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NOTES

Black Identity and Child Placement: The Best Interests of Black and Biracial Children

Kim Forde-Mazrui

INTRODUCTION

*Transracial adoption*¹ increased sharply in the 1950s and 1960s.² Many factors converged to cause this increase,³ including a rise in the number of children in the placement system⁴ and an insufficient number of minority homes in which to place minority children.⁵ Beginning in 1972, however, transracial adoptions were drastically curtailed in favor of *racial matching*.⁶ This reversal was caused in large part by the National Association of Black Social Workers (NABSW), which came out strongly against transracial adoption.⁷ The organization's 1972 position paper stated:

1. This Note uses the term *transracial adoption* to refer to adoptions of Black children by white parents. See *infra* note 9 for an explanation for the capitalization of the term *Black*.

2. Margaret Howard, *Transracial Adoption: Analysis of the Best Interests Standard*, 59 NOTRE DAME L. REV. 503, 505-16 (1984); see also *infra* notes 3-5 and accompanying text. The number of transracial adoptions tripled between 1968 and 1971. Twila L. Perry, *Race and Child Placement: The Best Interests Test and the Cost of Discretion*, 29 J. FAM. L. 51, 109 n.199 (1991).

3. Professor Howard identifies seven factors contributing to the rise in transracial placement: (1) a rise in the number of children entering the child-placement system due to increased awareness and reporting of child abuse, Howard, *supra* note 2, at 505; (2) a growing awareness of foster care deficiencies, *id.* at 505-06; (3) empirical data revealing the dangers of maternal and stable-family deprivation, *id.* at 506-09; (4) a dramatic decline of healthy white infants available for adoption, *id.* at 509-10; (5) a reduced adherence to the policy of "matching" children with adoptive parents to whom they might have been born, *id.* at 510-13; (6) an insufficient number of minority homes available for minority children, *id.* at 513-14; and (7) an increasing societal acceptance of integration, which contributed to willingness of white parents to adopt Black children. *Id.* at 514-16.

4. *Id.* at 505.

5. *Id.* at 513-14.

6. Elizabeth Bartholet, *Where Do Black Children Belong? The Politics of Race Matching in Adoption*, 139 U. PA. L. REV. 1163, 1179 (1991) ("In 1972 this brief era of relative openness came to an abrupt end."). In this Note, *racial matching* refers to the practice of preferring to place Black children with Black parents rather than white parents. Racial matching may result in avoiding placement with white parents even when Black parents are not immediately available.

7. *Id.* at 1181 ("Adoption agency bureaucrats moved swiftly to accommodate the position taken by the NABSW."). Howard writes, "[i]n 1972 the National Association of Black Social Workers (NABSW) condemned transracial adoption in terms so militant that transracial adoption fell by 39 percent in a single year." Howard, *supra* note 2, at 517. The NABSW's position against transracial adoption contributed significantly to the decline of the practice. James S. Bowen, *Cultural Convergences and Divergences: The Nexus Between Putative Afro-American Family Values and the Best Interests of the Child*, 26 J. FAM. L. 487, 502 (1988).

The National Association of Black Social Workers has taken a vehement stand against the placement of Black children in white homes for any reason. We affirm the inviolable position of Black children in Black families where they belong physically, psychologically and culturally in order that they receive the total sense of themselves and develop a sound projection of their future.

....

... Black children in white homes are cut off from the healthy development of themselves as Black people, which development is the normal expectation and only true humanistic goal.

Identity grows on the three levels of all human development; the physical, psychological and cultural and the nurturing of self identity is a prime function of the family. The incongruence of a white family performing this function for a Black child is easily recognized. The physical factor stands to maintain that child's difference from his family. There is no chance of his resembling any relative. One's physical identity with his own is of great significance. . . .

....

... In our society, the developmental needs of Black children are significantly different from those of white children. Black children are taught, from an early age, highly sophisticated coping techniques to deal with racist practices perpetrated by individuals and institutions. . . . Only a Black family can transmit the emotional and sensitive subtleties of perception and reaction essential for a Black child's survival in a racist society. Our society is distinctly black or white and characterized by white racism at every level. We repudiate the fallacious and fantasied reasoning of some that whites adopting Black children will alter that basic character.⁸

The NABSW advances two arguments for the position that trans-racial placement is contrary to a Black⁹ child's interests. First, it argues that a Black child needs to be raised by Black parents in order to develop a positive racial identity.¹⁰ Second, the NABSW argues that a

8. NATIONAL ASSN. OF BLACK SOCIAL WORKERS, POSITION PAPER (Summer 1973) [hereinafter POSITION PAPER I].

9. This Note capitalizes the term *Black* when referring broadly to people classified as Black in the United States, including biracial children and people with any Black ancestry. See *infra* note 169. This Note does not capitalize *black* when referring specifically to children born to two Black parents in order to distinguish them from biracial children. This distinction is necessary because racial-matching policies do not distinguish between black and biracial children; therefore, when evaluating such policies, one should use the same racial referent. When, however, this Note specifically addresses the placement of children born to one white parent and one Black parent, these biracial children are distinguished from black children born to two Black parents. For other articles capitalizing the term *Black*, see Bowen, *supra* note 7; Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1332 n.2 (1988) ("Blacks like Asians, Latinos, and other 'minorities,' constitute a specific cultural group and [thus] require denotation as a proper noun."); John D. Gregory, *Juvenile Court Jurisdiction over Noncriminal Misbehavior: The Argument Against Abolition*, 39 OHIO ST. L.J. 242, 266 (1978); Catharine A. MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, in 7 SIGNS: J. WOMEN IN CULTURE & SOC'Y. 515, 516 (1982); Perry, *supra* note 2, at 52 n.6.

10. POSITION PAPER I, *supra* note 8.

Black child needs Black parents in order to develop skills for coping with a racist society.¹¹ The NABSW argues that, because of these concerns, transracial adoption should be abolished.¹² Other, less adamant opponents of transracial placement would allow it in certain circumstances but argue that same-race placement should be favored.¹³

The NABSW also opposes placing *biracial* children with white parents.¹⁴ The NABSW argues that society and those around such children will treat them as Black and, consequently, these children also need to identify positively as Black and cope with racial prejudice. Therefore, the NABSW concludes, when an adoption or custody proceeding concerns a biracial child, a court or adoption agency should favor placing the child with Black parents. The NABSW is not only concerned with the child's interest; it also argues that transracial placement threatens the cultural interests of Black people as a group. The association claims that, by raising Black children to affiliate with the dominant culture, transracial placement removes these children from Black culture and dislocates them from the Black community. In this way, the NABSW argues, transracial placement constitutes "cultural genocide."¹⁵

Arguments such as those by the NABSW have influenced the practice of state adoption agencies and the reasoning of courts confronting the issue of race in child-placement decisions.¹⁶ As a result, courts and adoption agencies often practice a policy of racial matching whereby they strive to place Black children with Black parents and

11. *Id.*; Shari O'Brien, *Race in Adoption Proceedings: The Pernicious Factor*, 21 TULSA L.J. 485, 494 (1986).

12. See *supra* text accompanying note 8.

13. *E.g.*, Bowen, *supra* note 7, at 529, 533. Although he argues that race should always be a factor in child-placement determinations, *id.* at 522, Professor Bowen would favor transracial placement over lengthy institutional care, especially when the Black adoptee is older, disabled, or otherwise hard to place. *Id.* at 511.

Professor Twila Perry writes:

To the extent that the NABSW would support keeping a child in an institution when a permanent home is available, or would support removal of a child from a home where she has formed strong bonds with her caretakers to place her in a home with adults of the same race, the position of that organization is too extreme. However, the view that emphasis should be placed on finding Black homes for Black children is proper and reasonable, and consistent with the view of other experts that where possible, Black children should be placed in Black homes.

Perry, *supra* note 2, at 113-14.

14. See Bowen, *supra* note 7, at 505 n.88. This Note uses the term *biracial* to refer to children born to one white and one Black parent. See *supra* note 9 for an explanation of terminology and capitalization.

15. Joan Mahoney, *The Black Baby Doll: Transracial Adoption and Cultural Preservation*, 59 UMKC L. REV. 487, 501 n.85 (1991); see also JOYCE A. LADNER, *MIXED FAMILIES: ADOPTING ACROSS RACIAL BOUNDARIES* 76-77 (Anchor Books 1978) (1977) ("Some supporters of the NABSW view transracial placement as a 'genocidal plot' designed to destroy the black race.").

16. Professor Carl Schneider describes the NABSW's position as "another formulation of the [racial-matching] argument." Carl E. Schneider, *Family Law* ch.13 (1991) (unpublished manuscript, on file with author). Several courts have adopted this reasoning. The Supreme Court of Pennsylvania, for example, in affirming the placement of a biracial child with Black foster par-

discourage placement with white parents. Courts also practice racial matching in child custody disputes between parents, preferring to place the biracial child with the Black parent when the parents divorce.¹⁷

The purpose of this Note is to question whether racial matching by courts and child-placement agencies serves the best interests of Black children. The principle that guides this Note's analysis is that racial matching is justified only if such a policy better serves the interests of Black children than a policy in which race is not a factor in a child-placement determination. This Note also questions whether racial matching serves the interests of biracial children and those of Black people as a cultural group.

This Note does not focus on the equal protection concerns raised by the use of race in child placement. This is not to suggest that the Constitution is not implicated or important. Rather, by concentrating on the interests of Black children, this Note recognizes that, unless and until Congress¹⁸ or the Supreme Court¹⁹ forbids the consideration of race in child placement,²⁰ many courts and agencies will continue to view the issue only with reference to the best-interests standard.²¹

Part I of this Note examines caselaw regarding the permissible use of race in child custody and adoption proceedings and finds that many courts permit the consideration of race in placing a Black child. Part I

ents instead of white grandparents, explicitly referred to the position of the National Association of Black Social Workers. *In re Davis*, 465 A.2d 614, 622 (Pa. 1983).

Similarly, in *In re R.M.G.*, 454 A.2d 776, 791 (D.C. 1982), the court stressed the importance of evaluating "how each family's race is likely to affect the child's development of a sense of identity, including racial identity." In defining identity, the court included "survival skills that enable the child to cope with the world outside the family." 454 A.2d at 787 (citation omitted). In *Drummond v. Fulton County Dept. of Family & Children's Servs.*, 563 F.2d 1200, 1205 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978), the court referred generally to the professional literature as stressing the importance of having parents that could cope with problems of racial identity.

17. See *infra* section I.C.

18. Senators Carol Moseley-Braun (D-Ill.) and Howard Metzenbaum (D-Ohio) have recently introduced a bill that would prohibit any agency receiving federal funds from denying or delaying the placement of a child on account of race, color, or national origin. See S.1224, 103d Cong., 1st Sess. (1993). Representative Luis V. Gutierrez (D-Ill.) has introduced a similar bill in the House that would prohibit delay or denial of placement on such grounds only if a "matching" parent is not available. See H.R. 3307, 103d Cong., 1st Sess. (1993). The NABSW has also advocated enactment of "National Black Heritage Child Welfare Act," which would mandate preferences for placing minority children in minority homes. Bartholet, *supra* note 6, at 1182 n.43 (citing NATL. ASSN. OF BLACK SOC. WORKERS, INC., PRESERVING BLACK FAMILIES: RESEARCH AND ACTION BEYOND THE RHETORIC 49 (1986)).

19. Arguably, the Court has forbidden the use of race in child placement. See *Palmore v. Sidoti*, 466 U.S. 429 (1984), discussed *infra* notes 24-36 and accompanying text. Read narrowly, however, *Palmore* only forbids a court from removing a child from her biological parent solely because of the risks of societal hostility to the parent's interracial marriage. See *infra* section I.A.

20. The term *child placement* refers to adoption proceedings and child custody determinations.

21. See *infra* note 23 and accompanying text.

further finds that courts and agencies view a biracial child as Black and, consequently, favor placing a biracial child with her Black parent after a custody dispute and with Black parents in the adoption context. Part II considers various ways in which the use of race in the placement process harms Black children. Part II concludes that, even assuming that transracial placement entails risks, the harms of racial matching — both in the adoption and custody context — counsel against race-conscious placement. Part III evaluates the assumptions underlying the NABSW's position against transracial placement. It first considers the interests of Black children generally and concludes that not only is there insufficient evidence that transracial placement harms Black children, but transracial placement may also carry its own benefits over inracial placement. Part III then focuses on biracial children and finds that additional reasons support the abandonment of Black-preferred placement for these children. Finally, Part III considers the interests of Black people as a group. Contrary to the position of NABSW, this Part argues that transracial placement does not threaten Black culture and may in fact contribute to Black culture's ability to survive and adapt.

This Note concludes that, in light of the harm caused by racial matching and the benefits offered by transracial placement, the use of race in the child-placement process is not justified. Courts and agencies should instead limit child-placement determinations to nonracial criteria. Alternatively, if courts or agencies insist on considering race, the perceived risks involved in transracial placement, the costs of racial matching, and the benefits of transracial placement should inform their decisions.

I. CASELAW CONCERNING RACE IN CHILD CUSTODY AND ADOPTION

When considering the placement of a child, the states generally charge courts with protecting the best interests of the child.²² The courts have great discretion over the factors to consider and the weight to attribute to each.²³ Many courts consider race when placing

22. For a list of state child-placement statutes setting forth the best-interests standard and the criteria by which courts should apply it, see Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS., Summer 1975, at 226, 236-37 nn.45-47; see also *Palmore*, 466 U.S. at 433 ("In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved.") (citation omitted); *Compos v. McKeithen*, 341 F. Supp. 264, 267 (E.D. La. 1972) ("In all jurisdictions the welfare and best interests of the child are paramount in both adoption and custody proceedings."); cf. *Bartholet*, *supra* note 6, at 1237 ("Adoption laws throughout this country provide that agencies are to make children's interests paramount in placement decisions.").

23. See Mnookin, *supra* note 22, at 233. Factors relevant to a child's best interests include the need for a permanent home, continuity of relationships, Perry, *supra* note 2, at 84, and the ability of the parents to provide care and education. *In re R.M.G.*, 454 A.2d 776, 794 (D.C. 1982) (Mack, J., concurring).

a child. The issue of race in child placement arises primarily in three situations: (1) when a divorced parent sues to gain custody because the custodial parent remarries interracially; (2) when parents of different races both seek custody following divorce; and (3) when a Black child is placed for adoption.

