

University of Michigan Journal of Law Reform

Volume 41

2007

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Recommended Citation

David J. Herring, *The Multiethnic Placement Act: Threat to Foster Child Safety and Well-being?*, 41 U. MICH. J. L. REFORM 89 (2007).

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THE MULTIETHNIC PLACEMENT ACT: THREAT TO FOSTER CHILD SAFETY AND WELL-BEING?

David J. Herring*

Despite the efforts of public officials to reduce the time children spend in foster care, many children live in foster homes for a substantial portion of their childhoods. In fact, a child placed in a foster home may remain in that home for an extended period, with a significant possibility of remaining there permanently. In light of this situation, the decision to place a child in a particular foster home is extremely important.

The federal Multiethnic Placement Act ("MEPA") significantly affects foster care placement decisions. This law expressly prohibits public child welfare agencies from delaying or denying a child's foster care or adoptive placement on the basis of race, color, or national origin. Federal officials have interpreted MEPA as barring public agencies from routinely and systematically considering race when placing children in particular foster homes. In other words, MEPA precludes these agencies from pursuing children's interests through a policy or practice of matching a child's race with that of his or her foster parent.

To date, commentators who have examined MEPA have focused their attention on identifying and weighing the benefits and harms of transracial adoption for minority children and communities. As a consequence, they have not addressed the impact of MEPA on foster care placement decisions in any detail.

In contrast, this Article examines foster care placement decisions. More specifically, this Article uses behavioral biology research on kinship cues and social psychology research on in-group favoritism to formulate a hypothesis that has implications for MEPA's prohibition on the routine consideration of race in making foster care placement decisions. Namely, children placed with non-kin, same-race foster parents are likely to be safer and healthier than children placed with non-kin, different-race foster parents. The Article calls for a test of this hypothesis, explains how such a test may proceed, and discusses possible implications for laws and policies that address race and foster care.

INTRODUCTION

Despite the efforts of public officials to reduce the time children spend in foster care, many children live in foster homes for a

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substantial portion of their childhoods.¹ In order to improve conditions for these children, it is necessary to understand the dynamics of the foster parent/foster child relationship. Findings from behavioral biology and social psychology research are helpful in addressing this need.² This Article uses this research to formulate a hypothesis that has implications for the current prohibition on the routine consideration of race in making foster care placement decisions.³ Namely, children placed with non-kin, same-race foster parents are likely to be safer and healthier than children placed with non-kin, different-race foster parents.

Since the 1970's, federal law has been the dominant mechanism for reform of state public child welfare systems.⁴ Although many assert that family matters are primarily subject to state control, Congress has largely taken over state child welfare systems through the exercise of its spending power. For example, if states want to receive federal funds for foster care expenditures, they must comply with a set of federal statutes and regulations that dictate the design of their child welfare systems.⁵ Because every state depends heavily on federal funds to sustain their public child welfare sys-

1. See U.S. DEPT. OF HEALTH AND HUMAN SERVS., ADMINISTRATION FOR CHILDREN AND FAMILIES, CHILDREN'S BUREAU, THE AFCARS REPORT—PRELIMINARY FY 2005 ESTIMATES AS OF SEPTEMBER 2006, [http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report 13.htm](http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report%2013.htm) (last visited Sept. 8, 2007) [hereinafter the AFCARS Report] (revealing that 37% of the 513,000 children in foster care had spent more than two years in foster care placements, with 15% having spent five years or more). See generally Susan P. Kemp & Jami M. Bodonyi, *Beyond Termination: Length of Stay and Predictors of Permanency for Legally Free Children*, 81 CHILD WELFARE 58 (2002); Brenda D. Smith, *After Parental Rights are Terminated: Factors Associated with Exiting Foster Care*, 25 CHILD. & YOUTH SERVICES REV. 965 (2003); Fred Wulczyn, *Closing the Gap: Are Changing Exit Patterns Reducing the Time African American Children Spend in Foster Care Relative to Caucasian Children*, 25 CHILD. & YOUTH SERVICES REV. 431 (2003).

2. See generally David J. Herring, *Child Placement Decisions: The Relevance of Facial Resemblance and Biological Relationships*, 43 JURIMETRICS J. 387 (2003) [hereinafter *Facial Resemblance*]; David J. Herring, *Foster Care Placement: Reducing the Risk of Sibling Incest*, 37 U. MICH. J. L. REFORM 1145 (2004) [hereinafter *Reducing the Risk*]; David J. Herring, *Foster Care Safety and the Kinship Cue of Attitude Similarity*, 7 MINN. J. L. SCI. & TECH. 355 (2006) [hereinafter *Attitude Similarity*]; Owen D. Jones, *Evolutionary Analysis in Law: An Introduction and Application to Child Abuse*, 75 N.C. L. REV. 1117 (1997).

3. See The Multiethnic Placement Act ("MEPA"), Pub. L. 103-382, § 551, 108 Stat. 4056 (1994) [hereinafter MEPA] (codified as amended at 42 U.S.C. § 1996b (2000) and 42 U.S.C. § 5115a (1994) (repealed 1996)).

4. See *id.*; The Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified at 42 U.S.C. §§ 671-79(b) (2007)); The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 (codified as amended at 42 U.S.C. §§ 671-79(b) (2007)).

5. See, e.g., The Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500 at §§ 671-79(b) (codified as amended at 42 U.S.C. §§ 671-79(b) (2007)); Robert M. Gordon, *Drifting Through Byzantium: The Promise and Failure of the Adoption and Safe Families Act of 1997*, 83 MINN. L. REV. 637 (1999).

tems, state laws, policies, and practices comply with federal law, at least in form if not in operation.⁶

The construction of federal child welfare law proceeds primarily from permanency planning concepts.⁷ These concepts have their origin in child development theory and social work policy and practice.⁸ Their goal is to secure child well-being by having at least one adult make a permanent commitment to care for and raise each child.⁹

Permanency planning concepts have significant implications for state actors in public child welfare systems. According to permanency planning, state actors should be reluctant to disrupt an established parent/child relationship. Intervention in family associations, especially interventions that entail removal of children from parental custody, should occur only when necessary to protect children from serious harm.¹⁰ In addition, if state actors must intervene, the period of intervention should be as short as possible.¹¹ For instance, if they must place a child in foster care, state actors should return the child to parental custody as soon as a parent can provide minimally adequate care. Because this is a strongly favored outcome, state actors should actively provide services to the parent and child so that reunification can occur as soon as possible.¹² However, if state actors determine that a child's parents will be unable to provide minimally adequate care in time to meet the child's developmental needs, they should secure an alternative permanent placement as soon as possible. This could mean an adoption placement, permanent guardianship, or another arrangement that results in an adult making a permanent commitment to care for the child.¹³

Current federal law, and the state laws that parrot it, appears well designed to achieve timely permanent placements for children while also securing child safety and health. Federal law requires states to maintain systems that encourage and facilitate the reporting of child maltreatment.¹⁴ Once state actors receive a report, they must investigate and take appropriate action such as providing the

6. See Gordon, *supra* note 5, at 642–46; 673–84; David J. Herring, *The Adoption and Safe Families Act—Hope and Its Subversion*, 34 FAMILY L.Q. 329, 331–36 (2000).

7. See Herring, *supra* note 6, at 329–31; ANTHONY M. MALUCCIO ET AL., PERMANENCY PLANNING FOR CHILDREN: CONCEPTS AND METHODS 5 (1986).

8. MALUCCIO ET AL., *supra* note 7, at 3–16.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.*

14. 42 U.S.C. § 5106f-1 (2003).

subject family with support services or removing a child from parental custody.¹⁵ If they remove a child, state actors must make efforts to return the child to the parents as soon as possible unless the particular family's circumstances are egregious.¹⁶ While making reunification efforts, state actors' paramount concern must be the child's safety and health.¹⁷

In addition, an administrative or judicial officer must review the affected family's situation at least every six months while the child remains out of parental custody.¹⁸ This officer must determine if the state child welfare agency is making reasonable efforts to return the child to the parent and formulating appropriate plans for the child's future.¹⁹ The state must provide a permanency hearing at the time a child has been out of parental custody for twelve months.²⁰ The presiding officer must ensure that the state agency has an appropriate plan to achieve a timely permanent placement for the child.²¹ Once a child has been in foster care for fifteen of the past twenty-two months, the state agency must petition a court to terminate parental rights unless the child is living with kin, termination would clearly not serve the child's best interests, or the state has failed to make adequate reunification efforts.²² If the court grants the petition, state actors must make efforts to secure a permanent placement for the child, with adoption being the favored outcome.²³

Through this process of case review, the law seeks to secure an affected child's safety and health while also achieving a timely permanent placement for him or her. If effectively implemented, this legal scheme should reduce the number of cases where state actors remove a child from parental custody. Removal would occur only after state actors have provided an affected family with appropriate public services and only when necessary to protect a child from a significant risk of serious harm. In addition, children whom the state must remove from parental custody should exit their

15. See 42 U.S.C. § 671(a)(15)(B) (2007) (calling for states to require public child welfare agencies to make reasonable efforts to maintain or reunify a child's family of origin).

16. *Id.*; see 42 U.S.C. § 671(a)(15)(D) (2007).

17. 42 U.S.C. § 671(a)(15)(A) (2007).

18. See 42 U.S.C. §§ 671(a)(16), 675(5)(B) (2007).

19. See 42 U.S.C. §§ 671(a)(16), 675(1)(B), 675(5)(B) (2007).

20. See 42 U.S.C. §§ 671(a)(16), 675(5)(c) (2007).

21. *Id.*

22. 42 U.S.C. § 675(5)(E) (2007).

