Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children

Twila L. Perry
Rutgers University School of Law - Newark

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

Part of the Family Law Commons, Juvenile Law Commons, Law and Race Commons, and the Law and Society Commons

Recommended Citation

This Book Review 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 Race and Law by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
INTRODUCTION

The Ethics of Transracial Adoption by Professor Hawley Fogg-Davis raises timely and provocative issues about a subject that has both fascinated and troubled the American public for more than three decades. In light of the fact that the actual number of Black children adopted by Whites represents only a tiny fraction of the number of adoptions completed each year in this country, it is significant that this issue continues to command such attention. Although the intensity of the debate has varied, transracial adoption has been publicly debated on a recurring basis since the 1970s, a time when transracial adoptions began to increase and the National Association of Black Social Workers began to publicly express opposition to the placement of Black children in White adoptive homes.

Transracial adoption continues to intrigue and trouble Americans because it touches on many issues that evoke a strong emotional response: the bonds of family, the love between parents and children, and the responsibilities

* Professor of Law and Judge Alexander T. Waugh, Sr. Scholar, Rutgers University School of Law—Newark. This book review grew out of my presentation at the Joint Meetings of the Law and Society Association and the Canadian Law and Society Association, Vancouver, Canada (May 2002), Author-Meets-Reader: Navigating Race and Politics in Adoption: The Ethics of Transracial Adoption by Hawley Fogg-Davis.


2. See id.

of parents to teach their children how to survive and thrive in a complex and challenging world. The transracial adoption debate also reflects this country’s potent legacy of racial discrimination, including antimiscegenation laws specifically designed to prevent the formation of interracial families.\(^4\)

In recent years, the debate over transracial adoption within legal scholarship has been identified as reflecting two perspectives.\(^5\) One perspective is represented by advocates of transracial adoption who argue that adoption should be colorblind.\(^6\) The other perspective, in which views lie along a continuum, is represented by those who argue that Black children should not be placed with White families at all or only as a last resort.\(^7\) This latter group, in which I place myself,\(^8\) argues, in essence, that in America, race always matters and that to place Black children for adoption without considering the issues they will inevitably confront growing up in a racist society is a disservice to the children. Some who urge this perspective further believe that many of the arguments in favor of transracial adoption devalue Black families and that placing Black children in White families undermines the strength of the Black community by removing potentially valuable human resources.\(^9\)

In *The Ethics of Transracial Adoption*, Fogg-Davis attempts to bridge the gap between these two views. Eschewing membership in either camp and addressing the issue primarily in terms of ethics rather than law, Fogg-Davis argues that race should not be an absolute barrier to adoption, but rather it

---


5. Twila L. Perry, *The Transracial Adoption Controversy: An Analysis of Discourse and Subordination*, 21 N.Y.U. Rev. L. & Soc. Change 33, 43–47 (1993–94) [hereinafter Perry, *The Transracial Adoption Controversy*] (describing two competing perspectives: "colorblind individualism," which is based on optimism about the eradication of racism in America, a belief in colorblindness as a societal goal, and a focus on the individual as the unit for analyzing rights and interests, and "color and community consciousness," which is based on a more pessimistic view of the permanence of racism, a belief in multiculturalism as opposed to colorblindness or assimilation, and the view that in analyzing rights and interests, the group as well as the individual must be taken into account).


should be permissible to consider race as a factor in the placement of individual children. This book review offers a critique of Fogg-Davis’ attempt to carve out a middle ground. Part I of this book review will provide a legal background to the controversy over transracial adoption. Part II will summarize the author’s description of her position as taking a middle ground in the transracial adoption debate. Part III will examine the book’s discussion of the ethical issues raised by transracial adoption. The first section of Part III will focus on Fogg-Davis’ opposition to the practice of parents passing on society’s racial definitions to their transracially adopted children. The second section will examine Fogg-Davis’ discussion of the ethical implications of assigning children for adoption on the basis of race. This review concludes that The Ethics of Transracial Adoption raises some interesting issues concerning transracial adoption but does not go as far as it should in exploring the political and practical implications of the author’s arguments.

I. Transracial Adoption and the Law

The focus of Fogg-Davis’ book is on the ethical rather than the legal issues raised by transracial adoption. Ethical inquiries often seek to determine the morally correct approach to a particular issue. In contrast, legal analysis usually addresses what is permissible under the law. These approaches are different, yet related—ideally, legal determinations should embody sound values and arrive at results that are morally justified. Thus, before examining Fogg-Davis’ ethical analysis of transracial adoption, it is helpful to situate the transracial adoption debate within a legal context.

The current law governing transracial adoption is a combination of longstanding common law principles, more recent judicial decisions, statutory law, and federal regulations. First, the longstanding common law principle applied in child placement decisions is the best interests of the child rule. Although this rule, which often employs a multi-factor balancing test in order to reach a result that is best for the individual child, has been criticized as being subjective and indeterminate, it retains widespread popularity.