This Part examines caselaw regarding the permissible use of race in these child custody and adoption proceedings. It does not attempt to review all available caselaw, but only to illustrate a typical approach taken by courts that engage in racial matching. Section I.A considers the issue of race in custody-modification proceedings based on the interracial remarriage of a white child's custodial parent. Although this type of case is not the focus of this Note, it is the only context in which the Supreme Court has considered the use of race in child placement. This section concludes that the Supreme Court's holding in *Palmore v. Sidoti*,²⁴ while limiting the use of race in custody modifications, did not clearly foreclose its consideration in such proceedings. Moreover, *Palmore* has left unresolved the issue of race in adoption and custody determinations other than when a white parent remarries interracially.

Section I.B examines cases involving Black children in the adoption context and concludes that, while race may not be the sole or controlling placement factor, many jurisdictions allow or require courts and agencies to consider race when placing Black children. Section I.C looks specifically at custody and adoption cases involving biracial children. It concludes that most courts addressing the placement of biracial children find that such children should be placed with Black parents.

A. *Custody Modification Based on the Interracial Remarriage of the Custodial Parent*

The Supreme Court addressed the use of race in child placement in *Palmore v. Sidoti*.²⁵ Melanie Sidoti, a three-year-old white girl, was placed with her mother when her white parents divorced in 1980.²⁶ Subsequently, Melanie and her mother began to live with a Black man whom her mother eventually married.²⁷ Sixteen months following Melanie's placement with her mother, her father sought a change of custody based on "changed conditions."²⁸ In particular, her father

24. 466 U.S. 429 (1984).

25. 466 U.S. at 429.

26. 466 U.S. at 430.

27. 466 U.S. at 430.

28. 466 U.S. at 430. As one commentator states:

Although the standard for modifying custody varies from state to state, the most common standard is a substantial change of circumstances, coupled with a showing that the best interest of the child will be served by the modification. The substantial change usually must be with the custodial parent or the child; a change of circumstance of the noncustodial parent is not enough by itself to warrant modification.

objected to the interracial marriage of Melanie's mother.²⁹ The Florida trial court entered an order transferring custody of the child to the father. The trial court relied exclusively on the interracial marriage,³⁰ which, that court concluded, would subject the child to racial hostility.³¹

The U.S. Supreme Court reversed. Writing for a unanimous Court, Chief Justice Burger recognized the importance of protecting the best interests of the child.³² He further acknowledged that "[t]here is a risk that a child living with a stepparent of a different race may be subject to a variety of pressures and stresses not present if the child were living with parents of the same racial or ethnic origin."³³ Nonetheless, the Court stated, equal protection forbids a court from considering "the reality of private biases and the possible injury they might inflict" in removing a child from the custody of her biological parent.³⁴ Therefore, the Court held, Melanie should have remained with her mother.

Palmore seemingly made clear that courts may not base custody decisions on the existence of an interracial marriage.³⁵ Read nar-

Jeff Atkinson, *It All Comes Down to the Best Interest of the Child*, FAM. ADVOC., Winter 1990, at 34, 35; see, e.g., *Boone v. Boone*, 565 P.2d 337, 338 (N.M. 1977) (stating that a party seeking change of custody must prove a material change in circumstances).

29. *Palmore*, 466 U.S. at 430-31.

30. The court order stated that "'there is no issue as to either party's devotion to the child, adequacy of housing facilities, or respectability of the new spouse of either parent.'" 466 U.S. at 432 (citation omitted). It is clear, wrote Chief Justice Burger, that the trial court's decision "would have been different had petitioner married a Caucasian male of similar respectability." 466 U.S. at 432.

31. 466 U.S. at 431. The Florida appellate court had affirmed the trial court order without opinion. *Palmore v. Sidoti*, 426 So. 2d 34 (Fla. Dist. Ct. App. 1982).

32. "The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. . . . The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest" 466 U.S. at 433.

33. 466 U.S. at 433.

34. 466 U.S. at 433.

35. Before *Palmore*, several courts, on their own initiative, refused to modify custody because of the interracial remarriage of the custodial parent. See, e.g., *DeLander v. DeLander*, 37 U.S.L.W. 2139 (Cal. Super. Ct. Aug. 14, 1968) (stating that an interracial relationship in and of itself is irrelevant); *In re Marriage of Kramer*, 297 N.W.2d 359, 362 (Iowa 1980) (stating that the only relevance an interracial relationship might have is possible harmful effects on the emotional welfare of children, but finding that race in this case had no bearing on that issue); *Edel v. Edel*, 293 N.W.2d 792, 796 (Mich. Ct. App. 1980) (holding that the trial judge committed error in determining child custody in a divorce case by considering the mother's association with a person of a different race); *Boone v. Boone*, 565 P.2d 337, 339 (N.M. 1977) (holding race alone cannot form the basis of a custody modification); *Pennsylvania ex rel. Myers v. Myers*, 360 A.2d 587 (Pa. 1976) (stating that a nonmarital relationship of the mother, irrespective of race of her paramour, is irrelevant absent a showing that the relationship adversely affected the children; stating that problems related to racial identity are inapplicable in custody proceedings); *Commonwealth ex rel. Lucas v. Kreischer*, 299 A.2d 243 (Pa. 1973) (stating that the interracial marriage of the mother does not warrant denial of custody when no evidence is presented that the children would suffer); *In re Custody of Temos*, 450 A.2d 111 (Pa. Super. Ct. 1982) (stating that race is not a consideration, concern, or factor).

rowly, however, the Court's holding — that race may not be the sole factor in a decision to remove a child from her natural mother³⁶ — does not clarify whether race can play a role in some child-placement contexts. For example, the Supreme Court of Kentucky in *Holt v. Chenault*³⁷ held that, although the trial court may not consider societal hostility toward a white mother's interracial remarriage, the "child's emotional reaction to her mother's marital circumstances may enter into deciding what is in the best interest of the child."³⁸ Thus the decision in *Palmore* did not clearly forbid the consideration of a parent's interracial remarriage when the child, rather than the community at large, objects to the marriage. In other child-placement contexts, such as adoption proceedings and custody disputes between parents of different races — contexts in which additional issues of the child's racial identity and coping skills arise — *Palmore* provides even less guidance.

B. *Black Children and Transracial Adoption*

The question of race also arises when agencies and courts place Black children for adoption. This section illustrates the approaches some courts have taken in deciding how much weight to place on race in a best-interests determination.³⁹ The cases demonstrate that, while courts differ in their approach to the proper role of race in adoption proceedings, many courts permit the consideration of race.⁴⁰

The use of race by state agencies and courts when placing a child raises questions concerning the rights of the children and prospective adoptive parents under the Equal Protection Clause.⁴¹ *In re R.M.G.*⁴² illustrates two approaches to addressing these concerns. A one-judge plurality held that consideration of race in adoption is subject to strict scrutiny; courts and agencies can only consider race if necessary to achieve a compelling government interest. In this case, a white foster couple raised a Black child for the first three years of her life. When the foster parents sought to adopt the child, the Black paternal grandmother challenged the adoption by claiming that, because the child was Black, she should be placed with her. The trial court removed the child from her home and placed her with the grandmother. The ap-

36. 466 U.S. at 432, 434.

37. 722 S.W.2d 897 (Ky. 1987).

38. 722 S.W.2d at 898 (emphasis added).

39. Cases involving biracial children are included in this section because the courts' reasoning applies to Black children generally. The next section deals more specifically with biracial children in the context of custody disputes.

40. For a collection of such cases, see Perry, *supra* note 2, at 55 n.8 (citing cases); see also *DeWees v. Stevenson*, 779 F. Supp. 25, 28 (E.D. Pa. 1991); *Gloria G. v. State Dept. of Social & Rehabilitation Servs.*, 833 P.2d 979, 986 (Kan. 1992).

41. U.S. CONST. amend XIV, § 1.

42. 454 A.2d 776 (D.C. 1982).

pellate court accepted the trial court's policy of preferring to match children with families of the same race. In looking out for the best interests of the child, the court held that race could have a determinative impact on child placement.⁴³

The concurring judge presented an alternative view that "s[aw] no need to reach the constitutional issue of equal protection."⁴⁴ "We are . . . not faced with a statutory scheme separating persons solely on the basis of racial classifications or an affirmative action program allegedly giving preference on the basis of racial classifications."⁴⁵ He argued that a court does not infringe upon equal protection concerns when it considers race simply as one of many factors that bear on the child's best interests. He criticized the plurality and dissent's debate over the appropriate constitutional scrutiny, observing that, "[w]hile my colleagues are quibbling about 'strict scrutiny' and 'intermediate scrutiny,' a little girl is reaching school age under the care of the only parents she has eve[r] known."⁴⁶

While permitting the use of race in child placement, courts have ruled that race may not be the sole factor in placing a child for adoption. For example, the court in *Compos v. McKeithen*⁴⁷ invalidated a state statute that categorically prohibited transracial adoption.⁴⁸ Finding such a racial classification "constitutionally suspect," the court invalidated the law under the Equal Protection Clause,⁴⁹ determining that no permissible state objective existed because foster care or institutional life is not always preferable to transracial placement.⁵⁰ In dicta, the court left open a limited use of race. The court regarded "the difficulties inherent in interracial adoption as justifying consideration of race as a relevant factor in adoption, [but] not as justifying race as the determinative factor."⁵¹

The Fifth Circuit in *Drummond v. Fulton County Department of Family & Children's Services*⁵² also held that race cannot be *determinative* in the sense, as the *Compos* court seemed to say, that race cannot serve to deny a transracial placement automatically. The *Drummond* court did, however, permit race to determine a placement

43. 454 A.2d at 791-92. The court did state, however, that race should be a determinative factor only when opposite race families are unable to provide the child with a sense of identity.

44. 454 A.2d at 794 (Mack, J., concurring).

45. 454 A.2d at 794-95 (Mack, J., concurring) (citations omitted).

46. 454 A.2d at 795 (Mack, J., concurring).

47. 341 F. Supp. 264 (E.D. La. 1972).

48. The statute read: "A single person over the age of twenty-one years, or a married couple jointly, may petition to adopt any child of his or their race." LA. REV. STAT. ANN. § 9:422 (1950), cited in *Compos*, 341 F. Supp. at 264.

49. 341 F. Supp. at 266, 268.

50. 341 F. Supp. at 266, 268.

51. 341 F. Supp. at 266.

52. 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978).

in the sense that, but for consideration of race, the placement would have been different. Timmy, a biracial child,⁵³ was placed with Robert and Mildred Drummond, a white foster couple, when he was one month old. Within a year, the Drummonds applied to adopt Timmy. The agency resisted. After Timmy had been in the Drummond home for nearly two years, the agency denied the Drummonds' petition because, although they did not have a Black home in which to place Timmy, they *intended* to find a Black home for him. The Drummonds brought suit alleging, in part, that the agency's consideration of race denied both Timmy and them equal protection. Although it found the Drummonds qualified in other respects, the trial court refused to enjoin the agency from removing Timmy from the Drummonds.

Sitting en banc, the Fifth Circuit upheld the trial court's decision to give substantial weight to race in removing Timmy. Because of the "difficulties inherent in interracial adoption," the court allowed the use of race to "avoid[] the potentially tragic possibility of placing a child in a home with parents who will not be able to cope with the child's problems."⁵⁴ In fact, the court held, race can be decisive "if it is the factor which tips the balance between two potential families, where it is not used automatically."⁵⁵ Thus, race can be the deciding factor in a close case.

C. *Biracial Children and Custodial Placement*

The issue of race also arises in custody disputes between the parents of a biracial child. Despite the historical hostility in the United States toward interracial marriages,⁵⁶ their frequency is increasing.⁵⁷ Consequently, the number of biracial children is also increasing.⁵⁸ As these children become the subject of custody and adoption proceedings, the issue of race presents itself more frequently. Courts must decide not only whether to consider race, but also which race to label the biracial child. Courts that have confronted this issue often con-

53. Except for a passing observation that, "as Timmy grew older he would retain the characteristics of his black father," 563 F.2d at 1204, the court approached the case as one concerning the placement of a black child. See *supra* note 39.

54. 563 F.2d at 1205.

55. 563 F.2d at 1205.

56. Until the 1960s, several states had laws prohibiting interracial marriages. See *Loving v. Virginia*, 388 U.S. 1, 6 n.5 (1967) (citing statutes of 15 states); see generally Walter Wadlington, *The Loving Case: Virginia's Anti-Miscegenation Statute in Historical Perspective*, 52 VA. L. REV. 1189 (1966) (discussing the development of antimiscegenation statutes in Virginia). In *Loving*, the Supreme Court of the United States declared laws prohibiting interracial marriages unconstitutional under the Equal Protection Clause of the Fourteenth Amendment.

57. The number of black-white interracial marriages increased from 65,000 in 1970 to 167,000 in 1980 to 218,000 in 1988. See Perry, *supra* note 2, at 52 n.4.

58. One author asserts that, in 1984, there were approximately one million mixed-race children. Kathi Overmier, *Biracial Adolescents: Areas of Conflict in Identity Formation*, 14 J. APPLIED SOC. SCI. 157, 158 (1990).

clude that a biracial child is better placed with Black parents.⁵⁹

An early case that addressed a biracial custody dispute is *Ward v. Ward*.⁶⁰ The *Ward* court granted custody of biracial daughters to their Black father instead of their white mother. The court stated that "[t]hese unfortunate girls, through no fault of their own, are the victims of a mixed marriage and a broken home. They will have a better opportunity to take their rightful place in society if they are brought up among *their own people*."⁶¹ Evidently, the court considered the biracial children's "own people" to be Black.⁶²

While *Ward* may be outdated in its language,⁶³ courts and placement agencies continue to subscribe to its assumption that courts should treat biracial children as Black. *Farmer v. Farmer*,⁶⁴ for example, involved a custody dispute between a white mother and a Black father. Although, due to other factors, the court granted custody to the white mother, it did consider the biracial heritage of the child. The court stated that "[a]ll agreed that the child of this interracial union, with evident black physical characteristics, however subtle, will be perceived by society at large as a black child. Such a child can be expected to endure identity problems, which can be exacerbated in her because of the mixed racial heritage."⁶⁵ The court concluded that a Black parent would better understand the identity problems of a biracial child than a white parent.