23. *Id.*

temporary foster care placements within six to twenty-four months.²⁴

In light of these expectations, one could reasonably predict a significant reduction in the number of children residing in foster care. Statistics concerning the nation's foster care population constitute one measure of the effectiveness of the federal legal scheme.²⁵

Unfortunately, foster care statistics reveal the failure of federal child welfare law. The number of children living in foster care has grown steadily during recent years.²⁶ Well over half a million children now live in temporary placements,²⁷ with many spending more than two years in foster care.²⁸

Even the extreme measure of terminating parental rights has not addressed this latter problem. Many children are now legal orphans, having been freed for adoption without the prospect of joining new families anytime soon, if ever.²⁹ Making matters worse is the demographic profile of children who live in foster care. They are disproportionately from poor, minority families.³⁰ Living in poverty within a minority community appears to significantly increase the risk of a child spending a substantial portion of childhood in foster care.³¹

Governmental actors have failed to adequately support and effectively implement a well-designed child welfare legal scheme.³² The current reality is that a substantial number of children (especially minority children) spend a significant amount of time in temporary foster care placements. Accordingly, focusing exclusively on family preservation and permanency planning, while ignoring conditions in foster care, overlooks viable opportunities to improve children's lives. To seize these opportunities, public

24. See generally Gordon, *supra* note 5 (noting an emphasis on achieving timely permanent placements for children in foster care as evidenced by federal law that requires a permanency hearing within twelve months of a child's placement in foster care and mandates the filing of a petition seeking termination of parental rights when a child has been placed in foster care for fifteen of the past twenty-two months); Kemp & Bodonyi, *supra* note 1; Smith, *supra* note 1.

25. See Kemp & Bodonyi, *supra* note 1, at 61.

26. *Id.*

27. The AFCARS Report, *supra* note 1, at 1-2.

28. *Id.*

29. See Kemp & Bodonyi, *supra* note 1, at 63-65; Smith, *supra* note 1, at 968-69, 979-80.

30. See Wulczyn, *supra* note 1, at 431, 433. See generally DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

31. ROBERTS, *supra* note 30, at 7-10, 94-95.

32. See Gordon, *supra* note 5, at 643-50, 662-67, 673-84; Herring, *supra* note 6, at 333-36, 341-48.

officials must realize that one aspect of the child welfare system calls out for their attention—foster care.³³

Because many children will spend a great deal of time growing up in foster care, the decision to place a child in a particular foster home is extremely important.³⁴ In fact, a child placed in a foster

33. Many aspects of the current conditions of children in foster care are problematic. After experiencing the trauma of maltreatment and removal from parental custody, these children experience a high level of instability. For example, a recent study found that a cohort of children in foster care from 1990 to 1992 in San Diego experienced an average of more than four different placements during an eighteen month period, with the number of placements ranging from one to fifteen. Sigrid James et al., *Placement Movement in Out-of-Home Care: Patterns and Predictors*, 26 CHILD & YOUTH SERVICES REV. 185, 190 (2004). Another recent study of a cohort of children who had been placed in foster care between 1988 and 1998 in Washington and Oregon found that these children experienced an average of over six moves during their time in foster care. See PETER J. PECORA ET AL., IMPROVING FAMILY FOSTER CARE: FINDINGS FROM THE NORTHWEST FOSTER CARE ALUMNI STUDY 26 (2005), <http://www.casey.org/NR/rdonlyres/4E1E7C77-7624-4260-A253-89C5A6CB9E1/923/CaseyAlumniStudyupdated082006.pdf>. Over sixty-five percent of these children spent more than 3.5 years in care. *Id.* at 27. (This is largely consistent with national data indicating the average stay in foster care is more than 28 months. The AFCARS Report, *supra* note 1.) Almost one-third of the children experienced ten or more school changes from elementary through high school, with sixty-five percent experiencing seven or more school changes. PECORA ET AL., *supra*, at 28. The former foster children reported that a significant number of their foster parents had been disengaged or authoritarian, expressing little warmth. *Id.* at 30. Over thirty-two percent of the former foster children experienced some form of maltreatment while in care (i.e. sexual abuse, physical abuse, or physical neglect). *Id.* This finding is consistent with other studies that have found a high level of maltreatment in foster care. See Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (1999); Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, in CHILD ABUSE AND NEGLECT 577 (1994). The study did find that the former foster children had had access to a high level of education and therapeutic services, but that many of these individuals experienced negative outcomes in terms of mental health, employment, and finances. Pecora et al., *supra*, at 28, 32–39. In light of these findings, there are opportunities to improve conditions in foster care.

34. This is especially true in light of public agency efforts to achieve stable foster care placements. See PECORA ET AL., *supra* note 33, at 25 (noting the importance of and recommending placement stability). Because of these efforts, foster children are likely to spend a significant period in a chosen foster home thus increasing the stakes of a foster care placement decision for the placed child. Despite the importance of a foster care placement decision, a team of researchers that investigated agency practices in placing children in specific foster homes characterized the process as exhibiting institutional neglect. See Emily Jean McFadden & Patricia Ryan, *Allegations of Maltreatment in Family Foster Homes*, in ASSESSING CHILD MALTREATMENT REPORTS 209, 213 (Michael Robin ed., 1991); James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 CHILD ABUSE & NEGLECT 249, 250–51 (1991). Another group of researchers discussed the realities of the foster care system in an attempt to explain their findings that a significant portion of reports of abuse and neglect in foster care involves serious incidents:

Dynamics in family foster care demonstrate the interaction of multiple causal factors. Low pay leads to shortages in foster homes. These shortages create pressure to license marginal homes. Pressures to place children in the least restrictive setting direct difficult, behaviorally disturbed children into family foster care. Large caseloads mitigate against adequate supportive services by foster care workers. Inevitably, an over-

home may reside there for an extended period, with a significant possibility of remaining there permanently.³⁵

The federal Multiethnic Placement Act (“MEPA”) significantly affects foster care placement decisions.³⁶ This law prohibits public child welfare agencies from delaying or denying a child’s foster care or adoptive placement on the basis of race, color, or national origin.³⁷ Public agencies cannot routinely and systematically consider race in placing a child in a particular foster home. Only in exceptional circumstances related to an individual child’s demonstrated, specific need for a foster parent of a particular race does MEPA allow an agency to consider race.³⁸

A primary purpose of MEPA is to eliminate discrimination that lengthens the time that minority children wait for adoption placements.³⁹ Under the law, agencies cannot delay an adoption placement in order to match the race of the child with that of the adoptive parent. Because of the shortage of minority adoptive parents,⁴⁰ many expect MEPA to increase the number of transracial

strained family helps out in a crisis. [For example,] [p]erhaps two abused children need emergency short-term placement. As no other placements are available, the short-term placements [sic] extends on. These events combine with stress in the family home—perhaps the husband is laid off at work—to create a tension-filled setting. A foster child reacts to this tension with provoking behavior and is abused. The children are removed, placed in another home, and a similar cycle repeats. The county investigation assigns blame to the foster family.

Rosenthal et al., *supra*, at 257–58. This description identifies the frequent failure of agencies to carefully match children with foster parents and homes. In current practice, the availability of a bed for the child often appears to be the driving force in making placement decisions. The placement process is often haphazard, leaving a great deal of room for improvement. See *id.* For a more extensive discussion of this process, see Herring, *Facial Resemblance*, *supra* note 2, at 401–05.

35. It is important to note that a significant portion of these children effectively, if not formally, will be permanently placed with their foster parents. For example, the adoption of foster children by their foster parents is supported by public agencies and has grown dramatically. See The AFCARS Report, *supra* note 1, at 12 (reporting that 60% of the children adopted from the public foster care system during fiscal year 2005 were adopted by their foster parents).

36. MEPA, Pub. L. 103-382, § 551, 108 Stat. 4056 (1994) (codified as amended at 42 U.S.C. § 1996b (2000) and 42 U.S.C. § 5115a (1994) (repealed 1996)).

37. *Id.*

38. See ADMIN. FOR CHILDREN & FAMILIES, U.S. DEP’T OF HEALTH AND HUMAN SERVS., A GUIDE TO THE MULTIETHNIC PLACEMENT ACT OF 1994 AS AMENDED BY THE INTERETHNIC ADOPTION PROVISIONS OF 1996 ch. 1, pt. A (1998) [hereinafter “HHS Guide”], <http://www.acf.hhs.gov/programs/cb/pubs/mepa94/mepachp1.htm>.

39. See Devon Brooks et al., *Adoption and Race: Implementing the Multiethnic Placement Act and the Interethnic Adoption Provisions*, 44 SOC. WORK 167 (1999); HHS Guide, *supra* note 38.

40. See Richard P. Barth, *Effects of Age and Race on the Odds of Adoption versus Remaining in Long-Term Out-of-Home Care*, 76 CHILD WELFARE 285, 302 (1997) (describing the inadequacy of federally funded minority adoptive parent recruitment projects to address “the gross discrepancy between the numbers of African American children in care and African

adoptions.⁴¹ To date, commentators have focused their attention on identifying and weighing the benefits and harms of transracial adoption on minority children and communities.⁴² As a consequence, they have not addressed the impact of MEPA on foster care placement decisions in any detail.

Findings from behavioral biology and social psychology research that investigates kinship cues and in-group favoritism provide reasons to suspect that a prohibition on the consideration of race jeopardizes child safety and well-being in foster care.⁴³ This Article will examine this research and explore its implications for MEPA's prohibition on the consideration of race in foster care placement decisions. Part I discusses MEPA's development, current provisions, and implementation. Part II describes the debate surrounding MEPA. Part III presents a hypothesis concerning MEPA's possible impact on child safety and well-being in foster care. Part III also calls for a test of the hypothesis, explains how such a test may proceed, and discusses possible implications for laws and policies that address race and foster care.

I. THE MULTIETHNIC PLACEMENT ACT

Congress enacted MEPA in 1994 in response to the widespread practice of placing children primarily with foster or adoptive parents of the same race and a separate set of practices that discouraged minority individuals from serving as foster or adoptive parents.⁴⁴ These latter practices contributed to a shortage of minority foster and adoptive parents.⁴⁵ As a result, it was very difficult for many public agencies to place children with same-race foster or adoptive parents. Minority children frequently had to live in a

American families who could adopt"); Devon Brooks et al., *Preferred Characteristics of Children in Need of Adoption: Is There a Demand for Available Foster Children?*, 76 SOC. SERVICE REV. 575, 577 (2002).