Second, judicial decisions provide context for the transracial adoption debate. The Supreme Court has never directly addressed the issue of whether

10. See, e.g., Chapsky v. Wood, 26 Kan. 650 (1881); see also Jo Beth Eubanks, Comment, Transracial Adoption in Texas: Should the Best Interests Standard Be Color-Blind?, 24 St. Mary’s L.J. 1225, 1233–35 (1993) (“The best interests standard has been widely used as the appropriate test in deciding child placement, both in custody and adoption proceedings. Generally, the best interests standard holds that the sole guideline in determining placement of the child should be furtherance of the welfare of the child.”); Perry, Race and Child Placement, supra note 8, at 54.

race may be used as a factor in adoption. The most relevant case to date is *Palmore v. Sidoti.* Palmore is the only case in which the Supreme Court has discussed the relationship between race and the best interests of the child test in a child placement context. In *Palmore*, a 1984 case, following the divorce of a White couple, in which custody of the couple's three-year-old White daughter was awarded to the mother, the mother began to live with and later married a Black man. As a result, the child's father sought custody of the child, claiming that the child would be stigmatized if she remained in a home with her mother and a Black stepfather. The lower court ordered the change in custody. On review, the Supreme Court applied strict scrutiny analysis and required that the use of race as the basis for governmental action be justified by a compelling governmental interest and be necessary to the accomplishment of a legitimate purpose. The Supreme Court went on to find that the best interests of the child is a substantial governmental interest for purposes of equal protection analysis; however, the lower court's consideration of race as the sole basis for its decision did not survive strict scrutiny and thus violated equal protection. Since *Palmore* was a custody case, there is no agreement on whether it applies to the context of transracial adoption. However, since *Palmore*, a number of state and federal court decisions have upheld at least a moderate use of race in adoption.

Third, Congress has also addressed the issue of transracial adoption. In 1996, Congress promulgated the Interethic Amendments to the Multiethnic Placement Act, which prohibit the use of race to delay or deny the placement of children for adoption by agencies receiving public funds. Questions re-

---

13. *Id.* at 430–31.
14. *Id.*
15. *Id.* at 431.
16. *Id.* at 432–33.
17. *Id.* at 433.
18. *Id.* at 433–34.
19. See, e.g., J.H.H. v. O'Hara, 878 F.2d 240 (6th Cir. 1989) (permitting consideration of race in foster care placements); *In re R.M.G.*, 454 A.2d 776 (D.C. 1982) (upholding a statute permitting consideration of race in adoption proceedings); Drummond v. Fulton County Dep't of Family & Children's Servs., 563 F.2d 1200, 1205 (5th Cir. 1977) (upholding race as a relevant factor in adoption); *In re Davis*, 465 A.2d 614, 624 (Pa. 1983) (noting that race may not be unduly emphasized by the placement agency).
20. 42 U.S.C.A. § 1996(b) (West Supp. 2003). The originally enacted version of the Multiethic Placement Act prohibited delay in the placement of a child for the purpose of seeking a same-race match; however, the Act also explicitly contemplated the consideration of race if such consideration did not result in delay. See 42 U.S.C.A. § 5115a(a) (West 1995 & Supp. 2003) (repealed 1996). The current Act states:

A person or government that is involved in adoption or foster care placements may not—
main about whether the amendments were intended to completely bar the use of race, and, if so, the degree to which the amendments are being enforced. In 1998, the Department of Health and Human Services issued a set of administrative guidelines regarding the amendments. There is a lack of consensus as to whether the guidelines may be interpreted to permit consideration of race on a case-by-case basis as part of the individualized assessments agencies traditionally perform with respect to all prospective adoptive parents.

Finally, some legal scholars are trying to shape the governing law on transracial adoption. Some contend that the issue of race in adoption must be examined within the framework of Supreme Court jurisprudence on affirmative action, which has become increasingly hostile to the use of race. Others reject this view and argue that more appropriate analogies lie in areas such as voting rights, where the Court has permitted the use of race in redistricting, provided that it is not the predominant factor.

(A) deny to any individual the opportunity to become an adoptive or a foster parent, on the basis of the race, color, or national origin of the individual, or of the child, involved; or
(B) delay or deny the placement of a child for adoption or into foster care, on the basis of the race, color, or national origin of the adoptive or foster parent, or the child, involved.


21. See, e.g., Fogg-Davis, supra note 1, at 49 (arguing that the amendments were not intended to be implemented in a completely colorblind manner); RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION 400 (2003) (arguing that the amendment "rescinds authorization to consider race as a factor at all").

22. KENNEDY, supra note 21, at 400 (arguing that the amendment has not terminated the practice of race matching).

23. Fogg-Davis, supra note 1, at 49.

24. See id. at 49–50; see also Joan Heffetz Hollinger & The ABA CTR. ON CHILDREN AND THE LAW NAT'L RES. CTR. ON LEGAL AND COURT ISSUES, A GUIDE TO THE MULTICULTURAL PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 9–10 (1998). This guide states:

While explicitly prohibiting the use of race, color, or national origin to deny a foster care or adoptive placement, MEPA–IEP does not require that these factors must always be ignored when an agency or caseworker makes an individualized assessment of a particular child to determine the kind of placement that will serve that child's best interests. The 1997 and 1998 HHS Guidances indicate that in exceptional, non-routine, circumstances, a child's best interests may warrant some consideration of needs based on race or ethnicity.

Id.