The Pennsylvania Supreme Court, in *In re Davis*,⁶⁶ actually held that the trial court erred by *not* taking race into account. In this case, white maternal grandparents sought custody of their biracial grandchild. The trial court awarded custody to Black foster parents primarily because they also had custody of the child's siblings. In reviewing the trial court testimony, the appellate court found that others would perceive the biracial child as Black and therefore the child should be placed in the Black foster home. The court held erroneous the trial court's failure to consider the harmful consequences of plac-

59. See, e.g., *Drummond v. Fulton County Dept. of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); *Fontaine v. Fontaine*, 133 N.E.2d 532 (Ill. 1956); *Farmer v. Farmer*, 439 N.Y.S.2d 584 (Sup. Ct. 1981); *Ward v. Ward*, 216 P.2d 755 (Wash. 1950); see also Perry, *supra* note 2, at 65 ("[S]ome courts automatically assumed it would be proper for [biracial] children, who would be defined by the society as Black, to be raised by the Black parent.").

60. 216 P.2d 755 (Wash. 1950).

61. 216 P.2d at 756 (emphasis added).

62. Without explanation, the court concluded that children of the mixed marriage are Black. "He is colored; she is white. . . . Both children are colored." 216 P.2d at 755.

63. *Ward* was repudiated by the Washington Court of Appeals in *Tucker v. Tucker*, 542 P.2d 789 (Wash. Ct. App. 1975).

64. 439 N.Y.S.2d 584 (Sup. Ct. 1981).

65. 439 N.Y.S.2d at 586.

66. 465 A.2d 614 (Pa. 1983).

ing the "black" child with white custodians.⁶⁷

When confronted with the placement of black or biracial children, many courts permit consideration of race to a certain degree. They intend these racial-matching policies to serve the best interests of the children. The next Part of this Note argues, however, that such policies injure the very children they are designed to protect.

II. THE PSYCHOLOGICAL COSTS OF CONSIDERING RACE IN THE CHILD-PLACEMENT PROCESS

This Part examines the psychological costs to individual Black children when courts and agencies practice racial matching. The child-placement process consists of two dependent stages: the stage during which state adoption agencies alone handle the process and the stage during which parties request the courts to intervene. For custody disputes between divorcing parents, the judicial process usually represents the only stage in the placement process. Section II.A considers the initial stage, which only involves adoption agencies and prospective adoptive parents. Racial-matching policies at this stage cause unnecessary delays in placing black and biracial children in permanent homes, and these delays, as a consequence, seriously decrease the children's chances of permanent placement. In addition, adoption agencies may take these children from white foster parents, who have cared for the children for months or years, in order to prevent the white parents from adopting them.

Section II.B considers the costs of racial matching in judicial proceedings concerning adoption and custody. Considering race causes two problems. First, courts tend to overemphasize the importance of race. Although courts profess to treat race as only one of many factors influencing their decisions, they often rely on race as the primary or dispositive basis for placement decisions. Second, by including race in a best-interests proceeding, courts encourage litigation over the issue of how the court should consider race. While litigation generally can be traumatic for children, litigation over racial identity particularly threatens the welfare of Black children. This Part concludes that, even if Black children derive some benefit from having courts and agencies take race into account, the attendant costs of the process to the children involved supports the exclusion of race as a placement consideration.

A. *Racial Matching by Adoption Agencies*

Professor Elizabeth Bartholet has conducted extensive research into the prevailing practices of adoption agencies responsible for plac-

67. Because the trial court had granted custody to the Black foster parents, the state supreme court found the error to be harmless.

ing Black children.⁶⁸ Adoption agencies, according to Bartholet, typically practice racial-matching policies.⁶⁹ These policies cause delays in permanent placement.⁷⁰ Because Black children represent a disproportionately high number of children in need of homes,⁷¹ they wait up to twice as long for permanent homes as white children wait.⁷² In addition, a higher proportion of Black children are never placed.⁷³ An insufficient number of Black families are available for these waiting Black children, while many white families are available to adopt them.⁷⁴

By avoiding placement with white parents, racial-matching policies cause and exacerbate delays in the placement of Black children.⁷⁵ As Bartholet observes, if no same-race family is available, adoption agencies "typically . . . hold[] black children in foster or institutional care for significant periods of time after they are or could be free for adoption."⁷⁶ Adoption agencies often resist transracial placement due to procedural disincentives and political pressure,⁷⁷ even after mandated waiting periods for finding Black homes have expired.⁷⁸ Indeed, in many agencies, policies against transracial placement are virtually

68. For a full account of her research and findings, see Bartholet, *supra* note 6, at 1163-256.

69. *Id.* at 1183-200.

70. *Id.* at 1201-07.

71. Although Black people and people of color represent approximately 12.3% and 17% of the total population, Black children and children of color represent an estimated one-third (34.1%) and one half (47.5%) of children waiting for homes. *Id.* at 1187 n.61, 1201-02 n.99.

72. "A recent study found that minority children waited for an average of two years, compared to an average one year wait for non-minorities." *Id.* at 1201; *see also id.* at 1201 n.102.

73. The placement rates of Black children are 20% lower than those of their white counterparts. *Id.* at 1201.

74. *Id.* at 1202 n.103, 1203. One study by the Child Welfare League found a large number of minority children waiting long periods for placement, a large number of white parents waiting to adopt, and a limited number of minority parents applying to adopt. *Id.* at 1202 n.103. *But see* NATIONAL ASSN. OF BLACK SOCIAL WORKERS, POSITION PAPER ON TRANSRACIAL PLACEMENTS (1986) (arguing that the historic scarcity of Black adoptive parents stems from the failure of the child welfare system to recruit Black families). Whether sufficient Black families could be found is dubious. *See* Howard, *supra* note 2, at 513-14; *supra* note 72. Even if Black homes could be found with special efforts, the question remains whether such efforts involving expenditures of limited resources are necessary for the interests of Black children.

75. "Informed observers of the adoption scene — people who know the [racial-matching] policies and see them in operation — believe there is a strong causal connection between the policies and the delays and denial of placement that minority children face." Bartholet, *supra* note 6, at 1202 n.103. *But see id.* at 1201 n.102.

76. *Id.* at 1193.

77. Social workers are often required to document efforts to find Black homes before approving a white adoption. In addition, a social worker who approves a transracial placement may incur harsh criticism from the NABSW and other transracial adoption critics. Consequently, "[t]he overburdened and underpaid adoption worker has every incentive to avoid the multiple troubles promised by transracial placement." *Id.* at 1195 (noting that the attitudes of white adoption professionals toward transracial placement have been affected by the perceived "risks of punishment").

78. Agency policies often specify time periods, ranging from three to 18 months, before the agencies can consider transracial placement. *Id.* at 1193.

absolute.⁷⁹ Racial-matching policies especially delay the placement of Black children with special needs, including those who are older, disabled, or otherwise difficult to place.⁸⁰ In some cases, delays result in the denial of placement altogether.⁸¹

When agencies delay or deny permanent placement, children suffer:

The ravaging consequences of both institutionalization and successive foster care placements are well documented. A child deprived of an ongoing, stable relationship with a psychological parent is likely to lack the capacity to form deep emotional attachments or warm social relationships, and may well encounter difficulties functioning intellectually and maintaining physical stamina.⁸²

Thus, while the risks of transracial adoptions are largely speculative,⁸³ the costs of racial-matching policies — for the children they are intended to help — are real. Despite these children's urgent need for a home, adoption agencies prolong the wait in an attempt to find Black homes. Unfortunately, as one commentator notes, "[a] child who must forego parents, whatever their color, is victimized, not benefitted, by well-intentioned but misdirected attempts to promote racial pride."⁸⁴ Given these costs, agencies should abandon such attempts unless clearly warranted.⁸⁵

B. *Racial Matching in the Judicial Process*

This section considers the psychological costs to black and biracial children when the judiciary, as opposed to agencies, engages in racial matching. Section II.B.1 argues that courts tend to place more emphasis on race than the law purportedly permits. By overemphasizing race, a court's decision fails to consider adequately other important

79. *Id.* at 1195; Mahoney, *supra* note 15, at 497 ("In practice, it appears that either the due consideration given to race or the priority for same race placements preclude[s] transracial adoptions . . .").

80. Hard-to-place children include older children, children with severe disabilities, and children with emotional problems resulting from abuse or successive foster care placement. Agencies often rebuff white parents seeking to adopt such children because the agencies consider transracial placement only as a last resort, even for these children. Bartholet, *supra* note 6, at 1204 & n.111.

81. While the months and years go by the children are pushed deeper into the hard-to-place category, as they get older and accumulate what are often damaging experiences in foster care. Delay thus puts the child at risk of yet more delay and, ultimately, the denial of placement altogether.

Id. at 1204.

82. O'Brien, *supra* note 11, at 492. Professor Howard writes, "[t]he weight of current opinion is that a stable family may be the single most important factor in children's healthy emotional development." Howard, *supra* note 2, at 508 (footnote omitted).

83. See *infra* Part III.

84. O'Brien, *supra* note 11, at 494-95.

85. Part III *infra* argues that these attempts to avoid transracial placement are unwarranted and should be abandoned.

factors relating to the child's best interests. Section II.B.2 argues that the courts' willingness to consider race tends to encourage harmful litigation over a child's placement and her racial identity.

1. *Judicial Overemphasis of Race*

Courts that consider race in child-placement proceedings generally hold that race may be one of many factors forming the basis of a placement decision.⁸⁶ Often, however, race becomes the primary factor on which a court bases its decision.⁸⁷ Several reasons may explain the excessive weight courts give to race in child-placement proceedings.⁸⁸ One explanation stems from the subjective and discretionary nature of the best-interests standard.⁸⁹ Naturally, a judge will have personal views, biases, or prejudices regarding a historically controversial issue such as race.⁹⁰ By leaving the use of race and its relative weight to the discretion of the court, the best-interests standard allows the judge's own personal and cultural biases to influence her decision.⁹¹ In addition, judges may lack sufficient training to determine a child's best interests and, especially, to evaluate the risks posed by transracial placement.⁹² Assessing a child's needs and predicting a child's future are difficult tasks for professionals trained in childhood development,

86. See, e.g., *Drummond v. Fulton County Dept. of Family & Children's Services*, 563 F.2d 1200, 1211 (5th Cir. 1977) ("[R]ace may be considered as 'a' factor in adoptions."), *cert. denied*, 437 U.S. 910 (1978); *Compos v. McKeithen*, 341 F. Supp. 264, 266 (E.D. La. 1972) (stating that race is a relevant factor but cannot be determinative); *In re R.M.G.*, 454 A.2d 776, 802 (D.C. 1982); *In re Davis*, 465 A.2d 614, 622 (Pa. 1983) ("[T]he respective races of the participants is a factor to be considered in a child's placement determination but, as with all factors, can be no more than that — a factor."); see also *supra* section I.B.

87. See Noel Myricks & Donna L. Ferullo, *Race and Child-Custody Disputes*, 35 FAM. REL. 325, 325 (1986); O'Brien, *supra* note 11, at 487; Perry, *supra* note 2, at 57 ("Although the [best-interests] rule is intended to be a multi-factor balancing test, it may often allow race inappropriately to achieve a dominant position.").

88. One writer identifies three special problems that judges have in deciding custody cases: the vagueness and lack of guidance provided by most child-placement statutes; the human frailty of judges, who often fall prey to their personal "value systems, cultural biases and stereotypical beliefs"; and, finally, "the fact that judges are not trained to understand and analyze human psychological behavior." Colleen McKinley, Note, *Custody Disputes Following the Dissolution of Interracial Marriages: Best Interests of the Child or Judicial Racism?*, 19 J. FAM. L. 97, 122 (1980).

89. Perry, *supra* note 2, at 59-60 ("Where courts have broad discretion to consider race under the best interests standard, it can easily become the dominant concern . . ."); see also David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481 (1984) (arguing that open and flexible judicial standards result in arbitrary and overreaching decisions).

90. For example, in 1977, the Supreme Court of Pennsylvania censured Judge William F. Potter for his remarks about the adoption of biracial children. Judge Potter was reported to have said: "It's great when they're little pic[k]aninnies; they're very cute and everybody's a do-gooder. But what about when they're older? When they're 14 or 15? I don't think its proper." *In re Potter*, No. 82 (unpublished order, Pa. 1977), cited in Talbot D'Alemberte, *Searching for the Limits of Judicial Free Speech*, 61 TUL. L. REV. 611, 631 n.117 (1987).

91. McKinley, *supra* note 88, at 122; Perry, *supra* note 2, at 60.

92. See McKinley, *supra* note 88, at 122.

let alone a judge trained primarily in law. Race may provide judges with a convenient way to avoid a careful best-interests analysis. Whatever the reason, when courts consider race, they often ignore other important factors and thereby risk deciding cases contrary to the welfare of the child.⁹³

A court's focus on race in *McLaughlin v. Pernsley*,⁹⁴ for example, caused Raymond, a two-and-one-half-year-old Black boy, to suffer deep clinical depression. An adoption agency removed Raymond from his white foster parents with whom he had lived for two years. Raymond was transferred to a Black foster family. After the removal, Raymond fell into severe depression resulting from the disruption of his relationship with his white foster parents. A federal district court returned the child to the foster parents because it found that the state court had impermissibly removed Raymond solely on the basis of race.

Recall also the *Drummond*⁹⁵ case, in which the Fifth Circuit affirmed an agency's removal of Timmy, a two-year-old biracial child, from the home of the Drummonds, a white foster couple with whom Timmy had lived since he was one month old. Despite the trial court's findings that the Drummonds were qualified in all respects except race, that the Drummonds had cared for Timmy for two years, and that the agency had no Black home in which to place Timmy, the Fifth Circuit upheld the removal of Timmy on the basis of race in order to "avoid[] the potentially tragic possibility of placing a child in a home with parents who will not be able to cope with the child's problems."⁹⁶ The real tragedy, however, is that Timmy lost the only parents he ever knew and has since been placed in one foster home after another.⁹⁷

The New Mexico Supreme Court, in contrast, reversed a trial court decision that impermissibly overemphasized race in refusing to place a white child with an interracial couple. In *Boone v. Boone*,⁹⁸ a white couple divorced, and the mother retained custody of the children. The father sought custody on the ground that the mother was sexually involved with her fiancée, a Black man. The lower court granted the petition, finding that such a relationship "was immoral, a

93. "In principle, the sole factor of race cannot be used to automatically disqualify petitioners as adoptive parents But in practice, race alone can be dispositive when a court chooses to downplay or ignore other germane considerations, indulge in generalizations, or otherwise cover its tracks beneath an innocuous facade." O'Brien, *supra* note 11, at 487; see also Myricks & Ferullo, *supra* note 87, at 325; Perry, *supra* note 2, at 59-60.

94. 693 F. Supp. 318 (E.D. Pa. 1988).