41. See ELIZABETH BARTHOLET, NOBODY'S CHILDREN: ABUSE AND NEGLECT, FOSTER DRIFT, AND THE ADOPTION ALTERNATIVE 182 (1999); Brooks et al., *supra* note 40, at 577; Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The Pew Commission Recommendations and the Transracial Adoption Debate*, 66 MONTANA L. REV. 21, 41 (2005).

42. See, e.g., BARTHOLET, *supra* note 41; RANDALL KENNEDY, INTERRACIAL INTIMACIES: SEX, MARRIAGE, IDENTITY, AND ADOPTION chs. 11–12 (2003); Carla Bradley & Cynthia G. Hawkins-León, *The Transracial Adoption Debate: Counseling and Legal Implications*, 80 J. COUNS. & DEV. 433 (2002); Devon Brooks & Richard P. Barth, *Adult Transracial and Inracial Adoptees: Effects of Race, Gender, Adoptive Family Structure, and Placement History on Adjustment Outcomes*, 69 AM. J. ORTHOPSYCHIATRY 87 (1999); Ruth-Arlene W. Howe, *Transracial Adoption (TRA): Old Prejudices and Discrimination Float Under a New Halo*, 6 B. U. PUB. INT. L.J. 409 (1997).

43. See *infra* notes 94–207 and accompanying text.

44. See Brooks et al., *supra* note 40; HHS Guide, *supra* note 38, at ch. 1, pts. A-B.

45. See Brooks et al., *supra* note 40, at 577; HHS Guide, *supra* note 38, ch. 1, pt. C.

temporary placement while the agency sought a same-race home. This wait could be lengthy, allowing a child to form a strong bond with a temporary caretaker such as a different-race foster parent. When this occurred, the agency would eventually have to disrupt an established family bond when it secured a same-race placement.⁴⁶ In many other cases, agencies failed to secure a same-race adoptive family, effectively denying affected children a permanent placement.⁴⁷

Some members of Congress believed this situation of delay and failure surrounding the placement of minority children in foster and adoptive homes harmed affected children.⁴⁸ Lawmakers perceived public agencies as failing to promote the best interests of minority children by effectively denying them timely placements in permanent homes. They passed MEPA in order to prohibit agencies from using race, color, or national origin⁴⁹ to delay or deny a child's placement in a particular foster or adoptive home.⁵⁰

Originally, the statute expressly permitted agencies to consider race as one of a number of factors in assessing a child's best interests and the capacity of prospective foster or adoptive parents to meet the child's needs.⁵¹ An agency could not delay or deny a placement solely on the basis of race, but in making a placement decision an agency could routinely consider race as one relevant factor among many. In 1996, Congress amended this provision of MEPA.⁵² The current version of MEPA prohibits agencies from routinely considering race as one of many factors relevant to a placement decision.⁵³

The Administration of Children and Families of the United States Department of Health and Human Services has issued a

46. HHS Guide, *supra* note 38, ch. 1, pt. C.

47. See Martin Guggenheim, *The Effects of Recent Trends to Accelerate the Termination of Parental Rights of Children in Foster Care*, 29 FAM. L.Q. 121, 132-34 (1995); HHS Guide, *supra* note 38.

48. HHS Guide, *supra* note 38.

49. For purposes of this article, the word "race" stands for the broader statutory phrase "race, color, or national origin."

50. MEPA, Pub. L. 103-382, § 551, 108 Stat. 4056 (1994) (codified as amended at 42 U.S.C. § 1996b (2000) and 42 U.S.C. § 5115a (1994) (repealed 1996)); HHS Guide, *supra* note 38. MEPA also requires agencies to make diligent efforts to recruit minority foster and adoptive parents.

51. HHS Guide, *supra* note 38, at ch. 3, § 2.

52. *Id.*

53. *Id.* at ch. 3, § 3. The HHS Guide states that "on rare occasions, the distinctive needs of an individual child may warrant consideration of the child's race, color, or national origin." *Id.* The Guide makes it clear that the use of racial or ethnic factors is permitted only in "exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated." *Id.*

guide to MEPA.⁵⁴ The guide aims to “assist states and child welfare agencies in their efforts to comply with the new federal mandates concerning the role of race, color, and national origin in foster care and adoptive placements.”⁵⁵ It begins by noting that prior to the enactment of MEPA, agencies had generally favored placing children with families of the same race, with transracial placements a last resort.⁵⁶ The guide articulates its view of the reasoning once openly used by agencies to justify the race matching approach: children have special needs because of their immutable racial characteristics, as well as because of their cultural experiences.⁵⁷ Thus, agencies should place children with adult caretakers who can fully address these race-based needs.⁵⁸

Just as it was assumed that most prospective parents want children who resemble them, it was assumed that children would be uncomfortable in an adoptive family that did not have a similar racial or ethnic heritage. It was alleged that children raised in racially or ethnically matched families would more easily develop self esteem and a strong racial identity, and that minority children would have the best opportunity to learn the skills needed to cope with racism they were likely to encounter as they grew up in American society.⁵⁹

Apparently, child welfare agencies had assumed that their race matching policies and practices complied with federal law. The guide rejects this assumption, asserting that both the Constitution and Title VI of the Civil Rights Act bar states and publicly-funded entities from systematically placing children in racially matched foster care and adoptive homes.⁶⁰

In the authors’ view, MEPA simply makes it clear that such placement practices are to be reviewed under a strict scrutiny standard.⁶¹ Therefore, a state must have a compelling interest that it is pursuing through race matching.⁶² In addition, the policy and

54. HHS Guide, *supra* note 38.

55. *Id.* at ch. 1. State officials have a significant incentive to comply with MEPA because the law provides for “the withholding of federal funds and the right of any aggrieved individual to seek relief in federal court against a state or other entity alleged to be in violation.” HHS Guide, *supra* note 38; *see also* MEPA, Pub. L. 103-382, § 551, 108 Stat. 4056 (1994).

56. HHS Guide, *supra* note 38, at ch. 1. pt. C.

57. *Id.* at ch. 1, pt. C.

58. *See id.*

59. *Id.*

60. *Id.* at ch. 1, pt. D.

61. *Id.*

62. *Id.*

practice of race matching must be narrowly tailored to achieve the compelling interest.⁶³ Accordingly, a state agency cannot simply assume that every child's best interests (arguably a compelling state interest) call for a same-race placement.⁶⁴ In other words, race matching cannot be a routine practice.⁶⁵

MEPA-IEP encourages child welfare workers to make decisions on the basis of individualized needs of each child, and renders suspect any placement decision based on stereotypical thinking or untested generalizations about what children need. From now on, it should be clear that any use of race, color, or ethnicity is subject to the strict scrutiny standard of review, and that the use of racial or ethnic factors is permitted, only in exceptional circumstances where the special or distinctive needs of a child require it and where those needs can be documented or substantiated.⁶⁶

As to enforcement, federal officials note that MEPA authorizes the United States Department of Health and Human Services to impose Title IV-B fiscal penalties and Title IV-E graduated financial penalties on offending states.⁶⁷ In addition, it expressly authorizes private individuals who are adversely affected by a violation of the law to seek injunctive relief, monetary damages, and attorneys' fees in federal court.⁶⁸ State officials are likely to view the financial implications of these enforcement mechanisms as significant incentives to comply with MEPA.⁶⁹

II. THE MEPA DEBATE

In the federal guide to MEPA, federal officials expressly acknowledge that their views are controversial and that they cannot resolve the debate surrounding MEPA.⁷⁰ In beginning their discussion of this debate, federal officials identify two primary concerns

63. *Id.*

64. *Id.*

65. *Id.* The guide acknowledges that some courts had struggled with this issue and had evaluated some racial classifications with less than strict scrutiny if public agencies intended to promote diversity or remedy the effect of historic discrimination. *Id.* However, in the authors' view, the United States Supreme Court has applied the strict scrutiny standard to all racial classifications, even those that are allegedly benign. *Id.*

66. *Id.* at ch. 3.

67. *Id.* at ch. 2; see MEPA, Pub. L. 103-382, § 551, 108 Stat. 4056.

68. HHS Guide, *supra* note 38, at ch. 2.

69. See *id.*

70. *Id.* at ch. 1.

Congress addressed in passing MEPA. First, Congress was concerned about reports that child welfare agencies were removing minority children from stable transracial foster homes in order to place them with someone of the same race whom the children had never met.⁷¹ Second, Congress was concerned with reports of child welfare agencies denying minority children timely adoptive placements because of their prolonged efforts to find race-matched adoptive homes.⁷²

In light of these concerns, federal officials' discussion of the controversy surrounding MEPA primarily focuses on achieving timely permanent placements. In fact, their discussion focuses almost exclusively on one type of permanent placement—adoption. Although the guide alludes to the insistence of proponents of race matching policies that agencies recruit a diverse pool of both foster and adoptive parents (an issue that federal officials believe MEPA addresses),⁷³ the remainder of the discussion emphasizes adoption placements.⁷⁴ In presenting their view of the controversy, federal officials assert the superiority of adoption by referring to studies that indicate that adopted children perform better on most outcome measures than do children who remain in foster care.⁷⁵

Federal officials then discuss the desirability of transracial adoption. Initially, they note that critics of racial matching assert that little evidence supports the claim that transracial adoption is harmful to children's self-esteem, sense of racial identity, or ability to cope with racism.⁷⁶ The officials themselves then assert that transracial adoptees do as well as same-race adoptees in these areas, developing a positive sense of racial identity and doing even better in school.⁷⁷ They conclude the discussion on a positive note concerning race relations:

[t]here are some differences that manifest themselves over time between same-race and transracial adoptive families. Among these is that transracial adoptees have a more positive attitude about relations with whites, are more comfortable in integrated and multiethnic settings, and do not consider race

71. *Id.* at ch. 3, p. 1.

72. *Id.* The guide notes that some agencies required specific waiting periods during which they would search for a same race placement or required caseworkers to justify a transracial placement.

73. *Id.* at ch. 1.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

as basic to their self-understanding as do most same-race adoptees.⁷⁸

Federal officials perceive and embrace transracial adoption as an effective mechanism for achieving a color-blind society.

