children. In critiquing the "welfare queen" stereotype, Roberts identifies the fear tactics used to justify attacks on state aid programs: "Contemporary poverty rhetoric blames poor Black mothers for perpetuating welfare dependency by transmitting a deviant lifestyle to their children." The same could be true for Black men who are blamed for crime rates, children in foster care, the failure of patriarchy and for transmitting an absentee father culture to the children they are irresponsibly bringing into the world.

182. Id. at 64.
183. Id. at 65.
184. David Autor, Lecture Note: Group Differences in Economic Outcomes: Market and Non-Market Factors, MIT 14.663, http://economics.mit.edu/files/4100 (May 7, 2009) (according to one study, "[a]mong Black, non-Hispanic males born between 1965 and 1969, [Western and Petit] estimate that 22.4% were incarcerated in prison at some point prior to 1999 ... ."); Ta-Nehisi Coates, 'This is How We Lost the White Man: The Audacity of Bill Cosby's Black Conservatism, The ATLANTIC, May 2008, http://www.theatlantic.com/magazine/archive/2008/05/-8216-this-is-how-we-lost-to -the-white-man-8217/6774/ (discussing how Bill Cosby toured the country speaking to audiences of males, "aiming to grab the city's black men by their collars and shake them out of the torpor that has left so many of them—like so many of their peers across the country—undereducated, over-incarcerated, and underrepresented in the ranks of active fathers.").
185. GOVERNMENT ACCOUNTABILITY OFFICE (GAO), REPORT TO THE CHAIRMAN, COMMITTEE ON WAYS AND MEANS, HOUSE OF REPRESENTATIVES, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE 17–19 (2007) ("Of the many factors that have been found to influence African American children's disproportionate entry into foster care, the most often cited factors that emerged ... were African American families' higher rates of poverty and issues related to living in poverty. Poverty-related factors included the large number of single parents among African American households. ... Across the nation 35 percent of African American family households were headed by single females with children under 18 years of age ... ").
186. At a 2004 NAACP awards ceremony, Bill Cosby gave what has now been dubbed the "Pound Cake Speech," criticizing black families, and black men in particular, for refusing to be present in their children's lives. "No longer is a boy considered an embarrassment if he tries to run away from being the father of the unmarried child." Bill Crosby, Address at the NAACP on the 50th Anniversary of Brown v. Board of Education, available at http://www.americanrhetoric.com/speeches/billcosbypoundcakespeech.htm; Jeffery Faulkerson, Black Family Restoration: The Missing Covenant, iZANIA BLOGS (Aug. 11 2008), http://www.izania.com/blogs/Black-Family-
Considering the long history of disrupted patriarchal family structures in Black communities,\textsuperscript{187} it is not surprising that conservative organizations and rhetoric appeal to disenfranchised groups as a means of obtaining full citizenship. Conservative rhetoric seems to answer criticism about the lack of personal responsibility on the part of Black men by providing a model for transmitting acceptable family values based on morality and gender-specific roles, rather than racial, cultural, or religious claims to rightful fatherhood that are unavailable to Black men.

Returning to the ABC News story about LGBT adoption offers a glimpse of the anti-gay rhetoric that is expressed as a concern about gender. Much Black conservative thinking is focused on gender roles and a drive to return fathers to their "natural" place in a patriarchal home.\textsuperscript{188} Conservative anti-gay rhetoric is often expressed in terms of gender disruption.\textsuperscript{189} Related to these concerns are other narratives about rightful fatherhood. The first is that of cultural competence; the belief that Black fathers have a greater claim to Black children because Black fathers can more authentically transmit Black culture\textsuperscript{190} still has traction. Another narrative is that Black family cohesion is threatened by many external forces,\textsuperscript{191} making it appear as though LGBT adoption of Black children is another risk to Black family cohesion.\textsuperscript{192}

\begin{flushright}
\textsuperscript{187} DANIEL P. MOYNIHAN, UNITED STATES DEP'T OF LABOR, THE NEGRO FAMILY: THE CASE FOR NATIONAL ACTION OFFICE OF POLICY PLANNING & RESEARCH, ("THE MOYNIHAN REPORT") (1965); Kay S. Hymowitz, The Black Family: 40 Years of Lies, CITY J. (2005), http://www.city-journal.org/html/15_3_black_family.html (glorifying the Moynihan report and calling for an end to the controversy surrounding it; author suggests Black families have not progressed in the last 40 years since the report).
\textsuperscript{188} See infra Appendix 2 Black Conservative Perspectives About Gay Adoption.
\textsuperscript{189} Armstrong Williams, Homosexual Adoption, TOWNHALL.COM, (Mar. 18, 2002), http://townhall.com/columnists/ArmstrongWilliams/2002/03/18/homosexual_adoption ("To abruptly break with social convention by placing the child in a homosexual household can create the sort of gender confusion and social scrutiny that ignites a lifetime of emotional confusion.").
\textsuperscript{190} See, e.g., NABSW, supra note 42.
\textsuperscript{191} Roberts, supra note 106.
\textsuperscript{192} Nancy Mullane, Gay Adoption of Black Children Raises Concerns, NPR (Oct. 31, 2006), http://www.npr.org/templates/story/story.php?storyId=6411137 (The story promises to discuss the concerns raised by some people in the Black community, but primarily focuses on the great need for greater protections for gay, read White,
The BOND representative in the ABC News story was in a difficult political spot during the news segment. He opposed LGBT adoption on the basis of sexual and gender development, rather than on racial, cultural, or religious grounds. However, race, culture, and religion were present as a meta-narrative simply because the spokesperson selected for the segment was a Black man from an organization aimed at helping Black men, and not one of several other organizations that could have spoken about opposing LGBT adoption. If the BOND representative’s claim had not been related in any way to race, culture, or religion, then ostensibly anyone could have been the spokesperson for LGBT adoption opponents. The debate was not only about conservative values, but also transracial adoption.

Gay men are featured on the Human Rights Campaign (HRC) poster that serves as the flagship image for the “All Children—All Families” campaign for parenting equality. Gay men are featured in other advocacy images and popular media images because they capture many of the tensions around LGBT parenting. Per the stereotype of wealthy gay men, the men featured in parenting equality campaigns are often privileged, but they are still seen by opponents of LGBT adoption as a threat because of gender stereotypes about men’s ability to nurture and predation fears because of gender and sexual orientation. Gay men are a disfavored group as evidenced by the legal, monetary, and social barriers for gay men to become parents.

Featuring gay fathers on posters is a way to counter the belief that gay men are a threat to children and provide positive images about them as parents. Images of women as parents, even same-sex parents, do not have the same impact as images of two men because of the conflation of gender and motherhood; it is less unnatural for a child to have two

adoptive parents); Rev. Dr. Dennis W. Wiley, Gays Are Us, Part II: Refuting the Arguments that Label LGBT Equality a “White” Issue, CENTER AM. PROGRESS (Aug. 25, 2011), http://www.americanprogress.org/issues/2011/08/gays_are_us2.html (in refuting the claims that LGBT issues are not Black issues and that gay marriage threatens Black families, Wiley argues, “This argument ignores the fact that many heterosexual married couples are either unable or unwilling to reproduce and, further, that homosexuality usually has nothing to do with the contemporary disintegration of black families. It also overlooks the fact that, contrary to destroying the black family, many loving, gay couples are actually saving it through adoption, foster parenthood, mentoring, and other creative means. Consequently, untold numbers of neglected and forgotten children are being rescued and socialized through the love and care of strong, close-knit families headed by gay couples.”) (emphasis removed).

193. HRC, supra note 148.

mothers because of the stereotype that women tend to be mothers and most mothers are nurturing. In contrast, images of gay men on parenting materials capture the dual nature of being privileged and disfavored. The HRC poster has a White man, a Black child and a Black man grouped together as a family. The dual nature of being at once privileged and disfavored is communicated through race and sexual orientation.

The ABC News story about LGBT adoption in Los Angeles featured no footage of gay men; the only evidence that the story was about LGBT parenting at all was a brief shot of the poster at the beginning of the segment and the adoption agency spokesperson who defended reaching out to the LGBT community because of the desperate need for foster and adoptive parents. The notable absence of LGBT parents in the news segment is a reminder that regardless of economic or social privilege that places LGBT families in a position to adopt, they are still a disfavored group.

At first glance, LGBT parents look like White, upper class privileged parents adopting children transracially without any thought for how the children will assimilate, but on closer inspection, the story is more nuanced. One of the reasons LGBT parents adopt more children of color and children with disabilities is because LGBT parents are disfavored as parents, and those are the children available to them. In some states, LGBT individuals and couples are not permitted to parent at all or are considered the parents of last resort. They face barriers both legally and socially for adoption. In the HBO documentary film All Aboard! Rosie’s Family Cruise, a shipboard seminar provided a glimpse into some of the difficulties faced by LGBT parents. The seminar speaker indicated that there are two primary problems with LGBT adoption; the first is finding a birth mother willing to surrender her child to an LGBT couple, and the second is the cost of adoption.