95. *Drummond v. Fulton County Dept. of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), *cert. denied*, 437 U.S. 910 (1978) (discussed *supra* in text accompanying notes 52-55).

96. 563 F.2d at 1205.

97. After Timmy's removal from the Drummonds, the agency eventually found a mixed-race foster couple with whom to place him. This placement proved unsuccessful, and Timmy was placed in yet another foster home. See O'Brien, *supra* note 11, at 489 n.18.

98. 565 P.2d 337 (N.M. 1977).

bad influence on the children, and an improper atmosphere to raise minor children.”⁹⁹ Furthermore, the lower court continued, the children would “be better reared with members of their own race.”¹⁰⁰

In reversing the lower court, the New Mexico Supreme Court found no evidence justifying a change of custody. A review of the record revealed undisputed evidence that the mother had provided the children with proper care. The children were well fed, well dressed, clean, and happy, and they had a good relationship with their Black stepfather.¹⁰¹ By failing to consider these factors and relying on race alone, the lower court failed to protect the welfare of the children. The Supreme Court also found that the lower court impermissibly punished the mother for exercising her constitutional right to marry a person of another race.¹⁰²

A case decided in the District of Columbia illustrates how judges can implicitly overemphasize race in the face of other important factors. In *In re R.M.G.*,¹⁰³ the trial court found the white foster parents and the Black grandmother to be comparably qualified to raise a Black girl¹⁰⁴ but granted custody to the grandmother because she was Black. Had race not been taken into account, however, it is difficult to explain how the trial court could have found the foster parents and the grandmother equally qualified. The child had never lived with the grandmother, while the foster parents had been the child’s psychological parents for the first eighteen months of her life. In addition, the trial court found that the child had “bloomed enormously” due to the “love, affection and special efforts” of the foster parents.¹⁰⁵ As to the foster parents’ capacity and willingness to foster a healthy racial identity in the child, the trial court found that the foster parents had bought preschool Black history and coloring books for their previously adopted child, a Black boy and had instituted an “affirmative program” of fostering a healthy racial identity with him.¹⁰⁶ By focusing on race, the trial court failed to give adequate consideration to these other findings.

In custody disputes between parents of different races, courts have also placed excessive weight on race. *Fountaine v. Fountaine*,¹⁰⁷ for

99. 565 P.2d at 339.

100. 565 P.2d at 338.

101. 565 P.2d at 339.

102. 565 P.2d at 339 (citing *Loving v. Virginia*, 388 U.S. 1 (1967)).

103. 454 A.2d 776 (D.C. 1982). For a discussion of the appellate court’s decision, see *supra* notes 42-46 and accompanying text.

104. The trial court found that both the white foster parents and the Black grandmother had “shown love and concern for the child” and that both were “reasonably stable.” 454 A.2d at 781.

105. 454 A.2d at 780 n.1.

106. 454 A.2d at 780.

107. 133 N.E.2d 532 (Ill. 1956).

example, involved a white mother and Black father. After the divorce, the father initially obtained custody. The mother again sought custody after remarrying. The father argued that, because he and the children shared Black characteristics, the children would adjust to life better if they remained with him. The judge denied the mother's petition, despite finding that "if a difference in color was not involved in the case he would not hesitate for 'a moment in awarding custody to the mother.'" ¹⁰⁸ The appellate court reversed on the basis that the trial court had relied solely on race. ¹⁰⁹ Elsewhere, however, appellate courts have failed to correct trial courts' undue reliance on race. ¹¹⁰ Moreover, there may have been countless cases in which race overwhelmingly determined the outcome, but the parties did not appeal. Consideration of race harmed, not served, the interests of many of these children.

2. *Encouragement of Harmful Custody Litigation*

Professor Twila L. Perry identifies another risk of considering race in placement proceedings: race may encourage divorcing parents to litigate over the custody and race of their biracial child. ¹¹¹ Discretionary standards, as opposed to fixed rules, create incentives for parents to litigate custody. ¹¹² "To the extent that race may be considered in the court's discretion, it will encourage the parties to litigate the custody issue." ¹¹³ Custody litigation, in turn, often harms the child who is at the center of the dispute and may feel uncertainty and torn loyalties. ¹¹⁴ Litigation also increases tension between the parents, thus decreasing the likelihood of postdivorce parental cooperation. ¹¹⁵ Postdivorce cooperation is important for children in order for them to

108. 133 N.E.2d at 534.

109. 133 N.E.2d at 534-35.

110. See, e.g., *Drummond v. Fulton County Dept. of Family & Children's Servs.*, 563 F.2d 1200 (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978); *Potter v. Potter*, 127 N.W.2d 320 (Mich. 1964); *Ward v. Ward*, 216 P.2d 755 (Wash. 1950). In *Potter*, a white couple divorced and the mother remarried a Black man. In denying her custody, the trial court described her as a "young woman who has been in serious rebellion. . . [whose recent history] does not give a picture of certainty and stability." 127 N.W.2d at 326. Instead, the court placed the child with the maternal grandparents and awarded the father legal custody. In affirming the trial court, the appellate court found no evidence that race had been considered. The dissent disagreed, observing that "[t]he fears which form the muted thread of this whole proceeding are patently groundless" and believed that the majority had ignored factors favoring the mother such as an attractive home, a full-time mother, and a stepfather who was a surgeon. 127 N.W.2d at 329.

111. Perry, *supra* note 2, at 67-69.

112. See *id.* at 67.

113. See *id.*

114. Perry observes, "[c]hildren have an interest in not being the subjects of long and bitter litigations to determine their custody. Many experts have expressed the view that litigated custody disputes can have a negative effect on children, often resulting in tension, uncertainty, and feelings of torn loyalties." *Id.* at 63 (footnote omitted).

115. See *Chambers*, *supra* note 89, at 559 (noting that harmful costs of custody disputes include protracted litigation and embittered litigants).

experience a positive relationship with both parents.¹¹⁶

A custody dispute may be even more traumatic for a biracial child than for a child born to parents of the same race. The parent who benefits from considerations of race will likely attempt to focus the hearing on race.¹¹⁷ This action may create tension around the very issue over which the child is expected to have difficulty, her racial identity.¹¹⁸

The threat to parental cooperation after divorce is also particularly worrisome for a biracial child. Positive relationships with both parents are especially important for the child of an interracial marriage in order for her to have access to both her racial backgrounds.¹¹⁹ Therefore, by encouraging litigation over custody and race, consideration of race by courts may harm the biracial child by limiting her access to the noncustodial parent in the postdivorce period and thus depriving her of half her racial heritage.¹²⁰

This Part has argued that black and biracial children are harmed in various ways when courts and agencies practice racial matching. When practiced by adoption agencies, racial matching results in harmful delays for these children and jeopardizes their chances for permanent placement. In the judicial process, consideration of race impairs the courts' ability to consider all relevant factors appropriately and encourages litigation. Given these concrete harms suffered by black and biracial children, courts and agencies should abandon racial-matching policies unless the risks of transracial placement are clearly substantiated. The following Part argues that they are not.¹²¹

116. Some states explicitly include the ability of the custodial parent to promote a relationship between the child and the noncustodial parent as a factor to consider when placing a child. Michigan's Child Custody Act of 1970, for example, was amended in 1980 to include in the list of factors relating to the "best-interests" standard, "[t]he willingness and ability of each of the parents to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent." MICH. COMP. LAWS ANN. § 722.23(3)(j) (West 1993); see also Joan G. Wexler, *Rethinking the Modification of Child-Custody Decrees*, 94 YALE L.J. 757, 789-92 (1985) (arguing that postdivorce hostility has deleterious effects on children).

117. Perry, *supra* note 2, at 67.

118. Litigating over race "can result in the unhappy scene of parents trading allegations about racism, impaired racial identity, and real, perceived or invented attitudes of relatives and grandparents about interracial relationships and interracial children." *Id.*

119. See *infra* section III.C.

120. In one study, a seven-year-old biracial child named Kevin was experiencing identity confusion. His father was Black; his mother, with whom he lived, was white. Kevin's identity confusion stemmed from his lack of access to his Black heritage. The mother, still angry toward Kevin's father, prevented Kevin from communicating with his father's side of the family. Also, Kevin's father, due to his bitterness over the divorce, did not want to see Kevin. Ruth G. McRoy & Edith M. Freeman, *Racial-Identity Issues Among Mixed-Race Children*, 8 SOC. WORK EDUC. 164, 169-71 (1986). The study did not indicate whether race contributed to the bitterness of the divorce but, if race does increase parental hostility, problems like those suffered by Kevin would result from the inclusion of race in the divorce proceeding.

121. The question whether to attempt to match children with parents of the same race "is not simply whether racial matching is good or bad, but also whether racial matching is better than the alternatives." Schneider, *supra* note 16, at 1395. Even assuming racial matching has

III. QUESTIONING THE CASE AGAINST TRANSRACIAL PLACEMENT

Many empirical studies indicate that transracially placed Black children are as well adjusted as their intracially placed counterparts.¹²² The success of transracial placement revealed by these studies and the demonstrable harms of racial matching¹²³ seriously call into question the wisdom of resisting transracial placement. Although some studies report difficulties with transracial placement,¹²⁴ they are inconclu-

some justification, the costs of such policies, both in the child welfare system and the judiciary, suggest that courts and agencies should forgo racial considerations.

122. A survey of the major studies on transracial adoption concludes that transracially placed children seem in general to be as well adjusted as other adopted children. Bartholet, *supra* note 6, at 1208 n.120; see also Angela T. McCormick, *Transracial Adoption: A Critical View of the Courts' Present Standards*, 28 J. FAM. L. 303, 316 n.116 (1989-1990).

Several studies indicate that parents of transracial adoptees typically foster a healthy sense of racial identity and pride in their children. See O'Brien, *supra* note 11, at 494. The major studies conducted on transracial adoptees — studies done by Black people and whites, by proponents and opponents to transracial adoption — reveal substantial evidence that transracial adoptees have a strong sense of racial identity while at the same time being fully integrated into their families and communities. Bartholet, *supra* note 6, at 1208-09. There is significant support for the conclusion that transracial adoptees are well adjusted in their schools and communities in terms of achievement, adjustment, and self-esteem. *Id.* at 1209. Moreover, where transracial adoptees have experienced adjustment problems, studies have found that the child's age at placement or prior foster care experience more likely caused problems rather than the transracial placement. For studies finding problems relating to placement age, see Richard P. Barth et al., *Predicting Adoption Disruption*, 33 SOC. WORK 227, 231-33 (1988) (documenting benefits of permanent adoption and finding age at placement related to adoption disruption, but finding race difference between parent and child not related to adoption disruption); Bowen, *supra* note 7, at 502. For studies finding problems relating to foster care, see Howard, *supra* note 2, at 536 n.167.

Silverman and Feigelman report that maladjustment in transracially adopted children is due primarily to their age at placement rather than racial differences. Bowen, *supra* note 7, at 502. Professor Bowen explains the Silverman-Feigelman report as relating to the adopted children's adjustment to adoptive parents. Bowen, *supra* note 7, at 502 n.69.

In his doctoral research, Professor Silverman studied Black, Vietnamese, Colombian, and Korean children placed with white parents and compared them to intracially adopted white children. The findings suggested that race played no significant factor in the children's adjustment, but that the longer a child remained in his or her preadoptive environment, the more the child experienced maladjustment after adoption. Arnold R. Silverman, *Transracial Adoption in the United States: A Study of Assimilation and Adjustment* (1980) (unpublished Ph.D. dissertation, University of Wisconsin (Madison)), abstracted in 41 DISSERTATION ABSTRACTS INTL. No. 5, at 2311-A (1980).

123. See *supra* Part II.

124. Amuzie Chimezie, *Transracial Adoption of Black Children*, 20 SOC. WORK. 296, 299-300 (1975) (claiming that transracial adoptees suffer peer and community rejection); Susan J. Grossman, *A Child of a Different Color: Race as a Factor in Adoption and Custody Proceedings*, 17 BUFF. L. REV. 303, 329 (1968) (community rejection); see also Bowen, *supra* note 7, at 506 (A NABSW report "suggests that various Blacks who grew up in white adoptive or foster homes universally experienced identity problems. Various individuals in the group expressed fears of, or prejudice towards, other Blacks. Another individual 'stated that she thought of herself as caucasian . . . even though she knows she is Black.'").

One study found that 23% of families with transracially adopted children were "in trouble." The study did not, however, investigate other factors that could cause adjustment problems, such as the amount of time the children had spent in institutionalized and foster care. Moreover, the researchers found that the 77% success rate was approximately the same as the success rate for white infant adoptions and older-child adoptions. Howard, *supra* note 2, at 536-37 & n.167.

sive.¹²⁵ Therefore, an evaluation of racial matching should examine the reasons for adopting such policies in the first place. Only if the perceived risks of transracial placement are substantiated, and such risks outweigh the demonstrable costs of racial-matching policies, should racial matching continue.

This Part critically evaluates the case against transracial placement. Section III.A questions the argument that racial matching is necessary to foster a positive racial identity in a Black child. Section III.B addresses and criticizes the argument that Black parents are better suited than white parents to teach a Black child skills for coping with racism. Section III.C focuses on biracial children and challenges the assumption that such children should be treated as Black and placed with Black parents. Finally, Section III.D considers the interests of Black culture and whether transracial placement frustrates those interests. This Part concludes that transracial placement does not harm black or biracial children or Black culture. Instead, this Part suggests that, in many ways, transracial placement may benefit Black children and Black culture.

A. Racial Identity

The NABSW argues that racial matching is necessary to foster a positive racial identity in Black children and to give these children the skills to cope with a racist society.¹²⁶ Assuming a positive racial identity is in a Black child's best interests, this section refutes the argument that *same-race* placement is necessary to accomplish this goal. Section

125. See Howard, *supra* note 2, at 534 n.155 ("It is, of course, impossible to define 'success' or to measure whether it is accomplished, or to define 'cultural identity' or to determine whether it is lost. Any researcher investigating transracial adoption must face this problem, and all of the available data can be attacked on this point.") (citations omitted); *id.* at 541 ("The transracial adoption studies have not followed the children through adolescence, so they cannot provide definitive answers."); O'Brien, *supra* note 11, at 492 ("[T]he deleterious effects of interracial adoption are not at all certain."); *id.* at 495 (finding insufficient data on effects of transracial adoption from which to draw firm conclusions). In *In re R.M.G.*, the trial court observed that "all the experts who appeared in this matter agreed that not enough work has been done on the subject [of transracial adoption]" and found "that little medical or scientific attention has been devoted to this problem." 454 A.2d 776, 782 (D.C. 1982).