Commentators who support the consideration of race in making placement decisions disagree with federal officials' views and conclusions.⁷⁹ They also focus almost entirely on adoptive placements, especially on the issues surrounding transracial adoptions.⁸⁰ These commentators raise methodological and analytical questions about studies that indicate that transracial adoptees do not suffer developmental harm and turmoil, especially in relation to their racial identity and sense of belonging.⁸¹ They also raise the prospect of harm to minority communities posed by transracial adoption.⁸² According to these theorists, the majority, often using the power of the state, devalues minority parents and communities, removing their children and "saving" them through placement in a majority family.⁸³ In the past, the National Association of Black Social Workers has characterized this as "cultural genocide."⁸⁴

Because both sides in the debate focus on adoption policy, they largely ignore foster care or simply demonize it in passing:⁸⁵ foster care placements do harm, result in worse outcomes for children, and are to be limited in duration as much as possible.⁸⁶

However, as discussed previously, numerous children spend a substantial portion of their childhood living in a foster home. For all intents and purposes, the foster home is their childhood home, and the foster family is their family. This is the reality of the public

78. *Id.*

79. See Bradley & Hawkins-León, *supra* note 42; Margaret F. Brinig, *The Child's Best Interests: A Neglected Perspective on Interracial Intimacies*, 117 HARV. L. REV. 2129 (2004); Brooks et al., *supra* note 39; Howe, *supra* note 42; Ruth McRoy, *Expedited Permanency, Implications for African-American Children and Families*, 12 VA. J. SOC. POL'Y & L. 475 (2005); Twila L. Perry, *Power, Possibility and Choice: The Racial Identity of Transracially Adopted Children*, 9 MICH. J. RACE & L. 215 (2003).

80. See, e.g., Brooks et al., *supra* note 39 (mentioning foster care, but primarily as a complicating factor in achieving adoption); Howe, *supra* note 42; McRoy, *supra* note 79.

81. See Bradley & Hawkins-León, *supra* note 42, at 434–36; Sarah Ramsey, *Fixing Foster Care or Reducing Child Poverty: The PEW Commission Recommendations and the Transracial Adoption Debate*, 66 MONT. L. REV. 21, 42 (2005).

82. See ROBERTS, *supra* note 30, at 236–53; Howe, *supra* note 42, at 416–17.

83. ROBERTS, *supra* note 30, at 236–53; Howe, *supra* note 42.

84. ROBERTS, *supra* note 30, at 246–48.

85. See, e.g., KENNEDY, *supra* note 42; Brinig, *supra* note 79; see also Ramsey, *supra* note 81, at 39–44.

86. Ramsey, *supra* note 81, at 39–44.

child welfare system, and it affects a disproportionate number of minority children.⁸⁷

Several leading social work scholars have noted that the debate surrounding MEPA has focused on transracial adoption despite the fact that MEPA regulates foster care placement decisions as much as adoption decisions.⁸⁸ These scholars view transracial adoption as a mere distraction for child welfare officials who are attempting to secure child safety, well-being, and permanency.⁸⁹ Because not nearly enough white adoptive parents are available, or willing, to adopt the many minority children living in foster care,⁹⁰ transracial adoption is unlikely to be an effective mechanism for addressing the needs of these children.⁹¹ Further, all the energy and effort expended in pursuing or resisting transracial adoption only diminishes the resources available to address the situation of these children and their families.⁹² For example, public officials could be much more effective if they emphasized family support and preservation programs, family reunification efforts, kinship care placements and support, and foster care conditions and support.⁹³

The prevalence of foster care in the current system suggests that a close examination of conditions in foster care is in order. Such an examination would properly include an inquiry into the impact of MEPA on foster care placement decisions made shortly after a child is removed from parental custody. In particular, how does the prohibition on the consideration of race at this point in a case affect child safety and well-being? Does prohibiting the consideration of race contribute to securing child safety and well-being or does it increase the risk of harm faced by foster children? Acknowledging such questions may provide a basis for formulating testable hypotheses that could eventually contribute to the improvement of conditions in foster care. In the next Section, this Article uses scientific research to formulate one such hypothesis.

87. See *supra* text accompanying notes 26–34.

88. See Brooks et al., *supra* note 40; Mark E. Courtney, *The Politics and Realities of Transracial Adoption*, 76 CHILD WELFARE 749, 750, 768–69 (1997).

89. See Courtney, *supra* note 88, at 765–72.

90. See Barth, *supra* note 40; Brooks et al., *supra* note 40; Courtney, *supra* note 88.

91. Courtney, *supra* note 88, at 755–60.

92. *Id.* at 766–71.

93. *Id.* at 765–72.

III. MEPA AND FOSTER CARE PLACEMENT DECISIONS: THE FORMULATION OF A HYPOTHESIS

Research in the fields of behavioral biology and social psychology provides a basis for a hypothesis concerning race and foster care placements.⁹⁴ Namely, children are likely to experience less maltreatment and receive more favorable treatment in non-kin, same-race foster placements than in non-kin, different-race foster placements.⁹⁵

Two primary lines of research support this hypothesis. The first is behavioral biology research addressing kinship cues.⁹⁶ The second is social psychology research examining in-group favoritism.⁹⁷

A. Behavioral Biology Research—Kinship Cues

The behavioral biology line of research arises from evolutionary theory and the concept of inclusive fitness.⁹⁸ Individuals who are biologically related share a significant amount of genetic material that distinguishes them from other members of their species.⁹⁹ As a result, an individual can increase the amount of his or her genetic material that passes on to future generations not only through his or her own reproductive success, but also through that of his or her kin.¹⁰⁰ In other words, an individual who possesses a behavioral trait or inclination to assist kin in achieving reproductive success will be more likely to maximize the amount of his or her genetic material present in future generations. Accordingly, there has been and is significant natural selection pressure to possess the trait of kinship altruism.¹⁰¹ In the end, an individual is likely to favor members of his or her kin group, providing them with beneficial

94. See, e.g., Herring, *Attitude Similarity*, *supra* note 2, at 388–90.

95. *Id.*

96. See, e.g., Irene Bevc & Irwin Silverman, *Early Separation and Sibling Incest: A Test of the Revised Westermarck Theory*, 21 *EVOLUTION & HUM. BEHAV.* 151 (2000); Justin H. Park & Mark Schaller, *Does Attitude Similarity Serve as a Heuristic Cue for Kinship?*, 26 *EVOLUTION & HUM. BEHAV.* 158 (2004); Steven M. Platek et al., *Reactions to Children's Faces: Resemblance Affects Males More than Females*, 23 *EVOLUTION & HUM. BEHAV.* 159 (2002).

97. See *infra* notes 138–70 and accompanying text.

98. See ROBERT TRIVERS, *SOCIAL EVOLUTION* 109–44 (James W. Behnke & Jo Andrews eds., 1985).

99. *Id.*

100. *Id.*

101. *Id.*

treatment that increases their reproductive success directly and thereby his or her reproductive success indirectly.¹⁰²

A hypothetical may help to illustrate this point. An individual has a twenty-two-year-old nephew who is having great difficulty in securing employment. Although this individual ordinarily refuses to use his professional connections to help young adults find a job, he makes a series of phone calls on behalf of his nephew. Even though he does not know his nephew well, he vouches for his intelligence and desire to work hard. In doing this, he risks losing credibility among those with whom he works and conducts business—a loss that may subsequently diminish his direct reproductive success. But he also provides potentially substantial benefits to his nephew that may subsequently enhance the nephew's reproductive success. Because the uncle shares approximately twenty-five percent of his genetic material with his nephew,¹⁰³ the uncle may increase his own reproductive success by favoring and assisting his nephew in this way. If the nephew is more successful in producing children who possess some of the uncle's genetic material, the uncle will realize benefits in terms of his own reproductive success. These potential benefits may outweigh the possible diminution of the uncle's direct reproductive success.¹⁰⁴

Research on both animal¹⁰⁵ and human¹⁰⁶ behavior has found a tendency to favor kin. An essential component of this tendency is an individual's capacity to recognize kin. Kinship cues serve this

102. *Id.* Justin H. Park et al., *The Psychology of Human Kin Recognition: Heuristic Mechanisms and Their Implications* 22–25 (2006) (on file with author).

103. See DAVID J. BULLER, *ADAPTING MINDS* 351–55 (2005).

104. See TRIVERS, *supra* note 98, at 113–14. Robert Trivers presents this concept in mathematical form by asserting that an individual tends to provide benefits to another if the indirect benefit to the donor's reproductive success (B) multiplied by the degrees of relatedness (r) (25% in the example in the text) is greater than the direct cost to the donor's reproductive success (C)— $Br > C$. There is evidence that altruistic acts among kin are especially likely and pronounced in a life and death situation. In such a situation, the benefits of acting to help kin are likely large in relation to the costs. See Eugene Burnstein, Christian Crandall & Shinobu Kitayama, *Some Neo-Darwinian Decision Rules for Altruism: Weighing Cues for Inclusive Fitness as a Function of the Biological Importance of the Decision*, 67 J. PERSONALITY & SOC. PSYCHOL. 773 (1994).

105. See DAVID J. C. FLETCHER & CHARLES D. MICHENER, *KIN RECOGNITION IN ANIMALS* (1987); Burnstein, et al., *supra* note 104; Paul W. Sherman, *Nepotism and the Evolution of Alarm Calls*, 197 SCIENCE 1246 (1977).