There is also gender bias in LGBT parenting; gay men are far less likely to parent than lesbian women. For gay men to reproduce using their own genetic material, expensive procedures like surrogacy, in-vitro fertilization, and other forms of assisted human reproductive techniques

---

195. Cooper & Cates, supra note 41.
196. All Aboard! Rosie’s Family Cruise (HBO Documentary Films 2006).
197. Id.
198. Gary Gates, Family Focus on LGBT Families, Nat’l Council on Family Relations, F1 (Winter, 2011) http://williamsinstitute.law.ucla.edu/wp-content/uploads/Gates-Badgett-NCFR-LGBT-Families-December-2011.pdf ("Analyses of the 2008 General Social Survey suggest that 19% of gay and bisexual men and 49% of lesbians and bisexual women say they have had a child.") See also Stacey & Biblarz, supra note 130, at 166 ("It is much more difficult (and costly) for gay men to choose to become fathers, particularly fathers of infants.").
are necessary.\textsuperscript{199} To become parents through fostering and adoption, gay men have to live in a state that does not have prohibitions against LGBT foster parenting and adoption or cohabitation bans.\textsuperscript{200} Private adoption is an available route for those who have the resources.\textsuperscript{201} This is an expensive route, and some countries refuse to adopt children to LGBT couples.\textsuperscript{202}

The bias against gay men as parents\textsuperscript{203} is also based on gender. Gender works against gay men because society does not conceptualize and embrace men as fathers in the same way it has in the past.\textsuperscript{204} During a brief period after World War II and the 1970's, men were encouraged to engage in childcare while advancing in their careers.\textsuperscript{205} Because of economic factors, social unrest, and changing demographics with more female-headed households, “masculinity was again needed to make things right.”\textsuperscript{206} Sadly, the perception that fathers had a rightful place as nurturers in the home reverted so that men in childcare fields or early education were perceived as less masculine and sexual predators.\textsuperscript{207} Gay

\begin{enumerate}
\item[199.] Planet Hospital targets gay couples for surrogacy services, and outlines their “reasonable and economic” prices, starting at $28,500. \textsc{Planet Hospital}, \texttt{http://www.planethospital.com/inner.jsp?id=0090d28e-bb8e-11e0-a3d5-21bd546b1d4f} (last visited Feb. 1, 2012).
\item[200.] U.C.A. 1952 § 78B-6-117(3).
\item[201.] \textsc{The New York Times Practical Guide to Practically Everything 81} (Amy D. Bernstein & Peter W. Bernstein eds., St. Martin’s Press 2006) (“Private adoption has the reputation of being more expensive, because the costs usually aren’t set up-front, while some agencies may charge on a sliding scale basis.”); \textsc{Child Welfare Information Gateway, Adoption Options} (2010), \texttt{http://www.childwelfare.gov/pubs/f_adoptoption.pdf}.
\item[202.] China Center of Adoption Affairs, \textit{Can Homosexuals Adopt Children from China?}, Oct. 12, 2005, \texttt{http://www.china-ccaa.org/site/infocontent/SWSY_200510120-2091715_en.htm} (stating that the CCAA does not allow foreign homosexuals to adopt Chinese children. “In accordance with the principle that adoption shall not violate social ethics as set forth in the Adoption Law, foreign homosexuals are not allowed to adopt children in China.”); \textsc{Are There Any Agencies that Deal with Lesbian Couples for International Adoption?}, \textsc{Human Rights Campaign}, \texttt{http://preview.hrc.org/issues/4105.htm} (last visited Feb. 1, 2012) (noting that most countries do not knowingly place children with same-sex couples, so members of the LGBT community are left to hide their sexuality in the adoption process.).
\item[203.] Jorge C. Amesto, \textit{Developmental and Contextual Factors That Influence Gay Fathers’ Parental Competence: A Review of the Literature}, 3 PSYCHOL. MEN & MASCULINITY 67 (2002) (providing a review of existing literature about gay men as parents which is sparse compared to the literature concerning lesbian mothers and discussing cultural and institutional homophobia that affects gay men as fathers).
\item[204.] Willett, supra note 194.
\item[205.] \textsc{Id.} at 276.
\item[206.] Willett, supra note 194.
\item[207.] \textsc{Id.} (The challenge to traditional gender roles where men worked and women provided childcare lasted only a short time before “male teachers and childcare workers were
men continue to be cast as predatory or recruiters of children. Gay men are seen as threatening in ways that heterosexual men are not, despite the statistical indicators that show heterosexual men are much more likely than homosexual men to perpetrate sexual assault against minors in the home.

The Advocate, a print magazine and award-winning LGBT news site, ran an article in August 2007 about White gay men adopting Black children. The article began with a description of a White gay couple, “good-looking, 30-something men with six-figure salaries, a Lexus hybrid, expensive shoes, and an even more expensive 2-year-old African-American toddler.” Considering the barriers to parenthood that gay men face, it is not surprising that, unlike the story in The Advocate, the stories of men like Martin Gill, Stillman Stewart, Greg Stewart, Steve Lofton and Roger Croteau who form families with children caught in the welfare system or in orphanages are compelling and heartwarming. Rather than appearing as threatening, superficial, catty, fashion-conscious, fatuous, ultra-stylish men as in Brüno and the men depicted in The Advocate article, the gay men paired with Black children in biographical news stories and media representations for advocacy purposes are serious, productive, charitable, good family men—who just happen to be gay.

tragically transformed into sexual predators capable of perverting if not destroying American boyhood.

208. Eva Vergara, Pope’s No. 2: Pedophilia Linked to Homosexuality, NEWSMAX (April 12, 2010), http://www.newsmax.com/Newsfront/LT-Chile-Church-Abuse/2010/04/12/id/355524 (stating even though Catholic priests in Chile were allegedly sexually assaulting girls and boys, the Vatican’s secretary of state, Cardinal Tarcisio Bertone, claimed that there is a link between homosexuality and pedophilia and not pedophilia and celibacy).


210. Andrew C. McLeod, Isiaah Crawford, & Jeanne Zechmeister, Heterosexual Undergraduates’ Attitudes Toward Gay Fathers and Their Children, 11 J. OF PSYCHOL. & HUM. SEXUALITY 43 (1999) (explaining a study where students believed that gay men were more likely to abuse their adopted child in comparison to a heterosexual man and his adopted child).

211. Understanding Child Sexual Abuse, AM. PSYCHOL. ASS’N. 3, http://www.apa.org/pubs/info/brochures/sex-abuse.aspx. (“Despite a common myth, homosexual men are not more likely to sexually abuse children than heterosexual men are.”). See, e.g., Rosky, supra note 124 (stating stereotypes of gay men have been used by courts to deny custody to gay fathers).


213. Id.

214. Id.

215. See infra Appendix 1, Media Survey of Images and Stories Featuring White Gay Fathers and Children of Color.
As an advocacy strategy for parenting equality, it is easy to see why this particular narrative has traction and salience for the parenting equality movement. Advocacy stories are a reminder that gay men are just like other parents, facing the same types of mundane and profound challenges that other parents face. They also serve to create sympathy for gay men who are treated as parents of last resort.216

However, relying on advocacy strategies that position gay men as the rescuers of Black children and relying on neoconservative rhetoric that positions Black men at the vanguard of anti-gay thought feeds Black versus gay discourse. For Black men, aligning themselves with patriarchal, heterosexual norms from which they are usually barred allows them to access powerful political narratives that seem to answer concerns about the state of the Black family. For White gay men, using these advocacy strategies creates gains in parenting equality. The next section explores another way in which the media version of Black versus gay discourse sets orientation against race.

D. Patriarchy Versus Privilege

Patriarchy is arrayed against privilege in Black versus gay discourse. The relationship between the two is not always visible as a direct competition. White gay men who adopt Black children are valorized as rescuing the children no one else wants217 despite simultaneously being negative stereotypes as unwanted parents, as disruptors of natural sexual development, or as using children for advocacy purposes. The Advocate218 article suggesting that White gay men adopting Black children will end racism characterized Black boys as unwanted children. The couple in the article was the stereotypical White, rich gay couple and the child in the article was commodified along with the rest of their possessions. In March 2011, MSNBC posted an article about the results of the November 2010 Pew Research Center’s Report, The Decline of Marriage

216. See, e.g., Preacher’s Sons—The Film, http://www.preachersons.com/film/more.htm (last visited April 9, 2012) (“[S]tate social workers seem to have given the dads these particular children because there seemed so little to lose by placing them with homosexuals.”).
217. Perry, supra note 11, at 49 (examining the blame and rescue scenario where Whites families who adopt Black children are valorized as heroic and the Black families are blamed for losing the right to raise their children). See also discussion infra Section IIc (discussing LGBT advocacy stories and videos that feature White gay men arguing for LGBT adoption because of the social good provided to Black children through transracial adoption).
218. Munroe, supra note 212.
suggesting the results meant that, in America, "Gay families [are] more accepted than single moms." Commenting on the race and class issues ignored by MSNBC, another headline read, "White, Rich Gay Couples more Acceptable than Single Moms." The phrase "single moms" does not apply equally to mothers across racial groups. The study indicates that in 2008 72 percent of "black women giving birth . . . were unmarried" compared to 29 percent of White women. Similarly, the phrase "gay families" invokes the image of a particular kind of family.