25. See, e.g., Bartholet, supra note 6, at 1228–37, 1243–45.

26. See infra notes 89–90.

The current state of the law does not provide a clear answer to the question of whether or how race may be considered as a factor in adoption. Moreover, the future of the law governing transracial adoption remains to be seen. However, there is also a continuing exploration of the issue in other contexts. For example, in recent years, there have been an increasing number of first person accounts of transracial adoption, some written by White adoptive parents of Black children,28 and others by transracial adoptees themselves.29 The perspectives of these persons with respect to their own experiences as well as their views regarding the desirability of transracial adoption and the role of race in adoptive placements are certain to enrich the evolving legal analysis in this complex and controversial area.

II. STAKING OUT A MIDDLE GROUND

In the continuing contentious debate over transracial adoption, Fogg-Davis seeks to stake out a middle ground. She argues that race should not be an absolute barrier to adoption, but rather it should be a permissible consideration. This position is consistent with cases in which courts have permitted a moderate use of race in child placement cases.30 Fogg-Davis describes her position as being in opposition to what she claims are two polar extremes in the political and scholarly discourse: the strict colorblind approach and "racial solidarity."31

Fogg-Davis rejects the strict colorblind approach on the grounds that it "is practically impossible in a race-conscious world"32 and "a disingenuous refrain that is selectively applied in equal-protection law to ensure prospective adopters the equal opportunity to adopt a [B]lack child if they so desire."33 Fogg-Davis is also troubled by the impact of increased privatization in adoption, which she views as ensuring racial choice for those Whites who have the resources to circumvent the public adoption system.34 Similarly, Fogg-Davis is concerned about the consumerist ideology increasingly driving adoption as


30. See cases cited supra note 19.

31. Fogg-Davis, supra note 1, at 9–11.

32. Id. at 112.

33. Id.

34. Id. at 82.
well as new reproductive technologies. Fogg-Davis understands how these
trends support transracial adoption advocacy by furthering the idea that peo-
ple who wish to adopt are entitled to choose the characteristics, including the
race, of the children they will bring into their families.

On the other hand, Fogg-Davis also rejects what she terms an opposite
extreme of "racial solidity," which she describes as a "non-negotiable descrip-
tion of [B]lackness that is often couched in cultural specificity." She argues
that theories of racial solidity "steamroll racial complexity," attempt to set a
"solid, inflexible notion of racial self-identification," and lead to "intragroup
policing." According to Fogg-Davis, "[i]nstead of seeing [B]lack culture as
choice, advocates of racial solidity present [B]lack culture as fixed, "natural,"
and necessary for developing the right kind of racial self-understanding." Fogg-Davis objects to what she describes as cultural nationalist arguments in
the transracial adoption debate. She argues that "political arguments
couched in [B]lack cultural nationalism are especially pernicious because they
stamp essentialism with a legal seal of approval." Although Fogg-Davis' rejection of the strict colorblind approach and
racial solidity in favor of a middle ground position may appear to be a safe
place, sometimes it is not. Positing oneself as occupying middle ground can
sometimes be viewed as a tactic designed to make ones' own position appear
more reasonable than those of others whom one describes as operating from
presumably less rational polar extremes. Adopting a middle ground position
can also be viewed as an indication of confusion, ambivalence, or fear of
committing to a more controversial position.

III. "RACIAL NAVIGATION," "RACIAL RANDOMIZATION,
AND TRANSRACIAL ADOPTION

Although Fogg-Davis devotes some time to the legal and sociological
arguments surrounding transracial adoption, her focus is primarily on what
she defines as the ethical issues. It is a substantial challenge to discuss transra-
cial adoption as an ethical matter because there are many issues that invite
exploration from this perspective. For example, the racism, patriarchy, and
poverty that result in the removal of so many Black children from their birth
The ethical issues Fogg-Davis identifies and zeroes in on are: first, the practice of parents who transracially adopt accepting and passing on society’s racial designations to their children; and second, the moral implications of the assignment of children for adoption on the basis of race. As vehicles for exploring these ethical questions, Fogg-Davis introduces what she describes as two theoretical threads: racial navigation and racial randomization. Fogg-Davis’ principle of racial navigation suggests that rather than people accepting society’s racial designations, they should be allowed to create “flexible racial self-understandings in a lifelong process of self-reflection and revision.”47 With her principle of racial randomization, Fogg-Davis suggests a “thought experiment” in which children are placed in adoptive homes without regard to race.48

A. Racial Navigation

Through her concept of racial navigation, Fogg-Davis seeks to challenge what she claims is the prevailing assumption in this country that children should acquire their racial identity from their parents. She describes this method of racial identification as a burden of “racial ascription.”49 She argues that rather than being assigned racial identities by parents or by society, children should develop or “activate” their own racial identities in dialogue with many people over the course of a lifetime.50 Fogg-Davis’ view is that rather than affirm the racial identities society assigns to children, “[f]amilies . . . should be launching pads for initiating a lifelong process of flexible racial self-identification.”51