After an extensive investigation of available empirical studies, Professor Bartholet concludes: Few studies ask questions designed to assess the potentially positive aspects of transracial adoption. Almost none ask questions designed to assess the potentially negative aspects of current matching policies. . . . [T]here have been no systematic attempts to measure the degree to which racial matching policies result in delay in and denial of adoptive placement. There have been no systematic attempts to evaluate on a comparative basis the experience of children placed immediately with waiting white families to the experience of children held in foster or institutional care on a temporary or permanent basis for same-race placement.

Bartholet, *supra* note 6, at 1208. But see *id.* at 1208 n.119; Barth et al., *supra* note 122, at 231 (documenting benefits of permanent adoption and finding age at placement related to adoption disruption, but race difference between parent and child not related to adoption disruption).

For a comprehensive review of empirical research on transracial placement, see Bartholet, *supra* note 6, at 1207-26.

126. See *supra* note 8 and accompanying text.

III.A.1 discusses whether a Black child must identify with Black culture in order to maintain a positive racial identity. Section III.A.2 discusses whether a positive racial identity depends on the strength of racial identity — that is, the extent to which being Black dominates a child's identity. Both discussions consider the extent to which the race of the parents determines the racial identity of the child. This section concludes that transracial placement does not impair the healthy development of a Black child's racial identity or overall self-esteem.

1. *Black Cultural Identity*

Opponents of transracial placement argue that a Black child needs Black parents in order to develop an appropriate racial identity.¹²⁷ What is meant by the term *racial identity*, however, is ambiguous. It could mean simply that the child identifies as a Black person, or it could mean something more — namely, that the child identifies with Black culture.¹²⁸ It is the latter concept of Black identity as a cultural concept that the NABSW argues is in a Black child's best interests.¹²⁹ Assuming the existence of a Black-American culture,¹³⁰ two further questions arise: first, whether a Black child's interests are best served by identification with Black culture; and, second, whether Black parents are necessary to foster such an identity.

As to the first question, identification with Black culture has plausible benefits for Black children.¹³¹ First, by identifying with Black culture, a Black child may gain membership within the Black community and thereby receive support from others who share her Blackness and value it.¹³² Second, identifying with Black culture may benefit

127. See, e.g., Bowen, *supra* note 7, at 506 n.91; Howard, *supra* note 2, at 538 ("Critics of transracial adoption . . . argue that white parents, no matter how hard they try, simply cannot provide an environment in which the child can retain or develop his or her black or Indian identity."); *supra* text accompanying note 8.

128. Kathi Taylor writes,

Racial identity and ethnic identity are probably the two most commonly applied [terms] and are often used interchangeably. However, several scholars differentiate between them. For instance, Casas (1984) argues that race is biologically determined, whereas ethnicity is "a group classification of individuals who share a unique social and cultural heritage (customs, language, religion, and so on) passed on from generation to generation."

Kathi E. Taylor, *The Dilemma of Difference: The Relationship of the Intellectual Development, Racial Identity, and Self-Esteem of Black and White Students to Their Tolerance for Diversity* 67 (1990) (unpublished Ph.D. dissertation, University of Maryland) (citations omitted). *But see id.* at 68 ("E. Smith (1989) . . . conceptualizes racial identity to be a component of ethnic identity.").

129. The NABSW's position is based in part on the belief that, "in a racist society, Black children must not lose their cultural identity." Bowen, *supra* note 7, at 505.

130. For a discussion on whether Black Americans in fact share a cohesive culture, see *infra* section III.D.2.

131. Besides the two benefits discussed here, Black culture may also provide a child with the skills to cope with racial prejudice. Bowen, *supra* note 7, at 505. The coping skills rationale is discussed *infra* section III.B.

132. "McRoy and Zurcher found that transracially adopted children develop a sense of be-

Black children because the culture itself embodies positive statements about being Black, and these statements enable the child to value her race. Therefore, by identifying with Black culture, a Black child will feel better about being Black because of the positive feelings engendered by the culture and the support received from other Black people who, as a result of the shared cultural affiliation, accept the Black child as a member of the group.

Certainly it is in a Black child's interest to feel positive about her racial identity. What is less clear, however, is whether identification with Black culture is coextensive with a positive racial identity. Being Black, at minimum, is having a physical characteristic.¹³³ There is no logical reason why a healthy attitude towards one's appearance requires identification with an entire cultural system; a child could feel good about being Black without identifying with Black culture. Indeed, this proposition is borne out by empirical data. Studies have found that transracially adopted Black children who identify less with Black culture nonetheless feel positive about being Black.¹³⁴

One risk for Black children who do not identify with Black culture is that they may feel less comfortable associating with other Black people.¹³⁵ If such children feel positive about their racial identity, however, why is association with other Black people necessary for the welfare of the individual Black child? In fact, greater association with white people may carry its own benefits.¹³⁶ Thus, a positive racial identity, which presumably is in a Black child's best interests, need not require identification with Black culture.

The second question is whether white parents are capable of foster-

longing and acceptance by identifying with other blacks." McRoy & Freeman, *supra* note 120, at 166-67.

133. Katherine Gale, *Color Me a Person*, CHRISTIAN SCI. MONITOR, Sept 11, 1990, at 19 ("'Black' is a descriptive word that applies only to physical appearance."); Taylor, *supra* note 128, at 67 ("Casas (1984) argues that race is biologically determined, whereas ethnicity is 'a group classification . . .'"). But see Taylor, *supra* note 128, at 68 ("E. Smith (1989) . . . conceptualizes racial identity to be a component of ethnic identity."); Lena Williams, *In a 90's Quest for Black Identity, Intense Doubts and Disagreement*, N.Y. TIMES, Nov. 30, 1991, at A1 ("'Aside from skin color, there is something to being ethnically black in terms of outlook on life, values and beliefs.'" (quoting Dr. Roderick J. Watts of DePaul University, Chicago, a consultant on human diversity and assistant professor of psychology)).

A concept of race as a biological trait is not necessarily inconsistent with viewing race as a cultural or ethnic identity. Society may construct certain values, attitudes, and norms of behavior around a biologically determined trait. Sex and skin color are two examples. The point of characterizing race as a physical trait is that a Black child's physical appearance is the only immutable aspect of her racial identity and, therefore, the only racial trait that her identity must include.

134. Cf. Bowen, *supra* note 7, at 500 (stating that transracially placed black children may have as strong a self-esteem as their inracially placed counterparts but that they are less likely to identify strongly as Black).

135. See McRoy & Freeman, *supra* note 120, at 166 ("[A mixed-race transracial adoptee] may tend to prefer white friends and dates . . .").

136. See *infra* section III.B.

ing a Black cultural identity in a Black child. Racial-matching proponents argue that Black parents are better suited to foster an identity with Black culture.¹³⁷ Such an argument proceeds as follows: Black parents will transmit their own culture to their children. It may be difficult, if not impossible, for white parents to raise their children in a culture foreign to their own.¹³⁸ Therefore, a Black child should be placed with Black parents in order to foster an identity with Black culture.

Many white parents who adopt Black children, however, successfully teach these children Black culture and foster a sense of ethnic pride.¹³⁹ At the same time, not all Black families identify with Black culture, nor would they provide such a cultural setting for their children.¹⁴⁰ White parents can provide books and music about Black culture, encourage friendships with other Black children, and encourage participation in Black cultural activities.¹⁴¹ For those transracially placed Black children who do not identify with Black culture, the problem may be ignorance, rather than inability, on the parents' part regarding how to foster a Black cultural identity. Instead of refusing to place Black children with white parents, agencies could educate such parents about ways to teach the children Black culture.

Concededly, teaching their children Black culture may not be an easy task for all white parents. Many white parents may be unable¹⁴² or unwilling¹⁴³ to meet the challenge. The neighborhood or commu-

137. See Howard, *supra* note 2, at 538 (noting the position of transracial adoption critics that white parents cannot adequately foster ethnic identity).

138. *Id.*

139. Bartholet, *supra* note 6, at 1209; O'Brien, *supra* note 11, at 494. But see Howard, *supra* note 2, at 554 ("Concededly, ethnic identity will be diminished, even when white parents are willing to accept help from the child welfare agency in building their black child's racial identity.").

140. Mahoney, *supra* note 15, at 498 ("Some Blacks choose to live in primarily white neighborhoods and send their children to schools where they may be the only Black children.").

141. Seventy-five percent of the transracially adoptive parents studied by Simon and Altstein made efforts to foster their child's ethnic identity through books, music, toys, and the like, and by providing opportunities to play with other nonwhite children. Howard, *supra* note 2, at 539.

Speaking of her adopted "coffee-with-cream"-colored infant named Rachel, Professor Mahoney looks ahead: "We need to have Black friends, send her to integrated schools and provide her with toys and books that relate to her culture, not only for her sake but for ours." Mahoney, *supra* note 15, at 500.

142. Before allowing a transracial placement, McRoy recommends investigating the residential setting of the prospective parents to determine the availability of Black role models, peer groups, churches, and other cultural institutions. In addition, McRoy suggests providing post-adoption consultation to transracial families to aid in developing an appropriate black identity. Bowen, *supra* note 7, at 501.

143. Mahoney writes:

In the 1960s, at least some of the families that adopted Black children believed that the way to conquer racism was to pretend that it did not exist. They treated their children as if they were white, sent them to white schools and made little, if any, effort to provide them with Black culture.

Mahoney, *supra* note 15, at 499.

nity in which white parents live may lack opportunities for the child to celebrate Black culture or to interact with other Black people.¹⁴⁴ In addition, if the child does not experience the benefits of Black cultural identity until later in life, white parents may not realize the importance of Black culture for the child. Moreover, although many white parents may make commendable efforts to teach their children Black culture, their children may not identify with Black culture to the full extent that a child would if immersed in a Black family and Black community.¹⁴⁵

As a general rule, then, Black parents may be more capable of transferring Black culture to Black adopted children. As discussed above, however, failing to identify with Black culture is not necessarily inconsistent with developing a positive racial identity. White parents should be able to teach a Black child to value her identity, including her race. Therefore, in terms of fostering a positive racial identity, albeit not necessarily with Black culture, white parents may equally serve the interests of Black children.

2. *Strength of Racial Identity*

Another question regarding racial identity is the extent to which a positive racial identity requires a *strong* racial identity. A child with a strong racial identity is one who places a high priority on her race as a component of her self-image. Put simply, a Black child with a strong racial identity views her race as a more important aspect of her identity than most of her other personal attributes or characteristics. This issue is important because studies show that many transracially adopted Black children place less significance on their race than inracially adopted Black children.¹⁴⁶ In a society that emphasizes race and often denigrates the Black race, a strong racial identity arguably enables a Black child's self-esteem to weather the messages of inferiority she receives from others. As with a Black cultural identity, a strong racial identity may be more likely to result from having Black parents rather than white.

The important question, however, is the extent to which the strength of a Black child's racial identity is in her best interests. In fact, the same studies that reveal a less race-conscious racial identity in transracial adoptees also show a comparable level of overall positive

144. *But see id.* at 498 ("Some white families choose to live and work in integrated neighborhoods and social groups.").

145. Howard, *supra* note 2, at 554 (conceding that transracially placed Black children will have diminished ethnic identity despite white parents' efforts to foster racial identity).

146. *See* Bowen, *supra* note 7, at 500; McRoy & Freeman, *supra* note 120, at 166 ("Other transracial adoptive parents tend to take a color-blind attitude to racial differences between the child and family and therefore deemphasize racial identity to the child. The child in these circumstances usually acquires similar perceptions."). *But see* Bowen, *supra* note 7, at 499.

adjustment and self-esteem.¹⁴⁷ A child whose self-image is less dominated by her race may be just as happy as a child whose race is central to her being. A child's identity is multifaceted, with many attitudes, beliefs, and characteristics composing her self-image; it is unclear why the quality of a child's identity should depend on the emphasis placed on any particular trait.

To illustrate the point, compare two hypothetical people. When asked who they are, the first replies: "I am a husband and a father, a writer, a teacher, and a musician. I am also Black, a man, and a Methodist." The second person replies: "I am Black, and I am a doctor; I am a mother, a wife, and a Presbyterian. I also write poetry and sing in a choir." Does the second person necessarily have a healthier identity because race is a priority? Can one even conclude that the second person's *racial* identity is more positive? In fact, the first person may feel equally or more positive about being Black although he gives it less significance.

Racial-matching proponents could argue that, in an ideal world, race need not have great significance but, in reality, contemporary American society not only places great significance on race, but is especially hostile toward the Black race. Under these circumstances, a Black child needs not only a positive racial identity, but one that is substantial enough to withstand the racism that characterizes much of mainstream ideology.

One method to cope with a personal characteristic disfavored by society, however, is to recognize its insignificance. When a child whose Black skin is one of her most valued attributes experiences racist treatment, she must struggle against the racism to preserve her self-esteem. If the racist message has any effect, the very center of her identity is maligned. When, on the other hand, a child's race is merely one of many characteristics and one of minor importance, she is less vulnerable to racial attacks. If the message of racial inferiority affects this child, it will certainly damage her self-esteem, but perhaps to a lesser extent because her race accounts for a smaller proportion of her self-image. Due to the minor role race plays in this child's identity, she has less to protect, less that can be damaged, and less to repair. Thus, although transracially placed Black children may in general identify less strongly as Black, or with Black culture, than inracially placed Black children, they may feel comparably positive about their race and overall self-esteem. In short, it is unclear whether transracial placement helps or harms the children's self-esteem and positive racial identity, and therefore courts and agencies should not consider these factors to counsel against transracial adoption.

147. See Bowen, *supra* note 7, at 500 (stating that transracially placed Black children may have as strong a self-esteem as their inracially placed counterparts but they are less likely to identify strongly as Black).

B. *Coping Skills*

Opponents of transracial placement also argue that only Black parents can teach a Black child the "coping skills" necessary to survive in a racist society.¹⁴⁸ Although often advanced as separate issues, coping skills and racial identity are closely related. How well a Black child copes with society depends in large part on her feelings about her race. Thus, any discussion of coping skills necessarily involves questions of racial identity. Unlike the previous section, however, this section discusses how a child's racial identity bears on the child's ability to cope with the world outside. The question that courts and agencies should consider is whether Black parents are better able to teach a Black child how to cope with society. This Note divides coping skills into two related components: those that enable a child to achieve interpersonal and scholastic success and those that enable her to protect her self-esteem from potentially harmful interactions with others.