At this point, where the potential parents of Black children are single mothers or absent fathers, Black conservative groups counter with Black fathers who embody the patriarchal ideal and restore the family to its proper gender balance. The too-strong Black woman is relegated to her place of submission and femininity and the Black man can take his rightful place as father and head of the household. Patriarchy is aligned against privilege in a way that can prevail in a competition over Black children.

Twila Perry, a law professor at Rutgers School of Law, compared gentrification to transracial adoption, showing that they both feature the possibility for a competition over scarce resources. In the case of transracial adoption, healthy newborn Black babies are the scarce resource, and in the case of gentrification, cheaply priced properties in traditionally Black and economically repressed areas. White parents and property buyers tend to prevail in the competition for resources through a combination of privilege and rhetoric that supports the conditions for White access. By placing individual blame for the broken family or impoverished neighborhood on Black parents and communities and then framing themselves as brave "pioneers" or creators of social change, White transracial adoptive parents and gentrifying property

223. See Appendix 2, media survey of Black conservative websites (many of the websites urge supporters to eschew homosexuality and support traditional patriarchal gender roles as a way to save the Black family).
224. Perry, supra note 11, at 26.
225. Perry, supra note 11, at 26.
226. Perry, supra note 11, at 26–27.
owners become heroic rescuers of Black children and run-down neighborhoods.\textsuperscript{227}

Gentrification is addressed in the 2003 documentary film \textit{Flag Wars}.\textsuperscript{228} In a Columbus, Ohio neighborhood, longtime Black residents and gay potential home-buyers clash.\textsuperscript{229} The film tracks a four-year period during which Black residents struggle to maintain their properties because of city ordinances that require historic properties be maintained at a certain level.\textsuperscript{230} Several of the residents claim that the laws are a way to drive them out of their homes.\textsuperscript{231} As their homes and neighborhoods fall into disrepair, White gay homeowners move in as an effort to gentrify the neighborhood.\textsuperscript{232} As residents and would-be purchasers are drawn together in conflict, it results in expressions of homophobia, racism, and classism.

The subjects in \textit{Flag Wars} demonstrate how Black versus gay discourse can saturate everyday interactions so that this discourse seems to reflect reality. The gay subjects were White, seemed to have a lot of money to invest in properties, and made comments “like, ‘if you don’t want to renovate it, don’t live in it.’”\textsuperscript{233} The Black subjects were often poor and angry, and their resistance to gentrification was expressed as bias against homosexuality.\textsuperscript{234} Much like the misrecognitions of the un-

\textsuperscript{227} Perry, \textit{supra} note 11, at 49–51.
\textsuperscript{228} \textit{FLAG WARS} (Zeitgeist Films 2003). The film was nominated for an Emmy Award and received the 2003 Peabody Award.
\textsuperscript{229} \textit{Id}.
\textsuperscript{230} \textit{Id}.
\textsuperscript{231} \textit{Id.} (Black man stating “I think what’s happening here is . . . ethnic cleansing. There is a new surging of people moving into the community, they want to gentrify it. And they have different ways of doing it. A lot of them come in and use the city code enforcement to put pressure on the people who don’t have the money to maybe maintain the homes the way two European American males have. I mean, they have a lot of money. When you have two European American males living together, they have a lot of money.”).
\textsuperscript{232} \textit{Id.} (during an open house of one of the remodeled homes, one White man exclaims, “Isn’t it amazing what fags in an urban area can do?”); \textit{Id.} (while two gay men converse, one states, “Before, the only place I saw rainbow flags was up Brighton, that strip there. And now I am seeing them all throughout the neighborhood, and running into just tons of people who have just moved here . . . I’ve seen this in other cities too, it’s the gay community that actually goes in . . . when nobody else will go to these neighborhoods.”).
\textsuperscript{233} \textit{Id}.
\textsuperscript{234} \textit{Id.} (Black man stating, “Just because you moved down there, you and your boyfriend, you know what I’m sayin’, which ain’t good when my kids are right down the street.” Another Black man responds, “Yeah, that’s no role model for my children.” The men continue to talk about how “flaming homosexuals” should not be in the classroom as teachers. He continues to talk about how he doesn’t want to “wake up in my Black community and see White people . . .”).
derlying tensions in \textit{Brüno} and the ABC News clip, the subjects in the documentary fell into the familiar use of stereotypes typical of Black versus gay discourse.

In \textit{Brüno} and the ABC News clip, Black and religious conservative identities were conflated, as were gay and privileged. \textit{Brüno} satirized the stereotypical preening, shallow, privileged gay man and angry Black woman, but failed to disrupt the negative stereotypes. In the ABC News clip, the BOND representative served to affirm the stereotype of Black men as patriarchal and conservative without the possibility of gay Black men or straight Black men who support gay parenting. Another level of failure was the inability to see the larger forces behind poverty and gentrification beyond Black culture and homosexuality.

In the misrecognitions seen in examples of Black versus gay discourse, patriarchy is aligned against privilege as Black is conflated with conservatism and gay is conflated with privilege. The ABC News clip presented another troubling aspect of patriarchy aligned against privilege. In the clip, the BOND representative claimed that gay parenting would lead to gender identity development problems and girls would become promiscuous. Underpinning the argument is a gendered attempt to reassert patriarchal patterns through the regulation of gender norms. One of the underlying themes in anti-abortion \textsuperscript{235} and anti-homosexuality campaigns is that of controlling women. Much like President Obama's call to action aimed at Black fathers, the campaign imagines that if only Black men would step up to the responsibility of fatherhood and control Black women's reproduction, then Black families could step back from the brink of extinction. The historic stereotype of Black men's passivity in relation to family life is channeled through conservative rhetoric towards observing strict gender roles and dominating women rather than working towards a coequal partnership.\textsuperscript{236}

\textsuperscript{235}. See infra II(A) for a discussion of the Too Many Aborted anti-abortion campaign.

\textsuperscript{236}. The BOND website provides a link to a webcast sermon about the role of fathers. During the sermon, Reverend Jesse Lee Peterson valorizes strict gender roles, decrying the softening and feminizing of men as the reason for failure in the home. He refers to men riding in cars with women instead of being in the driver's seat without feeling shame at being in what he considers a secondary position. The failure of men in society and the home is being subject to women. He also claims that women make decisions based on what they feel rather than on what is right because they have not been taught by fathers and husbands how to make right choices. Jesse Lee Peterson, \textit{The Role of Fathers} (June 15, 2008), http://www.youtube.com/watch?v=-zXviYQwers.
Black versus gay discourse as imagined by the media has structural costs. Seeing how this discourse reinforces pernicious stereotypes is useful in deciphering and disrupting ideas that appear in judicial reasoning about Black versus gay discourse. Understanding the structural costs of the discourse underscores the complexity of comparing orientation to race, particularly in the case of adoption. Having a fuller vision of the costs that result from the use of this discourse demonstrates why a more nuanced method of advocacy should be used in LGBT transracial adoption. Rather than accepting the media version of Black versus gay and simply assuming that children of color exist in foster care independent of family, that Black or gay men are parents of last resort, and that children of color are damaged, second-hand goods, advocates for LGBT transracial adoption could acknowledge and transform the way they speak to and about the parties involved. Doing so could affect the transracially-adopted children of LGBT parents as they grow up by telling an alternate story that accurately reflects more than the media version of LGBT transracial adoption that pits Black against gay. There is also the possibility of advocacy and community building that could reach across orientation, class, race, and gender lines to align for the interests of the children. None of this is likely to happen, though, if there is no recognition of the costs of relying solely on the media version of Black versus gay to the groups involved in LGBT transracial adoption.

In media narratives of LGBT transracial adoption, Black women's motherhood is displaced as part of the narrative that creates the availability of Black children to be rescued from foster care. Black women who are single mothers are characterized as transgressing gender norms; Black women are too strong as romantic partners, but too weak to keep the state from removing children from the home.

237. Sophia A. Nelson, The Strong Educated Black Woman in the 21st Century, HUFFINGTON POST (Jan. 13, 2010), http://www.huffingtonpost.com/sophia-a-nelson/the-strong-educated-black_w_421548.html (discussing the ongoing national concern about the low marriage rates of Black women in America and stereotypes that frame that discourse; "Black women have always been viewed politically as impolitic and sexually as wild, exotic seductresses with loose mores; or the exact opposite as high minded religious prudes looking to emasculate and control black men").


239. GAO, supra note 185, at 19 (Single female-headed households are cited as a factor contributing to higher numbers of African American children entering foster care. Another factor cited was the high level of substance abuse. "[N]early half of the child welfare directors responding to [this] survey considered higher rates of substance
families need a man to keep the house and gender roles in control. In a similar vein, LGBT advocacy based on the moral good of LGBT adoption relies on the narrative of the failed Black mother as the reason that children are available. Black women provide the foil for the social good that Black conservatives and LGBT adoptive parents can perform as they step up to the challenge of adopting children with disfavored identities. This discourse that imagines men at the forefront of the parenting equality movement obscures the role that lesbians of color and lower income lesbians perform in parenting. Lastly, the fixing of identities for Black children, Black men, and gay men permits others to act based on the stereotypes reaffirmed by media representations and creates the conditions for the devaluation of transracially adoptive LGBT families.