44. See Perry, Transracial and International Adoption, supra note 8 (discussing the roles of racism, patriarchy, and poverty in the surrender of children for adoption).
45. See Perry, The Transracial Adoption Controversy, supra note 5, at 88–98 (discussing the disparagement of Black families in the transracial adoption discourse).
46. See id. at 77–78 (discussing the intersection between colorblind discourse in transracial adoption and the conservative agenda).
47. Fogg-Davis, supra note 1, at 2.
48. Id. at 11.
49. Fogg-Davis uses various terms including “racial ascription,” “racial imposition,” “racial confinement,” and “racial pigeonholing,” to convey the idea that society assigns racial identities to individuals rather than permitting them to choose their racial identities themselves. Id. at 13, 16, 25, 30–31, 60, 108, 113. She describes racial ascription as “an involuntary association that affects our self-understandings,” and contrasts racial ascription with “first-person racial self-identification,” which she sees as a positive approach to the issue of the determination of race. Id. at 60, 114.
50. Id. at 13, 32.
51. Id. at 13.
Fogg-Davis describes her principle of racial navigation as a “compromise between the social-scientific treatment of race as a static variable in human behavior and political-theory arguments for justice that imagine colorblind utopias,"52 and as “a metaphor for mediating the personal and political meaning of race."53 She offers it as an alternative to what she calls the “trap of racial confinement.”54 Fogg-Davis further argues that racial navigation should not be limited to transracial adoptees. She urges that it be practiced by everyone, including Blacks who are not transracially adopted, and Whites, whom she says, should encourage racial navigation in their own lives and in the lives of their children.

Although Fogg-Davis complains about the advantages Whites possess in the adoption system, her main focus is her disagreement with the assignment of a racial identity to transracially adopted children. Fogg-Davis believes that this is wrong, and given the title of her book, unethical. Since virtually all transracial adoptions are by Whites of Black children, Fogg-Davis’ argument, as a practical matter, seems to be that it is morally wrong for Whites who adopt Black children to tell the children that they are Black. Instead, she argues that through the racial navigation process, transracially adopted children should be allowed to choose their own racial identity as they grow up.

In one sense, Fogg-Davis’ concept of racial navigation, which is a strategy rather than a legal principle, describes what is actually a familiar process for most Black people. The fact is, many Blacks, whether transracially adopted or not, practice a kind of racial navigation as they deal with race in their everyday lives. The term “navigation” brings to mind the idea of a person carefully steering between two sides and attempting to avoid hitting, and thus being injured, by either. Many Blacks survive both personally and professionally by forging a careful path between the White world and the Black world. Moreover, many Black professionals also perform a careful act of navigation within the Black world, steering carefully between the Black middle class and the Black lower class. In each of these contexts, the forging of a personal identity, finding a place in this racially complex world, is done in the context of personal experiences and in dialogue with others. It is likely that because of their family history, transracial adoptees perform a somewhat different and perhaps more complex act of racial navigation. However, many Blacks already steer through and find places in a racially complicated world and Fogg-Davis does not make it clear how her process of racial navigation differs for transracial adoptees from the experiences of other Black people.

It might be helpful, in considering Fogg-Davis’ idea, to think about racial navigation as having two related, but different meanings—one external and one internal. The external meaning of racial navigation concerns how a person society defines as Black functions in the world as a practical matter—
professionally, politically, and socially. This is the sense of the term as it was discussed above. The internal meaning of racial navigation, and the way in which Fogg-Davis seems to be using the term, involves the question of how a person society identifies as Black self-identifies. This quest for self-definition is largely a private one, but it inevitably takes into account the powerful public reality that in this society people are assigned racial identities.

Another significant problem with Fogg-Davis' argument that transracial adoptees should not be forced to adopt a Black identity, but rather be given the freedom to develop their own racial identity, is that she presents the argument in a manner that suggests that it would apply equally to all transracial adoptees regardless of their appearance or racial heritage. This seems odd, because as a practical matter, Fogg-Davis' argument would only seem to apply to those transracial adoptees who are either biracial or appear to be so. Whatever one might think about the ethics or morality of racial classifications, it seems very odd to seriously recommend that the White parents of a dark-skinned transracially adopted Black child tell the child that he can choose his race. Although at one point, Fogg-Davis notes that the fact that most of the babies adopted by Whites are either biracial or appear to be biracial even where both biological parents self-identify as Black is one issue virtually never discussed in the transracial adoption controversy, she never connects this point to her central argument that transracial adoptees should not automatically be given a Black racial identity by their parents. It is not clear whether Fogg-Davis is unaware of the centrality of the issue of biracialism to her theme, or whether she is aware of it but has consciously chosen not to make it explicit. In any event, the issue looms very large as a subtext to the entire book.