A child's achievement interests include interpersonal success and scholastic performance. In terms of interpersonal success, transracial placement may be harmful to the extent that transracial adoptees are less comfortable associating with other Black children than are in-racial adoptees. On the other hand, transracial adoptees tend to associate more comfortably with white children.¹⁴⁹ Courts and agencies should not assume these interracial friendships are less fulfilling than same-race friendships. As such, transracially placed children fare as well as same-race placements with respect to the quality and amount of interpersonal relations in their lives. In fact, because white children are generally more numerous, they may fare better.

More remarkable are the scholastic benefits of transracial placement.¹⁵⁰ Rightly or wrongly, achievement in American society generally inures to those whose values and motivations track those of the dominant culture. Black people who identify, or at least comply, with the dominant or "white" culture generally achieve greater academic, career, and monetary success.¹⁵¹ Similarly, Black children who identify with dominant cultural values achieve better grades and score better on scholastic measurement tests.¹⁵² In contrast, many Black adults

148. See *id.* at 509-11; see also *In re R.M.G.*, 454 A.2d 776, 802-03 (D.C. 1982) (Newman, C.J., dissenting) (discussing black children's need for "survival skills"); Bartholet, *supra* note 6, at 1222 (noting that "[c]ritics of transracial adoption have claimed that only blacks can teach black children the coping skills needed for life in a racist society").

149. See generally McRoy & Freeman, *supra* note 120, at 165-66 (discussing racial self-concepts of transracially adopted children).

150. See, e.g., Bartholet, *supra* note 6, at 1222 n.159.

151. "[R]esistance . . . to identifying too strongly with the Black community [characterizes] . . . Black adults in the workforce who have achieved some measure of success above the existing job ceiling." Signithia Fordham, *Racelessness as a Factor in Black Students' School Success: Pragmatic Strategy or Pyrrhic Victory?*, 58 HARV. EDUC. REV. 54, 80 (1988).

152. *Id.* (discussing empirical study that found that high-achieving black high school stu-

and Black children perceive academic and career ambitions as inimical to Black culture and, consequently, reject such ambitions in the name of ethnic loyalty.¹⁵³ Transracial adoptees are more likely to embrace the achievement goals of the dominant culture and, in turn, achieve greater success in school than inracially placed Black children. Therefore, in terms of coping with the demands of academic achievement, transracial placement is not only as good as, but arguably better than, same-race placement.

Opponents of transracial placement might respond that, for transracial adoptees, these children obtain white friends and academic achievement at the expense of their racial identity and self-esteem. A Black child who denies or hides her ethnic identity in order to feign or mimic the ways of white people rejects a part of herself, thus causing inner conflict, confusion, and self-hatred. Especially in a society defined by a pathology of racial discrimination, a Black child needs to connect with the Black community and celebrate her ethnic heritage. A child can learn these necessary coping skills from Black people who have experienced racism personally and struggled against demoralization. Only Black parents, the argument goes, can give Black children these skills, and, therefore, Black parents are in Black children's best interests.

The argument that adopting the dominant culture subjects a Black child to a feeling of racial self-rejection is supported by empirical research indicating that some high-achieving Black children who act in accordance with the dominant culture feel ambivalence toward Black culture.¹⁵⁴ A critical difference, however, between these children and transracial adoptees is that, for these children, the dominant culture is different from, and often contrary to, the culture of their home and neighborhood. For transracial adoptees, the culture of their home is identical or consistent with the dominant culture; "acting white" comes naturally and, consequently, so does interpersonal or academic success. Their interpersonal styles and behavioral patterns need not conflict with those of white and other mainstream children; the academic ideals of their families need not conflict with those of the educational system. Thus, identifying with the dominant culture can itself be a valuable coping skill that transracial adoptees can exercise without leaving their own culture at home.

If a transracial adoptee can identify with the culture of her white parents, one must question whether such an identity enables her to

dents associate themselves with the dominant culture); Overmier, *supra* note 58, at 165 (finding that biracial adolescents who identify with white middle-class values do better in school).

153. "Black youths, for example, are sometimes accused by their peers of 'acting white' simply because they study hard, go to the library or use standard English." Williams, *supra* note 133, at 26.

154. *E.g.*, Fordham, *supra* note 151 (discussing empirical study which found that high-achieving Black high school students generally dissociate themselves from Black culture).

cope with racist attacks. White parents have not experienced the type of racial oppression suffered by Black Americans and, accordingly, have not needed to develop strategies for coping with such oppression.¹⁵⁵ Black Americans, on the other hand, have experienced racial discrimination; their culture, which is informed by this experience, teaches its members how to cope with it.¹⁵⁶ Black children can learn these coping skills from the culture and personal experience of Black parents but, according to this argument, black children raised by white parents will not learn the skills necessary to cope in a racist society.¹⁵⁷ This argument, while appealing, rests on a questionable premise. The argument assumes that a person must experience racism first hand, or at least must identify with the culture of people who have experienced it directly, in order to teach a child how to cope with it.¹⁵⁸ This lack of experience with racial oppression, however, need not prevent white parents from teaching coping skills to their Black children.

For several reasons, white parents can furnish a Black child with skills to cope with racism. First, the experience of white parents may benefit Black children by teaching these children to be less race conscious.¹⁵⁹ In American society, being white does not distinguish one from the majority of successful people and, consequently, a white person has less reason to focus on her race. Not surprisingly then, white parents tend to place less importance on the race of their Black adoptees than do Black adoptive parents.¹⁶⁰ In contrast, Black parents have learned the importance of their race in this society and can, in turn, teach their children to emphasize their race. But white par-

155. Having never been black, the white adoptive parents might not have been subjected to the kinds of discriminatory treatment that have been the lot of black people. Therefore, they might not have needed to maintain in their cognitive and psychic makeup the expectation of probable oppressive treatment by whites. . . .

. . . . When white adoptive parents are unable to transmit to the black adoptive child the tendency toward doubt and the temporary suspension of trust, especially when dealing with white persons, they are failing to satisfy the "psychosurvival" need of the black child.

Blacks need to have an inclination toward doubt of white persons as a basic attribute in the fight against racism. . . . This doubt — call it "black paranoia" or what you will — is an important and necessary aspect of black culture.

Chimezie, *supra* note 124, at 298-99, cited in Howard, *supra* note 2, at 540; see also Bowen, *supra* note 7, at 510.

156. See Bowen, *supra* note 7, at 509-11.

157. POSITION PAPER I, *supra* note 8.

158. See Bowen, *supra* note 7, at 510 ("To suggest that the skills of survival, coping and defense can be taught by those who have never themselves learned them is at best mystifying.").

159. Section III.A.2, *supra*, discussed race consciousness in relation to racial hostility from others, concluding that, in some ways, placing little emphasis on race enables a black child to cope with racism. This coping skill — a lower level of race consciousness — is a coping skill transracial placement can provide.

160. "Other transracial adoptive parents tend to take a color-blind attitude to racial differences between the child and family and therefore deemphasize racial identity to the child. The child in these circumstances usually acquires similar perceptions." McRoy & Freeman, *supra* note 120, at 166.

ents, by deemphasizing race, may enable a Black child to cope better with racial attacks because the child may view the attacks less personally.¹⁶¹

Second, although white parents are unlikely to have experienced racial discrimination, they could teach their Black child to view a racial insult as one might view other insults. White people, as individuals, have not been spared maltreatment from others, and white parents routinely teach their children how to cope with insults from others. Black children can learn and use these skills to cope with a variety of offensive insults, including racist ones. For example, a person called "commie" for protesting Vietnam or a woman referred to as "girl" by her boss has some experience from which to empathize with her Black child who is called "nigger" at school. A person who stutters, limps, or cannot hear well also gains analogous experience that could benefit a Black child. Must a parent have worn glasses, been fat, worn braces, or been short in order to help her child who, while on the playground, is called "four eyes," "fatso," "tinsel teeth," or "shrimp"? Consider especially the coping skills that white parents employ when stigmatized for adopting Black children.¹⁶² Thus, the dominant culture and the personal experience of white parents provide them with a rich source of coping skills that they can teach to their Black children.

Finally, having white parents may enable a Black child to cope better with racism because, as a member of the dominant race, a white parent's repudiation of Black inferiority may seem more credible than the same message from a Black parent. Assume a Black child encounters a white person who tells her that she is inferior because of her race. To cope with the remark, the child needs to dismiss or disbelieve it in order to protect her self-esteem. The child should believe that her Blackness is not a mark of shame but rather a mark of beauty, or at least an incidental physical attribute. She can learn this belief or "coping skill" from her parents. A message of racial equality from a white parent carries a certain credibility over the same message from a Black parent because the Black parent has a greater personal interest in refuting white superiority than does the white parent. True, white parents have an interest in racial equality in order to protect their Black child. From the child's perspective, however, a Black parent might espouse racial equality for the parent's sake as well as for the child's sake; a white parent, by contrast, diminishes her own status relative to the Black race by advancing the equality of the races. Thus, a white parent's denial of Black inferiority may be more believable because it is less self-serving. At the least, a white parent's motive in denying racial inferiority will appear to be solely to support and show love for

161. See, e.g., *id.* at 166.

162. White families who adopt Black children are sometimes subjected to intense bigotry. Bowen, *supra* note 7, at 504.

the child. Such a gesture might itself benefit the child. In this way, the race of white parents need not hinder their ability to help their Black child cope with racism and, arguably, may give them an advantage.

Although questions of racial and personality development do not lend themselves well to firm conclusions, the discussion of the preceding two sections has, consistent with available empirical data, raised serious questions concerning the wisdom of racial-matching policies. Both in terms of racial identity and coping skills, the ability of white parents to protect their Black child's interests is not clearly inferior to that of Black parents.

The arguments in this and the previous section should not imply that placement with white parents is necessarily better than placement with Black parents; both offer benefits.¹⁶³ These arguments are intended to demonstrate the lack of justification for racial matching, not the superiority of transracial placement. In addition, a white preference would cause similar psychological costs that children currently suffer from racial matching in the adoption process¹⁶⁴ and in custody proceedings.¹⁶⁵ If courts and placement agencies are to fulfill their duty to serve the best interests of Black children, they should consider the benefits of transracial placement. If such benefits are at least comparable to those of Black-parent placement, this fact undermines the basis for favoring Black placement. Nor is a shift to a transracial preference policy warranted. By ignoring race when placing a Black child, courts and agencies would avoid the concrete harms of current policies without subjecting the child to substantiated risks. Thus, when placing a Black child, courts and agencies should not favor Black placement over white.

C. *The Interests of Biracial Children*

The NABSW argues that biracial children should be treated as completely black and, accordingly, should not be placed with white parents.¹⁶⁶ Consistent with this view, courts and adoption agencies usually categorize biracial children as black when considering placement.¹⁶⁷ The primary justification for this treatment is that, in the eyes of American society, a biracial child is black¹⁶⁸ and, therefore,

163. See *infra* notes 188, 191.

164. See *supra* sections II.A and II.B.1.

165. See *supra* section II.B.2.

166. Bowen, *supra* note 7, at 505 n.88. See also *supra* note 9 for an explanation of this Note's use of the terms *Black* and *black*.

167. See *supra* section I.C.

168. "Society has historically tended to categorize any person who has any amount of Negro blood as a member of the black, or Negro, race. Therefore, when whites married blacks, their children, regardless of skin color, became black — not black-white." McRoy & Freeman, *supra* note 120, at 165; see also JAMES F. DAVIS, WHO IS BLACK?: ONE NATION'S DEFINITION (1991)

must identify positively with being black and must be able to cope with discrimination toward her as a black person.¹⁶⁹ This section challenges the presumption that biracial children should be treated as black and placed with black parents.¹⁷⁰

If society treats biracial children as black, any risks to biracial children from being placed with white parents are at least as questionable as the risks for black children. To the extent that biracial and black children differ, avoiding "trans"-racial¹⁷¹ placement of biracial children is even less justifiable. A biracial child is as white as she is black and thus "bears a legitimate claim to membership in both groups."¹⁷² The racial duality of such a child suggests that her interests may be best served, or at least comparably served, by a positive identification with both of her cultural heritages, both to the same extent.¹⁷³ Indeed, many biracial persons identify themselves as neither black or white, but rather as "mixed."¹⁷⁴

By treating a biracial child as black, the courts decide first, that the biracial child should identify herself as one and only one race, and

(American society generally defines Black according to a one-drop rule — that a person is Black if he has any traceable Black-African ancestry); Mahoney, *supra* note 15, at 487 n.1; Perry, *supra* note 2, at 65; Itabari Njeri, *Call for Census Category Creates Interracial Debate*, L.A. TIMES, Jan. 13, 1991, at E1 ("[S]ocially, [in America,] any known African ancestry makes you black.").

Statutory definitions provided that a person is a member of a minority group either if he has a certain percentage of minority blood or any trace whatsoever. McRoy & Freeman, *supra* note 120, at 165.

169. See, e.g., *In re Davis*, 465 A.2d 614 (Pa. 1983). The Supreme Court of Pennsylvania, in affirming the trial court's placement of a biracial child with black foster parents instead of white grandparents, cited the testimony of the black foster care mother that the biracial child would be treated as black and is therefore black. As a black, her testimony continued, the child needs a black parent to develop a healthy Black identity. 465 A.2d at 626-27.

Itabari Njeri expresses a contrary view rejecting the societal definition that any Black ancestry makes one Black:

[I]t is not what one is considered to be or [how one is] treated that determines who we are, because people of color are always considered to be ignorant and lazy and lesser than European Americans. If we [mixed-race Americans] are to accept their considerations and perspectives of our identity, then we have beaten ourselves before we've started the race.

Njeri, *supra* note 168, at E9-E10.

170. See Bowen, *supra* note 7, at 505 n.88 ("The NABSW position allows that Black children includes children of Black-white parentage."); *supra* section I.B.

171. Indeed, as this section suggests, the placement of biracial children with white parents is as much a same race placement as it is transracial. See also Bartholet, *supra* note 6, at 1173 n.8 ("These biracial children can be seen as at least a partial racial match with their white adoptive parents.").

172. Philip M. Brown, *Biracial Identity and Social Marginality*, 7 CHILD AND ADOLESCENT SOC. WORK 319, 325 (1990); see also Overmier, *supra* note 58, at 158 ("[C]hildren of black/white unions . . . are a unique group of mixed-race young people who defy simple racial classification and who have legitimate claims to both majority and minority status.").