A. Displacing Mothers: Black Women, Abortion and Foster Care

In transracial adoption, Black women are displaced as rightful mothers. In this discourse Black women are always already failed mothers; in some cases they are given no consideration at all, and in others they are referred to as tragic victims of poverty, drug use, or violence. Both parenting equality advocates and Black conservative groups play a part in displacing Black women as mothers. Black conservative groups condemn Black women for high abortion rates and single, female-headed households. Parenting equality advocates often use rhetoric about the surplus of children in foster care as an argument for opposing foster and adoption bans.

The Black mother is both demonized and sainted in her absence. The absence of the Black mother plays an important role in transracial adoption, that of making the story possible at all. Rather than examining the state and society's role in Black women's perceived inability to safely and successfully raise children, society blames the biological mother for failing in ways that are then ascribed to race and culture.
She is at once the strong mother figure actually doing the work raising children in adverse societal conditions and the tragic figure of failure because she cannot or will not reproduce characteristics perceived as successful outcomes for children, those of White, middle class children.

Black women are impossibly guilty of both having too many children and aborting too many children. One critique of the movement No Wedding No Womb, which aimed at raising awareness about the high number of single parent Black families, was the disconnect between the opposition to single parenthood and the fight over government programs to make birth control more accessible to low income women. Rhetoric about high numbers of Black children languishing in foster care, involved in juvenile delinquency, endangered by abortion rates, and otherwise disappearing from idealized two-parent, heterosexual homes creates additional pressure to restore Black children to Black homes.

A recent campaign, Too Many Aborted, attempted to re-frame abortion as a race-based eugenics project masterminded by Planned

---

245. Hing, supra note 244.
246. Too Many Aborted, supra note 241.
249. Books like Bill Cosby's Come on People: On the Path from Victims to Victors (2007), President Barack Obama's call to action on Father's Day in 2008, and thinkers on both sides of the political debate engage in raising awareness about the crisis of Black American families. A common theme is questioning why Black families do not conform to patriarchal, middle-class mainstream norms. See also Gailey, supra note 86, at 54–55 (positing that welfare reforms were enacted at roughly the same time as adoption reforms, all of which led to greater numbers of Black children being removed from homes and filling the foster care system.)
Parenthood to ethnically cleanse America of racial minorities. A key part of the campaign against abortion featured billboards with an image of a Black infant. The billboard, which appeared in Georgia, read, “Black Children are an Endangered Species.” Another billboard, paid for by Thatsabortion.com, was removed for its controversial appearance, use of a stock photograph, and content; it featured the statement, “The most dangerous place for an African American is in the womb.”

The Too Many Aborted website provides a history of Margaret Sanger, the founder of Planned Parenthood, arguing that her dislike of racial minorities is the reason more Planned Parenthood centers are located in areas with higher populations of racial minorities. Black children are framed as a scarce resource, but this claim does not speak to the thousands of children in foster care, most of whom are racial minorities. The disregard for the disconnect between the large numbers of children in foster care and the abortion rate for women of color in urban centers contributes to the framing of Black children as scarce.


254. Foster Care Statistics 2009, CHILD WELFARE INFORMATION GATEWAY, 9 (May 2011), http://www.childwelfare.gov/pubs/factsheets/foster.pdf (according to the official foster care statistics from the US Department of Health and Human Services, on September 30, 2009, 40% of children in foster care were White, 30% were Black, 20% were Hispanic, and 10% were other races or multiracial); see also Perry, Transracial Adoption, supra note 11, at 29–31.
While the campaign against Black abortion has been seen as another attempt to control women's reproductive choices generally, it has the effect of reaffirming the pernicious belief that Black women cannot be trusted with their own reproductive choices, let alone the more difficult work of raising children. The Too Many Aborted campaign fails to recognize that once Black women do have children they are treated as reprehensible for reproducing too many unwanted, damaged children that they cannot appropriately raise.

Professor Twila Perry theorizes that the scarcity of healthy newborn Black babies and surplus of older Black children is explained by the market forces of the newborn baby market. With the rise of abortion and single mother parenting, there are fewer White babies available for adoption by White couples in America. The children of choice for Black families and White families are Black newborns because foster children are seen as damaged and dangerous.

Perry discusses how the rhetoric of private responsibility for social ills can be used to excuse others from solving social problems and from seeing their own complicity in social problems. When noble and sometimes ignoble failure is inscribed on Black mothers, it makes transtacial adoption transactions and campaigns that could resemble a repetition of slave owners taking or stealing black children from their black mothers into a social good that operates to rescue children and provide gay families with children. Rather than interrogating the privilege that allows some families to maintain family stability, the rhetoric of personal responsibility frees society to accept the belief that Black women are not the rightful mothers of Black children.

Parenting equality advocacy films are not immune from Black versus gay rhetoric that displaces Black women. In the film Preacher's

259. Perry, *supra* note 11, at 53 (discussing how disparaging one group helps valorize another group's actions. "The belief is that problems of poor education, ill health, and involvement with the criminal justice system are the result of poor parenting rather than the consequences of poverty and racism. Black mothers are stereotyped as crude, lazy, and emasculating while Black fathers are stereotyped as unemployed, powerless, and irresponsible.").
Sons, a film made to advocate for parenting equality, a gay White couple adopts several children of color with a variety of disorders. Two of the children in Preacher's Sons were born addicted to crack and made available for adoption because their mother “couldn’t shake her demons.” In a scene from We Are Dad, a documentary aired by PBS about a couple of White gay men who adopt Black children, one of the fathers responds to public criticism and questions about where the children’s mother is by responding, “she’s a crack whore who is dead.”

Thinking about the overlapping and sometimes competing interests of Black women, Black men, and LGBT adoptive parents focuses on adult interests instead of children’s interests. The displacement of Black women by Black conservatives and LGBT advocates interested in the fostering and adoption of Black children is a barrier to building communities for LGBT transracially adoptive families. Rather than displaying the reality of families that can be both of color and LGBT, the displacement of Black women suggests that children already in such families might find it difficult to develop a racial identity that embraces a nuanced view.

B. Obscuring Parents: LGBTs of Color, Low Income, or Both

Another problematic aspect of the Black versus gay narrative is that it elides the role that women and people of color have played and continue to play in LGBT parenting. Recognition of the strides that women have made in parenting equality helps reveal the nuances hidden by the Black versus gay discourse. In addition to giving women credit for their work in the fight for parenting equality, acknowledging the role women play in LGBT parenting will help reveal the everyday commonalities that women across race and class lines have with other adoptive parents.

Lesbians do more parenting than gay men. They have more children, have had their children since the “gayby” boom in the 1980s,

261. Preacher’s Sons, supra note 216.
262. Id.
263. We Are Dad (Tavroh Films 2005). The film features the family at the center of the landmark Lofton case that affirmed Florida’s LGBT adoption ban. One of the fathers is a pediatric nurse who specializes in the care of HIV positive children. The children they fostered were HIV positive.
264. Id.
265. Richman, supra note 12, at 20–21.
266. Id.
and have more social science research performed about their families. Most social science research has been focused on middle to upper class White women, which leads people to speculate that lesbian women of color have been parenting without fanfare for as long with unknown outcomes for their children. Timothy Biblarz, a sociology professor at the University of Southern California, and Judith Stacey, a sociology professor at New York University, propose that lesbian moms are more accepted and have made greater strides in the courtroom than gay men because of gender. It is easier for them to have biological children, many often have children from previous heterosexual relationships, and society is comfortable with women as mothers because of the predominance of heterosexual women providing the bulk of childcare in heterosexual relationships.

White gay fathers with Black children are not the only LGBT families, and the available data do not adequately support the proposition that pairing White gay men with Black children is indicative of all LGBT families. Most of the studies assiduously cited by both advocates and opponents to LGBT parenting are studies that were performed on lesbian families and their now adult children. Lesbian parenting has been going on for years. Often their faces and their stories are obscured, perhaps because of gender or because they have less need than gay men for state intervention since women can have biological children or may have children from heterosexual relationships prior to coming out. Lesbians have been parenting in both urban centers and rural areas. Lesbians of color living in rural communities are proportionally par

267. Bridget Fitzgerald, *Children of Lesbian and Gay Parents: A Review of the Literature*, 29 MARRIAGE & FAM. REV. 162, 164–65 (1999) (Golombok and Tasker performed one of the few longitudinal studies on lesbian mother families; many of the studies reviewed were performed on lesbian mothers and their children).


270. *Id.*

271. *See, e.g.*, Fitzgerald, *supra* note 267. Stacey & Biblarz, *supra* note 134, at 167 (four of the twenty-one studies designed to identify the effects of sexual orientation of parents are studies performed on lesbian families). Charlotte Patterson’s work, *supra* note 129, compares children raised by lesbian parents with data from a national study of all children of the same age. Gartrell & Bos, *supra* note 130, completed a seventeen year-long longitudinal study of lesbian mothers that continues to provide data about lesbian families.