The argument that parents do not have the right to automatically pass on society's racial designations to their children does raise some interesting broader questions and legal issues. For example: What are the limits of parental rights? What are the autonomy rights of children in terms of defining their own futures? What are the responsibilities of parents, and in particular, parents who raise children in a race conscious society? In the well-known 1972 case, Wisconsin v. Yoder, the Supreme Court upheld the right of Amish parents to remove their children from the public school system after the eighth grade. The parents were concerned that by pursuing further education, the children would be exposed to, and possibly inculcated with, values that were contrary

55. Id. at 85–86; see also Kennedy, supra note 21, at 449 (noting the prevalence of biracial children among transracial adoptees). The only law review article addressing this issue is Julie C. Lythcott-Haims, Note, Where Do Mixed Babies Belong? Racial Classification in America and Its Implications for Transracial Adoption, 29 Harv. C.R.-C.L.L. Rev. 531 (1994) (arguing for the use of a "multiracial" category in the Census and in daily life, and arguing that multiracial children should be placed in adoptive homes where there is at least one parent who represents at least one of the heritages in the child's ancestry).

to those of the Amish society\textsuperscript{57} in which their parents assumed that they would continue to live as adults. As a practical matter, the decision in favor of the parents gave them the power to curtail their children's access to a whole range of opportunities in the wider world.

Today, many people would disagree with the Supreme Court's decision in \textit{Yoder} and support the position that parents' fears, prejudices, and limitations should not prevent their children from reaching their fullest potential. Parents do not own children, children are not property, and each child should have the right to at least entertain options for a life that goes beyond the choices his or her parents may have made, or had imposed on their own lives. Likewise, Fogg-Davis' implicit argument is that parents who "go along" with society's racial definition of their children are somehow limiting their children's potential by placing them in a racial box that will restrict their opportunities to become full, rich, and complex human beings.

This argument is somewhat naive. In a world in which race still determines so many of a person's opportunities and obstacles, parents raising Black children have certain obligations, whether the children are transracially adopted or not. Helping a child to achieve clarity about racial identity does not foreclose options that a child would otherwise have; to the contrary, it assists the child in achieving a sense of place and a sense of peace that will help him or her move effectively in a racially complicated world.

Let us assume, for example that a teenage biracial boy has been adopted and raised by White parents. What should his White parents tell him about race and about the race with which he will inevitably be identified? What should they tell him about encounters between young minority men and the police? To provide that child with a Black identity is not a matter of acquiescence to "racial ascription," it is a matter of ensuring the child's survival—his very life. Indeed, other than making clear her view that the parent should not "assign" her Black child a Black racial identity, Fogg-Davis never makes it clear what a White parent who has adopted a child the society identifies as Black should tell the child about race. Would it make any difference whether it was a biracial child or not? Would it make any difference depending on how White or Black the particular child appeared to be? Because the focus of this book is on ethical concerns, the author may have decided not to deal with such practical issues, but arguments about the interests of children need to be grounded in the realities of children's lives.

In a sense, this is precisely what the best interests of the child rule\textsuperscript{58} is intended to accomplish. Thus, in deciding whether or not a particular home would be an appropriate placement for a child, an important factor to consider would be whether the prospective adoptive parents are capable of understanding the issues the child will inevitably face as the result of living in a race-conscious and racist society. Further specificity as to the approach she

\begin{itemize}
\item \textsuperscript{57} See id. at 211.
\item \textsuperscript{58} See supra note 10 and accompanying text.
\end{itemize}
recommends, along with some examples that illustrate how it might be preferable to traditional wisdom and practices, might have made some of Fogg-Davis' arguments concerning the racial identification of children more convincing.

It is also important to note that Fogg-Davis' argument that transracially adopted children whom society deems Black should not have that identity affirmed by their adoptive parents is completely contrary to the findings of the vast majority of sociologists who have studied transracially adopted children. Most of the research on this group of children has concluded that the adjustment of transracially adopted children is best promoted when their parents explicitly accept and embrace the child's most obvious and most likely racial designation. The first-person accounts of transracial adoptees also support this perspective. It is surprising that Fogg-Davis' book does not address these findings which obviously have an important bearing on the book's central argument.

Fogg-Davis not only argues that White parents should not force a Black identity on their transracially adopted children, but also that Black parents do Black children a disservice by passing on a Black identity to them. Here, the language is harsh: she describes passing on Black identity as the "[p]assive absorption of racial classification," "racial reductionism," and "racial retreat." Indeed, the impression one receives from Fogg-Davis' discussion is that she believes that it is cowardly for those deemed Black not to rebel against that racial label and that it is an act of courage to demand the option of racial self-definition. Fogg-Davis states that she is looking for creative ways to respond to racial imposition and that it is important to seek to achieve "a strong sense of personal agency in shaping one's life." However, the language and arguments employed convey the impression that Fogg-Davis views the acceptance of a Black identity as akin to serving time in prison for a crime you did not commit. The suggestion seems to be that a strong Black identity inevitably stifles individuality, is culturally limiting, and forecloses the possibility that, for example, a Black Nationalist might enjoy Tosca.

It is not irrational to take offense to the "one-drop" rule, a historical approach to race in this country which assigned a Black racial identity to


60. See supra note 29 and accompanying text.

61. Fogg-Davis, supra note 1, at 53.

62. Id. at 99.

63. Id. at 110.

64. Id. at 31.

65. Id. at 96.
anyone with either provable or discernable Black ancestry. In addition, it is not unreasonable to reject, as Fogg–Davis does, the idea that racial categories are somehow “natural.” In recent years, many scholars have challenged the notion of separate races, theorizing race as a social construction rather than a biological reality. The popularity of post–modernism has also brought to the idea of race the notion of shifting identities. Still other scholars have argued that the traditional focus of the study of race on the relationship between Blacks and Whites is a limiting “Black/White binary” which fails to incorporate racial complexity and the experiences of other minority groups.