106. See Burnstein et al., *supra* note 104, at 773–89; Martin Daly et al., *Kinship: The Conceptual Hole in Psychological Studies of Social Cognition and Close Relationships*, in *EVOLUTIONARY SOCIAL PSYCHOLOGY* 265 (Jeffrey A. Simpson & Douglas T. Kenrick eds., 1997); Daniel J. Kruger, *Evolution and Altruism: Combining Psychological Mediators with Naturally Selected Tendencies*, 24 *EVOLUTION & HUM. BEHAV.* 118, 118–24 (2003); Park & Schaller, *supra* note 96, at 159–60.

function, constituting cognitive heuristic mechanisms for the recognition of kin that often operate at an unconscious level.¹⁰⁷

Behavioral biology researchers have identified several kinship cues such as facial resemblance,¹⁰⁸ attitude similarity,¹⁰⁹ odor,¹¹⁰ and co-residence during early childhood.¹¹¹ These researchers have also explored the operation of kinship cues and the inclination to provide beneficial treatment to kin.¹¹² For example, researchers examining facial resemblance as a kinship cue conducted a series of studies using arrays of photographs of children's faces that included a photograph constructed by morphing a child's face with that of the adult subject.¹¹³ The results of these studies indicate that adult subjects strongly favor a child who shares their facial features.¹¹⁴

Some of these researchers have also found that this inclination to provide favorable treatment to children based on facial resemblance is stronger in men than in women.¹¹⁵ The researchers note that men face a higher degree of uncertainty surrounding their biological relationship to a particular child, and therefore an increased risk of misdirected parental investment. In light of this paternity uncertainty, the researchers speculate that men rely more heavily on facial resemblance to assure themselves that a particular child is biologically related to them and to identify the child for favorable treatment.¹¹⁶ While the inclination to provide favorable treatment to a child who resembles them is present in women, it is stronger in men.¹¹⁷

107. Park and Schaller, *supra* note 96, at 159–60, 166–67.

108. See Platek et al., *supra* note 96, at 159–60, 164–65; Lisa M. DeBruine, *Resemblance to Self Increases the Appeal of Child Faces to Both Men and Women*, 25 *EVOLUTION & HUM. BEHAV.* 142, 143, 151 (2004).

109. See Park & Schaller, *supra* note 96, at 166–67.

110. See Richard H. Porter & John D. Moore, *Human Kin Recognition by Olfactory Cues*, 27 *PHYSIOLOGY & BEHAV.* 493–95 (1981); Glenn E. Weisfeld et al., *Possible Olfaction-based Mechanisms in Human Kin Recognition and Inbreeding Avoidance*, 85 *J. EXPERIMENTAL CHILD PSYCHOL.* 279 (2003).

111. See Bevc & Silverman, *supra* note 96, at 151–52, 159–60.

112. See, e.g., Park & Schaller, *supra* note 96; Platek et al., *supra* note 96.

113. See DeBruine, *supra* note 108; Platek et al., *supra* note 96; Steven M. Platek et al., *Reactions to Children's Faces: Males Are More Affected by Resemblance than Females Are, and So Are Their Brains*, 25 *EVOLUTION & HUM. BEHAV.* 394 (2004).

114. DeBruine, *supra* note 108, at 150–01; Platek et al., *supra* note 96, 162–65; Platek et al., *supra* note 113, at 397–98, 402–03.

115. Platek et al., *supra* note 113, 397–98, 402–03; Platek *supra* 96, 162–65.

116. Platek et al., *supra* note 96, at 159–60, 164–65; Platek et al., *supra* note 113, at 395.

117. Platek et al., *supra* note 96, at 162–65; Platek et al., *supra* note 113, at 397–98, 402–03. *But see* DeBruine, *supra* note 108, at 151–52 (questioning the differences between men and women in their reaction to children's facial resemblance).

Research examining attitude similarity as a kinship cue provides a second example.¹¹⁸ The findings indicate that an individual tends to favor others who share his or her attitudes.¹¹⁹ In a recent study, researchers initially determined the attitudes of subjects in relation to ten items. They then introduced the subjects to two women through photographs and descriptions of their attitudes on the measured items. The women were comparable in terms of age and physical features. However, one woman shared the attitudes of the subject, while the other did not.¹²⁰ The researchers found that subjects favored the woman who shared their attitudes, exhibiting a significantly stronger inclination to provide beneficial treatment to this woman in comparison to the woman who did not share their attitudes. In addition, through careful design of the study, the researchers determined that the positive feelings evoked by attitude similarity did not arise from general feelings of pleasantness. Instead, the subjects' reactions to the profiles of the two women arose independently from perceptions of kinship.¹²¹

The researchers also determined that the subjects' favorable reaction to the similar attitude was largely unconscious.¹²² The subjects did not consciously assess the woman who shared their attitudes as genetically related to them. This result supports the idea that attitude similarity is simply a component of an unconscious heuristic mechanism that gives rise to perceptions of kinship and evokes favorable feelings toward the other individual.¹²³

Although researchers need to conduct further studies on the effects of various kinship cues, the research completed to date

118. See Park & Schaller, *supra* note 96.

119. *Id.*; see also Donn Byrne et al., *The Ubiquitous Relationship: Attitude Similarity and Attraction: A Cross-Cultural Study*, 24 HUM. REL. 201 (1971) (finding that perceived attitude similarity promotes interpersonal attraction across five distinct cultural groups); Fang Fang Chen & Douglas T. Kenrick, *Repulsion or Attraction? Group Membership and Assumed Attitude Similarity*, 83 J. PERSONALITY & SOC. PSYCHOL. 111 (2002) (finding that perceived attitude similarity increases attraction between individuals, especially if the individuals are not members of the same social or political group); Milton E. Rosenbaum, *The Repulsion Hypothesis: On the Nondevelopment of Relationships*, 51 J. PERSONALITY & SOC. PSYCHOL. 1156 (1986) (asserting that perceived attitude similarity does not necessarily lead to attraction, but that perceived attitude dissimilarity leads to repulsion between individuals).

120. Park & Schaller, *supra* note 96, at 162–63.

121. *Id.* at 164–67.

122. *Id.*

123. *Id.* However, it must be noted that it is unclear how powerfully and for how long shared attitudes evoke favorable feelings and possible favorable treatment. *Id.* at 167. See also Jerry M. Burger et al., *What a Coincidence! The Effects of Incidental Similarity on Compliance*, 30 PERSONALITY & SOC. PSYCHOL. BULL. 35 (2004) (raising the possibility that prosocial behavior evoked by superficial similarities may constitute only a fleeting sense of attraction and that additional research needs to be conducted in order to determine the limits of the effect).

already has potential implications for foster care placement policy. Foster care presents risks for children such as maltreatment and low parental investment.¹²⁴ Thus, it may be desirable to secure placements in which foster parents are likely to provide beneficial treatment to the biologically unrelated children in their care.¹²⁵ If so, caseworkers would benefit from tools that allow them to match a particular foster child with a foster parent who is more likely to favor that child. Kinship cues may constitute one such tool.

For example, by placing a foster child with a foster parent who has similar facial features, a caseworker may evoke unconscious perceptions of kinship and secure favorable treatment for the foster child.¹²⁶ This strategy may be especially effective with foster fathers because men are more influenced by facial resemblance.¹²⁷ Similarly, a caseworker may be able to prompt favorable treatment for a foster child by matching some of the child's attitudes with those of the foster parent.¹²⁸ In summary, child welfare agencies may be able to use knowledge of kinship cues in order to enhance foster child safety and well-being.

One characteristic that may serve as a rough, partial proxy for facial resemblance and attitude similarity is race.¹²⁹ Skin color or tone may be a factor an individual considers in assessing facial similarities. Other facial features, such as hair texture or nose shape, that correlate with race may also be relevant to an assessment of

124. See Mary I. Benedict et al., *Types and Frequency of Child Maltreatment by Family Foster Care Providers in an Urban Population*, 18 CHILD ABUSE & NEGLECT 577 (1994); Anne Case et al., *Educational Attainment of Siblings in Stepfamilies*, 22 EVOLUTION & HUM. BEHAV. 269 (2001) (research findings indicate low parental investment in foster children in comparison to investment in biological children who reside in the same household); Jill Chaifetz, *Listening to Foster Children in Accordance with the Law: The Failure to Serve Children in State Care*, 25 N.Y.U. REV. L. & SOC. CHANGE 1, 7 (1999) (noting high incidences of abuse and neglect within foster care); Child Welfare League of America, *National Working Group to Improve Child Welfare Data: Highlights: Child Maltreatment in Foster Care: Understanding the Data* (2002) http://ndas.cwla.org/Include/text/NWG_CMinFC_FinalCopy.PDF (asserting that the incidence of maltreatment in care is relatively low, but that it is a significant problem that is difficult to measure).

125. This article does not address kinship foster care placements.

126. Herring, *Facial Resemblance*, *supra* note 2.

127. See Platek et al., *supra* note 96; Platek et al., *supra* note 113. *But see* DeBruine, *supra* note 108 (presenting research findings that indicate that men and women are equally affected by perceptions of facial resemblance). This is important because most incidents of child maltreatment in foster care are perpetrated by men. See James A. Rosenthal et al., *A Descriptive Study of Abuse and Neglect in Out-of-Home Placement*, 15 CHILD ABUSE & NEGLECT 249 (1991).

128. Herring, *Attitude Similarity*, *supra* note 2.

129. See *id.* at 388–90; Herring, *Facial Resemblance*, *supra* note 2, at 408–09.

similarity.¹³⁰ In addition, some attitudes possessed by both children and adults may correlate with race.¹³¹

Of course, race does not invariably indicate facial resemblance or attitude similarity, but on average, individuals who share racial features may be more likely to perceive each other as similar.¹³² Conversely, individuals of different races may be more likely to perceive each other as dissimilar.¹³³ The likelihood of these perceptions of similarity and dissimilarity allows one to posit that two individuals of different races are less likely to perceive each other as kin than are two individuals of the same race, and that two individuals of the same race are more likely to perceive each other as kin than are two individuals of different races.

This reasoning provides a foundation for a hypothesis concerning race and foster care placements.¹³⁴ Because foster parents caring for a child of the same race may be more likely to perceive the child as kin and to provide favorable care, children in non-kin, same-race foster care placements are likely to be safer and health-

130. See Robert W. Livingston & Marilynn B. Brewer, *What Are We Really Priming? Cue-Based Versus Category-Based Processing of Facial Stimuli*, 82 J. OF PERSONALITY & SOC. PSYCHOL. 5 (2002); Leslie A. Zebrowitz & Joann Montepare, *The Ecological Approach to Person Perception: Evolutionary Roots and Contemporary Offshoots*, in EVOLUTION AND SOCIAL PSYCHOLOGY 97 (Mark Schaller et al. eds., 2006).