273. LISA BENNETT & GARY GATES, WILLIAMS INST., *COST OF MARRIAGE INEQUALITY TO CHILDREN AND THEIR SAME SEX PARENTS* 3 (2004). See also, the 2004 figures to the United States Census Snapshot 2010 which shows the geographic distribution of same-sex couples and same-sex couples raising children, demonstrating that same-sex
enting more children than White lesbians in urban centers.\textsuperscript{274} One possible reason for the distance between LGBTs of color and white LGBTs is the focus paid by the media on white LGBT advocacy that does not include issues that have more impact on low income and of color LGBT families, such as employment discrimination, economic disparity, and racial equality.\textsuperscript{275}

Opponents of LGBT parenting use the argument that children need parents of both genders in the home to provide a proper model for optimum gender identity development.\textsuperscript{276} The strong push from conservative groups for the father and the mother in the home as necessary ingredients for proper gender identity development targets single (Black) and double female (lesbian) headed households. Even though rates of approval for single parent households are down, families comprised of a mother and father who are married to each other are becoming less common.\textsuperscript{277} Higher education rates are tied to higher marriage rates.\textsuperscript{278} Increasingly, education is expensive and difficult to obtain.\textsuperscript{279}

Flying under the radar means that not only are some White lesbian mothers—often those with lower incomes and educational attainments—and nearly all lesbian mothers of color are missing from data sets and the national discourse about parenting equality. It also means that many lesbian mothers may have little or nothing to do with organizations and communities that are seen primarily as LGBT advocacy and support groups. This elision is dangerous because it fails to acknowledge that there are people bridging LGBT groups and communities of color. In the fallout after Proposition 8 passed in California, LGBT protesters clamored for outreach to faith communities\textsuperscript{280} and communities of color.

\begin{thebibliography}{99}
\bibitem{273} Bennett & Gates, supra note 273.
\bibitem{274} Movement Advancement Project, supra note 133, at 5.
\bibitem{276} Decline of Marriage, supra note 229 (BU study that reports 20\% of families are nuclear with mother and father of biological children.)
\bibitem{277} \textit{Id.}, at 10 (colleges graduates 64\% more likely to marry than those who do not attend (48\%).
\end{thebibliography}
as though LGBT people who identify as part of both communities did not and had not existed prior to November 2008. The elision of women and communities of color tends to reinforce the belief that LGBT organizations only fight for issues related to White gay men.

Another problematic aspect of placing White gay fathers on a pedestal as parents is that it is divisive along class and gender lines. There is no data set that proves LGBT parents adopt substantially more children of color and other children deemed by the system to be challenging or hard to place. While the Census data suggests more gay parents are adopting, even while LGBT individuals raising children generally has declined, the Census data does not tell whether those are second parent adoptions or whether those parents have adopted across racial lines. In the recent past, “adoption was often an option only for wealthy gay families who could afford to adopt internationally or to pay a surrogate.”

The higher rate of adoption by LGBTs of foster children is likely a reflection of self-selection rather than an inherent quality of nobility connected to sexual orientation. LGBT parents are like other parents in choosing children; there is no evidence that sexual orientation is the reason couples adopt across racial lines and accept disabled children. LGBT parents with means tend to engage in AHRT (assisted human reproductive technology) and foreign adoption of non-black children at similar rates to heterosexual parents.

A recent data set about the preferences of prospective adoptive parents and birth mothers, taken over five years, provides insight into transracial adoption. The results show that White gay men prefer Afri-
can American boys the least.\textsuperscript{287} The study admittedly focused on a small group of men. Nonetheless, it suggests that the trope of rich, White gay men adopting Black children may not necessarily be a reality or a product of choice but a reflection of the reality that gay men are perceived to be poor prospective parents. The findings may suggest that gay and Black pairings are a result of necessity, as gay men are not preferred parents and Black children are not preferred adoptees. What then is parenting equality—the ability to legally adopt available children or the ability to adopt preferred children? Is there a possibility that parental preferences and child selection could be freed of bias and so-called market demands of desirable and less desirable babies? Probably not. But advocacy for parenting equality should not be based on the social good that supposedly comes from adopting a child that is deemed socially undesirable.

The idea that gay people should be able to adopt because they provide a social good by adopting surplus foster children should not be the only reason they are legally permitted and socially supported in their decision to adopt. Before legislation changed to allow LGBT families to foster and adopt, parenting equality advocates argued that relaxing policies would help solve the social problem of surplus foster children. It is a tempting argument that same-sex parents are more likely to act for the social good\textsuperscript{288} rather than their own interests when it comes to selecting a child. Taken to the extreme, the argument could be made that same-sex parents should not have access to the children deemed more desirable because of race or identity; they should continue to fill the social need with surplus foster children. The social good argument creates additional pressure for same-sex adoptive parents to be more socially aware and culturally competent than other parents.\textsuperscript{289}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{287} Catherine Rampell, \textit{Black Babies, Boys Less Likely to be Adopted}, N.Y. \textsc{Times} Jan. 25, 2010, \url{http://economix.blogs.nytimes.com/2010/01/25/black-babies-boys-less-likely-to-be-adopted/}.
\item \textsuperscript{288} \textsc{Gailey}, supra note 86, at 46–47 (discussing discomfort experienced by adoptive parents whose adopted children are not of the same race when people make comments about the “noble deed” they have done by adopting).
\item \textsuperscript{289} Abigail Garner, \textit{Families Like Mine: Children of Gay Parents Tell It Like It Is} (1999) (Children raised by LGBT parents discuss the additional pressure to be just like families with heterosexual parents. They discussed feelings of being in the spotlight as though any failure on the part of their families would reflect on all LGBT families.).
\end{itemize}
\end{footnotesize}
C. Fixing Identities: Black Boys, White Gay Men, Black Fathers

Characterizing Black boys as unwanted, gay men as parents of last resort, and Black fathers as entirely without the desire to raise children does a disservice to all groups because these characterizations are overgeneralizations and stereotypes. A result of shoring up stereotypes is fixing identities; once identities are fixed, policy decisions are informed by them and it becomes difficult to untangle the underlying causes of inequities and harms experienced by the groups in question. Fixing identities bars creative coalition building that could maximize positive results for adoptive families. The belief that Black men do not want to be fathers based on the fact that they are not present in the same way that other fathers seem to be contributes to the high rates of child removal. The belief that Black boys are unwanted could lead to relaxed standards in adoption and foster parent screening. Social and moral wrongs like secret drug trials conducted on foster children of color could only have happened because the drug companies believed that the children were unwanted and vulnerable. The belief that gay men are dangerous parents of last resort continues to support social beliefs and intuitions that negatively impact gay adoption.

To illustrate this, consider the social construction of Black boys. One reality is that there are inequalities and problems that coincide with racial status. A study of adoptive parents' preferences demonstrated that adoptive parents had the least preference for male African-American children. The seminar about LGBT adoption featured in Rosie’s Family Cruise offered strategies for overcoming barriers to LGBT parenting. One of the tips was, “if [you are] willing to accept a birth mother with a drug history or want an African-American child, that will increase your chances of adopting,” the implication being that those children are not the first choice for adoptive parents. Black children, a small proportion of the national population, are overrepresented in the welfare and dependency system. Black boys spend more time in foster care and are

290. GAO, supra note 185, at 19.
291. Jamie Doran, New York’s HIV Experiment, BBC (Nov. 30. 2004), http://news.bbc.co.uk/2/hi/programmes/this_world/4038375.stm (HIV drug testing was conducted on foster children in New York with the children’s parents’ or guardians’ consent; nearly 99% of the children in care were children of color.).
292. Rosky, supra note 124, at Section II (analyzing the stereotypes of HIV transmitter or sexual predator that were voiced in cases about gay fathers).
293. Baccara, supra note 286.
294. All Aboard!, supra note 196.
295. GAILEY, supra note 86, at 7; GAO, supra note 187, at Highlights; Foster Care No. 64, AMERICAN ACADEMY OF CHILD & ADOLESCENT PSYCHIATRY, (May 2005),
last to be adopted, if they are adopted at all.296 Many Black boys age out of foster care and in too many cases are funneled towards juvenile delinquency.297 There is empirical evidence to support the belief that Black boys are the least cared for in society, and this Article is not arguing that this issue should be ignored; rather, it is arguing that there is danger in distilling and fixing Black boys' status as unwanted children—and then building advocacy on that fixed identity.

Adoption stories made by LGBT filmmakers and advocacy groups provide examples of the construction of Black boys and gay men, showing how LGBT transracial adoption fits within Black versus gay discourse. Black boys are characterized as victimized, damaged, and borderline dangerous—latent Black men. Actual Black men are characterized as absent, and White gay men are portrayed as the parents of last resort, the last stop before institutionalization. What follows are accounts of a few famous gay transracial adoption stories. While the stories have compelling human interest and advocacy elements, focusing only on the construction of Black and gay reveals that the storytelling falls in line with the larger Black versus gay discourse seen in other contexts like same-sex marriage and Don’t Ask Don’t Tell.