However, despite their positions on the biology or morality of racial classifications, many people that society identifies as Black understand racial designations as a practical reality. As Professor John Calmore has noted, whether or not there is something called race, there clearly is something called racism. For many Blacks, therefore the problems of racial discrimination and racial hierarchy may be more of a practical problem than the actual label of “race.” The heroic struggle is more likely to be defined as resistance to racial oppression rather than resistance to racial designations.

The argument that those who are the product of Black and White interracial relationships should not automatically accept a Black racial identity is certainly legitimate. If this is Fogg–Davis’ argument, she needs to be explicit. However, the argument is still a controversial one. Historically, the exercise of choice about racial identity by those Blacks not clearly identified as Black on the basis of physical appearance has been termed “passing.” Many feel passing has become obsolete in light of the diverse cultural and racial backgrounds of an increasing number of Americans. Today, legal


67. FOGG–DAVISON, supra note 1, at 58.


71. John O. Calmore, Exploring Michael Omi’s "Messy" Real World of Race: An Essay for "Naked People Longing to Swim Free," 15 LAW & INEQ. 25, 28 (1997) (arguing that in discussing whether distinct races exist, it is important to discuss the oppressive conditions of racism).

72. See Perlmann, supra note 66, at 528.
arguments that biracial persons have a right to a unique racial identity that is neither Black nor White might be grounded in concepts of privacy or a right to be free of state sponsored racial classifications. The focus of Fogg-Davis’ book is on ethics rather than law, so it is not surprising that she does not pursue such legal arguments.

Fogg-Davis’ arguments regarding racial identity are certain to raise the ire of many Blacks who strongly believe that Black political unity is undermined when some Blacks claim a separate racial identity. From that perspective, the struggle for racial equality is most effective when Blacks, regardless of racial features or biracial heritage, combine their resources and talents without intraracial distinctions. Many individuals whom society considers Black but who are, in fact, the product of one Black and one White parent, or otherwise possess a mixed racial heritage, choose to unequivocally, publicly and privately, embrace a Black racial identity for personal and political reasons. Fogg-Davis’ principle of “racial navigation” is interesting but it is not clear that it defines an experience unique to transracial adoptees. In addition, Fogg-Davis does not go far enough in addressing the obvious and troubling practical implications of telling Black children they can choose their own race.

B. Racial Randomization

The second theoretical thread Fogg-Davis introduces in *The Ethics of Transracial Adoption* is “racial randomization,” which she describes as a “thought experiment” in which the reader is invited to imagine that rather than being assigned to parents with racial considerations in mind, children available for adoption are randomly assigned to those seeking to become adoptive parents. Fogg-Davis argues that the value of thinking about racial randomization is “to tweak our moral intuitions about nondiscrimination.” She urges us to think about Black children being adopted by White parents, and she also urges that Blacks be encouraged to adopt White children. She suggests the latter not only because such transracial adoptions would benefit their own families, but also “to show others that [B]lacks can successfully parent [W]hite children.”

This exercise builds on the earlier work of legal scholars who have noted that a true system of colorblind adoption would be one in which children are assigned to adoptive parents either on a random basis or on the basis


74. Fogg-Davis, *supra* note 1, at 11, 78.

75. Id. at 74.

76. Id. at 81.
of first-come, first served. For example, in two previous articles on transracial adoption, I argued that the only true colorblind system of adoption would be one in which all children are assigned to adoptive parents without regard to race. Professor Richard Banks takes this argument further and argues that permitting adoptive parents to select children on the basis of racial classification constitutes state sponsored racial discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment. Banks argues that although a significant public controversy has arisen over same-race matching in the case of Black parents and Black children, White prospective adoptive parents are routinely permitted to select White children for adoption. Banks further argues that this virtually unexamined practice has the effect of categorically denying to Black children, especially those in foster care, the opportunity to be considered individually for inclusion in the families of many adoptive parents. According to Banks, all prospective adoptive children have a constitutional right to be chosen for adoption without regard to state sponsored racial bias. He further argues that the denial to Black children of individual consideration for adoption by all prospective adoptive parents is precisely the kind of harm the Supreme Court has identified as resulting from racial classifications. Banks proposes a policy of nonaccommodation in which agencies that receive public funding must make it clear to prospective adoptive parents that their racial preferences can play no role in their selection of a child to adopt.

Fogg-Davis notes that although racial randomization and Banks' proposal of nonaccommodation share the same constitutional basis, her "thought experiment" is not a policy recommendation, but rather is "designed to motivate adoption practitioners and prospective adopters to question their own racial biases and expectations, and how such prejudice may conflict with the moral rights of children awaiting adoption not to be discriminated against on the basis of their racial ascription." She notes that she differs from Banks' view that Black families should be exempted from his proposed nonaccommodation policy. Rather, she believes that racial randomization should apply equally to all prospective adoptive parents and children.

It is peculiar that Fogg-Davis devotes so much effort to arguing the merits of random assignment and then shoots down the idea as impractical.