173. "The major task for biracial adolescents becomes integrating dual racial identifications into a single identity that affirms the positive aspects of each heritage . . ." Overmier, *supra* note 58, at 170.

174. See McRoy & Freeman, *supra* note 120, at 165; see also Njeri, *supra* note 168, at E1 ("[A] new generation of ethnically and racially mixed Americans is demanding the creation of a multiracial category for the U.S. Census.").

second, that this race should be black. For a biracial child, who needs exposure to both racial backgrounds¹⁷⁵ and who needs to accept both cultural heritages,¹⁷⁶ choosing an all-black identity may contribute to a certain degree of identity confusion¹⁷⁷ and self-rejection.¹⁷⁸

Although American society has historically defined biracial people as black,¹⁷⁹ it is questionable whether black people, as a rule, view biracial people in this way. In fact, biracial children can experience rejection and alienation from black people as well as from white people.¹⁸⁰ At school, black and white students may jeer biracial children for "trying to 'be something they're not' or for thinking of themselves as being 'better than other blacks' because of having a white parent."¹⁸¹ At home, black and white family members may reject biracial children because they view them as the product of accident or poor judgment.¹⁸² In placing a biracial child, courts and adoption agencies ought to recognize that either alternative — placing her with black parents or white parents — may cause difficulties for the child, both by denying her access to one culture and by subjecting her to alienation from the culture within which she is placed. In either event, placing a biracial child in a black home will not necessarily prevent her from experiencing "social marginality."¹⁸³

175. Mixed-race children, in order to identify positively with their mixed background, need both black and white role models and peers. See McRoy & Freeman, *supra* note 120, at 166.

176. See Overmier, *supra* note 58, at 170 (arguing that, to avoid developing negative identities, biracial adolescents need to "integrat[e] dual racial identifications into a single identity that affirms the positive aspects of each heritage").

177. A biracial child experiences unique stresses in developing her self-identity because she confronts social pressures that attempt to force her into one racial category that is contrary to her own self-perception as a member of both groups. Brown, *supra* note 172, at 324-25. Courts ought not contribute to these children's anxiety and confusion.

178. One biracial college student, Nia Mason, gives a personal account of how societal pressures to be Black led her to reject her white heritage only to realize later that accepting her white background was necessary for accepting herself:

I decided, if I'm [B]lack, then [see you] later for these white folks. . . . I rejected "white" adamantly Later I realized that that wasn't quite on target either. It certainly didn't make me feel better. . . .

. . . .

. . . Because you can't really reject who you are, you have to come to terms with who you are in terms of your race

Patricia Kessel, *Growing Up Integrated (Are You Black?)*, CRISIS, Mar. 1988, at 15, 18.

In his doctoral research, Professor Marvin Arnold studied 28 biracial children. The findings indicated that most biracial children, when given a choice, identified themselves as mixed as opposed to black or white. Those who identified themselves as mixed demonstrated a greater degree of emotional and psychiatric stability, and a higher overall self-concept, than those who identified as black or white. Marvin C. Arnold, *The Effects of Racial Identity on Self-Concept in Interracial Children* (1984) (unpublished Ph.D. dissertation, Saint Louis University), *abstracted in 45 DISSERTATIONS ABSTRACTS INTL.* No. 9, at 3000-A (1984).

179. See *supra* note 169.

180. Brown, *supra* note 172, at 333.

181. McRoy & Freeman, *supra* note 120, at 166 (footnote omitted).

182. Overmier, *supra* note 58, at 162.

183. A socially marginal person, such as a member of a minority group, does "not fit neatly

In addition, a biracial child may gain certain benefits from white parents. A biracial child has an interest in identifying positively with her mixed heritage. While black parents who adopt biracial children usually perceive the children as black, white adoptive parents tend to view their biracial children as mixed.¹⁸⁴ Thus, a biracial child with white parents may be more likely to identify as mixed than one placed with black parents.¹⁸⁵ By accepting her multiracial heritage, a biracial child may have a better chance to accept herself as a whole.¹⁸⁶

Furthermore, by learning the dominant culture, a biracial child placed in a white home may experience less racist hostility in life than a biracial child raised in a black home. Opponents of transracial adoption argue that black children need to cope with a racist society.¹⁸⁷ The racist attitudes of people toward the child may harm the child and thus are relevant to the question of the child's interests. Presumably, if the attitudes of others were less hostile, there would be less danger to the biracial child's psyche. Persons harboring prejudices toward Black people and Black culture likely would feel less hostile toward a biracial person who exhibited traits and values associated with the dominant culture. White parents can acculturate a biracial child to the dominant culture. Thus, such a child will probably encounter less racism and less prejudice-based obstacles to opportunities and advancement.¹⁸⁸ In this way, a biracial child may have less need for coping skills if placed with white parents.

Studies of biracial adolescents indicate that those who identify more completely with the dominant culture tend to be more achievement oriented and attain greater academic success.¹⁸⁹ On the other

into mainstream White society." Brown, *supra* note 172, at 319. A biracial person experiences even greater marginality since he is not easily racially categorized by those with whom he interacts. *Id.* at 324.

184. Bowen, *supra* note 7, at 499.

185. *Id.* at 500.

186. Besides fostering an identity as a black person, a black parent, due to resentment over discrimination, might explicitly or subtly teach a biracial child similarly to resent white people and the white within him. As Professor Schneider asks, "[w]ill the bitterness that blacks may feel about the black experience in America be difficult for a child of an interracial marriage who is in the custody of a black parent to cope with?" Schneider, *supra* note 16, at 139. But see Njeri, *supra* note 168, at E10 ("[M]ultiracial identity . . . [represents] a repudiation of blackness born of [an] unwillingness to identify with a despised minority.").

187. See Bowen, *supra* note 7, at 505.

188. This argument is not intended to favor white culture over Black culture; rather, it is intended to show that, if the state considers societal prejudice when deciding whether to allow particular parent-child relationships, then the benefits to the child that stem from such relationships have as much relevance as the costs.

189. Overmier writes:

The majority of biracial adolescents are well aware of racial prejudice and barriers to mobility. Therefore, they shape their current academic behavior and future aspirations accordingly. Those biracial teens who overidentify with their version of the black ghetto culture adopt a casual attitude toward their studies, express anti-achievement values, and fear rejection by their black peers if they are perceived as 'bookworms.' For those teens who identify with the white middle-class culture, educational achievement may be consistent with their

hand, feigning white culture when one identifies with Black culture is unhealthy and represents the "pathos of stigma."¹⁹⁰ If a child internally identifies with white culture, however, behaving in accordance with it does not represent pretense. For a biracial child especially, identifying with white culture need not be pathological. Thus, learning and exhibiting dominant culture traits, which may result more often when children are raised by white parents, represents a type of coping skill by which biracial children can achieve success without self-rejection.¹⁹¹

In sum, biracial children have a legitimate genetic and psychological claim to both their black and white heritage. The need for biracial children to identify positively with Black culture suggests the desirability of placing them with black parents. The equally legitimate need to identify positively with white culture, however, speaks in favor of placing biracial children with white parents. Two further considerations undermine the policy of favoring Black placement for biracial children. First, although biracial children are generally viewed as black by society at large, they are not always accepted as black by black people. Second, placing biracial children with white parents may afford certain benefits over placing them with Black parents. They are more likely to identify with their mixed heritage rather than as black alone. In at least this way, the biracial child may accept herself more completely. Furthermore, with respect to coping skills in a racist society, biracial children may acquire beneficial skills from white parents. Thus, for biracial children, placement with white parents is, on balance, as much in their interests as placement with black parents.

D. *The Interests of Black People as a Group*

The NABSW has described transracial placement as a form of "cultural genocide."¹⁹² Black people as a cultural group, it argues, have an interest in making decisions concerning Black people and in preserving Black people as a distinct cultural group.¹⁹³ Transracially placed Black children, the NABSW fears, will not identify as Black in

peers. However, they may drive themselves to academic excellence to "prove" they are "as smart as" their white peers.

Overmier, *supra* note 58, at 165 (citation omitted).

190. Brown, *supra* note 172, at 332.

191. To observe that the dominant culture embodies values better suited than those of Black culture for accomplishment in this society is not to accept this disparity as appropriate or inevitable. In light of the educational and economic opportunities denied to Black people by the dominant class, it is understandable for Black culture to reject dominant cultural values. In the meantime, however, if courts are to recognize racial prejudice by preferring same-race placement, they should also recognize the "coping skills" that a child can gain from the dominant culture.

192. See *supra* note 15.

193. See Bowen, *supra* note 7, at 501; Howard, *supra* note 2, at 530.

the sense of identifying with Black culture.¹⁹⁴ Rather, these children will assimilate into the dominant culture and, by so doing, contribute to the dilution and decline of Black cultural existence.¹⁹⁵ In order to preserve Black culture, Black children should be placed only into Black homes where they can join and strengthen the Black community. This cultural genocide argument is the focus of this section.

1. *The Necessity and Legitimacy of Preserving Black Culture Through Child Placement*

If Black people have an interest in preserving Black culture, two questions arise. First, does transracial placement jeopardize Black culture? Second, should courts and agencies use child placement to preserve Black culture? Unless both questions have affirmative answers, courts and agencies should not consider Black cultural interests when placing a child.

Although cultural interests need not affect,¹⁹⁶ or may even conflict with,¹⁹⁷ the interests of individual children, cultural interests have influenced the child-placement process. By enacting the Indian Child Welfare Act of 1978,¹⁹⁸ for example, Congress recognized a substantial interest in preserving Native-American culture and accorded significant rights to Native-American communities to determine the placement of Native-American children. Similarly, commentators have argued, giving weight to Black cultural interests is justified in the child-placement context as a means to preserve Black culture.¹⁹⁹

Professor Margaret Howard argues, however, that Native-American culture is at a significantly greater risk of extinction than Black culture.²⁰⁰ The rate at which agencies have placed Native-American children in mainstream society is so great that it has truly threatened

194. Bowen, *supra* note 7, at 506. By Black children, it should be noted, the NABSW intends to include biracial children. Bowen, *supra* note 7, at 505 n.88.

195. See Howard, *supra* note 2, at 531 ("Because transracial adoption removes children from their racial and ethnic groups, it poses some threat to the groups' interests in continuity.").

196. Howard separates the interests of Black people as a cultural group and the best interests of an individual Black child. *Id.* at 530; see also *supra* section III.A.1.

197. Howard, *supra* note 2, at 503.

198. Pub. L. No. 95-608, 92 Stat. 3069 (codified at 25 U.S.C. §§ 1901-1963 (1988)).

199. Professor Bowen argues that the history of the Black experience is analogous to that of Native Americans. Both have experienced tremendous discrimination, segregation, and oppression; both have suffered from inferior educational systems and residential areas; and both have been viewed as discrete and insular groups. Bowen, *supra* note 7, at 522 n.185; cf. Mahoney, *supra* note 15, at 500 ("The NABSW is correct in their assumption that if white parents who adopt Black children treat them as if they are exactly the same as white children except for their color, something will be lost.").

200. Howard, *supra* note 2, at 530-33. Perhaps the difference between the threat to Native-American culture and the threat to Black culture is reflected by the fact that, while Black Americans disagree on the desirability of transracial placement, Native Americans stand largely unified against it. See Howard, *supra* note 2, at 531 (citations omitted). But see *supra* note 199 (comparing the Native-American experience to the Black experience).

the continued existence of Native Americans as a distinct ethnic group.²⁰¹ In contrast, the number of transracial placements of Black children is insignificant.²⁰² Thus, transracial placement does not similarly jeopardize the interests of Black people in their continued existence as a cultural group.²⁰³ This argument does not mean that Black culture is free from risk, nor that Black culture is unworthy of preservation. The point is simply that the enemy of Black culture is not transracial placement.²⁰⁴

Even if transracial placement did threaten Black culture, the best-interests standard does not permit courts and agencies to advance cultural interests at the expense of an individual child's interests. The cultural genocide argument is premised on an understanding that cultural interests are inconsistent with, or at least go beyond, an individual Black child's interests.²⁰⁵ If cultural interests were no different than those of the individual child, courts and agencies would already protect Black culture under the best-interests standard without having to address group interests in a child-placement determination. Considering cultural interests undermines the child's interests. In some cases, a court could forgo a transracial placement that is in a child's best interests because of its concern for cultural interests. To compromise a child's welfare in the name of culture, especially when the cultural benefit is slight or nonexistent, is inimical to the purpose of child placement and violates the best-interests standard mandated by law.²⁰⁶

Furthermore, even if the law allowed courts and agencies to bal-

201. By the mid 1970s, the rate of transracial placement of Native-American children had become "alarming," "shocking," and a "crisis . . . of massive proportions." *Id.* at 520 (footnotes omitted).

202. *Id.* at 532 ("[T]he charge [of cultural genocide] in [the adoption] context is simply specious — so few black children have been placed in white homes that no genuine threat exists to the continuance of blacks as a cultural, racial, or ethnic group."); Mahoney, *supra* note 15, at 501 ("Unless . . . the numbers of children adopted transracially were to increase enormously beyond what they currently are, the culture of African-Americans will not be destroyed.").

203. Howard, *supra* note 2, at 532-33.

204. One writer identifies other reasons for the erosion of Black culture. These include the lack of Black history in the school curricula, the fallacious images of Black people conveyed by textbooks, and the separation of Black history from American history. Samuel L. Banks, *Blacks in a Multiethnic Social Studies Curriculum: A Critical Assessment*, 44 J. NEGRO EDUC. 82 (1975).

205. The President of NABSW writes:

The lateral transfer of our children to white families is not in *our* best interest. Having white families raise our children to be white is at least a hostile gesture toward us as a people and at best the ultimate gesture of disrespect for our heritage as African people. . . .

. . . .

It is their aim to raise Black children with white minds. . . .

. . . . We are on the right side of the transracial adoption issue. Our children are our future.

See Morris F.X. Jeff, Jr., *President's Message*, NATL. ASSN. BLACK SOC. WORKERS NEWSL., Spring 1988, at 1-2 (emphasis added).

206. See Bartholet, *supra* note 6, at 1237 ("[A]doption is not supposed to be about parent or community rights and interests, but rather about serving the best interests of children.").

ance cultural interests against the child's interests in placement proceedings, the child's interests would substantially outweigh cultural interests. A child whose placement is delayed suffers immediate, concrete, and probably irreparable harm. Black culture, by contrast, if harmed at all, suffers the minute and diffuse harm that results when a de minimis number of Black children are placed in white homes. Therefore, advancing cultural interests in the child-placement process compromises the interests of individual Black children and is not necessary for Black cultural preservation.