Reverend Stewart and Stillman White, “his partner of more than 20 years,”298 adopted children of color who had “endured fifteen homes, three failed adoptions, and every major category of abuse.” The children had “started life as alcohol and crack addicts” and suffered multiple foster placements where they “learn[ed] such survival skills as food hoarding and predator resistance, but not how to use a fork.”299 The children’s already small chances of finding a home were compounded by their medical issues. Four of the five boys continued to be or “ha[d] been on psychiatric medications ... hav[ing] received diagnoses such as Autism and Oppositional Defiant Disorder.”300 The fathers in the story


296. Foster Care Statistics, supra note 254, at 11 ([N]umbers have consistently shown a slightly greater percentage of boys than girls in foster care.”).


298. Preacher’s Sons, supra note 216.

299. Id.

300. Id.
were given the children because their social worker believed "there seemed so little to lose by placing them with homosexuals." 301

The Lofton-Croteau family's story is iconic because they were the litigants in the case 302 that challenged the adoption ban in Florida. 303 The Lofton family consists of partners, who are pediatric HIV nurses, and five Black children, some of whom have HIV positive status. 304 One of the children in the Lofton-Croteau family, a Black boy, seroreverted so he tested negative for HIV, making him available for adoption in the eyes of the state, even though he had been a part of the Lofton-Croteau family for years. 305

This story is more than the pairing of unwanted parents and children. It has a storybook element: Lofton, a pediatric HIV nurse, raised children with HIV positive status, making the story seem like a match made in foster care heaven. 306 The characterization of the children in question is that of the damaged, dangerous and unwanted. The children are simultaneously innocent and dangerous; their HIV status is not the result of their choices and yet they are perceived as dangerous carriers of a disease that renders them unavailable for adoption.

Another LGBT transracial adoption story is compelling because of the rescue of neglected, damaged children. Martin Gill and his partner fostered two young Black brothers for years before seeking to adopt them in Florida. 307 Gill details how sick the four-year-old and infant were when he and his partner first received the boys as foster children. 308 They were suffering from ringworm to such an extent that neither of them had any hair on the tops of their heads. 309 The four year old barely spoke and did not immediately bond with Gill or his partner. 310 The four year old was so used to changing his infant brother's diapers that Gill and his partner had to convince him that it was their responsibility, and not his, to provide care for the baby. 311 Gill filed for adoption but

301. PREACHER'S SONS, supra note 216.
304. Id.
305. Id.
306. Id.
308. Id.
309. Id.
310. Id.
311. Id.
was unable to do so because of the adoption ban in Florida.\textsuperscript{312} The ACLU represented him, and the ban was ruled unconstitutional, permitting him to adopt in November 2008.\textsuperscript{313}

Because Black boys are framed as dangerous and unwanted, they are also framed as vulnerable and easily accessible. The story of Frank Lombard is a tragic version of the LGBT transracial adoption story.\textsuperscript{314} Frank Lombard, a White man and Duke University employee, adopted a Black boy.\textsuperscript{315} He raised the child from infancy through age five.\textsuperscript{316} Lombard sexually abused the child and offered to sell the five-year-old boy for sex to an undercover FBI agent.\textsuperscript{317} In at least one report about the crime, Lombard is credited with comments about the availability and relative ease with which he was able to adopt children because of race and gender.\textsuperscript{318} Lombard was apprehended in 2009, but conservatives felt that major news carriers underreported the story as a ploy to protect LGBT adoptive parents,\textsuperscript{319} emphasizing the competition between Black communities and LGBT communities. This story demonstrates the deeply felt fears of the Black community about the vulnerability to predators of Black children who are figured as unwanted.

D. Acknowledging Adoptees: Providing More Resources for Adoptees

Black versus gay discourse covers up the voices of adult transracial adoptees. They are portrayed as passive children who are mere blank slates upon which racial identity or sexual orientation will be inscribed. Important contributions to the dialogue by children raised by LGBT families and adult transracial adoptees could help shape policy, provide

\begin{itemize}
  \item \textsuperscript{312} Id.
  \item \textsuperscript{313} Id.
  \item \textsuperscript{315} Date, supra note 314.
  \item \textsuperscript{316} Id.
  \item \textsuperscript{317} Id.
\end{itemize}
insight to courts about the types of resources and support LGBT transracial families might want, and give voice to the children’s interests. Acknowledging the complexity adopted children of color in LGBT families experience would help lighten their unfair burden of “ending racism,” the pressure to excel as a model LGBT family, and alleviate the tension between feeling grateful to be adopted and other losses adopted children may feel.

Recent data about transracial adoptees’ experiences suggest that racial connections are more important for transracial adoptees than was believed in the past. In spite of the popular idea that Americans are post-racial, there is a drive to revive and value racial transmission between parents and children; in transracial adoption, it appears under the guise of cultural competency or equipping a child to handle racism.

Determining what obligations, if any, adoptive parents have to transracially adopted children in terms of racial identity development, and how to fulfill those obligations, has long been a point of conflict at the center of transracial adoption debates. Historically, race-based claims to children in adoption and custody settings have been reduced to an appreciation of cultural practices. A large number of transracial adoptees have now reached adulthood; research and personal accounts of their experiences suggest that racial identity development is more important than previously believed. As the adult adoptee movement revives interest in and argues for strengthening race-based considerations in adoption decisions, it is important to consider that strengthened race-based claims may be perceived as problematic precisely because those claims cut against the popular notion that the United States has moved beyond outdated notions of race.

David Eng, an English professor at the University of Pennsylvania, refers to transnational adoption as a “new form of passing in a putatively colorblind age.” Eng is referring to children of color adopted by White parents who then assimilate the children into White culture. While Eng focuses his work primarily on Asian adoptees, his kinship theories are relevant to LGBT transracial families. Eng questions the ethics of color-blind decision making in transracial adoption, arguing that when race is ignored, racially marked children suffer the unacknowledged loss of ra-

320. Gailey, supra note 86, at 35–38 (discussing racial awareness).
321. Rita J. Simon & Rhonda M. Rooda, In Their Own Voices: Transracial Adoptees Tell Their Stories (2000); Seeds From a Silent Tree (Tonya Bishoff & Jo Rankin eds., 1997); Outsiders Within: Writing on Transracial Adoption (Jane Jeong Trenka, Julia Chinere Oparah & SunYung Shin eds., 2006).
322. See, e.g., Outsiders Within, supra note 321, at 253–301.
cial identity. This argument is another iteration of the race-based claims and stigma concerns that the National Association of Black Social Workers raised about transracial adoption. The type of analysis Eng advocates returns to the question: can cultural competency in the form of cultural practices and demographic choices be equal to racial identity development with biological family members? The “best interests of the child” standards require the court to speculate as to the future of the child’s well-being, physically and emotionally. How racial identity is formulated, what race means, and how racial identity is transmitted, if at all, by parents, are all questions that researchers consider in transracial adoption. While it is courts that make the decisions with available data, guidelines and laws, it is the families, and the children in particular, who must answer those questions themselves.

Eng theorizes that the “forgetting of race” that accompanies privileged forms of adoption, wealthy White parents adopting transracially and transnationally, leads to unacknowledged racial and psychic predicaments that emerge for adoptees and their parents. Eng argues that without a “sustained discussion of both the ethics of multiculturalism in a colorblind age and the emergence of . . . a new global family,” there will be “few ways to understand, and few therapeutic resources to alleviate, the psychic pain” many transnational adoptees express as an inability to have the psychic space for two mothers, the birth mother and adoptive mother. Having the psychic space for two mothers means that the adopted child no longer repudiates and condemns one of her mothers but has capacity to accept both. While this acceptance acknowledges the loss of a racial, cultural connection to a birth mother, it simultaneously recognizes that the adoptive mother’s happiness comes at the cost of the birth mother’s loss.

Professor Twila Perry comments that “in transracial adoption, the burden of creating [a] more integrated society is placed on Black

324. Id. at 117–121 (discussing Deann Borshay Liem’s film, First Person Plural [PBS television broadcast August 10, 2011], and the concept of unacknowledged loss).
325. NABSW, supra note 42.
326. Determining the Best Interests of the Child: Summary of State Laws, CHILD WELFARE INFORMATION GATEWAY, (2010), http://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.cfm (discussing “guiding principles” considering “health, safety, and/or protection of the child” and the “guidance that will assist the child in developing into a self-sufficient adult.” Some states have specific factors courts are to use such as the “mental and physical health needs of the child.”)
327. Nelson, supra note 237, at 125–170 (review of studies performed on transracial adoptees, assimilation, racial identity, and gender).
330. Id.
This idea is echoed by the sentiment in *The Advocate* article where adopted Black children are hopefully characterized as the end to racism.\(^3\) Perry also states that it is predominantly children of color being absorbed into White families, not adoptive parents of color with White children.\(^3\) The data from the past five years of the American Community Survey shows that Americans are still segregated by race, suggesting that a White family that adopted a child of color is likely to live in a predominantly White neighborhood.