131. Within American society, the formation of attitudes that correlate with race may occur relatively early in childhood. See generally Daphne Blunt Bugental, *Acquisition of the Algorithms of Social Life: A Domain-Based Approach*, 126 PSYCHOL. BULL. 187, 196-97, 209-10 (2000) (citing LAWRENCE A. HIRSCHFELD, *RACE IN THE MAKING: COGNITION, CULTURE, AND THE CHILD'S CONSTRUCTION OF HUMAN KINDS* (1996)).

132. See generally Zebrowitz & Montepare, *supra* note 130; Livingston & Brewer, *supra* note 130.

133. See generally Zebrowitz & Montepare, *supra* note 130.

134. In formulating this hypothesis, it is important to note that race may well not serve as an independent kinship cue. The characteristics that allow for categorization by race emerged relatively recently in the course of human evolution. See TIMOTHY H. GOLDSMITH & WILLIAM F. ZIMMERMAN, *BIOLOGY, EVOLUTION, AND HUMAN NATURE* 289-90 (2001). In other words, it is unlikely that individuals possessed racial features in the environment that existed for most of human evolution. Therefore, humans may well not have developed a cognitive mechanism that relies on racial features in order to identify kin. In addition, research indicates that racial features do not belie or signal significant genetic similarities or differences among individuals. See *id.* Thus, even if differential racial features were present in the evolutionary environment, these features would not relate to genetic material in a way that would support the development of a kinship recognition mechanism.

Despite the likelihood that race does not serve as an independent kinship cue, race may be related to particular kinship cues in a way that influences an individual's perception of others as kin or non-kin. As noted in the text above, the observation of shared racial features may contribute to a perception of facial resemblance and a corresponding perception of kinship. In addition, without essentializing individuals by race, it may be the case that shared racial features signal an increased likelihood of shared attitudes on particular matters. Thus, the observation of shared racial features may contribute to a perception of attitude similarity and a corresponding perception of kinship.

ier than children in non-kin, different-race foster care placements.¹³⁵

B. Social Psychology Research—In-Group Favoritism

A second line of research provides stronger support for this hypothesis. Social psychologists and behavioral biologists have begun to examine the consequences of in-group favoritism arising from superficial similarities.¹³⁶ Their research indicates that individuals perceive and treat more favorably, at least in the short-term, those with whom they share an attribute.¹³⁷ The shared attribute need not be high in heritability or relate in any consistent or strong way with kinship; in this sense the attribute is considered superficial or arbitrary.¹³⁸ Yet if the attribute is shared with another, and especially if it is relatively rare or unique, it is likely to evoke favorable perceptions and behavior.¹³⁹

Several experiments illustrate this behavioral tendency. Kerris Oates and Margo Wilson conducted an experiment that initially examined whether surnames operated as a kinship cue.¹⁴⁰ They noted that a kinship cue “can be arbitrary provided that it is statistically associated with relatedness.”¹⁴¹ They hypothesized that a shared family surname may operate as a cue of kinship, stating that “people may respond to nominal kinship cues as if they are kin

135. Kin placements are not included because they are presumably same-race placements and they usually involve an actual biological relationship. Based on behavioral biology research, one could reasonably hypothesize that children will be safer in kinship placements than in non-kin placements. Child welfare researchers have formulated this hypothesis and have begun testing it. See Jill Duerr Berrick, *Assessing Quality of Care in Kinship and Foster Family Care*, 46 FAMILY RELATIONS 273 (1997); Gary S. Cuddeback, *Kinship Family Foster Care: A Methodological and Substantive Synthesis of Research*, 26 CHILD. & YOUTH SERV. REV. 623 (2004). The results may support the increasing use and prevalence of kinship placements.

136. See Burger et al., *supra* note 123, at 35 (discussing studies finding that individuals who believed they shared a birthday, a first name, or fingerprint characteristics with a requester were more likely to comply with a request than those who did not share such an incidental characteristic); Kerris Oates & Margo Wilson, *Nominal Kinship Cues Facilitate Altruism*, 269 PROC. OF THE ROYAL SOC'Y OF LONDON B 105 (2002) (discussing study finding that individuals were most likely to respond helpfully when they believed that they shared a name with a requester, and that this was especially true if they shared a relatively uncommon name).

137. Burger et al., *supra* note 123, at 41–2; Oates & Wilson, *supra* note 136, at 105–09.

138. Burger et al., *supra* note 123, at 35–7; Oates & Wilson, *supra* note 136, at 105.

139. See Burger et al., *supra* note 123, at 36 (noting that previous work indicates that “incidental similarities often create a sense of association between two people”); Oates & Wilson, *supra* note 136, at 106–08.

140. Oates & Wilson, *supra* note 136.

141. *Id.* at 105.

markers, and feel more inclined to help people with the same surname than those with a different surname."¹⁴²

Oates and Wilson also examined personal names.¹⁴³ They thought it unlikely that a shared first name would operate as a kinship cue in the absence of a shared surname or another cue of kinship.¹⁴⁴ (If individuals share a surname, a shared personal name could be an additional cue of kinship because an infant is often named after another member of the family.) However, Oates and Wilson expected shared personal names to evoke favorable treatment independent of surnames because "almost any arbitrary marker shared in common is effective in facilitating favouritism toward in-group members over out-group members."¹⁴⁵

Oates and Wilson hypothesized that individuals would be more likely to provide assistance to another who shares both their surname and personal name in comparison to another who shares neither of their names.¹⁴⁶ In addition, if shared names serve primarily as kinship cues, Oates and Wilson expected individuals to be significantly more likely to provide assistance to another who shares only their surname in comparison to another who shares only their personal name.¹⁴⁷ However, if a shared name serves more as an arbitrary marker that facilitates in-group favoritism, the experiment would not find a significant difference in behavior between those who shared surnames and those who shared first names.¹⁴⁸ Finally, Oates and Wilson expected individuals who share unique or relatively unusual names to be more likely to provide assistance than those who share relatively common names because unusual names would send a stronger signal of kinship or constitute a more powerful in-group marker.¹⁴⁹

In order to test these hypotheses, Oates and Wilson sent e-mail messages to 2961 valid North American addresses. The researchers varied the name of the e-mail addressee and the e-mail sender so that the addressees could receive a message from a sender who shared both their surname and first name, only their surname, only their first name, or neither name. The names used for both senders and addressees fell within two categories—(1) names that

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.* at 105.

146. *Id.*

147. *Id.*

148. *Id.* at 106.

149. *Id.*

are relatively prevalent in the U.S. name census, and (2) names that are less prevalent in the name census, but that are not rare.¹⁵⁰

Each addressee received a standard message that requested assistance. More specifically, the sender's message asked the addressee to identify his or her city's sports team mascot(s) and its date of inception. The researchers considered a reply to this message within two weeks a minor act of altruism. If the addressee failed to respond within that period, the researchers considered this a lack of assistance and an absence of altruism.¹⁵¹

Based on the results of the experiment, the researchers found that sharing less prevalent names elicited a higher number of responses than sharing more common names.¹⁵² In addition, when both names were identical there were significantly more e-mail replies than when neither name was the same and when only one was the same.¹⁵³ Overall, there was no difference in response rate when the addressee and the sender shared only a surname and when they shared only a first name.¹⁵⁴ However, if the researchers considered only less prevalent names (for which a shared surname was more likely to be perceived as indicating kinship), the response rate for a shared surname was significantly higher than for a shared first name.¹⁵⁵ Nonetheless, a shared first name elicited more responses than no shared names.¹⁵⁶ Finally, the researchers noted that women's response rate was significantly higher than that of men, especially when the sender and the addressee shared less prevalent names. For women, the response rate was 26.6% when they shared both names, 12.5% when they shared a last name, 8.4% when they shared a first name, and 3.3% when they did not share a name. For men, the response rate was 8.3% when they shared both names, 6.3% when they shared a surname, 2.6% when they shared a first name, and 1.5% when they did not share a name.¹⁵⁷

The results indicate that shared names evoke favorable treatment, with the strongest reaction to shared surnames. This latter finding indicates that shared surnames give rise to perceptions of kinship.¹⁵⁸ However, shared first names also evoke favorable

150. *Id.*

151. *Id.*

152. *Id.* at 106–07.

153. *Id.* at 106.

154. *Id.* at 107.

155. *Id.*

156. *Id.* at 107–08.

157. *Id.* at 107. The researchers speculated that women in North American societies are more attuned to kinship markers than men in these societies. *Id.* at 108.

158. *Id.*

treatment. This result indicates either an inclination to view another individual as kin based on similarities that do not logically signal genetic relatedness, or that sharing any superficial attribute with another will give rise to in-group favoritism.¹⁵⁹ The first possibility indicates a strong tendency to view non-kin as kin—in other words to make a false-positive error.¹⁶⁰ The second possibility indicates a tendency to favor others who share some superficial attribute whether or not it gives rise to perceptions of kinship.¹⁶¹

The attribute of race may operate consistent with this second possibility. That is, even if race does not give rise to perceptions of kinship, it may evoke favorable treatment among those who share a particular racial category.¹⁶² This may be especially true for individuals who are members of a minority race within their community.¹⁶³ In this context, race may be analogous to sharing a less prevalent first name.

Researchers have conducted additional experiments on superficial similarities that may support the hypothesis concerning race and in-group favoritism. For example, a team of researchers conducted a set of experiments in which some subjects believed they shared a birthday, a first name, or unusual fingerprint characteristics with another person.¹⁶⁴ In each experiment, the researchers asked subjects to provide assistance to another person. The results of each experiment supported the hypothesis that sharing a superficial characteristic with someone who requests assistance evokes favorable treatment. In the experiment using birthdays, 62.2% of the subjects who shared a birthday with the person who asked for assistance agreed to help her with a paper assignment while only 34.2% of subjects who did not share a birthday with the requester agreed to provide assistance.¹⁶⁵ In the experiment using first names, a participant asked each subject to donate money to the Cystic Fibrosis Foundation. The subjects who shared a first name with the participant gave an average donation of \$2.07, whereas the subjects who did not share a first name with the participant gave an average

159. *Id.* at 105.