78. See Perry, The Transracial Adoption Controversy, supra note 5, at 102–04; Perry, Race and Child Placement, supra note 8, at 120–23.
80. Id. at 900–01.
81. Id. at 943.
82. FOGG-DAVIS, supra note 1, at 77.
83. Id. at 77–78.
She states that she advances the proposal in order to "tweak" our imaginations about the ethics of matching children by race. However, she admits that she fears the possibility that matching White parents with Black children would drive many Whites from the adoption system. The defection of so many potential adoptive parents from the adoption system would clearly hurt the interests of children of all backgrounds who are in need of adoption. It seems clear that a "thought experiment" or policy recommendation based on a premise that race does not matter in adoption collapses upon closer examination.

The lengthy and passionate arguments Fogg-Davis presents throughout the book against racial designations suggest that her sympathies lie much closer to the colorblindness position on adoption than she is willing to admit. Fogg-Davis' sympathy for the colorblind approach is also exemplified by the fact that she believes that Black families should not be exempted from Banks' proposed nonaccommodation to adoptive families' racial preferences. The fact that she essentially rejects the "survival skills" argument often advanced to justify same-race adoptive placement of Black children also suggests that Fogg-Davis is sympathetic to the colorblind approach. The "survival skills" argument is really nothing more than support for the idea that Black children's burden of navigating a race-conscious world should be facilitated by the support of Black parents who have done precisely that all of their lives. It seems contradictory to support the position that it can be appropriate to consider race in adoptive placement and at the same time reject the argument that Black parents offer Black children anything unique.

In light of Fogg-Davis' arguments against imposed racial labels, and in favor of racial self-definition, it is surprising that she does not take an explicit position on the recent controversy over a multiracial Census category. She mentions this debate but does not discuss it in detail. The essence of that controversy centers on the very issue that appears to be a major, although unarticulated, focus of this book—the power of biracial people to reject ascribed racial definitions and select their own racial identities. Nor does the
book address the question of whether fixed racial categories should be abandoned generally or what the potential consequences of this might be for the anti-discrimination struggle. The argument that race is fluid, indeterminate, or meaningless intersects comfortably with recent colorblind jurisprudence that seeks to dismantle affirmative action by arguing that racial classifications are inherently evil. The Supreme Court, for example, has adopted this approach in several recent cases in which it struck down affirmative action programs intended to assist minority government contractors. Proponents of transracial adoption have argued that the same kind of strict scrutiny that the Supreme Court applied in affirmative action cases must apply to same-race preferences in adoption.

In their zeal to eliminate a preference for placing Black children with Black adoptive parents, some advocates of transracial adoption have entered into an unfortunate alliance with opponents of affirmative action in other

---

MD. L. REV. 97 (1998), for a critique of the movement for a multiracial census category and the argument that multiracial discourse dovetail with recent colorblind discourse and jurisprudence in ways that impact negatively on the struggle for racial equality.

89. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 227 (1995) (holding that all racial classifications imposed by a governmental actor must be analyzed under strict scrutiny); id. at 241 (Thomas, J., concurring in part and concurring in the judgment) ("[R]acial discrimination based on benign prejudice is just as noxious as discrimination inspired by malicious prejudice."); City of Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (holding that strict scrutiny applies to affirmative action); id. at 528 (Scalia, J., concurring in the judgment) ("[r]acial preferences appear to "even the score" . . . only if one embraces the proposition that our society is appropriately viewed as divided into races"). Some legal scholars argue that racial classifications are inherently wrong. See, e.g., CHARLES FRIED, ORDER AND LAW: ARGUING THE REAGAN REVOLUTION—A FIRSTHAND ACCOUNT 90 (1991) (arguing that one of the most important principles of the constitution is "the basic right of every person to be considered as a distinct individual and not in terms of the groups to which government says he belongs"). But see Grutter v. Bollinger, 123 S. Ct. 2325 (2003) (upholding affirmative action program in higher education).

90. See Bartholet, supra note 6, at 1228–37. However, in Palmore v. Sidoti, 466 U.S. 429 (1984), the Supreme Court held that furtherance of the best interests of the child was not a compelling state interest. Instead, the Supreme Court held that it was a "substantial governmental interest," a less strict standard. Id. at 433. In addition, Palmore was a custody dispute between parents, and the law has long recognized that parents have a constitutionally protected interest in the custody of their children. See, e.g., Prince v. Massachusetts, 321 U.S. 158, 166 (1944) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") Prospective adoptive parents do not have any recognized equivalent rights. Finally, in Palmore, the court held that race could not be the sole factor in the determination of custody in the case. 466 U.S. at 432–33. It did not, however, hold that race could not be considered as one of many factors. Transracial adoption raises different issues than affirmative action. Most affirmative action cases involve the distribution of benefits that have a present or future economic value such as jobs, college admissions, or government contracts. Also, in affirmative action disputes, the object of the dispute—the benefit itself—has no independent interest, unlike a child. See Perry, The Transracial Adoption Controversy, supra note 5, at 100–02, for a further discussion of the distinction between the two contexts.
areas such as education and employment. The latter have used the transracial adoption controversy to further their real agenda, which is to dismantle all remedial race-conscious programs. This agenda is not in the best interests of the majority of Black children, and it is tragic that some advocates of transracial adoption have permitted themselves to be used in this way, particularly at a moment in time when the movement to eliminate race-conscious remedies continues to gain momentum. For example, Ward Connerly, the California businessman who was the prime initiator of Proposition 209, which ended California's affirmative action programs, recently proposed a "Racial Privacy Initiative" which sought to prevent the state government from classifying any persons by race in the operation of public education, public contracting, or public employment. Although it was voted down, the proposal would have prohibited the government from even compiling any information or statistics concerning race. The consequences of such a law, particularly if widely adopted, would virtually cripple efforts to achieve racial justice.