The challenge of cultural competency and the reluctance to embrace race matching are just two of the reasons some resist transracial adoption. The issue of racial loss is usually addressed from the point of view of the adopting parent—how will the parent’s family and friends react to a transracial adoption, how will the parent find ways to expose the child to culture, should the parent be obligated to address race, and so on. Only in recent years have adult adoptees begun to write their own stories and voice the psychic pain they experience as adoptees, suggesting that racial loss is real and inadequately addressed.

Gratitude about being lifted out of poverty and provided with opportunities, combined with conflicted loyalty, act as deterrents against voicing the isolation, alienation, pain, and confusion many transracial adoptees experience growing up in predominantly White families and communities.\(^4\) Many transracial adoptees are raised without a sense of connection to race or cultural identity because they are absorbed into segregated communities. Kim Ja Park Nelson, a professor of American Multicultural Studies, herself a transracial adoptee, collected qualitative data about transracial adoptees’ experiences.\(^5\) Nelson contends that transracially adopted children of color often experience feelings of isol-
tion and loneliness and forming identity can be especially demanding because "exploration of birth race is sometimes seen as rejection of adoptive race and family." Although some might argue that transracial adoption solves racism, there is evidence to support the position that a racial minority parent(s) is better equipped to prepare racial minority children than White parents.

There are several blogs run by transracial adoptees about being transracially adopted. Some seek more rights for adoptees, looking for a better understanding of transracial adoption, citing the hierarchical inequalities that result in White, developed countries that take the children of economically disadvantaged, developing countries. Others like Adopted and Fostered Adults of the African Diaspora (AFAAD) are concerned with building support networks and critically interrogating why African-American families continue to be broken apart. These blogs often provide personal insight about being adopted and negotiating racial identity in isolation from other people of color.

As one transracial adoptee, Chad Goller-Sojourner, noted in his original one-man show Sitting in Circles with Rich White Girls: Memoirs of a Bulimic Black Boy, "The difference between when I got called nigger and when other Black kids got called nigger is that they went home and got love, and I went home and got love from people who looked just like the people who called me nigger. As a child, you don't have the ability to bifurcate." Some transracial adoptee narratives focus on the inability of White parents to prepare children to handle racism. Other transracial adoptee narratives address the intense loyalty to adoptive

336. Id. at 157.
337. Id. at 158.
338. Id. at 150 (describing a study where researchers suggested that being transracially adopted produced better perceptions of Black subjects based on results showing that Black transracially adopted children showed a slight preference for African American Photographs).
339. Id. at 153–54 (reviewing a study performed of African American teenagers transracially adopted by white parents that raised concerns about the "prevalence of racist ideologies in dominant White societies.")
parents and repudiation of birth parents. David Eng describes the case of a Korean adoptee who disassociated herself from everything Korean as part of her assimilation into her White family. She imagined that her birth mother was a bad mother who was stupid or unfeeling, and that is why she gave her up for adoption. She valorized her adoptive mother. Her circumstances were not unique; a majority of adult Korean adoptees raised in White families stated that they grew up wishing they could be White. A 2008 study of Korean American adoptees aligns with David Eng’s theory that race should not be ignored in the placement of Korean children with White parents.

With the release of the Evan B. Donaldson Adoption Institute’s 2009 report about African American children’s outcomes, there is emerging discourse that reinforces the NABSW’s position that in the placement of African American children, colorblind policies have not produced the positive outcomes anticipated for the children. The report suggests that MEPA-IEP did not succeed in its goal to help Black children; rather than opening up more White homes to Black children, the legislation had the opposite effect of leaving more Black children in foster care and casting adopted children adrift because no race-based programs, such as diversity and sensitivity to race and culture, were permitted. Critics argue that MEPA-IEP accomplished its goal of providing more Asian and Latin American children to White parents. While the recommendations section in the Evan B. Donaldson Report is careful to indicate that the results do not indicate that transracial adoption is inherently negative or that it should be stopped, it does indicate that removing race matching has not been the protection for children MEPA-IEP hoped to achieve.

After adding the voices of adult transracial adoptees and children of LGBT parents to the debate over LGBT transracial adoption, the results are enough to give prospective adoptive parents pause. To be clear, interrogating the media portrayal of LGBT transracial adoption is not an

344. Eng, supra note 323, at 146.
346. Evan B. Donaldson Adoption Institute, Beyond Culture Camp: Promoting Healthy Identity Formation in Adoption 5 (2009) (“Most [78%] transracial adoptees considered themselves White or wanted to be White as children.”).
347. Id.
348. Id. at 7 (“The enactment of MEPA-IEP has not resulted in equity in achieving permanency for African American children awaiting adoption.”).
argument against LGBT transracial adoption. Some opponents argue that transracial adoption is hard enough; adding sexual orientation on top of that is too burdensome for children. That argument fails to take into account the possibility that an LGBT parent could be a person of color and suggests that sexual orientation and race pose challenges that are somehow entirely separate and unique from each other. There is every possibility that just as race and orientation have intersecting points in their discursive creation and policing by courts, so too will they have intersecting points in the context of adult adoptees’ experiences. Not unlike children in transracial families who are sensitive to being different or sticking out in a White family, children raised by LGBT families often comment on the pressure to be the model family to prove that LGBT families are just as good as idealized heterosexual families. There is considerably less data by and about children of LGBT families that cuts against the “kids are alright” narrative that has been important for parenting equality advocacy.

Perhaps as more children who were adopted during the “gayby boom” grow to adulthood, there will be more textured data and experiential work to provide nuance to the view of family life and children’s outcomes. As society grows more aware and accepting of different family forms, it will be interesting to see if and how the data from children raised in LGBT families is similar to or different from that data from children of color raised in White families. In LGBT families, the default sexual orientation is heterosexuality and there is a strong push by LGBT advocacy groups to suggest that having LGBT parents does not produce LGBT children. It will be interesting, nonetheless, to see if children raised by LGBT parents are expected to be a means to ending homophobia in the same way adopted children of color may be expected to be a means of ending racism. The pressure to have a model family could be motivated by the desire to end homophobia, but whether children understand what homophobia is and how it is articulated is unknown.

Without the voices of adult transracial adoptees to help shape policy and provide insights to families, critical information is unavailable. Every child is unique, so some may not find it useful or compelling to contemplate, uncover, or learn about a racial or sexual identity. For those who do want to make connections and layered identities, it would be better for them to have access to multiple identity vectors. The variety of

351. The Kids Are Alright (Focus Features 2010) (where a lesbian couple’s children seek to discover their sperm donor father’s identity; film is in line with social science narrative that children with lesbian mothers have good outcomes and experience everyday family life like other children).
family makeups is largely ignored in the media version of Black versus gay discourse. The reality of mixed-race partnerships, LGBT children, LGBTs of color, and so forth is lost in the discursive competition between Black and gay. Undoing the Black versus gay model must be an important goal so that adopted children already in LGBT homes can develop strategies to process experiences that tend to isolate, alienate, and send the message that they and their families are abnormal.

Conclusion

LGBT transracial adoption fits with Black versus gay discourse of the type seen in same-sex marriage debates and the erstwhile DADT debate where race and orientation are compared and contrasted. The media staging of LGBT transracial adoption perpetuates negative stereotypes that resonate with judicial and policy treatments of race and orientation in the context of custody and adoption. Aside from the harm done to gay fathers, Black men, and Black children, this staging is dangerous because it displaces Black women as mothers and ignores the voices of adult transracial adoptees who desire acknowledgment of their racial loss when they are adopted into White homes. Failure to disrupt this competitive staging ignores the common ground which LGBTs, LGBT racial groups, and racial advocacy groups could use to coalesce around already existing LGBT transracial families.
Appendix 1

Media Survey of Images and Stories Featuring White Gay Fathers and Children of Color

TV & FILM:


3. *That’s a Family!* (Women’s Educational Media 2000). This is a movie about family diversity, featuring some gay families including White fathers of children of color. The film is part of the Groundspark (formerly Women’s Educational Media) “Respect for All Project.” For general


6. **Our House: A Very Real Documentary About Kids of Gay & Lesbia...** (one of the families profiled in this film is that of Rob and Jon, the adopted fathers of five children of various races/ethnicities—at least one of the dads pictured appears to be White). *See Our House: Home, ITVS, http://www.itvs.org/ourhouse/*.

7. **The Real Housewives of New York City: The Lost Footage** (Bravo TV television broadcast May 27, 2008). This “lost footage” episode featured main character Alex McCord meeting up with White gay male couple friends raising a Black son.

**ADVOCACY/ PSAS/ ADVERTISEMENTS**

1. **Duncan & John** (GetToKnowUsFirst.org PSA 2009), *available at* http://gettoknowusfirst.org/* (featuring a White gay father and his Black son).


5. Aetna Wellness Programs, “Stay Healthy—Family” (Grey Worldwide 2008) (print ad featuring White father(s) with Black son).