160. Behavioral biology researchers have provided theoretical support for such a tendency in relation to heuristic kinship cues developed under certain evolutionary conditions. See Park et al., *supra* note 102, at 159; Hudson Kern Reeve, *The Evolution of Conspecific Acceptance Thresholds*, 133 AM. NATURALIST 407 (1989).

161. See Oates & Wilson, *supra* note 136, at 105–06.

162. See Zebrowitz & Montepare, *supra* note 130, at 96–97.

163. See Burger et al., *supra* note 123, at 40 (indicating that an attribute shared with another is more likely to evoke prosocial behavior if it is less prevalent within the relevant population); Oates & Wilson, *supra* note 136.

164. Burger et al., *supra* note 123, at 41.

165. *Id.* at 38.

donation of \$1.00.¹⁶⁶ In the experiment using fingerprint characteristics, a researcher told one group of subjects that they shared an uncommon fingerprint type with another person, a second group of subjects that they shared a common fingerprint type with another person, and a third group of subjects nothing about their fingerprints. The researchers then asked each subject to provide assistance to the other person on a paper assignment. The findings revealed that 82.1% of the subjects who shared uncommon fingerprints agreed to provide assistance, 54.8% of the subjects who shared common fingerprints agreed, and 48.3% of the subjects told nothing about fingerprints agreed to assist.¹⁶⁷

It is possible that race may constitute a superficial characteristic akin to birth date, first name, or fingerprints.¹⁶⁸ If so, sharing race with another person may evoke favorable treatment, especially if one shares membership in a minority race.

C. The Formation of a Hypothesis

As shown in the discussions in Parts III.A and III.B, behavioral biology and social psychology research provide a basis for a hypothesis concerning race and foster care placements. Race may contribute to perceptions of kinship that arise from cues such as facial resemblance or attitude similarity.¹⁶⁹ In addition, race may be a superficial attribute that gives rise to in-group favoritism.¹⁷⁰ Therefore, one may reasonably expect non-kin foster parents to be more likely to perceive foster children of the same race either as kin or as members of an in-group whom they are inclined to favor. Further, one may reasonably expect that, on average, foster parents would treat foster children of the same race more favorably than foster children of a different race. This favorable treatment would likely result in better outcomes for same-race foster children in terms of child safety (e.g., lower rate of maltreatment) and well-being (e.g., healthier attachments and family bonds, fewer mental health problems, better educational performance, less delinquency).¹⁷¹

166. *Id.* at 39.

167. *Id.* at 40.

168. *See Zebrowitz & Montepare, supra* note 130, at 96–97.

169. *See supra* notes 96–135 and accompanying text.

170. *See supra* notes 136–168 and accompanying text.

171. For a general discussion of safety and well-being measures that researchers consider relevant to an assessment of the quality of care provided in foster care placements, see Cuddeback, *supra* note 135, at 627–32.

Similarly, the research suggests that foster parents are less likely to perceive different-race foster children as kin or as members of an in-group. Such parents may be inclined to provide their foster children with less favorable treatment. Such an inclination may result in worse outcomes for different-race foster children.

1. A Related Hypothesis—Stepparent Care

Consider a somewhat similar hypothesis concerning stepparent care formulated by Martin Daly and Margo Wilson.¹⁷² Daly and Wilson based their hypothesis on evolutionary theory and behavioral biology research.¹⁷³ Because stepparents are not genetically related to their stepchildren, one would expect stepparents, overall, to make a relatively low investment in stepchildren.¹⁷⁴ By conferring benefits on a stepchild, a stepparent would only incur a cost in terms of the stepparent's own reproductive success. The stepparent may receive a reproductive benefit related to this cost if his or her effort increased the likelihood of mating success with the stepchild's biological parent, but Daly and Wilson reasoned that this indirect mating strategy benefit would be significantly less than the direct reproductive benefit provided by biological children.¹⁷⁵ Thus, in comparison to a biological parent's treatment of his or her child, a stepparent would be less inclined to provide favorable treatment to a stepchild.

Daly and Wilson tested their hypothesis by examining the most severe cases of parental failure—those involving child death as a result of parental maltreatment.¹⁷⁶ An examination of the data collected in cases of child death supported their hypothesis. The rate of child death at the hands of a stepparent is much higher than the rate of child death at the hands of a biological parent.¹⁷⁷ The researchers concluded that children who live with a stepparent or another unrelated adult are much more likely to experience seri-

172. MARTIN DALY & MARGO WILSON, *THE TRUTH ABOUT CINDERELLA* (1998).

173. *Id.*; Martin Daly & Margo Wilson, *Discriminative Parental Solicitude: A Biological Perspective*, 42 J. MARRIAGE & THE FAM. 277 (1980).

174. Daly & Wilson, *supra* note 173, at 178; *see also* DALY & WILSON, *supra* note 172.

175. DALY & WILSON, *supra* note 172, at 62–6; Sievert Rowher et al., *Stepparental Behavior as Mating Effort in Birds and Other Animals*, 20 EVOLUTION & HUM. BEHAV. 367 (1999).

176. MARTIN DALY & MARGO WILSON, *HOMICIDE* 83–93 (1988); Martin Daly & Margo Wilson, *An Assessment of Some Proposed Exceptions to the Phenomenon of Nepotistic Discrimination Against Stepchildren*, 38 ANNALES ZOOLOGICI FENNICI 287, 291 (2001) [hereinafter *Nepotistic Discrimination*].

177. DALY & WILSON, *HOMICIDE*, *supra* note 176, at 83–93; Daly & Wilson, *Nepotistic Discrimination*, *supra* note 176, at 290–92.

ous maltreatment than children living exclusively with one or both of their biological parents.¹⁷⁸

Although this finding was not a complete surprise, it cut against a popular, hopeful view concerning the parity of stepparents and biological parents. This view arose from an effort to remove the stigma surrounding stepfamilies.¹⁷⁹ Following Daly and Wilson's work, policy-makers may still want to take steps to reduce this stigma, but they may be able to more fully consider the risks posed to stepchildren. In addition, Daly and Wilson's research, if considered seriously, would likely impact child protection policies, possibly leading to adjustments in risk assessment protocols applicable to child maltreatment investigations and in the level of support services provided to stepfamilies.¹⁸⁰ Such adjustments may result in improvements to stepchild safety and well-being.

2. A Test of the Formulated Hypothesis—Implications for Law and Policy

Although stepfamilies differ from foster families in important ways,¹⁸¹ both situations raise reasonable concerns about parental investment by adults who are not biologically related to the children in their care.¹⁸² These concerns call for the testing of hypotheses regarding foster care conditions and outcomes. The

178. DALY & WILSON, HOMICIDE, *supra* note 176, at 83–93; Daly & Wilson, *Nepotistic Discrimination*, *supra* note 176; see also Patricia G. Schnitzer & Bernard G. Ewigman, *Child Deaths Resulting From Inflicted Injuries: Household Risk Factors and Perpetrator Characteristics*, 116 PEDIATRICS 687 (2005).

179. See Jones, *supra* note 2, at 1238.

180. See *id.* at 1234–36.

181. Foster parents make a conscious and primary decision to invest in caring for a child. They are not engaged in a mating strategy similar to that of stepparents. Related to this point, it is important to note that foster parents' decision to provide care for a child may not be as strong as that of adoptive parents, whom Daly and Wilson expressly recognize as presenting a different situation than stepparents. Daly & Wilson, *supra* note 173, at 282–83. The data on child deaths reveal that children living with adoptive parents are not maltreated at a higher rate than children living with biological parents. See, e.g., Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions By Kin Caregivers*, 36 FAM. L.Q. 449, 462–63 (2002). Parents who adopt a child are making a long-term commitment to a particular child that calls for a conscious decision to heavily invest in the adopted child. In contrast, adults who decide to provide foster care make a commitment to care for a child for a limited period that will likely not extend throughout childhood. They contract to provide temporary care and to receive financial compensation from the state. Although the compensation is usually meager, it is often part of the foster parent's calculation in agreeing to provide short-term care for what likely will be a series of children living in their home. In summary, the foster care situation may be somewhat less problematic than the stepparent situation in terms of the level of parental investment, but somewhat more problematic than the adoptive or biological parent situation.

182. See generally Daly & Wilson, *supra* note 173; Schnitzer & Ewigman, *supra* note 178.

results of such research may have significant implications for foster care placement policies and practices, just as Daly and Wilson's studies concerning stepfamilies have implications for public policies related to child protection.¹⁸³

Testing the specific hypothesis formulated in this Article would entail a comparison of child outcomes for non-kin, same-race foster care placements with those for non-kin, different-race foster care placements. If the hypothesis holds true, one would expect a lower rate of maltreatment for foster children in same-race placements than that for foster children in different-race placements. One would also expect children in same-race placements to perform better than children in different-race placements on measures of child well-being such as attachment, mental health, educational attainment, delinquent behavior, and social relationships.¹⁸⁴

The new knowledge produced by such a comparative study would likely affect assessments of particular laws and policies. On one hand, researchers may prove the hypothesis false with findings that indicate insignificant differences between same-race foster care placements and different-race placements. This would mean that the MEPA prohibition on the systematic consideration of race in making foster care placement decisions is not problematic in terms of child safety and well-being. In terms of the debate surrounding MEPA, participants could reasonably view foster care placement decisions as similar to adoption placement decisions. In both settings, transracial placements would not appear to present a significant risk of harm to affected children.¹⁸⁵ The debate could then appropriately focus on MEPA's impact on the racial identity

183. See Jones, *supra* note 2, at 1234–38.

184. In considering this specific research project, one should note that researchers have already begun examining another hypothesis about foster care—children placed in kinship placements are likely to have better outcomes than children in non-kin foster care placements. See Berrick, *supra* note 135; Brinig & Nock, *supra* note 181; Cuddeback, *supra* note 135. The initial research efforts in this area indicate that researchers have the capacity to design and implement comparative studies of foster care conditions and outcomes. It may be difficult to gather the detailed data necessary for exhaustive comparative analyses, but this type of research appears feasible. In fact, the public child welfare system appears to provide a natural setting for applied research on theories and hypotheses related to kinship, kinships cues, and superficial similarities. Researchers should take advantage of this setting in order to test hypotheses outside the laboratory and to include legal scholars on the research team. See David J. Herring, *Legal Scholarship, Humility, and the Scientific Method*, 25 QUINNIPIAC L. REV. 867 (2007).