Fogg-Davis' opposition to placing children into racial categories must be examined in light of the practice's societal consequences, and ultimately, its effect on the struggle for racial equality. If it is not ethical to place children in racial categories in the context of adoption or other areas of life, is it ethical to place adults into them? And if we do not, how do we keep track of the progress of Blacks and other minority groups in terms of employment opportunities, health, education, and other areas? These are important issues that need to be addressed in any discussion of the justifications for, or objections to, racial designations.

Fogg-Davis also persuasively argues that there is a need to incorporate more voices of transracially adopted individuals into the debate. The literature on transracial adoption does discuss the rights and interests of transracially adopted children, and many of the scholars that conducted research studies

91. See Fogg-Davis, supra note 1, at 44 (noting the alliance on transracial adoption between Harvard Law School Professors Randall Kennedy and Elizabeth Bartholet and the conservative Institute for Justice, which opposes all affirmative action programs); Perry, The Transracial Adoption Controversy, supra note 5, at 77-78 (noting the alliance between liberal colorblind individualists and racial conservatives in the 1980s and 1990s).


95. See, e.g., Patricia J. Williams, Racial Privacy, THE NATION, June 17, 2002, at 9 (discussing the devastating effect the proposed Racial Privacy Initiative would have on efforts to achieve racial equality).
interviewed the children and incorporated the findings into their conclusions. Fogg-Davis makes a valid point if she is arguing that the voices of the children could be made more explicit in the transracial adoption debate. It is also important, as others have argued, to incorporate the voices of birthmothers into the analysis of both transracial and international adoption, who are often pressured to surrender their children for adoption as a result of the triple pressures of racism, patriarchy, and poverty.

Fogg-Davis’ suggestion of broadening the discussion of transracial adoption is valid, but in the end her “thought experiment” of assigning children for adoption without regard to race is of limited utility. She herself concedes that implementing such a policy would be impractical, and indeed, because of the very factor of racism, would threaten the viability of the entire adoption system. Furthermore, Fogg-Davis does not explore the implications of extending her “thought experiment” of eliminating the significance of race in adoption to other contexts, such as employment or the maintenance of statistics tracking racial progress.

CONCLUSION

Transracial adoption is one of the most complex contemporary racial issues. Because the number of children actually affected is so small, the issue has little practical relevance when compared to the major, devastating social problems faced by the majority of Black children. However, the debate over transracial adoption is important at a symbolic level because it sheds light on many sensitive and complex issues concerning race. In that respect, there is

---

96. See, e.g., Simon & Roorda, supra note 29; Susan R. Harris, Race, Search, and My Baby-Self: Reflections of a Transracial Adoptee, 9 YALE J.L. & FEMINISM 5 (1997); see also Isaacs, supra note 29.

97. See Perry, Transracial and International Adoption, supra note 8, at 107, 138–61. On the other hand, Fogg-Davis’ argument that the transracial adoption debate focuses solely on the event of adoptive placement and ignores the fact that adopted children are potential adults seems misplaced. See Fogg-Davis, supra note 1, at 60. A number of the studies of transracial adoption are longitudinal. Moreover, even in the early cases in which a number of courts expressed opposition to, or strong reservations about transracial adoption, their focus was still on the question of the potential long-term emotional effects on the children, rather than solely on the event of adoptive placement. During the earlier years of transracial adoption, the discussion about anticipated problems in adolescence was so frequent that it became known as “the puberty argument.” See Perry, Race and Child Placement, supra note 8, at 78–79 (citing Marriage Across the Color Line 72–73 (Clotye M. Larsson ed., 1965)); Susan J. Grossman, A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings, 17 BUFF. L. REV. 303, 330 (1968); Margaret Howard, Transracial Adoption: Analysis of the Best Interests Standard, 59 NOTRE DAME L. REV. 503, 541–45 (1984). Such discussions might be interpreted as racism on the part of those who raised the issue or as sincere concerns about societal hostility toward interracial marriage. Still, they indicate that the discussion of transracial adoption often went beyond the matter of initial placement and incorporated discussion of potential long-term concerns.
much to disagree about. It is therefore important for scholars to continue to bring multiple perspectives to the subject.

The book's focus on ethical issues is a significant contribution to the literature on transracial adoption. There is an apparent inconsistency between Fogg-Davis' position that race should be a permissible factor in adoptive placements and her argument that society should resist giving children racial designations. However, the book ultimately raises many interesting issues about the social construction of race and the significance of race to personal identity. Further, the question it raises, although not explicitly, about the racial identity of biracial children is a legitimate one. This question in particular warrants further exploration in a frank and open dialogue.