NEWS ARTICLES/HUMAN INTEREST STORIES:
1. Articles about Zyreal Oliver-Chandler, the adopted Black son of Jeffrey Chandler and Thomas Oliver, both White; Zyreal has sickle-cell anemia and some articles are encouraging people to sign up with the National Marrow Donor Program registry; although the Seattle Times article on the boy does not mention the parents' race or feature any pictures of them, it is clear that they are not Black. See, e.g. Nancy Bartley, *Kitsap County Boy with Sickle-Cell Anemia Needs Bone-Marrow Match*, SEATTLE TIMES, June 15, 2009, http://seattletimes.nwsource.com/html/localnews/2009338943_bonemarrow15m.html. Other articles are just following his treatment and the family more generally; for example, the Olympic College newspaper did a story on the family because Oliver is an executive assistant to the College's Vice President of Administration. See Chris Carter, *Another Chance at Life*, OLYMPIAN OF OLYMPIC COLLEGE, Oct. 20, 2009, available at http://www.ocolymnpian.com/features/another-chance-at-life-1.793274. One Kitsap County newspaper has a photo essay featuring a number of images of the family. Kitsap Sun, *Photo Galleries: Zyreal Oliver-Chandler*, (Mar. 18, 2009), http://www.kitsapsun.com/photos/galleries/2009/mar/18/zyreal-oliver-chandler/.


4. Mitchell Owens, *Love With the Proper Stranger*, N.Y. MAG.: FAM. GUIDE (Fall 2003), http://nymag.com/urban/guides/family/living/features/feature_gayparenting.htm. This Article does not specify that Owens is White, but if


7. Rex W. Huppke, Gay Adoption Fight Left Many Wounds: Girl at Center of Political Fireworks Burned Worst of All, IDAHO SPOKESMAN-REV., Apr. 3, 2000, at A1 (a special interest article about Craig Peterson, gay adoptive father of three Black boys, who also tried to adopt their sister & was blocked in the effort by the girl’s foster parents. The foster father was then found to be molesting the girl).

BOOKS:
1. ANDREW R. ALDRICH, HOW MY FAMILY CAME TO BE—DADDY, PAPA AND ME (2003). This is a children’s book narrated from the perspective of a Black boy adopted by White gay fathers. For a picture of the cover, customer reviews, etc., see How My Family Came to Be—Daddy, Papa and Me, AMAZON.COM, http://www.amazon.com/How-My-Family-Came-Be/dp/0974200808/
2. David Strah & Susannah Margolis, Gay Dads: A Celebration of Fatherhood (2003). In addition to the front cover featuring author Strah and his partner Barry Miguel with their children Zev & Summer, many of the chapters in the book discuss the White gay adoptive fathers of children of color, for example Naysayers, False Starts, and Works of Art at 8 (although parents' race is not mentioned, the birth mother's reliance on their gayness providing them with the tools required to parent a pair of biracial boy/girl twins suggests that she could not rely on the parents' race to do so), Daddy's Embrace at 124 (Black & White couple adopt Black boys), A Winning Fight at 161 (White couple adopt HIV positive Black boys), Open to the Possibilities at 201 (White fathers have one mixed-race daughter through artificial insemination and adopt a Black boy). An excerpt from the first chapter of the book is available online. See David Strah, Gay Dads: Excerpts (2003), http://www.gaydads.info/excerpts.htm. See also Gay Dads: A Celebration of Fatherhood, Amazon.com, http://www.amazon.com/Gay-Dads-Celebration-David-Strah/dp/1585422312.


5. Gerald P. Mallon, Lesbian and Gay Foster and Adoptive Parents: Recruiting, Assessing, and Supporting an Untapped Resource for Children and Youth (2006). This publication from the Child Welfare League of America features on its front cover a picture of White fathers with a child who is not White. See Lesbian


BLOGS:


ART EXHIBITS:
1. Gretie Ferguson Photography, *Exhibition: Gay Dads and Their Kids* (Tufts Health Plan Diversity Gallery, 2003) available at http://www.gfergphoto.com/gay-dads-photo-exhibition/. This exhibit includes a number of images of White gay fathers of children of color (e.g., White parents Michael and Jonathan with their Latino son Luis; fathers Alex and Gilbert, one of whom is White, are parents to three kids. The oldest, Zak, appears to be non-White; and White fathers Russell and Stephen have two non-White sons Charlie and George.). So three of the five families featured depict White dads with non-White sons. And this all makes a nice contrast with the artist's first gay dads album, consisting of 1999 gay dad photographs, in which not a single one of the White dads depicted appears to have children of color, available at, http://www.gfergphoto.com/gay-dads-photo-exhibition/first-album.html.

POLITICAL CARTOON:
Appendix 2

Black Conservative Perspectives About Gay Adoption & Related Links & Articles


2. Dr. June Dobbs Butts, *Is Homosexuality a Threat to the Black Family?*, 36 Ebony 138 (April 1981) (discussion of nine myths gleaned from author's conversations, including the myths that homosexuality will lower birth rate of Black children, and that homosexuality is the product of being raised in a matriarchy, among others—engages gay parenting only to the extent that author discusses parents' resentment against their gay children for denying them grandchildren).

3. Panama Jackson, *Why Do We Care Who Sandra Bullock Adopted?*, VerySmartBrothas.com, (May 5, 2010), http://www.verysmartbrothas.com/why-do-we-care-who-sandra-bullock-adopted/ (Blog entry about ethics of Sandra Bullock's adoption of a Black child—for an interesting discussion about gay adoption in the comments, see Caballeroso, Comment to *Why Do We Care Who Sandra Bullock Adopted?* VerySmartBrothas.com, (May 5, 2010, 2:21PM), http://www.verysmartbrothas.com/why-do-we-care-who-sandra-bullock-adopted/ ("I don't care if it's a gay couple, a white couple, an inter-racial couple—" Wait, wait, wait... stop the press. I am mostly down with the sentiment you express, but I must say that it does and did give me pause when I see a white male gay couple adopting a Black kid. I really don't take issue with adults
doing adult stuff, i.e. having gay relations, but raising a kid in an environment that predisposes him to consider it to be perfectly acceptable isolates him from the reality that our society, as a whole, does not embrace that as being perfectly acceptable. However, given the alternative of having said kid grow up outside of a caring/loving environment is admittedly worse, so even with my reservations about it, I'm willing to accept it. I'd be lying if I say I was perfectly ok with it though."


6. War on the Horizon, http://waronthehorizon.com/site/?p=672 (last visited April 10, 2012) (a Black Nationalist Group's site dedicated to preparing Black people for clash with White people bent on exterminating Black people, one priority is to prevent homosexuals from adopting Black babies), see also http://waronthehorizon.com/site/?p=796 (on homosexual sex tourism in Africa); http://waronthehorizon.com/site/?p=655; http://waronthehorizon.com/site/?page_id=68; etc.

7. Kenyon Farrow, Is Gay Marriage Anti-Black?, (Mar. 5, 2004), http://www.zimbio.com/Brown,+Black+and+Queer/articles/31/Is+Gay+Marriage+Anti+Black ("[W]hite queer couples are known for adopting Black children since they are so 'readily' available and also not considered as attractive or healthy compared to White, Asian and Latino/a kids. If Black families were not labeled as dysfunctional or de-stabilized by prison expansion and welfare 'reform,' our children would not be removed from their homes at the numbers they are, and there would be no need for adoption or foster care in the first place.").

The author suggests that proponents of gay marriage have seriously complicated discourse aimed at encouraging marriage before procreation in the Black community by “dismiss[ing] the formula ‘children growing up with their own married parents’ as a form of discrimination.”


14. Family Council Action Committee, http://adoptionact.familycouncilactioncommittee.com/index.asp?PageID=4 (last visited April 10, 2012) (FAQ’s section featuring many pictures of Black children) FCAC links to a number of adoption agencies. This invites the question: if this committee is interested in increasing the number of adoptive and foster homes available to children who are wards of the state of Arkansas, why does their Adoption

15. Black Adoption Placement and Research Center, Who Are We?, http://www.baprc.org/ (last visited April 10, 2012). (“Black Adoption Placement and Research Center (BAPRC) is a private, non-profit agency founded in 1983. Our services are provided to families residing in 14 Northern California counties. In the spirit of reclaiming our own, we are a licensed adoption and foster family agency (FFA) dedicated to recruiting permanent loving families from the community from which the disproportionate number of waiting children come—the African American community. BAPRC places an emphasis on advocating on behalf of children with special needs who might otherwise spend their entire childhoods in foster care.”) (Emphasis added).

16. There are other adoption agencies specifically focused on the placement of Black children, with emphasis on doing adoption work within the Black community, but I haven’t been able to get an idea of whether these orgs do gay adoptions or whether they are specifically devoted to recruiting adoptive parents within the Black community. See, e.g., Another Choice For Black Children, http://www.acfbc.org/.


18. Operation Rebirth, Is This Your Pastor?, http://www.operationrebirth.com/archive/eddieelong.html (last visited April 10, 2012) (review of sermon by Bishop Eddie Long, who opposes homosexuality generally on biblical grounds; while not specifically about adoption, the arguments
raised in connection with gay parenting are generally about children being "off balance").