185. See Bradley & Hawkins-León, *supra* note 42, at 433–36; Brooks & Barth, *supra* note 42, at 94–98; Courtney, *supra* note 88.

and coping skills of minority children and on the composition and health of minority communities.¹⁸⁶

On the other hand, research may confirm the hypothesis. This would mean that MEPA's prohibition is problematic in terms of child safety and well-being in foster care. In barring the consideration of race, MEPA would expose children to a heightened risk of maltreatment in foster care and worse developmental outcomes. Such findings would also support the alleged covert agency practice of matching the race of the foster child with that of the foster parent even if it means a delay in achieving a relatively stable foster care placement.¹⁸⁷ By engaging in such a practice, child welfare workers may be ensuring the safety and well-being of many minority children.

At the least, research that confirms the hypothesis would provide new knowledge relevant to the debate over MEPA and transracial placements. It would likely give rise to a new debate—one focused on foster care placement decisions. Further, this new debate could reveal a tension between MEPA and the federal Adoption and Safe Families Act (“ASFA”).¹⁸⁸ ASFA expressly states that its paramount concern is child safety and health.¹⁸⁹ By prohibiting the systematic consideration of race in making foster care placement decisions, MEPA may increase the risk of harm faced by children in foster care. Thus, the MEPA approach may stand in tension with the paramount goal of ASFA. This conflict would expose a difficult and controversial question—does the pursuit of a colorblind foster care placement regime justify placing some children at an increased risk of maltreatment or other negative outcomes? If research supports the hypothesis formulated in this Article, this difficult question is worthy of consideration and public discussion.

Furthermore, federal officials would likely have to reconsider their constitutional analysis.¹⁹⁰ If the systematic consideration of race in foster care placement decisions significantly enhances child safety and well-being, state actors may have a compelling interest in such an approach.¹⁹¹ In that case, the consideration of race along

186. See *supra* text accompanying notes 81–84.

187. For discussion of the longstanding practice of race matching and possible resistance to MEPA, see Brooks & Barth, *supra* note 42, at 87; Brooks et al., *supra* note 40, at 576–77; HHS Guide, *supra* note 38.

188. 42 U.S.C. § 671(a)(15)(A) (2007); Adoption and Safe Families Act, Pub. L. No. 105–89, § 101, 111 Stat. 2115, 2116 (1997).

189. *Id.*

190. See HHS Guide, *supra* note 38, at 4–5.

191. See generally *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (stating that a state has a duty of the highest order to secure children's interests and that the best interests of the child constitute a substantial government interest for purposes of the Equal Protection

with numerous other factors that relate to a foster child's best interests may constitute a narrowly tailored means for securing the state's compelling interest.¹⁹² This latter conclusion would be especially appropriate in regard to placement decisions that must be made near the time of a child's removal from parental custody or from a foster home. Although an initial emergency placement may truly be temporary in nature (e.g., a group shelter facility), the agency in most cases must find a relatively stable foster care placement in a timely manner.¹⁹³ Therefore, any delay in placement is likely to be limited (i.e., less than ninety days) even if state actors attempt to secure a same-race placement.¹⁹⁴

It should be noted that this time pressure in making a foster care placement decision is different than that typically confronted in making an adoption placement decision. In the adoption situation, a long delay is much more feasible, and thus, likely. For example, no pressing need would dictate removal of a child from a stable, transracial foster placement. Therefore, an agency could take its time in seeking a same-race adoptive home, letting the child remain in foster care and forgoing an adoptive placement with different-race parents. The resulting extended delay in achieving an adoption placement could expose the affected child to a significant risk of harm.¹⁹⁵

Clause, but that the state cannot accommodate and reinforce racist attitudes in pursuing this interest); *Hunter v. Regents of the Univ. of Cal.*, 190 F.3d 1061 (9th Cir. 1999) (finding state's interest in the operation of a research-oriented elementary school dedicated to improving the quality of education in urban public schools is compelling, allowing the consideration of race as one of many factors in making admissions decisions); *Drummond v. Fulton County Dep't of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977) (finding sufficient government interest in securing the best interests of a child to allow the consideration of race as one of many factors in making an adoption placement decision); *McLaughlin v. Pernsley*, 693 F. Supp. 318, 324 (E.D. Pa. 1988) (stating that the goal of making an adequate long-term foster care placement that provides for a foster child's racial and cultural needs and that is consistent with the best interests of the child is indisputably a compelling governmental interest for purposes of the Equal Protection Clause).

192. See generally *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Hunter*, 190 F.3d at 1061; *Drummond*, 563 F.2d at 1205; *Tallman v. Tabor*, 859 F. Supp. at 1086 (E.D. Mich. 1994) (finding that if racial considerations are not the sole reason for placement decisions, but only one of several factors, they do not run afoul of the Equal Protection Clause); *Compos v. McKeithen*, 341 F. Supp. at 266 (E.D. La. 1972) (finding the difficulties inherent in interracial adoption as justifying the consideration of race as a relevant factor in adoption, but not as justifying the use of race as a determinative factor).

193. See James et al., *supra* note 33, at 192–96 (articulating and verifying the child welfare system intent to achieve an initial stable placement within forty-five days).

194. This is true even within a system that regularly places children in a central shelter, then moves them to an emergency care unit, and then moves them to the intended initial placement site. See James et al., *supra* note 33; Sigrid James, *Why Do Foster Care Placements Disrupt? An Investigation of Reasons for Placement Change in Foster Care*, 78 SOC. SERVICE REV. 601 (2004).

195. See HHS Guide, *supra* note 38; Barth, *supra* note 40.

Because of this difference, the constitutional analysis would not be the same for both placement situations. Noting the higher risk of harm to the child stemming from race matching in adoption, a court should be less likely to view race matching as a narrowly tailored approach to securing a child's best interests.¹⁹⁶ In fact, as the delay lengthens and opportunities for timely transracial adoption present themselves, the state may no longer have a strong, let alone compelling, interest in placing the child with a same-race adoptive family.¹⁹⁷ At this point, the best interests of the child would likely support a timely transracial adoption placement rather than an extended or permanent wait for a same-race adoption placement.¹⁹⁸

As to the foster care placement process that occurs shortly after a child's removal from parental custody, the more appropriate constitutional analogy is provided by the practice of affirmative action in higher education.¹⁹⁹ The United States Supreme Court has acknowledged a state's compelling interest in securing a diverse student body.²⁰⁰ Similarly, a state is likely to have a compelling interest in securing child safety and well-being in foster care.²⁰¹ The Court has also found that the consideration of race as one factor among many in making college admissions decisions is a narrowly tailored means for achieving the state's compelling interest.²⁰² One can certainly argue that the consideration of race as one of many factors in making an initial foster care placement decision is a similarly tailored means for achieving the state's particular compelling interest.²⁰³

In summary, if careful, rigorous research confirms the hypothesis that non-kin, same-race foster care placements are safer and healthier than non-kin, different race placements, the MEPA prohibition on the consideration of race in making early foster care placement decisions would be called into question. MEPA would conflict with the paramount goal of federal child welfare

196. See HHS Guide, *supra* note 38; Davidson M. Pattiz, *Racial Preference in Adoption: An Equal Protection Challenge*, 82 GEO L.J. 2571, 2597-98 (1994).

197. See Pattiz, *supra* note 196.

198. See *id.*

199. See *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

200. *Id.*

201. The state's interest in child safety and well-being is arguably as important as its interest in educational diversity. See generally *Palmore v. Sidotti*, 466 U.S. 429, 433 (1984); *Drummond v. Fulton County Dep't of Family and Children's Serv.*, 563 F.2d 1200, 1205 (5th Cir. 1977); *McLaughlin v. Pernsley*, 693 F. Supp. 318, 324 (E.D. Pa. 1988).

202. *Grutter*, 539 U.S. at 334.

203. See generally *Drummond*, 563 F.2d 1200; *Tallman v. Tabor*, 859 F. Supp. 1078 (E.D. Mich. 1994); *Compos v. McKeithen*, 341 F. Supp. 264 (E.D. La. 1972).

law—securing child safety and health.²⁰⁴ In addition, such research findings would likely support the constitutionality of a public agency's systematic consideration of race in making early foster care placement decisions.²⁰⁵ In the end, this research would encourage serious discussion and consideration of laws, policies, and practices that allow or prohibit race matching in foster care.

CONCLUSION

Based on behavioral biology and social psychology research addressing kinship cues and superficial similarities that give rise to in-group favoritism, one can hypothesize that non-kin, same-race foster care placements are safer and healthier for children than non-kin, different-race placements. Because such a hypothesis may have significant implications for laws, policies, and practices related to foster care placement decisions, it is worthy of serious investigation. At its core, this investigation should entail a careful collection of data on maltreatment in foster care and other measures of foster child well-being. Such data would allow researchers to engage in a detailed analysis comparing non-kin, same-race foster care placements with non-kin, different-race placements.

Ideally, an interdisciplinary research team would pursue this inquiry.²⁰⁶ This team would include a behavioral biologist, a social psychologist, a social work scholar, and a legal scholar. Together they could design and carry out a research project to test the hypothesis formulated in this Article, effectively extending laboratory research on kinship cues and in-group favoritism to field research conducted through a socially important natural experiment—foster care. The legal scholar could communicate the research results to legal decision-makers and policy-makers, hopefully spurring a serious public discussion of the consideration of race in making foster care placement decisions. Such a discussion could provide significant benefits to many children who enter foster care, especially the substantial number who end up spending a substantial portion of their childhood in a foster home.

204. See *supra* text accompanying notes 188, 189.

205. See *supra* text accompanying notes 190–203.

206. See Herring, *supra* note 184.