2. *Defining Black Culture: Why Are Transracially Placed Children Less "Black"?*

The NABSW is concerned that transracially placed Black children will be raised to have "white minds."²⁰⁷ As a corollary, there must be a distinct "Black mind." What this Black identity entails, however, is far from clear. Indeed, whether Black people comprise an identifiable cohesive culture or share a set of common values is questionable. To the extent that Black people do have common interests, why do transracially placed Blacks not share such interests?

Black people do not comprise a discrete culture.²⁰⁸ Rather, the Black community is diverse in terms of the practices and values of the people within it. Black people are spread across geographic and class lines.²⁰⁹ Black people do not share a common language, a unifying religion, or a representative leadership.²¹⁰ On significant social and political issues, such as transracial adoption, there is no consensus among Black people.²¹¹ As one commentator observes, "[e]ach black person responds differently to [her] socialization and experience in

207. See *supra* note 205.

208. Compare, for example, the Old Order Amish discussed in *Wisconsin v. Yoder*, 406 U.S. 205 (1972). The Supreme Court of the United States upheld the right of Amish parents to keep their children home after the eighth grade in violation of state law. The Court found that the law requiring the Amish to send their children to school beyond the eighth grade "carries with it a very real threat of undermining the Amish community and religious practice." 406 U.S. at 218. Black people may have a similar interest in cultural preservation and self-determination and thus may have a legitimate interest in having Black children placed within the Black community. The analogy, however, is flawed to the extent the Black community does not constitute a cohesive group with an identifiable leadership or identifiable interests, at least not to the extent of discrete groups such as the Amish. See *Schneider*, *supra* note 16, at 1397. The Amish in *Yoder* are homogenous in culture with an identifiable leadership. See *id.* Amish communities systematically resist influence from mainstream society and even divide themselves, over doctrinal disputes, into separate communities. See *id.* Furthermore, Amish communities are geographically localized and homogenous in social class. See *id.* at 1398.

209. See *id.*

210. See *id.* at 1398; T. Garner & D.L. Rubin, *Middle Class Blacks' Perceptions of Dialect and Style Shifting: The Case of Southern Attorneys*, 5 J. LANGUAGE & SOC. PSYCHOL. 33, 47 n.1 (1986) ("The term[] 'Black English' . . . [denotes a] fiction[] . There is no monolithic language variety typical of black Americans . . .").

211. Bowen, *supra* note 7, at 501; Howard, *supra* note 2, at 531; O'Brien, *supra* note 11, at 493.

terms of being black.' ”²¹²

Despite this diversity, the NABSW, as if speaking for all Black people, charge that Blacks with white parents are less Black, indeed, that they are white. Such a position is consistent with other Black voices who seek to define the “correct” Black identity to the exclusion of others.²¹³ The “white” Blacks often include those who strive for individual achievement and aspire to career positions traditionally reserved for the dominant class.²¹⁴ These Black people, however, are not less Black and need not reject their racial heritage, although they often reject the “form of social fascism”²¹⁵ by which other Blacks impugn their racial identity as less than authentic simply because they seek lifestyles traditionally reserved for whites. Indeed, it is the attitude on the part of some Blacks who call into question the Black identity of those who “make it” that is counterproductive to the condition of Black people.²¹⁶ Being Black should not limit career aspirations or require a particular political viewpoint.²¹⁷ Accordingly, Black children placed with white parents, many of whom will join the ranks of the middle class, are Black nonetheless.

As to biracial children raised by white parents, the NABSW posi-

212. Williams, *supra* note 133, at A26 (quoting Dr. Robert Carter, associate professor of psychology and elementary education at Columbia University).

213. For example, in reaction to the televised nomination hearings of Justice Clarence Thomas, “[m]any blacks questioned the ‘blackness’ of a man who embraces a conservative philosophy and is married to a white woman. To still others, his accuser, Anita F. Hill, a law professor at the University of Oklahoma, failed the ‘blackness’ test by betraying another member of her race.” *Id.* at A1.

Stephen L. Carter, a professor of law at Yale University, writes that “[Blacks who ostracize other Blacks] really do believe that there is an important sense in which people of color who hold the wrong views have no right to call themselves people of color. They really do believe that the dissenters are traitors, Uncle Toms, merely biologically black, not bona fide representatives of their people.” STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY 131 (1991).

214. One 42-year-old Black attorney recounts how her success and upper-class lifestyle has, in the eyes of other Blacks, called her racial identity into question: “I’ve had black folks come up to me and say I’m not black because of the way I live[.] It hurts, but I don’t argue. In my heart, I’m black.” Williams, *supra* note 133, at 26.

215. The term *social fascism* was used by Julius Lester, a professor of Judaic and African-American Studies at the University of Massachusetts, when commenting on a 1988 incident in which members of the African-American Studies department, in which he was a member, sought his reassignment after he criticized novelist James Baldwin. Lester continued, “is black identity so problematic that one is to be judged as ‘anti-Negro[.]’ for being critical of Baldwin or Jesse Jackson?” *Id.* (quoting Prof. Julius Lester).

216. Cf. Gale, *supra* note 133, at 19 (“When the media insist[.] upon equating the term ‘black’ with what is less desirable, they are creating a self-fulfilling prophecy. . . . One’s self expectations are drastically reduced.”).

217. See *infra* note 220 (quoting Prof. Lester). But see Williams, *supra* note 133 (quoting Roger Wilkins, a professor of history at George Mason University):

Every oppressed community . . . has drawn lines and says certain behavior puts you outside the community[.] For black Americans who live in a society where racism exists, it is legitimate to set parameters. In arguing how best we struggle, there is some political and intellectual behavior in which you engage that keeps you from being a black person. *Id.* at A26.

tion appears paradoxical. Although half-white, such children are black; at the same time, due to their "white" upbringing, such children are white. How does such a child, raised by at least one parent who is a racial "match," most likely her mother,²¹⁸ simultaneously lose her whiteness on the outside and betray her blackness on the inside? It seems it is the NABSW position that creates the risk of racial confusion for biracial children.

The diversity of Black people's attitudes toward Black identity may be inevitable when the commonality of Black people primarily depends on a physical feature rather than adherence to a particular religious doctrine,²¹⁹ political platform, or other agenda or interest. Whatever the reason, the claim that transracially placed Black children do not have a Black identity is suspect. Indeed, such racial stereotyping is akin to that which led to the oppression of Black people.²²⁰ In any event, the NABSW's efforts to define Blackness, an "essentially adult agenda of promoting racial separation,"²²¹ has no place in the child-placement process. If, as this Note suggests, skin color is separate from cultural affiliation, a black or biracial child placed in a white home can learn the culture of her white parents while maintaining a realistic and healthy view toward her racial identity.

3. *Benefits of Transracial Placement for Black People and Society*

Assuming Black people have a cohesive culture and assuming transracial placement has a significant influence on it, transracial placement does not necessarily harm Black culture. In fact, Black people, and American society as a whole, may benefit from transracial placement. Black people as a group may benefit from transracial placement in at least two respects: career success and social integration.

Transracial placement may help Black people achieve career success. Black-American culture has developed in a society that has denied Black people educational and career opportunities. Deprived of these opportunities, Black people, as a group, are less experienced in meeting the challenges of school and the American marketplace. Furthermore, in the face of majority oppression, Black people have reason

218. In most interracial marriages, the father is Black and the mother is white. See Perry, *supra* note 2, at 61 n.32.

219. See *supra* note 208 for the discussion of the Amish.

220. In a telephone interview with Lena Williams of the *New York Times*, Lester stated that "[h]aving been involved in the civil rights movement, I didn't fight against whites trying to limit and define me to turn around and have blacks try to limit and define me." Williams, *supra* note 133, at A26 (quoting Prof. Lester).

221. Bartholet, *supra* note 6, at 1256. Professor Bartholet observes that "Black leaders in the adoption world originally promoted racial matching in the historical context of the black nationalism movement that gained prominence in the latter part of the 1960s, with its calls for black power and black self-determination." *Id.* at 1233.

to reject the values represented in the dominant culture.²²² Informed by this experience, Black culture may be less well suited to academic and career achievement in mainstream society. Transracial placement can aid in reversing this trend by creating opportunities for Black children to learn the skills and values with which to achieve academic and career advancement.

Transracial placement may also reduce racism by increasing understanding through integration. Transracial placement helps to bridge the gap between Black and white people and may reduce racial tension and the discriminatory obstacles to opportunities that Black people continue to encounter in American society.²²³ A Black child who is raised by white parents tends to be more understanding of white people and culture. A transracially placed child, and a biracial child in particular, is in the best position to see the commonality between Black and white people and the irrationality of racial barriers to communication, respect, and understanding.²²⁴ Similarly, by exposing white people to a Black child, transracial placement can increase the understanding and sensitivity of white people toward Blacks. By reducing racial prejudice, Black people — including Black children — have greater choice in what they pursue and accomplish and have less need for the coping skills argued for by the NABSW.

Furthermore, Black people need not obtain these benefits at the expense of Black cultural preservation. The skills and values necessary for individual achievement should be free from culture; a Black person who succeeds is still Black.²²⁵ As Black people attain greater

222. See, e.g., Kool Moe Dee, *White Supremacy Imposed False Values on Afrikans*, L.A. TIMES, May 24, 1992, at M2 (advocating rejection of "a way of life that was imposed on us through slavery").

223. Howard observes:

[B]oth white and non-white children raised in mixed-race families were less likely to have pro-white attitudes or to associate "white" with positive and desirable characteristics than were both white and non-white children generally. Thus, the practice of transracial adoption attacked as destroying "psychosurvival skills" of black children may in itself contribute to such a change in attitudes that those skills become superfluous.

Howard, *supra* note 2, at 540.

224. In her doctoral research, Christine Kerwin studied racial identity development in biracial school-age children. The majority of the subjects demonstrated an increased sensitivity to the views, values, and cultures of Black and white people, and tended to observe more similarities than differences between the two groups. Christine Kerwin, *Racial Identity Development in Biracial Children of Black/White Racial Heritage* (1991) (unpublished Ph.D. dissertation, Fordham University), abstracted in 52 DISSERTATION ABSTRACTS INTL. No.7, at 2469-A (1992).

225. Garner and Rubin conducted a series of in-depth interviews with several southern Black attorneys in order to understand how they were able to use Standard English (SE) without disavowing their Black cultural identities. The subjects reported that they disassociated SE from cultural identification:

Only two respondents even partially equated SE with the way whites spoke. The others thought there was no SE that was the predominant province of Italians, Irish, blacks or whites. Rather, SE usage identified the sophisticated and the educated, and an individual would use it to demonstrate that he or she was both. . . .

. . . . Since SE is not white English, and is rather an educated person's tool for survival,

achievement, Black culture can incorporate this experience and, by so doing, adapt to the challenges of modern America. Thus, with the help of transracial placement, Black culture can undo the effects of racial discrimination and not only survive, but flourish.²²⁶

Society also benefits by improving the condition of Black people. The productive participation of Black people in the economy promotes the prosperity of the United States. In addition, Black prosperity should reduce the societal burden of Black poverty and crime. Moreover, reducing racial tension should promote positive interracial relations whereby we can celebrate, rather than fear, cultural diversity.

Thus, if interests other than those of the particular child are to enter child-placement decisions, courts and agencies should recognize that transracial placement may serve interests as legitimate for Black people as those purportedly served by same-race placement. In addition, transracial placement offers benefits for society as a whole. For these reasons, given the plausible and reported successes of transracial placements in contrast to the high costs of racial-matching policies in adoption proceedings²²⁷ and custody disputes,²²⁸ courts and agencies should not consider race when placing a black or biracial child.

CONCLUSION

States rightfully charge courts and placement agencies with safeguarding the best interests of the child. By engaging in racial matching, however, courts and agencies cause serious harm to Black children. These children remain in institutional or foster care while white parents are available. The children become hard to place by virtue of their increased age and adjustment problems relating to the amount of time under state care.

In the judicial process, courts tend to place excessive emphasis on race. The discretionary nature of the race factor also encourages harmful litigation over child custody and racial identity. If courts and agencies did not consider race in placing Black children, they would

these professionals have found a way to maintain cultural identity while at the same time communicating credibility in the dominant culture.

Garner & Rubin, *supra* note 210, at 46.

In her doctoral research, Deborah Broadway studied the childrearing practices of Black middle-class families. The study found that the participating families raised their children to function competently in middle-class white society while maintaining psychological and cultural ties to the Black community. Deborah C. Broadway, *A Study of Middle Class Black Children and Their Families: Aspirations for Children, Perceptions of Success and the Role of Culture* (1987) (unpublished Ph.D. dissertation, Ohio State University), *abstracted in* 48 *DISSERTATION ABSTRACTS INTL.* No.1 at 42-A (1987).

226. Recall that this assumes that transracial placements occur in sufficient numbers to affect Black culture. As discussed above, however, transracial placement is unlikely to have a significant effect on Black culture. See *supra* section III.D.1.

227. See *supra* Part II.

228. See *supra* section II.B.

eliminate or greatly minimize these harms. Therefore, if courts and agencies are to protect the best interests of Black children, the consideration of race is justifiable only if the risks of transracial placement outweigh the concrete harms of racial matching. As this Note has argued, however, transracial placement is an equally attractive alternative to inracial placement for black and biracial children, and race-neutral placement is a far better alternative to the costs of racial matching.

This Note has also considered the argument that the preservation of Black culture justifies racial matching. It is doubtful whether transracial placement threatens Black culture and, even if it did, the best-interests standard requires cultural interests to yield to the interests of the individual child in a child-placement proceeding. This Note has also argued that transracial adoptees are no less Black than other Black children. Finally, if transracial placement does affect the nature of Black culture, it may in fact contribute positively to the development of Black people and Black culture.

The use of race in the child-placement process may be well intentioned, but such policies lack both empirical and reasoned justification. Therefore, courts and agencies should ignore the race of a child when making placement decisions. Instead, courts and agencies should place Black children as soon as possible in the arms — *whatever color* — of loving and capable parents. As one court recognized, if these “children are raised in a happy and stable home, they will be able to cope with prejudice and hopefully learn that people are unique individuals who should be judged as such.”²²⁹

229. *Lucas v. Kreischer*, 299 A.2d 243, 246 (Pa. 1973) (quoting Judge Hoffman’s unpublished dissent).